

# The Sedona Conference Draft Commentary on Proportionality in Cross-Border Discovery (January 2022)



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## **The Sedona Conference Draft Commentary on Proportionality in Cross-Border Discovery (January 2022)**

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# **Commentary on Proportionality in Cross-Border Discovery**

## **Sedona WG6 Drafting Group**

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## I. Introduction

Cross-border discovery is often challenging for parties, practitioners, and courts attempting to navigate conflicts between U.S. discovery obligations and non-U.S. laws. Such conflicts are especially prevalent with respect to non-U.S. data protection laws – the type of conflict most directly considered in this Commentary – but may include any non-U.S. law that impacts the scope and practice of data preservation and discovery. Although conflicts arising from non-U.S. data protection laws are certainly not new, the challenges and potential burdens have been exacerbated in recent years due to the emergence of new and more stringent data protection laws, evolution in existing data protection regimes, ever-increasing data volumes, and the proliferation of novel communication and collaboration technologies that use and rely upon personal information of the participating users and others.<sup>1</sup>

Along a similar trajectory and also driven at least in part by the increasing volume and types of data subject to discovery, proportionality has increasingly become established as a fundamental principle affecting and limiting the scope of discovery under Federal Rule of Civil Procedure 26(b)(1). While U.S. courts have analyzed the impact of U.S. data privacy laws on the production of documents and information in U.S. litigation, courts typically have not resolved conflicts between U.S. discovery obligations and non-U.S. data protection laws through a proportionality lens. Instead, courts most often have relied on the comity analysis outlined in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987) when considering such conflicts.

Although proportionality and comity are different legal analyses with different goals, they share overlapping factors that may, in some (but not all) cases lead to identical results whether a court applies one or the other. This Commentary examines the landscape of overlapping analyses, offering summaries and commentary on various approaches before recommending a framework that recognizes proportionality as a first step – as a threshold issue of discovery scope – but that recognizes that proper proportionality analysis may consider the impact of compliance with the non-U.S. law at issue. If the discovery is proportional to the needs of the case, when so considered, then a separate comity analysis should be conducted. Although those analyses may share similar factors, applying them in strict order should minimize analytic and doctrinal problems.

This Commentary also examines potential costs and burdens of cross-border discovery, including non-monetary risks and burdens, and including those potentially resulting from measures implemented to comply with non-U.S. laws, and advises that arguments based on such burdens should be made with sufficient specificity and detail. Further, parties and courts should employ and encourage practices that promote compliance with the non-U.S. laws while reducing burdens of cross-border discovery.

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<sup>1</sup> See, e.g., THE SEDONA CONFERENCE, INTERNATIONAL LITIGATION PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION IN CIVIL LITIGATION (Transitional Edition) (Jan. 2017) (hereinafter, “INTERNATIONAL LITIGATION PRINCIPLES”), at the Foreword (discussing Sedona’s history of analyzing and providing guidance on cross-border discovery challenges).

## II. Scope of U.S. Discovery and Proportionality

In tracking the development of scope in U.S. discovery law, the through lines of both technological advances in the creation of discovery objects and debate in the legal profession around the manipulation of the Federal Rules of Civil Procedure to gain a competitive discovery advantage frame the story of proportionality.<sup>2</sup> As technology drove the generation and copying of accelerated volumes of documents or objects for discovery, U.S. attorneys developed their focus on discovery rules and honed arguments for leveraging those rules in their favor. If one was requesting documents, the focus was on relevance and possibly burdening one's opponent, and if one was responding to document requests, the focus would likely be on arguments and objections around disproportionate burden, and protection of privileges or privacy.<sup>3</sup> This in turn put pressure on courts to resolve increasingly rancorous discovery disputes among the parties and decide what was proportional to the needs of the case long before the 1983 and 2015 Amendments to the Federal Rules of Civil Procedure<sup>4</sup>, whether they used the specific word "proportional" or not.<sup>5</sup> The result has been a slow march toward the realization that cooperation between attorneys committed to a proportional approach to discovery along with hands on judicial management are what is truly necessary for addressing the challenge of discovery volume and legal gamesmanship.<sup>6</sup>

Importantly, the scope of this cooperation in the context of those pursuing a reasonable approach to proportionality has, since 2015, increasingly included the need to consider non-monetary factors that may be unique to a responding party—such as business disruption, protection of various privileges and adherence to local data privacy and protection laws.<sup>7</sup> The specific and common non-monetary factors consistently present in cross-border discovery provide another dimension to proportionality analyses in U.S. courts given the accelerated volume of data generation, global business expansion and the burgeoning global data privacy and protection legal landscape.

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<sup>2</sup> As an example of how parallel developments in information related technology and the Federal Rules of Civil Procedure often parallel each other, consider that photocopying was developed in the same year, 1938, that the Federal Rules of Civil Procedure became effective.

<sup>3</sup> Early debates around discovery and the Federal Rules of Civil Procedure often framed the privilege protection specifically within the concept of privacy protections for the practicing attorney. *See Hickman v. Taylor*, 329 U.S. 495, 496 (1947) ("privacy of an attorney's course of preparation is so essential to an order working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.").

<sup>4</sup> Hon. Elizabeth D. Laporte, Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV., 20, 24 (2015) ("doctrine of proportionality always available to courts to limit discovery to that which is relevant and necessary for effective litigation of the issues in a case." Authors also point out that Rule 1 itself and its focus on "just," "speedy" and "inexpensive" resolution of disputes has been in place since 1937.).

<sup>5</sup> *Hickman*, 507 ("discovery, like all matters of procedure, has ultimate and necessary boundaries") and 508 ("as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.").

<sup>6</sup> Hon. Craig B. Shaffer, *"Burdens" of Applying Proportionality*, 16 Sedona Conf. J. 55, 57 (2015).

<sup>7</sup> *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 68 (2018) (Comment 2.d., addressing Sedona Principle 2, states that "Parties should address the full range of costs of preserving, collecting, processing, reviewing, and producing ESI"); *id.* at 69 ("the non-monetary costs (such as the invasion of privacy rights, risks to business and legal confidences, and the risks to privileges) should be considered.").

## **A. U.S. Discovery Pre-2015: Fishing Expeditions and Gamesmanship**

### *1937: Birth of the Federal Rules of Civil Procedure and Broad Discovery*

Although explicit references to proportionality in the Federal Rules of Civil Procedure would not come until 1983, the story of courts working to manage debates around the scope and burdens of discovery predate the Federal Rules of Civil Procedure themselves. The Notes of the Advisory Committee on Rules-1937, in discussing what would become the entirely new Rule 26(b) regarding the scope of depositions,<sup>8</sup> stated that “while the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation,” citing to multiple state codes of civil procedure for support for the trend of broadening the discovery scope in U.S. federal courts beyond just facts to support one’s own case.<sup>9</sup> Both courts and academics interpreting the new Federal Rules of Civil Procedure noted the ushering in of a an era of more liberal discovery,<sup>10</sup> abolishing the procedural distinctions between law and equity and evidentiary versus ultimate or material facts, converting the burdens of pleading to crystallize issues and reveal facts to simply notice-based pleading,<sup>11</sup> removing the restrictions on obtaining discovery only within the exclusive knowledge or control of the adverse party while providing new allowances for discovery into not only one’s own case but the facts underpinning the adverse party’s case.<sup>12</sup>

An example of the recognition of this shift can be seen in *Nichols v. Sanborn Co.*, 24 F. Supp. 908 (D. Mass. 1938), an equity patent-infringement suit involving electrocardiograph device patents. The plaintiffs, via interrogatories, sought information regarding diagrams, literature and designs for the electrocardiographs at issue from defendant manufacturer, with defendant objecting on the grounds of Equity Rule 58 that the interrogatories were focused on evidentiary details instead of the requisite facts—lodging the familiar complaint about plaintiffs being on a “fishing expedition.”<sup>13</sup> The court overruled the defendant’s objections based on the new Federal Rules of Civil Procedure which of course allowed for discovery into both the opposing party’s case and facts in their possession, explaining that “to keep in step with the purpose and spirit underlying the adoption of these rules it is better that liberality rather than restriction of interpretation be the guiding principle.”<sup>14</sup>

Rule 34 required that a party seeking inspection or discovery of documents or tangible objects first show good cause, specifically naming the objects of discovery in another party’s possession or control via motion practice and be granted a court order before moving forward with such discovery. Courts interpreting Rule 34 debated whether it should be restricted to only admissible evidence given the broad scope for deposition discovery in Rule 26, which was not so limited. Some judges held that

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<sup>8</sup> 1940 Edition v.2 Title 17-33 2604 (1940) Sections 723–24.

<sup>9</sup> FED. R. CIV. P. 26(b) advisory committee’s note to 1937 rule.

<sup>10</sup> Alexander Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205 (1942) (“Broad and liberal discovery is one of the outstanding contributions to civil procedure made by the new federal rules.....A veritable arsenal of weapons for discovery is provided, from which a skilled lawyer may select those best suited for this purpose, just as an experienced golfer chooses the club which fits his immediate needs.”).

<sup>11</sup> James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 UNIV. OF CHICAGO L. REV. 297, 297 (1940).

<sup>12</sup> *Nichols v. Sanborn Co.*, 24 F. Supp. 908, 910 (D. Mass. 1938) (cited by Holtzoff, *supra* note 10, at 207).

<sup>13</sup> *Nichols*, 24 F. Supp. at 909–10.

<sup>14</sup> *Nichols*, 24 F. Supp. at 911.

Rule 34 could not have been meant to be limited to admissible evidence while others insisted the rules be read separately.<sup>15</sup>

The major takeaway from these debates is that arguments regarding what exactly was within scope for discovery and how the rules could or should be read together to effectuate discovery of information by leveraging them strategically is neither new nor unique to twenty-first century discovery. Instead, the hope was that the new Federal Rules of Civil Procedure would put an end to complaints of “fishing expeditions” both because the scope of discovery was now broad enough to allow for some fishing and the structure of the rules organized enough to keep the fisherman focused on only those fish that mattered.<sup>16</sup>

*1946 Amendment: Reasonably Calculated to Lead to the Discovery of Admissible Evidence*

The 1946 amendment to Rule 26(b) added the “reasonably calculated to lead to the discovery of admissible evidence” language, continuing the explicit broadening of U.S. discovery and notching another important contribution in the march toward the proportionality standard.<sup>17</sup> The Notes of the Advisory Committee on Rules-1946 in discussing the amendment state that “the purpose of discovery is to allow a broad search for facts” and that the amendment makes “clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence.” However, this broad scope does have a limit as “matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry.” The Advisory Committee further explained that the amendment was needed specifically because courts were still erroneously applying an admissibility standard when limiting the scope of discovery through deposition testimony.<sup>18</sup> Rule 34 was also amended from “evidence material to any matter involved in the action” to “evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)” in a purposeful attempt to address the potential confusion around differing scopes for depositions and discovery of documents and things for inspection.<sup>19</sup>

*1970 Amendment: Further Broadening of Discovery*

The 1970 amendment to Rule 26(b) may be one of the most important in the march toward proportionality because it moved the broad scope outside of the limits of deposition testimony “to cover the scope of discovery generally,” and made clear that “all provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules,” including incorporation by reference to Rules 33 and 34.<sup>20</sup> Importantly, Rule 34 was also amended, this time removing the good cause requirement, which had caused some confusion and

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<sup>15</sup> Holtzoff, *supra* note 10, at 221.

<sup>16</sup> Pike & Willis, *supra* note 11, at 301; Holtzoff, *supra* note 10, at 205; *Nichols*, 24 F. Supp. at 507.

<sup>17</sup> 1946 Edition v. 3 Titles 27–42 3247 (1946) §§ 900–1218. Language added to Rule 26(b): “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence,” at 2626.

<sup>18</sup> FED. R. CIV. P. 26(b) advisory committee’s note to 1946 amendment.

<sup>19</sup> FED. R. CIV. P. 34 advisory committee’s note to 1946 amendment.

<sup>20</sup> FED. R. CIV. P. 26(b) advisory committee’s note to 1970 amendment.



inconsistent interpretations, and allowing for extrajudicial discovery of documents and things.<sup>21</sup> Together, these amendments handed over to counsel the responsibility for making and responding to document requests while attempting to apply a consistent scope definition for both deposition and document based discovery, which had now started to include electronic data compilations.<sup>22</sup>

### *1980 Amendment: Discovery Conferences*

While the 1970 amendments to Rules 26 and 34 attempted to provide a consistent definition of discovery scope and allow counsel to request and produce documents without the micromanagement of courts, by 1976, abuse of the discovery process had gotten so bad that in an ABA task force was established to address “unfair use of the discovery process.”<sup>23</sup> Although the Rule 26(f) conference was added in 1980 to help address “widespread criticism of abuse of discovery,” the Advisory Committee on Rules explained that it perceived the problem to be one of severity in limited cases rather than a general issue requiring application of considered amendments to Rule 26(b)(1).<sup>24</sup> Rule 34(b) was amended to add that a “party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request” with the Advisory Committee taking note of the ABA task force’s report, stating “it is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance.”<sup>25</sup> However, some practitioners felt the 1980 amendments did not go far enough in providing a framework for properly addressing discovery abuses and the problems associated with disproportionate application or leveraging of the rules for advantage in litigation.<sup>26</sup>

### *1983 Amendments: Proportionality’s Implicit Arrival*

By 1983 it had become apparent that reliance on the parties and Rule 26(f) conferences to curb discovery abuses was not sufficient and that the everlasting problem of “fishing expeditions” in the beautiful waters of broad discovery had only gotten worse over time as attorneys leveraged the rules as tactical weapons instead of honoring the spirit of the rules.<sup>27</sup> It might be argued that the pre-1983 language in Rule 26(a) which provided for no limit on the frequency and use of depositions, interrogatories, document productions and requests for admissions simply invited the very gamesmanship the rules were attempting to control for in 1937. The 1983 amendments to Rule 26 were a direct reaction to “over-discovery”<sup>28</sup> by: removing the unlimited language from Rule 26(a),

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<sup>21</sup> FED. R. CIV. P. 34 advisory committee’s note to 1970 amendment.

<sup>22</sup> FED. R. CIV. P. 34 advisory committee’s note to 1970 amendment.

<sup>23</sup> Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV., 20, 25 (2015).

<sup>24</sup> FED. R. CIV. P. 26 advisory committee’s note to 1980 amendment.

<sup>25</sup> FED. R. CIV. P. 34 advisory committee’s note to 1980 rule. (“*Subdivision (b)*.” “The Committee is advised that, “It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance.” *Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (1977)* 22. *The sentence added by this subdivision follows the recommendation of the report.*”)

<sup>26</sup> Laporte & Redgrave, *supra* note 23, at 26.

<sup>27</sup> FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment. The committee noted multiple studies detailing the issues with either excessive discovery requests or avoidance of reasonable discovery requests and the resulting costs in time and expenses “disproportionate to the nature of the case, the amount involved, or the issues or values at stake.”

<sup>28</sup> FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment.

changing the heading of Rule 26(b) from “Scope of Discovery” to “Discovery Scope and Limits” and most importantly, detailed the criteria for those limitations in Rule 26(b)(1).

The amendment to Rule 26(b)(1) included a new paragraph that for many attorneys, represents the “formal” embedding of the concept of proportionality language in the Federal Rules of Civil Procedure<sup>29</sup>:

The frequency or extent or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Although the literal use of “proportional” or “proportionality” was not included in the 1983 amendments, it was clear from the advisory committee’s notes that instilling a proportional approach to discovery that included non-monetary factors such as free speech, employment issues and public policy, was the goal.<sup>30</sup> It also was clear that the intent was to include and give weight to non-monetary factors that might be unique to an individual party and touch on non-legal issues complicating discovery but nevertheless important in the overall balancing test.

The 1983 amendments also included the creation of Rule 26(g), which gave teeth to the requirement that discovery be properly limited by requiring attorneys requesting discovery or responding to discovery requests to certify that they had conducted a “reasonable inquiry” that said discovery request or response was “consistent with the rules,” “not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” and “not unreasonable or unduly burdensome” given the specific factors outlined in Rule 26(b)(1)(iii). While not explicit, the amendments solidified a proportional approach to discovery through not only the edits and additions to scope language but also the provision of sanctions for failing to take a proportional approach to discovery and weaponizing it beyond the needs of the case.<sup>31</sup>

#### *1993 Amendments: Maybe Two More Factors Will Help (Or Hurt?)*

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<sup>29</sup> Laporte & Redgrave, *supra* note 23, at 22.

<sup>30</sup> FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment.; *see also* Shaffer, *supra* note 6, at 61 (noting that “the 1983 change to Rule 26(b)(1) sought to instill a more proportionate approach to discovery, while still respecting the parties’ right to ‘discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case’”) (citing *Leksi, Inc. v. Fed. Ins. Co.*, 129 FRD 99, 103 (DNJ 1989)).

<sup>31</sup> Shaffer, *supra* note 6, at 63 (“The 1983 amendments also sought to advance the goal of proportionality with a new Rule 26(g)”; Laporte & Redgrave, *supra* note 23, at 28 (“As is clear from the text, 26(g)(1)(B) tracked the notions of proportionality reflected in Rule 1 and the contemporaneously added Rule 26(b)(1)”)).

As discovery moved into the 1990s, however, it appeared as if the teeth of the 1983 amendments provided very little bite for litigants and courts, as the purpose of the rules seemed to largely be ignored. Counsel did not consistently apply the amendments and there is little case law to demonstrate enforcement of proportionality concepts embedded in Rule 26(g), despite the explosion of ESI throughout the 1990s.<sup>32</sup> One notable exception proving the rule of this observation is *In re Convergent Technologies Securities Lit.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985), in which a frustrated Magistrate Judge Brazil drafted an opinion that represents a master class summary of the proper application of the proportionality principles, the intent of the FED. R. CIV. P. 26 advisory committee's amendments and the aggregate negative impact on the practice of law caused by attorneys leveraging discovery as a weapon, as they did in this case—to the tune of a \$40,000-dispute over *when* interrogatories should be answered.

As a result of too many discovery patterns and too few opinions like *In Re Convergent*, the rules committee again revised Rule 26(b) in 1993, adding two additional factors: “burden or expense of the proposed discovery outweighs its likely benefit” and “importance of the proposed discovery in resolving this dispute,” noting that the textual changes were made “to enable the court to keep tighter rein on the extent of discovery” and to “provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery.”<sup>33</sup> However, and perhaps most importantly—the amendments also moved the implicit proportionality factors outside of the sub-section defining the scope of discovery and may have unintentionally muddled the waters of discovery fishing expeditions even further.

Despite—or arguably because of—the 1993 Amendments provision of two additional proportionality factors and stated intent of directly addressing over-discovery head on, “its effect on discovery practice appear[ed] to have been muted.”<sup>34</sup>

## **B. 2015 Amendments: Explicit Proportionality**

As the 1990s saw the explosion of data and the ongoing failure of the bar to properly apply principles of proportionality to discovery practice, the Advisory Committee on Rules-2006 again stepped in with a revision to Rule 26(b)(2) adding the “not reasonably accessible” language, followed by additional tweaks in 2007 to Rule 26(b)(1) to emphasize the limits of discovery scope.

The seismic shift, however, came with 2015 amendments and the Advisory Committee on Rules-2015 explicit placement of both the word and concept of proportionality in the Federal Rules by changing the language of Rule 26(b)(1) to what we have today: an equal apportionment of relevance and proportional value embedded into the definition of scope:

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<sup>32</sup> Laporte & Redgrave, *supra* note 23, at 29.

<sup>33</sup> FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

<sup>34</sup> Laporte & Redgrave, *supra* note 23, at 29.

(b) DISCOVERY SCOPE AND LIMITS.

Rule 26(b)(1) provides:

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The 2015 Committee Note explained that in revising 26(b)(1) it intended to bring proportionality back to its rightful place, the place the 1983 amendments originally had it. The "reasonably calculated" language was also removed as it was leveraged by some practitioners to improperly define the scope of discovery. Although the proportionality language was the star of these amendments, Rule 26(b)(2)(C)(iii) was also amended to add *must* language obligations on the court as the discovery case manager. Not only did proportionality and relevancy work in concert to define scope, but courts were now obligated to ensure discovery requests and responses maintained both elements and not only should not, but cannot, wait for attorneys to make the case when they spot disproportionate discovery:

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Of course, the 2015 Committee Note did hold attorneys responsible as well, and reminded everyone that it is still up to the advocates to concretely demonstrate all elements of the proportional scope definition with specificity if they wanted their argument to win.

Two days after the December 1, 2015 effective date of the Rule 26(b)(1) amendments, U.S. Magistrate Judge Francis interpreted the new proportionality rule in *State Farm Mut. Auto. Ins. Co. v. Yuri Fayda*, No. 14 Civ. 9792 (WHP)(JCF), 2015 WL 7871037, at \*2–4 (S.D.N.Y. Dec. 3, 2015), and noted that in the context of his proportionality and relevancy analysis around the tax records, federal courts often consider objections to discovery based on privacy rights. However, while he considered privacy arguments, the problem was that the defendant did not articulate privacy as a proportional burden, ultimately leading him to grant the motion to compel production of the tax records.

### **C. Post-2015: Grappling for a Matrix in a Cross-Border World**

In the context of cross-border discovery, what is most important to remember about U.S. law is that it has consistently adjusted its approach to scope and what is reasonable or proportional to the challenges of the time. Perhaps for many practitioners the adjustments were not timely, correct, or comprehensive, but nevertheless, they were repeatedly driven by the contemporary dynamics of technology and attorney practice trends. When combined with the multiple adjustments to account for courts improperly interpreting discovery rules, the pattern of the law adapting to the increased burden of information, weaponization of discovery rules and confusion around reasonable or proportional discovery emerges—and goes back to the creation of the Federal Rules of Civil Procedure.

When the Rules were first established, they promised a reasonable opportunity for opening up discovery. Of course they did. There were not as many documents back then and the challenge was developing any set of evidence-based facts given the demands around pleadings and restrictions on discovery at the time. Then printing took off, computers accelerated discoverable information and the evolution of broad scope gave way to the need to force attorneys to simply discuss reasonable approaches to discovery and clarify the guardrails.

In 2021, that data explosion continues to not only accelerate, but the burdens around it have changed to include data privacy laws. While this may seem like a large or asymmetrical litigation problem, the truth is compliance with data privacy laws is now a discovery burden for all litigants. Data types are more varied than ever, volumes are higher than ever, and data is hosted in more places than ever. Cross-border burdens associated not only with data privacy but differences in culture, resources, and accessibility are a reality for more litigants than ever before—not just corporate defendants. Social media, mobile applications, collaboration software and the move to cloud computing has complicated this picture for everyone. Before issues of comity or conflicts of law even come into the analytical framework, it is important to remember that Rule 26(b)(1) is not limited to geography. It simply focuses on burdens and costs for parties—regardless of where those come from or what law or regulation is driving them.

## **III. Non-U.S. Data Protection Laws**

### **A. Introduction**

Data privacy and protection laws have been around for years, and concerns about data privacy and protection go back more than a century. In 1890 for example, Samuel D. Warren and Louis D. Brandeis published an article in the Harvard Law Review called “The Right to Privacy.”<sup>35</sup> They noted that “[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”<sup>36</sup> They could not have imagined at the time the devices available today that “threaten” the privacy of the individual,

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<sup>35</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193–220 (1890).

<sup>36</sup> *Id.* at 195.

and the ongoing challenge for governments faced with the question of how to protect individual privacy while balancing other rights.

Modern times have brought forward the development of various and varying laws outside of the U.S. impacting privacy and the transfer of personal data. Omnibus laws are comprehensive national privacy and data protection laws that apply to any person and/or organization within the nation's defined territorial scope. In some cases, individual regions within a country may have separate privacy laws, but without national cohesion.

Sectoral laws are privacy and data protection laws directed at specific industries or targeted groups of individuals. For example, bank secrecy laws can prevent the disclosure of confidential client data to third parties. Telecommunications laws may restrict the international transfer of personal data held by a telecommunication firm. And blocking laws, which are laws of a jurisdiction meant to hinder the application of foreign law there, could make the implementation of data transfer requests even more difficult.<sup>37</sup>

Any party tasked with transferring and/or processing data internationally for any reason, including in the context of litigation, must understand the privacy requirements, data protection requirements, and data transfer restrictions of all countries involved and the potential burdens these requirements might place on a party trying to comply with discovery requests or court orders from the U.S.

## **B. The European Union General Data Protection Regulation**

Although data protection laws can vary in scope and focus, the exemplary legislation that will be considered here is the European Union (EU) General Data Protection Regulation ("GDPR").<sup>38,39</sup> [Cite also to the International Litigation Principles for further explanation of how GDPR and other non-U.S. data protection laws, and relationship to U.S. discovery.] The GDPR was adopted in 2016 and became fully applicable on May 25, 2018.<sup>40</sup> The GDPR has been incorporated into the European Economic Area (EEA) Agreement, applying to all member states of the EEA, which includes the member states of the EU, and also Iceland, Lichtenstein, and Norway.<sup>41</sup> The GDPR has been incorporated as a base legislation, but leaves room for derogations.<sup>42</sup>

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<sup>37</sup> Other confidentiality laws, such as blocking laws, state secret laws, and banking secrecy laws are enacted with the specific intent of depriving a foreign jurisdiction of access to data, rather than with the foremost intent of protecting the data and privacy of its citizenry. As such, U.S. judges are likely to accord less weight to those laws in their analysis of balancing the interest of the foreign state against the interest of the U.S. and the party seeking the information.

<sup>38</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679#PP3Contents> (hereinafter, "GDPR").

<sup>39</sup> Because the GDPR is so expansive, only certain provisions will be considered here.

<sup>40</sup> *Id.*

<sup>41</sup> See General Data Protection Regulation incorporated into the EEA Agreement, European Free Trade Association, July 6, 2018, <https://www.efta.int/EEA/news/General-Data-Protection-Regulation-incorporated-EEA-Agreement-509291>.

<sup>42</sup> See *id.*; GDPR.

The territorial scope of the GDPR is broad and intended to “ensure comprehensive protection of the rights of data subjects in the EU and to establish... a level playing field for companies active on the EU markets, in a context of worldwide data flows.”<sup>43</sup> The law applies to “the processing of personal data in the context of the activities of an establishment of a controller or processor in [the EU], regardless of whether the processing takes place in the Union or not.”<sup>44</sup> Thus, the extraterritorial reach of the GDPR extends to the processing of personal data of data subjects who are in the EU even when the controller or processor is not established in the EU, if the processing activities are related to any offering of goods or services to data subjects located in the EU (not just EU citizens)<sup>45</sup> or to the monitoring of the behavior of these data subjects while in the EU.<sup>46</sup>

Once an organization falls under the scope of the GDPR, multiple obligations are imposed on controllers and processors, which trigger additional tasks. For instance, there is an obligation for the responsible data controller/processor to keep a record of the processing activities performed on the data.<sup>47</sup> The responsible party must also designate a Data Protection Officer (DPO) if the processing falls under one of the cases laid down in the Regulation.<sup>48</sup> Additionally, in the case of a data breach likely to result in a risk to the rights and freedoms of an individual, the data controller must report it to the data protection authority “without undue delay and, where feasible, not later than 72 hours after having become aware of it.”<sup>49</sup>

A “*controller*” is the natural or legal person determining the purpose and means of the processing (Art. 4(7) GDPR). “*Processing*” is defined to include any operation performed on personal data, including its transfer (Art. 4(2) GDPR). “*Personal data*” means all data relating to an identified or identifiable person (Art. 4(1) GDPR). The understanding of “*personal data*” according to GDPR is much broader than the understanding according to U.S. law.

Even when all of obligations required of a data processor/controller by the GDPR are met, data processing, which includes the preservation, collection and analysis of personal data, shall be lawful only if and to the extent that at least one of the following criteria involving the data subject is met:

1. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
2. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
3. processing is necessary for compliance with a legal obligation to which the controller is subject;

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<sup>43</sup> European Data Protection Board (“EDPB”) Guidelines 3/2019 on the territorial scope of the GDPR (Article 3) Version 2.1 at 4 (Nov. 12, 2019), [https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_guide-lines\\_3\\_2018\\_territorial\\_scope\\_after\\_public\\_consultation\\_en\\_1.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_guide-lines_3_2018_territorial_scope_after_public_consultation_en_1.pdf).

<sup>44</sup> GDPR, *supra* note 38, art. 3.1.

<sup>45</sup> *Id.* art. 3.2(a).

<sup>46</sup> *Id.*, art. 3.2(b).

<sup>47</sup> *Id.* art. 30.

<sup>48</sup> *Id.* art. 37.

<sup>49</sup> *Id.* art. 33.

4. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
5. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
6. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.<sup>50</sup>

Thus, the processing of personal data is lawful if the data is processed on the basis of the consent of the data subject concerned or on another legitimate basis laid down by law.

In terms of consent, the GDPR specifically outlines that it must be given by a clear affirmative act, establishing a freely given, specific, informed, and unambiguous indication of the individual's agreement to the processing of his/her data.<sup>51</sup> In practical terms though, many companies may find relying upon consent too great a challenge, given the practical problems that accompany effective consent, such as the proof of burden applying to the controller to demonstrate that the GDPR requirements for lawful consent are met, or the consequences of the revocation of consent should the data subject makes use of the right to withdraw his or her consent at any time.

A party might seek to justify a data transfer or data processing in the course of a litigation because it is “necessary for the purposes of the legitimate interests pursued by the controller,” but the application of such requires balancing the interest of the controller and the individual.<sup>52</sup> There are several factors involved in satisfying the legitimate interest condition that must be met: the processing must be necessary for the purpose; the purpose must be a legitimate interest for the controller or a third party; and the legitimate interest is not overridden by the data subject's interest or fundamental rights and freedoms.<sup>53</sup> Data controllers relying on legitimate interest can document the considerations of the balancing test in a Legitimate Interest Assessment, which records the controller's reasons for reliance on that ground and shows a proper decision-making process.<sup>54</sup> Nevertheless, in relying on the legitimate interest criterion, controllers must carefully consider its interpretation by local data protection regulators and courts since it has historically been understood differently across the EU.

It is also essential that the “data minimization principle” is followed via the limitation of processing of personal data to what is relevant and strictly necessary and by erasing unnecessary material without preserving it.<sup>55</sup> In the context of eDiscovery, this would mean taking steps to collect, process, and review only what is necessary to the case. Parties would have to negotiate the appropriate discovery limitations to minimize the processing and transfer of unnecessary data, rather than allowing a fishing expedition for tangential information or data.

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<sup>50</sup> *Id.* art. 6.

<sup>51</sup> *Id.* art. 7.

<sup>52</sup> *Id.* art. 6(1)(f).

<sup>53</sup> See GDPR Recital 47, <https://www.privacy-regulation.eu/en/r47.htm>.

<sup>54</sup> See, e.g., *Data Protection Toolkit - Legitimate Interests Assessment & Template*, NORTHERN IRELAND COUNCIL FOR VOLUNTARY ACTION (NICVA), <https://www.nicva.org/data-protection-toolkit/templates/legitimate-interests-assessment-template> (last visited Dec. 24, 2021).

<sup>55</sup> GDPR, art. 5(1)(c).



Finally, EU Member States are allowed to maintain or introduce national provisions further specifying the application of the GDPR; for example an EU member state may “have several sector-specific laws in areas that need more specific provisions.”<sup>56</sup> Thus, a party charged with the international transfer of data falling within the territorial scope of a certain EU country would have to ensure that the data transfer conforms not only with the GDPR, but also with any additional country-specific requirements.

### **C. Enforcement and Penalties**

The enforcement of data privacy and data protection laws can vary by country and regulation, so the impact on a party that processes personal data can vary greatly depending on where the party and the data are based. The fines in the EU, as an example, can be significant. Failure to comply with the GDPR with more minor infractions can result in fines as much as the amount equal to 2% of a company’s global annual turnover or EUR 10,000,000, whichever is higher.<sup>57</sup> For more serious infringements, including violating the basic principles for processing, the data subjects’ rights, and rules regarding “the transfers of personal data to a recipient in a third country or an international organization,” the penalty can be as much as 4% of the global annual turnover for a company or EUR 20,000,000, whichever is higher.<sup>58</sup> In addition to administrative fines, supervisory authorities in each EU member state are empowered to impose limitations, including a ban on processing, or to order the suspension of data transfers to a recipient in a third country.

### **D. The GDPR and Cross-Border Transfers of Personal Data**

The entirety of Chapter V of the GDPR is devoted to the “transfers of personal data to third countries or international organizations.”<sup>59</sup> Its goal is to ensure that the level of protection guaranteed by the GDPR is maintained during international transfers of personal data.<sup>60</sup> The provisions also “aim at ensuring the continued protection of personal data after they have been transferred.”<sup>61</sup> International transfers of personal data may take in a place when certain requirements are met. First, international transfers of personal data are permissible when the European Commission has decided that the third country, territory, or organization has ensured an adequate level of protection that shall be essentially equivalent to that guaranteed within the EU by the GDPR.<sup>62</sup> Without this adequacy decision from the European Commission, data may be transferred “only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.”<sup>63</sup>

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<sup>56</sup> GDPR Recital 10, <https://www.privacy-regulation.eu/en/recital-10-GDPR.htm>.

<sup>57</sup> GDPR, *supra* note 38, art. 83(4).

<sup>58</sup> *Id.* art. 83(5).

<sup>59</sup> *See id.* arts. 44–50.

<sup>60</sup> *See id.* art. 44.

<sup>61</sup> EDPB Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR, [edpb\\_guidelinesinterplaychapterv\\_article3\\_adopted\\_en.pdf \(europa.eu\)](#)

<sup>62</sup> GDPR, *supra* note 38, art. 45(1)

<sup>63</sup> *Id.* art. 46(1).

Absent either an adequacy decision or the existence of appropriate safeguards, there are only a certain set of derogations that apply under specific conditions, by which the international transfer is lawful per the GDPR, including for example, with the consent of the data subject, when it is necessary for the performance of a contract, for reasons of public interest, or for the “establishment, exercise or defense of legal claims.”<sup>64</sup>

In July 2020, the Court of Justice of the European Union (ECJ) invalidated the EU-U.S. Privacy Shield, an international agreement between the EU and the U.S. outlining the level of protection necessary for the exportation of personal data from the EU to the U.S.<sup>65</sup> The ECJ ruled that transfers of data outside of the EU/EEA are prohibited absent an adequacy decision by the European Commission and adequate safeguards, which the Privacy Shield failed to provide, and set the bar even higher with additional obligations for the data exporter to ensure the adequate protection of data before its export,<sup>66</sup> through the adoption of supplementary measures that are necessary to bring the level of protection of the data transferred up to the EU standard of essential equivalence.<sup>67</sup>

The international transfer of personal data protected by the GDPR can be altogether avoided if that private information is deemed not relevant to a matter at issue in U.S. legal proceedings, because the personal data could be excluded from the transfer via redaction or anonymization.<sup>68</sup> Should however personal information be required in a U.S. legal context, there are limited legal exceptions within the GDPR. However, the GDPR specifies that decisions from third-country authorities, courts, or tribunals are not in and of themselves legitimate grounds for data transfers to a non-EEA country, unless based on an international agreement such as a mutual legal assistance treaty.<sup>69</sup>

One possible basis for the legal transfer of data would be when the “processing is necessary for the purposes of the legitimate interests pursued by the controller.”<sup>70</sup> However the application of this exception requires the strict balancing the interest of the controller and the individual as noted above.<sup>71</sup>

The processing of personal data by “competent authorities” such as a court is another possible exemption.<sup>72</sup> However, this is limited to the information being transferred directly to the court “for

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<sup>64</sup> *Id.* art. 49.

<sup>65</sup> Case C-311/18, *Data Prot. Comm ‘r v Facebook Ir. Ltd., Maximillian Schrems*, 2020 O.J. (C 297) 4, available at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=397BF5F2-AE797A24B87EAAAC9B44BD809?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2596699>.

<sup>66</sup> *Id.*

<sup>67</sup> See EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, [https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-012020-measures-supplement-transfer\\_en](https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-012020-measures-supplement-transfer_en).

<sup>68</sup> GDPR Recital 26, <https://www.privacy-regulation.eu/en/recital-26-GDPR.htm>.

<sup>69</sup> GDPR, *supra* note 38, art. 48.

<sup>70</sup> *Id.* art. 6(1)(f).

<sup>71</sup> *Id.* The factors involved in satisfying the legitimate interest condition include that the processing must be necessary for the purpose; the purpose must be a legitimate interest for the controller or a third party; and the legitimate interest cannot be overridden by the data subject’s interest or fundamental rights and freedom. See GDPR Recital 47, <https://www.privacy-regulation.eu/en/r47.htm>.

<sup>72</sup> *Id.* art. 2.2(d).

the purposes of the prevention, investigation, detection, or prosecution of criminal offenses or the execution of criminal penalties.”<sup>73</sup> And although compliance with a legal obligation to which a controller is subjected can justify the processing of data in some circumstances,<sup>74</sup> according to the European Data Protection Board, an order from a U.S. court alone does not serve as an applicable legal ground for the transfer of personal data to the U.S.<sup>75</sup>

One possible litigation exception as outlined in GDPR Article 49(1)(e) allows transfers to take place when “the transfer is necessary for the establishment, exercise or defense of legal claims.”<sup>76</sup> This can cover a wide range of activities, including “transfers for the purpose of formal pre-trial discovery procedures in civil litigation.”<sup>77</sup> However, the wording of the exception applies only to “a transfer or set of transfers of personal data,” and not to any processing that might be required.<sup>78</sup> And of particular consideration for the application of this possible litigation exception is the limitation that the transfer be “**necessary** for the establishment, exercise or defense of the legal claim in question.”<sup>79</sup> This “necessity test” requires a “close and substantial connection between the data in question” and the particular legal claim.<sup>80</sup> Thus a party required to disclose personal data to a U.S. court would have to carefully substantiate the relevance to the particular matter, creating another hurdle for the party involved before the legal transfer of data and creating more potential risk for the party should it misjudge the necessity of the data to the case.

If an organization follows a U.S. court order and transfers data to the U.S. without adequate privacy protection and safeguards, the European data protection authorities could seek to impose the fines as noted above. However, refusing to transfer the requested data due to concerns about following data protection law may lead a U.S. court to impose sanctions, including contempt. Thus, parties involved in legal matters requiring the transfer to the U.S. of personal data falling under international data privacy and protection laws may be stuck between a rock and a hard place regarding the obligation to fulfill requests for data in the U.S. and the obligations to protect that data and individual privacy under the applicable laws of the other territories involved.

#### IV. Comity Considerations

U.S. courts have invoked the doctrine of “comity” to reconcile conflicts between non-U.S. laws and U.S. discovery practices. Comity refers to the “spirit of cooperation” required of U.S. courts to resolve issues that affect the laws and interests of other sovereign states. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 126 (2d Cir. 2014). The U.S. Supreme Court has recognized the need for “due respect” for foreign laws and set out certain factors to consider in any comity analysis.

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* art. 6(1)(c).

<sup>75</sup> EDPB Guidelines 2/2019 on derogations of Article 49 at 5.

<sup>76</sup> GDPR, *supra* note 38, art. 49(1)(e).

<sup>77</sup> EDPB Guidelines 2/2018 on derogations of Article 49 at 11, [https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_guidelines\\_2\\_2018\\_derogations\\_en.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf).

<sup>78</sup> GDPR, *supra* note 38, art. 49.

<sup>79</sup> EDPB Guidelines 2/2018 on derogations of Article 49 at 11 (emphasis in original).

<sup>80</sup> *Id.*

## A. Hague Convention

To further aid with international discovery, the United States along with 14 other nations entered into the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”). This Convention “prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another.” *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 524 (1987). In the U.S., the Hague Convention “has become the preferred means of obtaining discovery from foreign non-parties to a U.S. litigation, largely because the mechanisms provided incorporate the express terms of the responding jurisdiction.” Timothy P. Harkness *et al.*, *Discovery in International Civil Litigation: A Guide for Judges*, FEDERAL JUDICIAL CENTER, Dec. 2015, at 9–10. Still, the Hague Convention procedures remain slow, and potentially expensive.<sup>81</sup>

In *Aérospatiale* the U.S. Supreme Court held that the Hague Convention does not provide the exclusive means for obtaining evidence abroad. *Aérospatiale* at 547. Rather, the Court recognized that in certain instances, such as where a court lacks personal jurisdiction, the Hague Convention may yield “evidence abroad more promptly than use of the normal procedures governing pre-trial civil discovery” and such instances will lead to “first-use strategy.” *Aérospatiale*, 482 U.S. at 542 n.26. The Court set out factors for district courts to consider on a case-by-case basis when determining whether a party should have to seek discovery through the Hague Convention, or whether a party may proceed under the Federal Rules of Civil Procedure.

## B. Comity Analysis

In the wake of *Aérospatiale*, district courts are responsible for analyzing the facts for each case and assessing the likelihood that the use of Hague Convention procedures would prove effective. “In determining whether to require a party to follow the Hague Convention protocol to obtain discovery requires ‘scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.’” *Sun Grp. U.S.A. Harmony City, Inc. v. CRRC Corp.*, No. 17-CV-02191-SK, 2019 WL 6134958, at \*1 (N.D. Cal. Nov. 19, 2019) (quoting *Aérospatiale*, 482 U.S. at 544.).

Courts have applied a two-step approach to determining whether the requested discovery at issue must be pursued through Hague Convention procedures. First, the party seeking protection from discovery (or application of the Hague Convention procedures) must show that production of the discovery sought conflicts with a foreign law. *EFG Bank AG v. AXA Equitable Life Ins. Co.*, No. 17-CV-4767 (JMF), 2018 WL 1918627, at \*1 (S.D.N.Y. Apr. 20, 2018)) (party seeking an order to apply Hague Evidence Convention procedures must identify a specific foreign law that “actually bars the production” at issue); *Sun Grp. U.S.A.*, 2019 WL 6134958, at \*4 (same).

Second, the court must apply a comity analysis to balance the interest of the foreign state against the interest of the U.S. and the party in obtaining the information. *Grupo Petrotex, S.A. De*

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<sup>81</sup> *Report on the Work of the Special Commission of May 1986 on the Operation of the Convention*, HAGUE CONF. ON PRIV. INT’L L., Sept. 1986, at 5, <https://assets.hcch.net/docs/a8a2e8d6-6e84-4f43-85af-add32837d244.pdf> (noting the average delay in executing letter requests varied between one and six months).

*C.V. v. Polymetrix AG*, No. 16-cv-2401 (SRN/HB), 2019 U.S. Dist. LEXIS 87594, at \*5 (D. Minn. May 24, 2019) (“[A] party seeking to require that discovery be obtained through Hague Convention international discovery procedures must ‘demonstrate appropriate reasons for employing [them].’”) (quoting *Aérospatiale*, 482 U.S. at 547) (modification in original); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475–78 (9th Cir. 1992) (“The PRC’s admitted interest in secrecy must be balanced against the interests of the United States and the plaintiffs in obtaining the information.”); *Randall v. Offplan Millionaire AG*, No. 617CV2103ORL31TBS, 2019 WL 1003167, at \*6 (M.D. Fla. Mar. 1, 2019) (applying *Aérospatiale* comity-analysis to determine whether to compel use of Hague Convention procedures).

Under the second step of this analysis, the U.S. Supreme Court set out the following factors to any comity analysis: “(1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.” *Aérospatiale*, 482 U.S. at 544 n.28 (citations and quotations omitted). The Court noted that these factors are not exhaustive.<sup>82</sup>

U.S. courts have also considered three additional factors: the hardship of compliance on the party or witness from whom discovery is sought; the likelihood of compliance; and whether the parties have entered into a protective order to protect the disclosure of personal information. *Richmark*, 959 F.2d at 1475 (9th Cir. 1992) (considering “the extent and nature of the hardship that inconsistent enforcement would impose upon the person” and “the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.”) (citation and quotations omitted); *Inventus Power v. Shenzhen Ace Battery*, No. 20 CV 3375, 2021 WL 4477940, at \*13 (N.D. Ill. Sept. 30, 2021); *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 553 (S.D.N.Y. 2012); *AnywhereCommerce, Inc. v. Ingenico, Inc.*, No. 19-CV-11457-IT, 2021 WL 2256273, at \*3 (D. Mass. June 3, 2021).<sup>83</sup>

This section discusses each of these elements in turn:

- **Importance of the Documents and ESI.** “Where the outcome of litigation ‘does not stand or fall on the present discovery order,’ or where the evidence sought is cumulative of existing evidence, courts have generally been unwilling to override foreign [privacy] laws.” *Richmark*, 959 F.2d at 1475 (quoting *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977); *Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS*, 303 F. Supp. 3d 1004, 1008 (D. Ariz. 2018) (“Where the evidence is directly relevant. . . this factor weighs against utilizing Hague procedures.”) (quotations omitted).

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<sup>82</sup> See also Principle 1 of the INTERNATIONAL LITIGATION PRINCIPLES, *supra* note 1, which also discusses comity under *Aérospatiale*.

<sup>83</sup> At least one other court has also consider whether the person resisting discovery is a party to the litigation and, “[w]here the issue is the application of another country’s privacy laws, . . . whether such privacy requirements are absolute.” *Tansey v. Cochlear Ltd.*, No. 13–CV–4628 SJF SIL, 2014 WL 4676588, at \*2 (E.D.N.Y. Sept. 18, 2014) (citation omitted).

Notably, “importance” of the information is a factor under both comity and FRCP 26(b)(1) analyses.

- **Specificity of the Requests.** “[G]eneralized searches for information, disclosure of which is prohibited under foreign law, are discouraged.” *In re Mercedes-Benz Emissions Litig.*, No. 16-cv-881 (KM) (ESK), 2020 WL 487288, \*7 (D.N.J. Jan. 30, 2020); *Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS*, 303 F. Supp. 3d 1004, 1008 (D. Ariz. 2018) (“Broad, generalized requests for information weigh in favor of utilizing Hague procedures, while specific, limited requests disfavor the use of Hague procedures.”).
- **Location of the evidence.** “[T]he Court looks to whether ‘the documents to be disclosed and people who will produce those documents are located in a foreign country’ or in the United States. If the determination is a foreign country, this factor weighs against compelling production.” *In re Mercedes-Benz Emissions Litig.*, 2020 WL 487288, at \*7; *Richmark*, 959 F.2d at 1475 (“The fact that all the information to be disclosed (and the people who will be deposed or who will produce the documents) are located in a foreign country weighs against disclosures, since those people and documents are subject to the law of that country in the ordinary course of business.”).
- **Availability of alternative means.** “If the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.” *Richmark*, 959 F.2d at 1475; *Sun Grp. U.S.A.*, 2019 WL 6134958, at \*4 (if parties are not able to obtain documents necessary to litigate their claims through the Hague Convention, then “the balance would tip towards weighing in favor of full discovery through the Federal Rules of Civil Procedure.”); *Salt River*, 303 F. Supp. at 1009 (“[I]f the [Hague Convention] procedures are unsuccessful, the Court retains power to order discovery under the Rules.”).
- **National interest.** Several courts, including the Ninth Circuit, have held that the interest of the foreign sovereign “is the most important factor” under this analysis. *Richmark*, 959 F.2d at 1476; *S.E.C. v. Gibraltar Glob. Sec., Inc.*, No. 13 CIV. 2575 GBD JCF, 2015 WL 1514746, at \*5 (S.D.N.Y. Apr. 1, 2015). In considering the interest of the foreign state, courts analyze “the significance of disclosure in the regulation of the activity in question and indications of the foreign state’s concern for confidentiality prior to the discovery.” *Richmark*, 959 F.2d at 1476 (internal quotations omitted).

Under this factor, courts typically examine whether a foreign data protection law will be violated by disclosure of the information sought. *E.g.*, *Finjan, Inc. v. Zscaler, Inc.*, No. 17CV06946JSTKAW, 2019 WL 618554, at \*3 (N.D. Cal. Feb. 14, 2019) (“considering the significant American interest in protecting its patents and the reduced U.K. interest in protecting the privacy of its citizens”). For example, in *Knight Cap. Partners Corp. v. Henkel Ag & Co.*, 290 F. Supp. 3d 681, 691 (E.D. Mich. 2017), German defendants argued that “the German Federal Data Protection Act bars their production of all of the information that the plaintiff seeks, because all of the documents requested inherently would include ‘personal information’ of persons who are employed by or do business with Henkel, such as their names, email addresses, and calendar and phone records.” *Knight*, 290 F. Supp. 3d at 687. The court concluded that the interest of the United States in vindicating the rights of American plaintiffs

was not outweighed by the “concerns of the German government with protecting its citizens from unjustified compromises of their personal information[.]” *Knight*, 290 F. Supp. 3d at 691 (citation omitted). The court further noted the particular German statute at issue “expressly allows disclosures that are necessary for the purposes of litigation[.]” *Id.*

- **Hardship.** If the foreign national is “likely to face criminal prosecution” in its home country for complying with the U.S. court order, “that fact constitutes a ‘weighty excuse’ for nonproduction.” *Richmark*, 959 F.2d at 1477 (quoting *Société Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 211 (1958)).
- **Likelihood of compliance.** “If a discovery order is likely to be unenforceable, and therefore to have no practical effect, that factor counsels against requiring compliance with the order.” *Richmark*, 959 F.2d at 1478.
- **Existence of a protective order:** A final consideration that courts look to is the existence of a protective order that would protect the disclosure of personal information made in response to discovery requests. Courts are more likely to grant discovery requests for data covered under foreign data protection laws where the parties have agreed to, and the court has entered, a robust protective order protecting information from further disclosure. *AnywhereCommerce, Inc.*, 2021 WL 2256273, at \*3 (recognizing that disclosure under the court-ordered protective order was “[c]onsistent with the objective of the GDPR”); *Knight*, 290 F. Supp. at 691 (considering that the documents will be produced under a protective order governing their confidentiality).<sup>84</sup>

Notably, the *Aérospatiale* Court held that non-U.S. laws prohibiting the production of documents in U.S. discovery is not dispositive. *Aérospatiale*, 482 U.S. at 544 n.29 (observing that it is “well settled that [non-U.S. laws limiting discovery] do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”) (citing *Rogers*, 357 U.S. at 204–06).

## V. U.S. Proportionality Rules Applied in Cross-Border Context

U.S. federal courts address cross-border discovery issues under Rule 26 in a variety of ways. Some courts have addressed cross-border issues in the Rule 26(b)(1) proportionality analysis, while other courts have considered cross-border issues in the Rule 26(b)(2)(b) analysis. Other courts have addressed cross-border issues only in the context of the “comity” analysis under the U.S. Supreme

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<sup>84</sup> Some courts have considered the existence of a protective order under the fifth category of the *Aérospatiale* analysis, which balances the interests of the United States with the interests of the foreign country. *See, e.g., In re Air Crash at Taipei, Taiwan on Oct. 31, 2000*, 211 F.R.D. 374, 379 (C.D. Cal. 2002) (noting that the presence of a protective order lessened concerns about the foreign government’s interest in maintaining secrecy over the disclosed materials); *Finjan, Inc. v. Zscaler, Inc.*, No. 17CV06946JSTKAW, 2019 WL 618554, at \*3 (N.D. Cal. Feb. 14, 2019) (noting the information sought would be marked confidential under the protective order); *Fenerjian v. Nong Shim Co.*, No. 13CV04115WHODMR, 2016 WL 245263, at \*5 (N.D. Cal. Jan. 21, 2016) (finding the protective order “adequately addresses the privacy concerns expressed in” the foreign data privacy law).

Court's *Aérospatiale* framework. This Commentary recommends that a series of approaches is appropriate, each with a different focus.

First, parties and courts should consider whether the information sought is discoverable under Rule 26(b), assessing whether it is both relevant and proportional. In that proportionality analysis, courts should consider the burden on parties and non-parties in complying with the non-U.S. law, as well as potential risk to parties and non-parties in failing to comply with the non-U.S. law. Second, (assuming the first prong is met), the court should then move to the *Aérospatiale* comity analysis to weigh the foreign sovereign's interests, among other factors, in deciding whether to proceed under the federal rules or Hague Convention.

As a prelude to the proposed recommendation, below is a representative sample of various cases analyzing this issue.

#### **A. Courts Shielded Discovery Relying Upon Foreign Laws In Its Relevancy/Proportionality Analysis**

A number of courts utilized Rule 26(b)(1) to hold that discovery of documents or information outside the U.S. is not permissible, based on relevancy and/or proportionality grounds. For example, *In re: Benicar (Olmesartan) Prod. Liab. Litig.*, No. 15-2606 (RBK/JS), 2016 WL 5817262 (D.N.J. Oct. 4, 2016) involved a dispute over the plaintiffs' motion to compel defendants to produce their European affiliate's documents. The court denied the plaintiffs' motion explaining that "just because defendants" have "control" over the ex-U.S. affiliate's documents, does not necessarily mean defendants will be directed to answer plaintiffs' document requests." *Id.* at \*7. And because "plaintiffs' document requests are overbroad and far-reaching," the court concluded, it would "not direct defendants to respond." *Id.* However, the court made "clear" that its decision did not "foreclose an Order directing defendants to respond to appropriate document requests asking for relevant [European affiliate's] documents that [had] not already been produced." *Id.* And explained that "[i]nstead of general and overbroad requests, however, plaintiffs' requests must be specific, focused and narrow." *Id.* at \*7 ("The Court will consider directing defendants to produce additional documents from Daiichi Europe but only if plaintiffs satisfy the Court the requests are well-grounded, materially relevant and non-cumulative."); *cf. Corel Software, LLC v. Microsoft Corp.*, No. 2:15-cv-00528, 2018 WL 4855268, at \*1 (D. Utah Oct. 5, 2018) (ordering retention and production of data relevant in a patent infringement case that Microsoft claimed "raises tension" with the GDPR and would require burdensome steps to anonymize).

Similarly, some courts have declined to permit discovery of ESI held by multinational or ex-U.S. entities where doing so would be cumulative of readily discoverable documents within the U.S. For example, in *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562 (D. Ariz. 2016), patients filed products liability actions against a global medical device manufacturer. Plaintiffs sought "discovery of communications between the [non-U.S.] entities and [non-U.S.] regulatory bodies regarding the [product] at issue in this case." *Id.* at 563. The court held that the non-U.S. subsidiaries' ESI regarding communication with foreign regulators was not relevant or discoverable, and the burden of accessing, identifying, and discovering such communications outweighed the benefit. In analyzing proportionality, the court concluded "that the burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery—a mere



possibility of finding a [non-U.S.] communications inconsistent with United States communication.” *Id.* at 566.

## **B. Other Courts Consider Foreign Laws In Their Comity Analysis**

Both before and after the 2015 amendments to Rule 26(b)(1), many courts have considered conflicts with foreign laws in the context of a comity analysis. A few courts have prohibited cross-border discovery based on finding that the requested discovery would violate foreign law, without undertaking the full-scale *Aérospatiale* analysis. For example, the District Court in *Salerno v. Lecia, Inc.*, No. 97-CV-973S(H), 1999 WL 299306, at \*3–4 (W.D.N.Y. Mar. 23, 1999), refused to compel production of certain documents sought based on the fact that such discovery was prohibited by foreign law. In *Salerno*, the plaintiffs moved to compel discovery of European nationals’ personnel and severance documents. *Id.* at \*1. Citing foreign data protection laws, the court held that, “the type of information sought by plaintiff is considered ‘personal data’ which cannot be disclosed to third parties located within the United States absent consent of the employee or assurances that the information will be subject to the same level of confidentiality protection.” *Id.* at \*3. Therefore, the court refused to compel production of data related to severance package and personnel files because it would expose defendants to liability under the EU Directive and the German Data Production Act. *Id.*

Most courts, however, have considered the foreign law conflict only within the *Aérospatiale* comity framework. As discussed above, that framework involves a two-step approach of first establishing the foreign law conflict, then undertaking the weighing of *Aérospatiale*’s enumerated factors. The party opposing discovery bears the burden of establishing that production would violate foreign law. Only after the party opposing discovery establishes that discovery will violate foreign law will the court proceed with a comity analysis. *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp. 3d 409, 413 (S.D.N.Y. 2016) (“Once a foreign law is found to conflict with domestic law, courts perform a comity analysis to determine the weight to be given to the foreign jurisdiction’s law.”) (internal quotations omitted).

While briefly acknowledging Rule 26 and the Federal Rules’ “usual liberal approach to discovery,” one court’s analysis focused only on whether the “need for deference to a foreign sovereign entity” precluded discovery under the *Aérospatiale* factors. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Lit.*, No. 05-MD-1720, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010) involved a discovery dispute over two documents created in connection with the European Commission’s investigations into the defendants’ conduct. *Id.* at \*1. “The Commission declined to authorize production . . . relying on ‘the European Commission’s general policy that the Statement of Objections and the information contained therein should be used only for the purpose of proceedings concerning the application of [European competition law].”” *Id.* at \*3 (quoting letter from commission). The court, ruling on a motion to compel applied *Aérospatiale* to conclude that the “Commission’s interest in confidentiality outweighs the plaintiffs’ interest in discovery of the European litigation documents.” *Id.* at \*8. The court reached this conclusion, in large part, based on the fact that the European Commission asserted that it desired to “restrict access to its own investigative and adjudicative procedures” and had “filed briefs in several district courts seeking to vindicate that interest.” *Id.* at \*8. Specifically, the court recognized the significance of the confidentiality of the investigative and adjudicative procedures for effective enforcement of European

antitrust law because: (1) such “confidentiality encourages third parties to cooperate with the Commission’s investigations,” and (2) the Commission “relies on information provided by complainants and other third parties, including business secrets and other information that the third parties often want to keep confidential.” *Id.* at \*9. In addition, the plaintiffs already had access to “an unredacted copy of the extensive opinion published by the Commission.” *Id.* at \*10. Therefore, the court denied the plaintiffs’ motion to compel.

Many courts hold that U.S. interests in full discovery outweigh the interests of foreign jurisdictions. For example, in *Devon Robotics v. DeViedma*, No. 09-CV-3552, 2010 WL 3985877 (E.D. Pa. Oct. 8, 2010). *Devon Robotics* involved broad discovery requests related to claims for breach of fiduciary duty, tortious interference with contract, and defamation. The defendant moved for a protective order to prevent disclosure, arguing that his employer owned the documents and that their disclosure was prohibited by Italian privacy laws. *Id.* The court denied the motion, stating that “[i]t is well settled that [a non-U.S. nondisclosure] statute[ ] do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” *Id.* at \*4. Applying the *Aérospatiale* comity analysis, the court found that: (1) the documents were “important to the litigation” and the requests were “specifically tailored” to obtain relevant documents, (2) the defendant worked largely in the United States, and much of the information sought “may very well be physically present in the United States at this time (e.g., on Defendant’s laptop)[,]” and (3) it was “unclear whether any Italian interests would actually be undermined” by disclosure, “while nonproduction would undermine important interests of the United States.” *Id.* at \*5. Therefore, the comity factors weighed in favor of disclosure, and the court denied the defendant’s protective order. *Id.* at \*5–6. *See also, e.g., Fenerjian v. Nong Shim Co., Ltd.*, No. 13CV04115WHODMR, 2016 WL 245263, at \*3 (N.D. Cal. Jan. 21, 2016) (comity and foreign law alone are not dispositive when a discovery dispute arises regarding a foreign law’s protection of documents sought in a United States court); *Finjan, Inc. v. Zscaler, Inc.*, No. 17-cv-06946-JST, 2019 WL 618554, at \*2 (N.D. Cal. Feb. 14, 2019). *But see, e.g., Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861 RSM, 2014 WL 202102, at \*2 (W.D. Wash. Jan. 17, 2014) (“Use of Hague Convention procedures is particularly relevant where, as here, discovery is sought from a non-party in a foreign jurisdiction.”); *CE Int’l Res. Holdings, LLC v. S.A. Minerals Ltd. P’ship*, No. 12-CV-08087 (CM)(SN), 2013 WL 2661037, at \*8–16 (S.D.N.Y. June 12, 2013) (denying motion to compel production of documents abroad and ordering use of Hague Convention); *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 160 (S.D.N.Y. 2011), *aff’d*, No. 10 Civ. 9471(WHP), 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011) (ordering parties to proceed through Hague Convention for discovery of non-party banks); *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 341 (N.D. Tex. 2011) (directing party to proceed with discovery of foreign non-party through the Hague Convention); *Pronova BioPharma Norge AS v. Teva Pharm. USA, Inc.*, 708 F. Supp. 2d 450, 453 (D. Del. 2010) (issuing letters of request through the Hague Convention); *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007) (denying motion to compel discovery on grounds of international comity).

### **C. Some Courts First Consider Discoverability Under Rule 26, Then Proceed to a Comity Analysis**

Some courts have first undertaken a Rule 26(b)(1) evaluation of whether the discovery sought is permissible, as both relevant and proportional. Only after finding the information discoverable under Rule 26, the court then proceeds to an *Aérospatiale* comity analysis.

For example, in *Connex R.R. LLC v. AXA Corp. Sols. Assurance*, No. CV1602368ODWRAOX, 2017 WL 3433542, at \*19 (C.D. Cal. Feb. 22, 2017), the court first determined that Rule 26 permitted plaintiffs to pursue the discovery at issue. Thereafter, the court concluded that the discovery would likely violate the French blocking statute, then examined the *Aérospatiale* factors to determine “[w]hether Plaintiffs may seek discovery under the FRCP or whether they must proceed in accordance with the Hague Convention ....” *Id.* at \*12.

In *In re: Xarelto (Rivaroxaban) Prod. Liab. Litig.*, No. MDL 2592, 2016 WL 3923873, at \*13 (E.D. La. July 21, 2016), the court first concluded that Rule 26 warranted discovery. The court then determined that discovery would violate a German blocking statute, and thus concluded that it would be necessary to perform an *Aérospatiale* comity analysis. *Id.*

#### **D. Some Courts Collapse Proportionality and Comity**

Courts have at times conflated the Rule 26 discoverability and *Aérospatiale* comity analyses. For example, in *In re Rubber Chemicals*, 486 F. Supp. 2d at 1081, the court stated that Rule 26 gives the Court “discretion” to limit discovery on the grounds set forth in *Aérospatiale*. Similarly, the court in *In re Qualcomm Antitrust Litig.*, No. 17-MD-02773 LHK (NC), 2018 WL 10731128, at \*1 (N.D. Cal. Mar. 26, 2018), held that under Rule 26, it had “discretion to limit discovery on several grounds, including international comity,” and then underwent the *Aérospatiale* analysis. (quoting *In re Rubber Chemicals*, 486 F. Supp. 2d at 1081).

In *In re Mercedes-Benz Emissions Litig.*, 2020 WL 487288, at \*6, the court expressly commented on a foreign party’s complaint that Rule 26’s broad relevance standard is separate and distinct from the question of whether information is important to the litigation (which is the first *Aérospatiale* factor). The foreign party argued that the magistrate judge “conflated” the two standards. The court appeared to agree that *Aérospatiale*’s first factor sets out a different, heightened standard than mere relevance, but suggested that if the information were “directly relevant” it is likely to be important. *See id.* at \*6 (citing *Richmark*, 959 F.2d at 1475).

In *Nespresso USA, Inc. v. Williams-Sonoma, Inc.*, No. 119CV4223LAPKHP, 2021 WL 942736, at \*2 (S.D.N.Y. Mar. 12, 2021), the court examined Williams-Sonoma’s request for letters rogatory to Swiss affiliates of Nespresso. It largely collapsed the Rule 26 and *Aérospatiale* analyses, treating the latter almost as an enhancement of the former. “Under Rule 26, parties may seek discovery as to ‘any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case. . . .’ Courts ‘should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.’” (quoting *Aérospatiale*, 482 U.S. at 546).

In *Hiser v. Volkswagen Grp. of Am., Inc.*, No. 5:14-CV-170-TBR-LLK, 2016 WL 11409339, at \*10 (W.D. Ky. Aug. 1, 2016), the defendant sought to produce redacted versions of documents omitting personal information of German employees, to avoid violation German data protection law. The court considered the *Aérospatiale* factors in the Rule 26(b)(1) proportionality analysis, finding that, “Plaintiffs have not shown that having the name of every individual named in every document produced is necessary, relevant or proportional to their needs in this case, particularly when weighed against the government of Germany’s important interest in protecting its citizen’s privacy. Defendants may produce redacted documents.” *Id.*

### **E. Different Purposes of Rule 26(b)(1) and Comity Analyses**

The current version of Rule 26(b)(1) resulted from that same pattern. Rule 26(b)(1) at its core—and as the header for that section specifies—is intended to define the “Scope in General” for civil discovery in the United States. The 2015 amendments to the Federal Rules of Civil Discovery, most notably to Rule 26(b)(1), provided clarifying language and included a principle of proportionality in defining the scope of discovery:

Parties may obtain discovery regarding **any nonprivileged matter** that is **relevant to any party’s claim or defense** and **proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit . . . .

FED. R. CIV. P. 26(b)(1) (emphasis added).

By contrast, the comity analysis recognized in *Aérospatiale* is specifically intended to address the interests of foreign sovereigns, which are generally not represented in the litigation. These principles are particularly important when the rights of foreign data subjects are at issue, as they are when cross-border discovery implicates, for example, the rights of non-U.S. employees or residents under non-U.S. data protection laws. Foreign jurisdictions and individuals are not present in the U.S. litigation to make arguments to protect their rights, and their interests may not fully align with those of the parties to the litigation. Accordingly, courts must be diligent in applying the *Aérospatiale* analysis not for the purpose of managing their dockets but respecting these important interests of nations and individuals not present in their courtrooms. For these reasons, the comity analysis has a very different focus than the Rule 26(b)(1) analysis.

### **F. Recommended Approach**

Due to the different objectives and focuses of Rule 26(b) and *Aérospatiale*’s comity analysis, this Commentary recommends that courts undertake a serial approach to considering potential foreign law conflict issues in cross-border discovery.

#### **A. Rule 26(b) analysis, including proportionality, should be the threshold inquiry.**

Cross-border discovery inquiries should always begin with a Rule 26(b)(1) analysis of whether the information sought is both relevant and proportional. In that analysis, court should consider the producing party's burdens and costs associated with complying with non-U.S. laws. [Even if the information is discoverable under Rule 26(b)(1), the court may limit discovery under Rule 26(b)(2)(B) as not reasonably accessible because of undue burden or cost. In that analysis, courts may consider the producing party's burdens and costs associated with complying with non-U.S. laws.] If the information sought is not discoverable under Rule 26, no further inquiry or comity analysis is necessary.

The balancing test of Rule 26(b)(1) should consider the burden on parties and third parties arising from the foreign law conflict. This is consistent with courts' interpretation of the "burden" prong of the Rule, and the Advisory Committee notes. Addressing conflict with foreign law involves both cost and non-cost factors, all of which are appropriate "burdens" to consider.<sup>85</sup>

## **B. Cost Factors**

By way of example, producing personal information of an EU resident in U.S. litigation requires the processing and transfer of that information under the GDPR. Before producing data to the requesting party, several assessments to comply with privacy laws need to be done first. These additional steps may be burdensome and costly. For example:

- According to the GDPR, Standard Contractual Clauses can be used as a ground for data transfers from the EU to third countries to ensure appropriate data protection safeguards.<sup>86</sup> Involvement of U.S. external counsel may require conclusion of Standard Contractual Clauses between external counsel and client so that U.S. external counsel can investigate/review the data (accessing the data from the U.S. via a review tool in Europe is already a transfer of personal data to the U.S.). Concluding the Standard Contractual Clauses is an additional step that could be burdensome. (*E.g.*, external counsel may need to establish technical and organizational measures.). Furthermore, additional measurements to the Standard Contractual Clauses need to be assessed (Transfer Impact Assessment).<sup>87</sup>
- Involvement of corporate data protection officer to discuss processing and transfer of data.

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<sup>85</sup> As elaborated above, proportionality is not limited to financial considerations (*see supra* note 7, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 68 (2018) (Comment 2.d., addressing Sedona Principle 2, which states that "Parties should address the full range of costs of preserving, collecting, processing, reviewing, and producing ESI"); *id.* at 69 ("the non-monetary costs (such as the invasion of privacy rights, risks to business and legal confidences, and the risks to privileges) should be considered").

<sup>86</sup> *Standard Contractual Clauses (SCC)*, EUROPEAN COMM'N, [https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en) (last visited Dec. 28, 2021).

<sup>87</sup> *Transfer Impact Assessment Templates*, INT'L ASS'N OF PRIV. PROS. (Sept. 1, 2021), <https://iapp.org/resources/article/transfer-impact-assessment-templates/>.

- Assessing if data transfer should be discussed with local data protection authorities. If local data protection authorities should be involved, these meetings will involve additional assessments and meetings with the data protection authorities will be time consuming.
- Legal assessment for every processing step (preservation, processing, collection, review and production). Article 6 of the GDPR requires balancing the interests of the controller (producing party) and the individual/data subject (employees). This balancing needs to be done properly for each processing step and for each production (explaining why the interests of the controller outweigh the interests or fundamental rights and freedoms of the data subject). The producing party must document every step and assessment thoroughly.
- Article 88 of the GDPR allows member states to enact more specific rules for processing employees' personal data in the employment context. So, besides the data privacy assessment according to GDPR, local data privacy laws need to be checked with local counsel.
- To resolve the conflict between the requirements of the GDPR and U.S. discovery requests, EU authorities have developed a “layered” approach to document productions.<sup>88</sup> This means “as a first step, there should be a careful assessment of whether anonymized data would be sufficient in the particular case. If this is not the case, then transfer of pseudonymized data could be considered. If it is necessary to send personal data to a third country, its relevance to the particular matter should be assessed before the transfer – so only a set of personal data that is actually necessary is transferred and disclosed”.<sup>89</sup> Anonymization and pseudonymization are expensive. However, the party requesting the discovery may require the personal identification information in the email header for the case.
- The personal data being transferred must be restricted to the absolute minimum necessary for the litigation. This results from the principle of data minimization in Art. 5(1)(c) GDPR (personal data must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”). Therefore, First Level Review and special review (like data privacy review) should be conducted locally in Europe.<sup>90</sup> Then, only the relevant data that is necessary for the legal defense will be transferred to the U.S. However, this also means that there are more costs involved as hourly rates of contract attorneys outside the U.S. are more expensive.
- Another important aspect concerns document review itself. As only documents that are necessary for the legal defense can be transferred to the U.S. and purely private information of this nature is unlikely to be necessary (or even relevant) to a plaintiff's claim, private data review needs to be conducted (“special review”). Therefore, review of

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<sup>88</sup> EDPB Guidelines 2/2018 on Derogations of Article 49, *supra* note 77, at 12.

<sup>89</sup> *Id.*

<sup>90</sup> DATA PROTECTION WORKING PARTY, WORKING DOCUMENT 1/2009 ON PRE-TRIAL DISCOVERY FOR CROSS BORDER CIVIL LITIGATION 11 (2009), [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp158\\_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp158_en.pdf); INTERNATIONAL LITIGATION PRINCIPLES, *supra* note 1, at 18 n.56.

European data requires additional review. It is not just a responsive review but a review to detect private content (*e.g.*, holidays, sickness, parental leave). In addition, this private content then needs to be redacted unless (1) it is necessary for some reason to a claim or defense and (2) the interests of the producing party outweigh the interests of the individuals/data subjects. Privacy redactions are burdensome and expensive.

- Furthermore, there are obligations towards the data subject/individual. *See* GDPR arts. 13 and 14 (“Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information . . .”). The controller needs to inform the data subject/individual that his data will be processed, *e.g.*,<sup>91</sup> “the identity and the contact details of the controller”, “the purposes of the processing for which the personal data are intended as well as the legal basis for the processing,” “where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party.”
- Production of data means transfer of data to the U.S. A legal basis for transferring personal data to the U.S. is needed. Again, assessment is needed if the transfer is necessary for the legal defense (balancing of interests of controller and individual/data subject).
- When data is transferred to the U.S., the data subject/individual needs to be informed, too. GDPR arts. 13, 14 (see examples above, and in addition, “where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission...”) <sup>92</sup>. Please note that not just the custodians have to be informed, but so too must every data subject/individual whose name appears in the production set. Depending on the amount of data in the production set, this could mean that several thousand individuals have to be informed.
- Any violation of Article 6, 13 or 49 of the GDPR can result in severe fines. In addition, it could lead to civil liability and reputational damage.
- If data of employees need to be processed, labor law need to be considered. Again, labor law regulations need to be checked with local counsel as labor law differs from country to country. Some local laws require the involvement of works council and/or specific information to the individual (*e.g.*, personalized information letter). One aspect is that if there is a works council, the data collection/review/transfer needs to be discussed/negotiated with the works council. This could be time consuming and burdensome. As regards review, a works council review and redaction need to be conducted as data containing works council topics are considered sensitive data and need to be protected. Again, special review and redactions are burdensome and expensive.

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<sup>91</sup> GDPR, *supra* note 38, art. 13.1–2.

<sup>92</sup> *Id.* art. 13.1(f).

- There are countries which consider their data as confidential so that a transfer outside their country is not possible without the approval of their authorities in charge. For example, China: as per Article 36 of the newly issued Data Security Law of the People's Republic of China (which came into effect on September 1, 2021), "the competent authority of the People's Republic of China shall process a request for data from a foreign judicial or law enforcement authority in accordance with relevant laws and international treaties and agreements entered into or acceded to by the People's Republic of China, or under the principle of equality and reciprocity. Without the approval of the competent authority of the People's Republic of China, a domestic organization or individual shall not provide data stored in the territory of the People's Republic of China to any foreign judicial or law enforcement authority."

### C. Non-Cost Factors

Some courts have recognized the privacy interests of U.S. residents in the Rule 26(b)(1) proportionality analysis, under specific legal or regulatory provisions, or common law considerations. It would be appropriate for courts to consider similar privacy interests of non-U.S. residents, particularly those that are codified under local laws or regulations.<sup>93</sup>

For example, in *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 562 (S.D.N.Y. 1996), the court held that Rule 26 allows courts to limit discovery on account of burden, including "where the burden is not measured in the time or expense required to respond to requested discovery, but lies instead in the adverse consequences of the disclosure of sensitive, albeit unprivileged, material," and that courts should consider "the burdens imposed on the [responding parties]' privacy and other interests."<sup>94</sup> See also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (affirming district court's refusal to allow discovery into certain private information of plaintiffs in a Title VII employment case because, among other things, "[t]he chilling effect such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest"); *Wiesenberger v. W.E. Hutton & Co.*, 35 F.R.D. 556, 557 (S.D.N.Y. 1964) (limiting the disclosure of personal income tax returns unless "clearly required in the interests of justice"); *Conn. Importing Co. v. Cont'l Distilling Corp.*, 1 F.R.D. 190, 193 (D. Conn. 1940) (recognizing that the court has discretion to limit discovery requests to avoid an undue invasion of privacy); *Appler v. Mead Johnson & Co.*, No. 3:14-cv-166-RLY-WGH, 2015 WL 5615038, at \*6 (S.D. Ind. Sept. 24, 2015) (declining to compel the production of entire categories of data from a Facebook profile due to the privacy burden outweighing the relevance to the case).

In *Henson v. Turn*, No. 15-cv-01497-JSW (LB), 2018 WL 5281629, at \*4 (N.D. Cal. Oct. 22, 2018), the court considered the defendant's requests for inspection or complete forensic images of

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<sup>93</sup> The Sedona Conference Primer on Social Media, Second Edition states that "[t]he proportionality limitation on the scope of discovery includes two factors that implicate privacy concerns, i.e., 'the importance of the discovery in resolving the issues, and whether the burden . . . of the proposed discovery outweighs its likely benefit.'" *The Sedona Conference, Primer on Social Media, Second Edition*, 20 SEDONA CONF. J. 1, 27–28 (2019).

<sup>94</sup> According to Robert D. Keeling and Ray Mangum, proportionality in discovery is particularly relevant at a time when the protection of privacy is of increasing concern in the United States and abroad. Robert D. Keeling & Ray Mangum, *The Burden of Privacy in Discovery*, 20 SEDONA CONF. J. 415, 416 (2019). "The burden of privacy is distinct and independent from the expense of litigation, and the risks to privacy are felt after, rather than before, production." *Id.* at 440.



mobile devices. The plaintiffs argued that those requests were overbroad and invaded their privacy rights. The court held that while questions of proportionality often arise in the context of disputes about the expense of discovery, proportionality is not limited to such financial considerations. Courts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly in the context of a request to inspect personal electronic devices. *See Hespe v. City of Chicago*, No. 13 C 7998, 2016 WL 7240754, at \*3 (N.D. Ill. Dec. 15, 2016) (affirming order denying request to inspect plaintiff’s personal computer and cell phone because, among other things, inspection “is not ‘proportional to the needs of this case’ because any benefit the inspection might provide is ‘outweighed by plaintiff’s privacy and confidentiality interests’”); *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617 LHK (NC), 2016 WL 11505231, at \*1–2 (N.D. Cal. Apr. 8, 2016) (denying request to inspect or forensically image plaintiffs’ computers, tablets, and smartphones as “invas[ive] plaintiffs’ privacy interests” and “disproportional to the needs of the case.”).

**1. If material is discoverable under Rule 26(b)(1), courts should then move to *Aérospatiale* inquiry**

Only if the court determines that the requested documents are discoverable under Rule 26(b)(1) will the court turn its attention to the elements of a comity analysis under *Aérospatiale*. The following flowchart reflects this serial approach to considering potential foreign law conflict issues in cross-border discovery.

**Step 1:** Is the request within the allowable scope under FRCP 26(b)(1): nonprivileged, relevant to any party's claim or defense, and proportional to the needs of the case considering the following factors?

- Importance of issues at stake
- Amount in controversy
- Parties' relative access to relevant information
- Parties' resources
- Importance of discovery to resolve issues
- Does burden outweigh likely benefit

Yes

No: discovery denied

**Step 2:** Should discovery be permitted under Comity factors outlined in *Aérospatiale*?

- Importance of information to litigation
- Specificity of the requests
- Whether information originates in U.S.
- Availability of alternative means
- National interests
- Hardship
- Likelihood of compliance
- Existence of protective order

Each of the comity factors outlined above are discussed in detail in Section IV.B of this Commentary.

## VI. Practice Points for Addressing Privacy in Cross-Border Discovery

A. Practice Point 1: U.S. courts may appropriately consider the impact of compliance with data protection and confidentiality laws as part of a proportionality analysis in determining the appropriate scope of discovery.

1. Within the Rule 26(b)(1) framework:
  - i. The importance of the issues at stake in the action.
  - ii. The amount in controversy.
  - iii. The parties' relative access to relevant information.
  - iv. The parties' resources.
  - v. The importance of the discovery in resolving the issues.

- vi. Whether the burden or expense of the proposed discovery outweighs its likely benefit.
- 2. Some factors parties may choose to highlight include:
  - i. Data privacy interests of data subjects weighed against importance of other issues at stake.
  - ii. Added costs relating to complying with discovery requests due to data privacy obligations, when balancing against the amount in controversy.
  - iii. Access to information potentially impacted by limitations on access due to data privacy laws.
  - iv. Cost and time to negotiate with Works Councils or confer with home country regulators.
  - v. Cost and time for data privacy review and redaction, as deemed appropriate.
  - vi. Cost and time for a large-scale discovery effort at various international locations.
  - vii. Reputational risk relating to violating international data privacy laws in favor of U.S. discovery request.
  - viii. Enforcement risk, regardless of the level of enforcement thus far; both for civil and criminal penalties. This issue is taken seriously by EU authorities.
- B.** Practice Point 2: Any comity analysis should be conducted separate from a proportionality analysis, though similar factors may weigh into both.
  - 1. Courts should take care not to dilute or undermine international comity standards.
- C.** Practice Point 3: When setting forth an argument on the burden of compliance with non-U.S. data privacy or confidentiality laws, a party should make such argument with sufficient specificity and detail.
  - 1. Detailed accounting of potential costs, monetary and otherwise.
  - 2. Statements from non-U.S. law experts.
- D.** Practice Point 4: Parties should put in place, and courts should encourage, practices that promote compliance with data protection and confidentiality laws while also reducing the burden and expense of cross-border discovery.
  - 1. Protective orders.
  - 2. Leverage data privacy counsel to find data-related workflows that minimize cross-border issues.

- E.** Practice Point 5: Courts may minimize analytic and doctrinal problems relating to overlap of proportionality and comity factors by carefully addressing topics in order (see flowchart above).