ILTA 2009

International Business Strategy in Small Doses

ADAM COHEN

FTI

Technology and Globalization: Transcending National Boundaries

- Time
- Culture
- Language
- Law
- Currency
- Expertise/Experience

Technology and Globalization: Blurring Other Boundaries

- Professional and personal
- Public and private
- Proprietary and communal

Fundamental Realities Strategy Must Address

- Most significant businesses touch outside the U.S. in one way or another, whether through affiliates or outsourcing, customer interactions, etc.
- The U.S. legal process requires preservation and production of information that is relevant, regardless of storage location.
- U.S. courts are unsympathetic to arguments that ESI outside the U.S. is not within custody or control or is not reasonably accessible. a1
- No other country has a discovery process like the U.S.

FTI

Slide 4

a1 Samsung example
acohen, 7/9/2009

Fundamental Realities (cont.)

- The value other countries place on personal privacy is far greater than in the U.S.
- U.S. clients are outsourcing portions of the litigation process to less expensive service providers outside the U.S.
- Most companies do not have consistent information management policies and practices globally.

Consequences for International Businesses Participating in the U.S. Legal Process

- Multinationals need to preserve, collect, review and produce ESI from foreign sources.
- This means that they must find a way to overcome the hurdles – linguistic, cultural, legal, etc. -- or risk losing cases, spending excessive money on litigation, and suffering reputational damage.
- Supervision of the legal process must reach overseas.

FTI

Overcoming Cultural Obstacles

- **Local Presence, Presence by Locals**
  - having an “office” v. having personnel and facilities on the ground suitable for getting the job done the right way.
  - challenge in finding local resources with the right qualifications.
  - having an “office” v. having an office staffed by native professionals.
  - capability to deploy on site
- **Tread Lightly**
  - sensitivity to stereotypes about Americans
  - education regarding socially acceptable behavior
- **Holiday Schedule**
- **Full and documented discussion and understanding in advance**

FTI

Language Barriers

- **Unicode**
- **Translation**
  - Machine
  - Human
  - Discoverability/work product issues
  - Native speaking reviewers

Cultural/Legal: Privacy
U.S. Perspective

- Any source of ESI is fair game, including for example home computers of employees who may have used them for business purposes. a2
- Generally, U.S. employers require employees to agree to computer use policies acknowledging the employers' right to access any information on company computers and disclaiming any expectation of privacy on the part of the employee.
- Generally, courts have sided with employers who have such policies where employees have raised privacy challenges. a3

FTI

Slide 9

a2 Northwestern "sick out" case
acohen, 7/9/2009

a3 Note NERA attorney/client privilege case.
acohen, 7/9/2009

Cultural/Legal: Privacy Perspective Outside U.S.

- Other countries are much more protective of personal privacy, considering it a “human right.”
- Laws bar accessing and transferring “personal data” even if stored on employer computer.
- In some countries, employees cannot be deemed to have consented to access based on unequal bargaining power.
- Violation of these laws often incurs criminal penalties.

Privacy Considerations

- Note that despite EU regulations, EU countries are autonomous and each has different privacy regime
- Laws are unclear and largely untested, including the "safe harbor" designation.
- Double-edged sword of foreign privacy laws:
  - Foreign authorities may prosecute perceived violations, while
  - U.S. courts are unsympathetic to arguments that foreign privacy laws preclude production.

Legal Challenges: Blocking Statutes

- Some countries have enacted laws specifically aimed at preventing parties from obtaining information for use in U.S. legal proceedings.
- In U.S. courts, a party precluded from providing discovery because of a blocking statute bears the burden of proof on this issue.
- U.S. courts will weigh the respective interests involved and have reached different results in different cases.

Legal Challenges:
International Procedures for Discovery –
The Hague Convention

- Foreign jurisdictions are in developmental stage with respect to procedures specifically addressing eDiscovery.
- Existing procedures are:
  - too slow
  - Still subject to widely varying evidentiary privileges
  - U.S. litigators likely to have difficulty identifying documents with requisite specificity

FTI

Legal Challenges: Labor Laws

- Minimum time periods for temporary workers (e.g., Japan)
- Restrictions on hours worked

Outsourcing Issues

- Document review and other substantive legal work
- Duty to Supervise
- Emerging focus on quality control
- Practice of Law

Social Networking

- Clients just beginning to grapple with policies
- As with email, choices on spectrum from allowing limited personal use to forbidding entirely
- What is public and what is private?
- Potential for widespread dissemination instantaneously

Harmonizing Information Management

- Common for different sites – even within a country -- to have different equipment, practices, policies, etc.
- Recipe for disaster?
- Note records management impact on admissibility issues

Cases in Point

- **Samsung**
- **Spanish Government**
- **In re NTL**
- **Intel**
- **USENET**
- **U.S. v. UBS AG, 09-cv-20423, U.S. District Court, Southern District of Florida (Miami).**
- **Ratliff**

Management Seeks Permanent
Auditors Seek Proactive Involvement
And Sustainability
Allegations Plague US Business
Lure of LBOs Lives On

Thank you