

Needles in cyber haystacks

It may have been on the scene for only a decade or so, but e-disclosure affects nearly every piece of major commercial cross-border litigation in Europe. **Jonathan Ames** talks to specialists about jurisdictional pitfalls

A lack of uniformity in Europe's privacy and data protection laws is causing confusion and expense in cross-border litigation, according to e-disclosure experts.

Germany, Luxembourg and Switzerland present particularly difficult data protection regimes. Authorities in the first two are reluctant to allow electronically held personal information to be transported across their borders without the parties first going through a process of agreed 'harvesting', or data review – and the latter will not allow electronic files to leave its boundaries at all.

Such strict approaches result in the parties involved in cross-border litigation in those jurisdictions being forced into expensive e-disclosure exercises, conducted in secure locations within the borders of those countries. In an average large-scale commercial dispute, that can mean transporting more than €210,000 worth of technology and teams of as many as five technical experts to sites where they can spend as long as two months 'harvesting' data for e-disclosure.

Massive undertaking

'That is a massive undertaking,' comments Martin Baldock, the general manager of US-based data and e-disclosure specialist company Stroz Friedberg. Indeed, the increasing demand for on-site e-disclosure techniques has grown so dramatically that Stroz Friedberg's London office has recently launched a mobile unit that can be established on-site in most European jurisdictions within a fortnight.

Mr Baldock explains the e-disclosure process once the



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Greg Wildisen, Epiq Systems

mobile unit has been set up: 'We go through an entire data review – harvesting – to prove that a set number of documents are relevant to the dispute. Then we print them, mark them as confidential, redact them in certain cases – and then that small number of documents will be taken out of the jurisdiction to court.'

'In a typical scenario, the process will take about two months on site, with most of the people involved being lawyers from a local law firm speaking the local language. That would involve four to six paralegals or junior lawyers looking for "hot documents" that will then be reviewed by a more senior lawyer.'

International scrutiny

Highlighting the problem of dealing with various jurisdictions, Mr Baldock comments that some EU member states take a much harsher line in relation to data protection than others. 'You would think that within the EU that the movement of data across borders wouldn't be a problem,' he says. 'But it seems that local practices and legislation are overriding EU law. The time and expense of these procedures would be dramatically reduced if these jurisdictions allowed us to go through the process remotely. But they are particularly concerned that personal information should not leave the jurisdiction.'

Others in the sector agree. Greg Wildisen, international managing director of US and UK-based Epiq Systems, warns that while 'there is still some debate over the practical implications ... you ignore these [local] statutes at your peril. In Europe

the main issues relate to data privacy and protection. There are many challenges of dealing with cross border reviews, which potentially will leave a party falling foul of various data laws. These challenge now extends to US firms seeking documents in European jurisdictions. This is a major topic [and] there is no easy solution at hand.'

Continues Mr Wildisen: 'This is a very technical area that is currently under deep international scrutiny. There are no easy answers right now but probably the best advice is that if you have a cross border litigation or review, hire local counsel for every jurisdiction involved. They will be able to provide you the best advice. Each jurisdiction is different and the entire exercise is one of risk assessment and risk management. It is almost impossible to meet all of the obligations, so probably the best you can do is mitigate the risk to the lowest level possible.'

Dramatic impact

Just as the digital revolution has profoundly affected daily communication in the developed world, it has also dramatically impacted on litigation over the last decade. Indeed, it is widely accepted that every significant corporate dispute today involves some form of e-disclosure.

Only a generation ago, the parties involved in a dispute would print their computer files onto hard copy and hand over huge bundles as part of the disclosure process. Junior lawyers would have redacted those documents in advance of disclosure, literally using black marker pens to obscure the relevant words and phrases

Knowledge zone: IT

and then photocopying the documents to ensure they were illegible.

Software packages do the redacting now as the whole disclosure process can not only be achieved on screen, but in many cases it can be conducted remotely – unless the jurisdiction involved insists on the disclosure team being physically present within its borders.

Cultural differences

There are also more general hurdles for the e-disclosure experts, not least the constantly evolving technology environment. Explains Mr Wildisen: 'European laws seek to restrict the volume of data that needs to be addressed in the process, but the physical volume of data stored by organisations, and indeed the variety of the type of data, continues to expand each year.'

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But cultural differences – if not legal variances – across Europe are being successfully addressed by e-disclosure technologies. In the past, Europe's multiplicity of languages has created a significant problem in e-disclosure, but the boffins are catching up. Mr Baldock says his technicians can invoke software translation packs that cover all western European languages as well as Japanese, Russian and the major Chinese languages. 'And our system allows searches in more than one language per document,' he says, pointing to a facility that caters for multi-lingual correspondence. 'I've seen e-mails where the correspondent switches between, say, English and Spanish in the same sentence.'

Also at the disposal of e-disclosure technicians are techniques such as automatic

language identification, which allows documents to be routed to a native speaker for review. That process can save considerable time and expense, but only if the languages likely to be part of the document population are identified at the outset so that appropriate reviewers can be made available.

Perhaps ironically, the human element remains a crucial factor in the e-disclosure equation. 'Any processing technology these days has to be Unicode-compliant [a computer industry standard] to deal with multiple languages, otherwise it simply isn't competitive any more,' comments Epiq's Greg Wildisen.

'This means all documents are processed in their native language. It is possible to do automated translations, but our experience shows that native speaking reviewers will do a more accurate job.'

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