US Document Discovery in Cross-Border Litigation: What Can We Expect After JASTA?

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Jurisdiction

Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, United Arab Emirates, USA

Relevant Companies

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Abstract

In September 2016, the US Congress passed the Justice Against State Sponsors of Terrorism Act ("JASTA") into law, overriding President Obama's veto to narrow the scope of foreign sovereign immunity for terrorism related claims and expanding liability under the Anti-Terrorism Act ("ATA") to now also include those who 'aid, abet, or conspire' with a foreign terrorist organisation. JASTA's twin expansions of liability now make it easier to hook Middle Eastern countries and institutions into the web of costly US litigation. As President Obama himself recognised as a basis for his veto, 'courts [can] potentially consider even minimal allegations…sufficient to open the door to litigation and wide-ranging discovery…'

Analysis

Shortly after JASTA's passage, this fear was realised as at least seven new lawsuits were filed against Saudi Arabia and foreign banks, companies, charities and non-Governmental organisations for alleged connections to the 9/11 attacks. JASTA's provisions have also been wielded by terrorist victims to attack US companies who service the Middle East, including a recently filed lawsuit in California against Twitter alleging it 'knowingly allowed ISIS members to use their platform, thereby providing 'material support' to, aiding and abetting, and conspiring with ISIS' in connection with terrorist attacks in Paris, France and Brussels, Belgium.

With the unfortunate rise in acts of terror worldwide, the increased scrutiny on Middle Eastern entities in the US and the ATA's provision of attorneys' fees, financial institutions and other entities based in or doing business with the Middle East face higher risks of potential litigation in the US. This presents myriad challenges for foreign businesses as US document discovery is wide ranging and costly and if not navigated properly has the potential to doom a defence before a court even entertaining the merits portion.

To obtain document discovery in the US, a party only needs to plead allegations legally sufficient to proceed past the motion to dismiss phase, where allegations are taken as true by the court. The types of documents which can be sought from another party during discovery are broad and may include any documents relevant to a party's claim or defence, regardless of admissibility in evidence at trial. If a party fails to respond to discovery requests or to produce documents, the party seeking discovery can seek to compel an answer or production and obtain a court order to comply with their request. Failure to comply with a court's discovery orders carries very high risks as it can lead the court to impose costly monetary sanctions, issue adverse inferences, and can even lead to the issuing of a default judgment against the non-complying party.

Parties find the document discovery phase of US litigation can be very costly, especially in cases involving foreign conduct necessitating the collection, review and production of documents in foreign jurisdictions, necessitating travel costs, translation fees and/or the engagement of attorneys or contract reviewers fluent in the relevant language(s) to review the documents and identify responsive materials.

Foreign parties have historically raised many objections in their attempts to mitigate wide-ranging US discovery. They have routinely objected to the production of documents in US discovery on the basis of domestic blocking statutes, export control laws or state secrets regulations in the country where the documents or information is located, particularly when what is sought may be classified as sensitive information, as is the case in many of the cases brought after JASTA. In one of these cases, the US Supreme Court laid out the following five-factor test, in its seminal 1987 decision in Société Nationale Industrielle Aérospatiale v US District Court for the Southern District of Iowa, to determine whether to limit foreign discovery: (1) the importance to the litigation of the documents or information being sought; (2) the degree of specificity of the request; (3) whether the information originated in the US; (4) the availability of alternative means of obtaining the information; and (5) the extent to which non-compliance with the request would undermine important US interests or the interests of the state where the information is located.

Since the Aérospatiale decision, US courts have increasingly undertaken an analysis of these five factors when examining international discovery disputes. The results, however, have largely tended to go against foreign litigants, with courts routinely ordering the production of documents and information located in foreign jurisdictions even where it would be a violation of foreign law. This is especially so in terrorism related cases, where the fifth factor's examination of 'important US interests' is weighed heavily and has tipped the balance to allow for discovery in claims against banks and financial

institutions on terrorism allegations based solely on their alleged role in processing wire transfers, without any allegations of overt acts in support of terrorism.

Even before JASTA's passage, foreign litigants defending against terrorism allegations has fared poorly when it comes to their efforts to limit discovery. In Linde v Arab Bank, a 2014 decision by the US Court of Appeals for the Second Circuit involving an ATA claim, the defendant, Arab Bank, failed to produce records which would have revealed the identities of customers who the Bank had performed financial services for due to compliance with foreign laws. Arab Bank had taken efforts to obtain permission to disclose the requested documents from the various jurisdictions, but those jurisdictions, including Saudi Arabia and Jordan, each submitted they would subject Arab Bank to criminal prosecution if the documents were produced. In its ruling, the Second Circuit upheld the lower court's sanction of adverse inferences against Arab Bank, holding that 'the District Court's decisions here to compel production and then to issue sanctions for the Bank's failure to comply find sufficient support in cases from this Court and other courts of appeals compelling discovery, notwithstanding competing foreign legal obligations.' The ruling also noted that 'district courts in [the Second Circuit] in previous ATA cases have required banks to produce materials which were asserted to be protected by foreign bank secrecy laws.'

It is crucial therefore companies and institutions operating in the Middle East or conducting business with the region, take proactive measures to prepare themselves adequately for the prospect of potential litigation in US courts and to become familiar to the issues presented by discovery in the US legal system. Organisations and their inhouse counsel or legal departments would be well served to work with counsel familiar with discovery in the US legal system to develop policies to control their universe of documents, in order to effectively minimise the risk of costly document discovery should a claim be brought against them in a US court. These policies should include the development and refreshing of policies governing document preservation and retention, encompassing both physical paper documents and documents or information stored electronically. Once an organisation has notice of a pending litigation they have an obligation to maintain their documents, pre-litigation routine destruction of documents consistent with internal policy and domestic laws are not penalised under the rules. These policies should also address the use of e-mail and the internet by employees or staff and the preservation of the data, as e-mails and internet histories are now routinely requested in US discovery. Additionally, organisations should be prepared for the necessary steps they would be required to take to preserve relevant documents and information should a lawsuit be filed against them in a US court. As a party's ability to effectively demonstrate a good faith and reasonable response to discovery from the outset of litigation can greatly mitigate the likelihood of very costly and time consuming discovery disputes and ensure their ability to have the merits of their case eventually heard by the court.

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