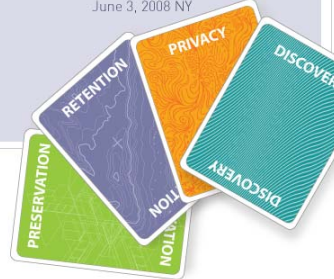




THE INTERSECTION OF PRIVACY, DISCOVERY
AND RETENTION OBLIGATIONS
A Legal and Operational Review

4TH ANNUAL
CGOC WORKSHOP
June 3, 2008 NY



Binding Corporate Rules (BCRs) and Standard Clauses for Managing Data Movement Among Countries

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RDRW Background

- **Core Mission:** to partner with clients to reduce the **cost** and legal **risk** of e-discovery and e-records compliance.
- **Our approach combines law, technology, records management, project management, and business process management methods.**



We are all Translators

- **Need to clearly communicate these issues among legal, IT, Records Management, Information Security, Compliance, Risk Management, Change Management, Project Management & Business Process Management Constituencies**
- **Consider French translation of the word “computer”**



Specific Focus

- **Discovery and disclosure requirements in litigation, and governmental/regulatory investigations vs. business electronic data interchange (EDI)**
- **Movement of data between the EEA and the United States – Data Transfer Mechanisms for Article 26(2) of EU DP Directive**



Cross-Border Discovery Conflicts

- “No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”

Restatement (Third) of the Foreign Relations Law of the United States §442, n.1.



The Shifting Sands of Cross-Border Discovery

- Differing notions of discovery and personal privacy
 - Competing concepts of full discovery vs. concept of privacy of personal data as a fundamental human right



The Shifting Sands of Cross-Border Discovery

- The new U.S. federal e-discovery rules in December 2006
- A variety of types of country-specific discovery litigation and civil & criminal investigations by regulatory/governmental entities
- A variety of country-specific data protection and privacy requirements and constraints that create conflicting obligations



Cross-Border Discovery Obligations

- U.S. – Generally, parent corporations are responsible for discovery of documents located in foreign branches or subsidiaries

In re Investigation of World Arrangements, 13 F.R.D. 280, 285 (D.D.C. 1952)



A Virtual “Catch 22”



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A “Hobson’s Choice”

- **Only two options – both lead to an undesirable result**
- **Either collect documents outside the U.S. that are required for discovery in U.S., and face non-U.S. civil and criminal sanctions; or fail to collect such documents, and face U.S. civil and criminal sanctions.**

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Model Contract & BCR History

- **EU Directive – 1995**
- **International Chamber of Commerce (ICC) and others:**
 - Borrowed from Business Standards of Conduct in Investment Banking (insider trading); Defense Industry (export – import restrictions); and Environmental Protection Standards
- **But note “moving target” of specific regulation vs. ability to articulate global standards**



Methods to Collect and Transfer Information from the EU

- **All involve significant limitations and specific procedural and substantive challenges:**
 - Clear, Unambiguous Consent
 - Safe Harbor
 - Model Contractual Clauses
 - Binding Corporate Rules



Methods to Collect Information from the EU

- **Clear, Unambiguous Voluntary Consent**
 - “Processing” of data is permitted if the data subject give clear, unambiguous consent. EU Directive, Article 7
 - Consent is interpreted strictly, and must be knowing and voluntary
 - Some EU Countries have found that employees are incapable of voluntary consent (France).



Methods to Collect Information from the EU

- **EU – US Safe Harbor Arrangement**
 - Managed by U.S. Dept of Commerce
 - Relates only to “transfer” issue
 - Only available to U.S. entities that are regulated by the Department of Transportation or Federal Trade Commission (excludes financial and telecoms).
 - Options include joining a self-regulatory privacy program or developing own privacy policy that conforms with Safe Harbor principles
 - See www.export.gov/safeharbor



Methods to Collect Information from the EU

- **Safe Harbor Principles**
 - Notice to data subject
 - Choice to “opt out”
 - Prohibition against onward transfer
 - Access to data
 - Security of data
 - Data integrity
 - Enforcement of violations



Methods to Collect Information from the EU

- **Model Contractual Clauses**
 - Restricted to Data Exporter and Data Importer
 - Data importer must contractually agree to comply with the Safe Harbor principles, and allow audits of its data handling methods.
 - Excludes company transfers of data to itself (e.g., internal e-discovery transfers are not allowed)
 - Data subjects (employees) can block transfer or production of the information at any time.



Methods to Collect Information from the EU

▪ **Binding Corporate Rules**

- Global reach – not limited to use with U.S. entities
- Very difficult to manage – rules have to be binding within the entire corporate group – parent and subs
- Requires prior approval of all EU member states, along with subjecting entity to enforcement jurisdiction of all EU member states
- Few multi-national groups have obtained full EU approval of Binding Corporate Rules (BCRs).



BCR Substantive Requirements

- **The EU Directive imposes three substantive requirements on BCRs: The rules must**
 1. Relate to the protection of personal information;
 2. Be legally binding or enforceable by individuals whose personal data is in the company's possession;
 3. Apply throughout a corporation's entire global structure



Strategic Challenges

- **No existing mechanism supports the processing and transfer of personal data for the purpose of foreign legal proceedings;**
- **Lack of uniformity among even EU countries as to requirements for BCRs and Model Contracts**
- **BCRs and Model Contracts are not recognized by many non-EU countries**



Strategic Challenges

- **Model Contracts are ineffective for cross-border discovery & review – you cannot contract with yourself, even in a parent – subsidiary situation**
- **Neither Model Contracts nor BCRs allow the production and disclosure (i.e., onward transfer) of personal data to other parties or courts in the litigation or governmental/regulatory investigation contexts**
- **U.S. Federal Judges are not aware of this tension -- only a one sentence Wikipedia description**



Tactical Challenges

- **Model Contracts are inefficient – an administrative and compliance nightmare**
- **BCRs are too costly and time-consuming to put in place, and have significant procedural and substantive hurdles – “Data Privacy for the Rich & Famous.”**
 - All 29 Data Privacy Authorities need to approve
 - No global EEA recognition
 - No guarantees as to outcome in specific EU and non-EU countries



Tactical Challenges

- **BCRs may require higher standard of care than local privacy regulations**
- **Absence of streamlined mechanism for approval by Data Protection Authorities (DPAs)**
- **Only GE, Philips, Bank Austria, Daimler-Chrysler and Shell have navigated BCR rapids, and only then for selected EU countries**



BCR Procedural Tools

- **Co-Operation Procedure for Issuing Common Opinions as Adequate Safeguards Resulting From “Binding Corporate Rules” WP107 (4/ 2005)**
- **Establishing a Model Checklist Application for Approval of Binding Corporate Rules, WP108 (4/ 2005)**
- **Standard Application of Binding Corporate Rules WP133 (2/2007)**

Source: http://europa.eu.int/comm/justice_home



The Shifting Sands of Cross-Border Discovery

- **French Blocking Statute:**
 - Bars the requesting, seeking or disclosing information directed toward establishing evidence for the purpose of legal or administrative proceedings abroad. French Penal Law No. 80-538 (1980).
- **Recent French Supreme Court Case:**
 - Conviction of French Attorney under statute for seeking an interview from a French citizen for purpose of a U.S.-based lawsuit



Striking the Right Balance

- Personal data privacy
- The legal right to protect individual and corporate economic interests
- A way forward to balance these competing legitimate interests



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The Sedona Conference® Working Group 6: Focus on International Issues

- Analytical Framework for Cross-Border Discovery Conflicts
- International Overview of E-Discovery and Data Protection Issues

www.thesedonaconference.org



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Take-Aways

- Understand the competing legal and policy constraints
- Identify the landmines
- Assess legal and business risks
- Attempt to negotiate safe passage

Avoid the “Logic of Failure”*



* Dörner, *The Logic of Failure: Recognizing and Avoiding Error in Complex Situations* (1996)