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4-5-2021

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Recommended Citation

McCracken, Bryan, "A Possible Solution for Conflicting International Discovery Practices" (2021). *CICLR Online*. 19.
https://larc.cardozo.yu.edu/ciclr-online/19

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CICLR Apr 5, 2021 5 min read

A Possible Solution for Conflicting International Discovery Practices

*By: Bryan McCracken

The scope of pretrial discovery in the United States ("U.S.") is the most expansive of any common law country in the world.[1] At the outset of civil litigation in the U.S., opposing parties are required to provide one another with allnonprivileged information that is relevant to their claims or defenses.[2] This discoverable information often includes personal information or data, such as names and addresses, of individuals.[3] This facet of expansive, and at times intrusive, discovery is a hallmark of the American legal system and is grounded in the principle that there should not be many surprises in the course of a lawsuit.[4] The Supreme Court opined that "[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."[5]

Europe, however, has a fundamentally different view regarding discovery. Europe has a history of viewing personal information collection and personal privacy together as fundamental human rights and vital components to democracy and human dignity.[6] That is, an individual's fundamental right to privacy cannot be disregarded when his or her personal information is collected for purposes of discovery in litigation. Individual European countries and the European Union ("EU") as a whole have promoted this sentiment in various privacy protection initiatives in the recent years.[7] Since 2018, however, the General Data Protection Regulation ("GDPR") is the controlling force.

At its core, the GDPR is intended to protect the "personal data" of those in the EU border and to give the individual more control over their data.[8] The GDPR does this by expanding the definition of personal data to any information relating to a natural person, such as a "name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."[9] The GDPR protects this personal data by only allowing the data to be collected for specified purposes[10] that are "limited to what is necessary in relation to the purposes for which they are processed."[11]These GDPR's restrictions clash with U.S. discovery practices, which requires all information this is relevant to the parties claims or defense, even if it is considered "personal data" under the GDPR.

At issue is not the fact that there are conflicting discovery practices between the U.S. and Europe. Rather, the issue is U.S. court's persistent negative treatment to the conflicting practices. U.S. courts rebuke foreign protective measures for two reasons: (1) SCOTUS precedent permits it and (2) the perceived unviability of an international medium that would effectively facilitate discovery. In 1987, the Court in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. Of Iowa* held that foreign protective measures cannot deprive an American Court of the power to order a party to produce, even if producing means potentially violating the protective measure.[12] The Court provided a five-factor comity analysis for lower courts to follow when addressing a request for discovery that implicated foreign law.[13]Since the GDPR has been active, federal courts continue to apply the *Aérospatiale* comity analysis to GDPR cases and have ultimately ruled in favor of violating the GDPR and ordering discovery.[14]

In addition to SCOTUS precedent that allows U.S. courts to favor U.S. litigant's discovery requests over foreign protective measures, U.S. litigants do not recognize a viable international medium to otherwise facilitate discovery and comply with the GDPR. The Hague Evidence Convention ("Evidence Convention") was created to "bridge differences between the common law and civil law approaches of the taking of evidence abroad."[15] One of the Evidence Convention's procedures for obtaining foreign discovery is to appoint a commissioner, pursuant to Article 17, who will acquire evidence in the territory of the foreign state in furtherance of the proceedings initiating in the court of the other contracting state.[16] However, this procedure for obtaining discovery under the Evidence Convention contains far more procedural hoops than the American litigation system that enjoys mandatory pre-trial discovery.[17]

Aérospatiale precedent alone is harmful enough for the possibility of U.S. courts complying with the GDPR. However, when paired with the perceived procedural unviability of the Evidence Convention, U.S. litigants have every reason to stay far away from the complying with the GDPR. That is until the District of Arizona broke long standing pro-forum precedent in *Salt River Project Agricultural Improvement & Power Distribution v. Trench France SAS*.[18] The *Salt River* court applied the *Aérospatiale* comity analysis but made a precedent shattering turn and ordered the parties to utilize the once forgotten Evidence Convention procedures.[19] Specifically, the *Salt River* court granted Trench-France's motion to appoint a commissioner pursuant to Article 17 of the Evidence Convention.[20] By utilizing this procedure, Trench-France would appoint a commissioner in France to facilitate discovery without substantial delay and they would bear the costs.[21]

Salt River is significant because the case broke precedent and it showed litigants that the Evidence Convention is a viable option to facilitate international discovery.[22] If foreign litigants want to preserve the GDPR's restrictions and escape the pro-forum caselaw that has formed in the United States, then they must follow the lead of *Salt River* and advocate towards a renewed commitment to the Evidence Convention.

Bryan McCracken attended Seton Hall University and received his Bachelor of Arts in Political Science. He is currently studying at Benjamin N. Cardozo School of Law, while serving as a staff editor of the Cardozo International & Comparative Law Review Journal and is interested in E-Discovery Law and Transnational Litigation.

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[1] Sedona Conference, *The Sedona Conference Practical In-House Approaches for Cross-Border Discovery & Data Protection,* 17

Sedona Conf. J. 397, 405–06 (2016).

[2] Fed. R. Civ. P. 26(b)(1).

[3] *Id.* at 26(a)(1)(A)(i).

[4] *Fact-Finding: Understanding the Discovery Process*, FindLaw (Nov. 29, 2018), https://injury.findlaw.com/accident-injury-law/fact-finding-understanding-the-discovery-process.html.

[5] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[6] *Data Protection*, Europa, https://edps.europa.eu/data-protection/data-protection_en (last visited March. 23, 2021).

[7] *See generally* European Convention on Human Rights Art. 8; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; French Law 68-678 of 27 July 1968.

[8] Danny Palmer, *What is GDPR? Everything You Need to Know to Know About the New General Data Protection Regulations*, zdnet.com (May 17, 2019), https://www.zdnet.com/article/gdpr-an-executive-guide-to-what-you-need-to-know/.

[9] Regulation 2016/679 of the European Parliament and the Council of Apr. 27, 2017 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement on Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation, art. 4(1), 2016 O.J. (L 119) 32 (EU) [hereinafter GDPR].

[10] *Id.* at art. 5(1)(b).

[11] *Id.* at art 5(1)(c).

[12] Alex Pearce, *Between a Rock and a Hard Place? How GDPR Can Affect Discovery in US Litigation*, EllisWinters (Feb. 19, 2019), https://www.elliswinters.com/trade/rock-hard-place-gdpr-can-affect-discovery-us-litigation/.

[13] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. Of Iowa, 482 U.S. at 544 n.28.
(1987).

[14] *See Finjan*, Inc. v. Zscaler, Inc., No. 17-cv-06946-JST (KAW), 2019 U.S. Dist. LEXIS 24570 (9th Cir. Feb. 14, 2019); *In re* Mercedes-Benz Emissions Litig., No. 16-cv-881 (KM) (ESK), 2020 U.S. Dist. LEXIS 15967 (D.N.J Jan. 30, 2020).

[15] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231, comment at 1464.

[16] *Id*. at Art. 17.

[17] Matthew B. Kutac, Note, *Reallocating the Burden of Persuasion Under the Aerospatiale Approach to Transnational Discovery*, 24 Rev. Litig. 173, 181–84 (2005).

[18] Salt River Project Agric. Improvement & Power Dist. v. Trench Fr. SAS, 303 F. Supp. 3d 1004 (D. Ariz. 2018)

[19] *Id.* at 1007–10.

[20] *Id.* at 1005.

[21] *Id.* at 1006.

[22] *Id.* at 1007–10.