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the **e-Disclosure**  
Information Project

## Foreign collections need more than big feet.

You will have seen from other posts that I have been at the ILTA conference in Dallas this week. ILTA is the International Litigation Technology Association and its conference title was **Global Perspective, Peer Advantage**, a title conveying the theme that attendees, regardless of size or location, can gain something from adopting a global perspective and from meeting with peers.

The opening session on the litigation track was very much about global perspectives. **Browning Marean** of DLA Piper LLP, **Nigel Murray** of [Trilantic](#) and **Stephen Dooley** of Sullivan & Cromwell talked about international discovery exercises under the title *International discovery and handling foreign language data*. Two international law firms and a UK-based litigation support company with a growing US client-base made a good team to give us the global picture.

That this is an important topic was evidenced by the number who attended. The joy of going to anything at which Browning is a speaker is that you think you are attending a comedy show and only realise afterwards that much useful stuff has stowed away behind the quips and jokes.

Browning tends to bring out the best in his co-speakers – Nigel Murray and Stephen Dooley are accomplished and knowledgeable speakers in their own right, but Browning sets the mood. I asked someone else what he thought the secret was: “practice” he said, which may indeed be part of it. It helps also to have been involved in discovery since before electronic documents were invented.

Data collections across international borders is a serious subject and one on which these three speakers can talk at any level. They opted here mainly for the primer level and my impression was that this was rightly pitched for the audience.

One might wonder why US litigation lawyers and those engaged in regulatory matters are apparently obsessed by privacy and data protection matters. To us in the UK, or at least to

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those engaged in entirely domestic or EU work, the need to comply with EU requirements as to privacy and data protection is a bump in the road. So, you have to identify certain classes of document and pull them out to check that you do not disclose something which European law protects? So what, really? There are other categories of documents which must be pulled or at least reviewed before disclosing them, and here is another one. I don't mean it is easy, but there are applications out there to help identify the documents which raise privacy or similar issues, just as they will help find keywords, concepts or meaning-related documents for other issues and implications.

To US lawyers and providers, this is not just a bump in the road but a major road-block. The mere export of the data which is subject to EU restrictions is, or may be, an offence. You won't know if it is offensive until you have reviewed it. It won't be the US attorney or director or consultant who gets fined anyway but some German lawyer, and it is the German who raises the objection. The US provider is baulked of his plan to bring the data back to the US of A for processing in his fine state-of-the-art facility. A US judge, used to unquestioning compliance with his directions, orders production anyway. The German, tossing up between compliance with the far-away US order and a fine (or worse), decides against production. No wonder US providers keep coming back to the subject of privacy.

The real issues arise in that latter scenario, where there is actually a production requirement under a US law or at the command of a US judge. The proper respect due to a US court suggests compliance – if you want the court as a sword or shield then you abide by its rules. “Rampant judicial imperialism” said one of our speakers. They did not between them have an answer, save that these things work themselves out over time. The EU – both the regulation factory which is Brussels, and individual states – are giving more teeth to the blocking statutes just as US judges demand more compliance with their commands. There will be a train-wreck, said Browning Marean comfortingly.

Browning drew attention to a the useful resource on Trilantic's web site, a summary of the chief Data Protection [regulations of every country in Europe](#) with links to details and to a local firm in each country which knows about the subject. The man sitting beside me literally gasped at the provision of such a resource, which gives for free information which a US law firm might charge a fortune to provide – if it could find the answers.

This was all good stuff, but (as **George Rudoy** of Shearman & Sterling suggested afterwards) it may be time for a twin-track approach to the subject of collections in foreign (let's call them non-US) jurisdictions – see below. Those who still express amazement at the idea that the nation which Won the War should be baulked of some documents by some pesky European could attend a basic track. Those who have grasped the idea that privacy is a fundamental and rather elementary right which just needs handling could move on to discussing how to grapple with it.

Much of the rest of the session consisted of useful tit-bits which were the more interesting for being varied. Stephen Dooley offered two dead basic but very important points when doing collections abroad – say “thank you”, and don't call their language

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“foreign”. It pays, he said, to understand a little about the culture in which the collection is being made. The Japanese business culture, for example, involves utter loyalty to the company, so it is politic to make it clear (if such be the case) that the collection is being made on the company’s behalf, at its request and for its benefit. Browning followed by recounting a story about a deposition of a Japanese witness which had to be restarted when he realised that the oft-recurring answer “Hi” might have meant “Yes” or might equally have meant merely “I understand your question”.

Nigel Murray emphasised that the UK and Europe were not coterminous expressions. In Europe, the expression “24/7” means they work for 7 hours out of 24 – t’was ever thus, I think, but now they have a Brussels diktat to justify it. Stephen Dooley told of cases where court deadlines were confounded by the fact that every techy who might have helped had clocked up his 35 hours that week. Anticipate these things and factor them into the deadlines – “calibrate expectations”, he said.

Copying large volumes or trying to download them over narrow bandwidth connections takes time. Stephen suggested an alternative – put applications on site to undertake an enterprise search in situ and narrow the search as you collect.

Foreign languages – sorry, non-English languages – raise issues of their own. There is a difference – which may be significant – between a literal translation and what was described as a “cultural translation”. Translation tools are getting better all the time, but a proper cultural translation really requires a human being to do it and that comes expensive. You have to trade loss of nuance against cost – proportionality in this, as in all things

Stephen Dooley side-stepped the argument (which was not on the agenda) as between keyword searching and more sophisticated forms of search, merely pointing out that foreign languages – particularly when the population includes mixed language sources - raised particular difficulties. Do some tests, keep the tests, and so be able to prove what steps were taken to make the collection.

This latter point is of wider application than merely to the collections phase. The UK climate is more benign than the US one, in that we have fewer absolute standards than the wide-ranging US case-law provides, and less scope for striking down an opponent for procedural defects. It is, nevertheless, more than just prudence which suggests that logging your steps is a good idea. Quite apart from its actual value in managing the case, it looks good when you come to show the court that what you did – the searches which you made and the options which you pursued – were not only comprehensive but proportionate.

This was a good session, well controlled by **Joanne Lane** of Kramer Levin Naftalis & Frankel LLP. The dominant message for those responsible for data collections abroad was much the same as the one which **George Rudoy** and **Jonathan Maas** of DLA Piper UK LLP gave at the ALM conference in London last November – whilst technical skill

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and legal knowledge are vital pre-requisites for a successful collection, an awareness of local sensitivities and some elementary courtesy are equally necessary, along with a project plan which takes account of the fact that big feet cut no ice in the face of local customs, culture and the European Commission.