

Chapter 20

The International Aspect of ESI Production

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§ 20:1 Introduction

The present chapter mainly addresses international jurisdiction in the production of electronically stored information (ESI) pursuant to civil discovery. It takes the perspective of the United States as the domestic jurisdiction and deals chiefly with civil proceedings in the U.S. possessing foreign affects. The practitioner in U.S. civil litigation may expect to confront three facets of discovery of ESI either physically stored outside of United States jurisdiction or otherwise subject to concurrent jurisdiction and, thereby, foreign legal impediments to disclosure. These concern: i) court control of discovery practice, ii) extraterritoriality of U.S. procedural law, and iii) foreign compulsion.

The present discussion concerns federal law pursuant to the Federal Rules of Civil Procedure (FRCP or Civil Rules) as substantively amended in 2006¹ and does not entail a comparative discussion of U.S. state jurisdictions in so far as distinctions and departures from the federal rules can be found in state authorities.² State courts (and their litigants) typically look to the federal rules and related decisional law for guidance in this field and are likely to continue to do so for the most part.³ It can be anticipated that state law will diverge from federal ESI discovery law infrequently and mostly at the margins. Due to the heavy international activity underlying many disputes in federal courts, this general deference to the federal positions should be even more pronounced when transnational issues are involved.

§ 20:2 Court control of discovery practice

Since the establishment of the FRCP one-half century ago, Rules 16 and 26 through 37 have fostered a singular breadth in pretrial discovery, distinguishing U.S. federal courts from other national jurisdictions.¹ These Civil Rules have gone on to entail a substantially wider scope than that found in the disclosure

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¹2006 Amendments took effect on December 1, 2006. Further amendments took effect on December 1, 2007. These 2007 Amendments were “part of a general restyling of the Civil Rules . . . intended to be stylistic only.” Advisory Committee Notes to 2007 Amendment of Rule 1.

²Other U.S. jurisdictions, as a general matter, have less developed law in this area than in the federal system. It also should be noted that several states have expressly incorporated the substance of these federal rules (e.g., Minnesota http://www.courts.state.mn.us/documents0/Public/Rules/RCP_effective_7-1-2007.pdf and New Jersey http://www.judiciary.state.nj.us/rules_toc.htm). See also §§ 25:1 et seq.

³See, e.g., *Bank of America Corp. v. SR Intern. Business Ins. Co., Ltd.*, 2006 NCBC 15, 2006 WL 3093174 (N.C. Super. Ct. 2006); *VISION POINT OF SALE, INC., Plaintiff, v. Ginger HAAS and Legacy Inc., Defendants.*, 2004 WL 5326424 (Ill. Cir. Ct. 2004) (interpreting and applying *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 92 Fair Empl. Prac. Cas. (BNA) 684, 56 Fed. R. Serv. 3d 326 (S.D. N.Y. 2003)).

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¹Congress authorized these Rules in 1934 (48 Stat. 1064 (1934)), 28 U.S.C.A. §§ 723b, 723c (Supp. 1938). The Rules took effect on September 16, 1938 (Rule 86), after three years of work by the Advisory Committee appointed by the Supreme Court of the United States. For a helpful overview of this process, see Charles E. Clark and James W. Moore, *A New Federal Civil Procedure: I. The Background*, 44 *Yale L. J.* 387 (1935). For earlier examples of extraterritorial jurisdiction, see *U.S. v. Sisal Sales Corp.*, 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927).

requirements of other prominent common law systems.² Further, the rules have evolved in the utmost contrast to the procedure in typical civilian law jurisdictions, where pretrial discovery by parties is not permitted and considered anathema to the judge's sovereign function as gatherer of evidence.³ In *Hickman v. Taylor* (1947), the U.S. Supreme Court provided the pithy statement still informing its federal discovery rules: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."⁴ The subsequent jurisprudence reflects that this principle, in essence, guides discovery affecting foreign interests in the same manner as it informs purely domestic discovery.⁵

However, the legal principle of reasonableness requires U.S. courts to remain cognizant of the potential foreign affects of U.S. discovery when exercising this manner of jurisdiction.⁶ Decisions have established conditions under which foreign law or foreign governmental interests can have legal affects on discovery pursuant to U.S. proceedings.⁷ However, even in cases with the strongest foreign affects, a U.S. court with jurisdiction to

²For instance, the English Civil Procedure Rules (CPR) contemplate document "disclosures" limited to documents on which a party relies or which are adverse to his or an adversary's case or support another party's case. See CPR Rule 31.6.

³See, e.g., Manual for Complex Litigation, Fourth, Federal Judicial Center (2004), § 11.494 Extraterritorial Discovery; Andre R. Fiebig, Obtaining Discovery Abroad, *Aba Section of Antitrust Law*, p. 1 (2d ed. 2005).

⁴*Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 91 L. Ed. 451, 1947 A.M.C. 1 (1947).

⁵See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 540, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (hereinafter, *Aerospatiale*, 482 U.S. 522) (quoting *Hickman*, 329 U.S. at 507).

⁶See, e.g., *McKesson Corp. v. Islamic Republic of Iran*, 138 F.R.D. 1, 3 (D.D.C. 1991), on reconsideration in part, 1991 WL 178105 (D.D.C. 1991); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 530, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987); *U.S. v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1162, 83-2 U.S. Tax Cas. (CCH) P 9468, 52 A.F.T.R.2d 83-5752 (C.D. Cal. 1983); *Richbell Information Services, Inc. v. Jupiter Partners L.P.*, 32 A.D.3d 150, 816 N.Y.S.2d 470, 475, (1st Dep't 2006).

⁷*Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 211, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) ("The findings below, and what has been show to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.") (hereinafter *Société Internationale*); see also *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 139, 67 Fed. R. Serv. 3d 1346 (2d Cir. 2007) ("If Russian law prohibits appellant from

adjudicate will not be deprived of its jurisdiction related to discovery;⁸ rather, the foreign elements will merely factor into the U.S. court's exercise of its power to compel discovery or to sanction for noncompliance with its discovery orders.⁹ It should also be noted that the use of discovery in establishing personal jurisdiction over a nonconsenting foreign defendant further distinguishes the reach of United States judicial rules. As shown below, a discovery sanction to persons resisting personal jurisdiction can include a finding that establishes certain jurisdictional facts.¹⁰ U.S. courts thereby can exercise jurisdiction over the merits in cases where the record lacks the otherwise applicable requirements for in personam jurisdiction over a given defendant.¹¹ In such cases, of course, the forum's applicable judicial rules concerning discovery shall apply. Thus, international ESI discovery regarding personal jurisdiction (or Rule 37(b) sanctions) may beget discovery as to the merits.

The Civil Rules leave federal courts to factor, on one side, their very robust power to compel production of discovery maintained

obtaining and producing the documents even with the agreement of IPT's board and an appropriate protective order in the district court, then the matter is at an end. However, if Russian law prohibits production simply because board approval—or waiver of a confidentiality agreement as to production in the United States under a proper protection order—is necessary, then the issue of appellant's control of IPT arises.”).

⁸*Société Internationale*, 357 U.S. at 205 (foreign compulsion barring production does not preclude “a court from finding that petitioner had ‘control’ over [certain records], and thereby from ordering their production” pursuant to Civil Rule 34).

⁹See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992, 1977-2 Trade Cas. (CCH) ¶ 61724, 24 Fed. R. Serv. 2d 477 (10th Cir. 1977) (noncompliance with discovery not sanctioned due to Canadian restrictions on production of certain records stored in Canada and good faith, yet unsuccessful, effort of defendant to obtain waiver from authorities); *Trade Development Bank v. Continental Ins. Co.*, 469 F.2d 35 (2d Cir. 1972) (affirming district court's finding that Swiss law prohibition of disclosure warranted, “as a matter of comity,” that the district judge not compel the defendant to disclose account holder information, “particularly since in his view the identity was not essential to the issue on trial”).

¹⁰*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982).

¹¹The factual inquiry for in personam jurisdiction derives from the long-arm statute of the state in which the federal court sits and must also comport with federal due process strictures. See, e.g., *Familia De Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1981 A.M.C. 2937, 30 Fed. R. Serv. 2d 1020 (5th Cir. 1980) (citing *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 18 Fed. R. Serv. 2d 1102 (5th Cir. 1974)). The *Third Circuit's Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.* decision provided a split with the Fifth Circuit's *Familia De Boom* decision and thereby supplied the expressed impetus for the Supreme Court's granting certiorari in the former litigation. *Insurance Corp. of Ireland*, 456 U.S. at 700.

abroad or otherwise subject to foreign law and, on the other side, their duty to duly regard conflicts with foreign laws precluding or limiting such disclosure. In recent years, the explosive growth in the reliance on electronic data integrated in webs of geographically dispersed communication networks has increased the volume and variation of material beyond U.S. borders yet susceptible to the scope of discovery in U.S. litigation. At the same time, the amount and nature of information stored on U.S. territory yet subject to concurrent jurisdiction of another state is similarly increasing. Foreign compulsion may apply not only to ESI abroad but to U.S. situated information with a foreign origin or a connection to a foreign legal relationship (e.g., banker-client confidentiality), making illegal or otherwise limiting under the foreign jurisdiction any production or disclosure of the information in discovery conducted in the U.S. court. The exponential proliferation of electronic mail is a very obvious source of the sort of growth and geographic dispersal precipitating these issues of concurrent jurisdiction, as is the ascent of traffic on the World Wide Web. Trading platforms of integrated capital and financial markets located in traditional centers such as New York, London, Shanghai, and Tokyo and emerging loci like Singapore, Shenzhen, and Dubai are other manifestations of such vast streams of data generation and cross-border exchanges capable of posing jurisdictional conflicts in civil litigation.

Civil Rule 34 establishes that parties may request from any other party any document or information within the scope of discovery, as it is set out under Rule 26(b), and “in the responding party’s “possession, custody or control.”¹² Federal courts have broadly construed the long-standing Rule 34 holding concepts of possession, custody, or control.¹³ Courts have interpreted control to encompass circumstances where “the party has the right, authority or practical ability to obtain the documents from a non-party to the action” and that the term “does not require that the party have legal ownership or actual physical possession of the documents at issue.”¹⁴ Because the reach of “control” determines the applicability of federal discovery rules and does so without

¹²Fed. R. Civ. P. 34(a)(1).

¹³See, e.g., *Camden Iron and Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438 (D.N.J. 1991) (finding the requisite “control” of a subsidiary over its parent corporation’s documents where intra-corporate relationship reflects the subsidiary’s mere ability to obtain the requested information).

¹⁴*In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179, 195, 68 Fed. R. Serv. 3d 1145 (S.D. N.Y. 2007), order aff’d, 2007 WL 1518632 (S.D. N.Y. 2007) (citing *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146–47 (S.D. N.Y. 1997)); see also, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 2009 WL 529224, at *3 (S.D. N.Y. 2009) (holding that the fact that plaintiffs had, in or around 2003, ceased to be officers of a student organization did not, in

regard to the geographic location of relevant ESI, the occurrence of the kind of concurrent jurisdiction problem outlined above can be expected to grow with increasing application of the Civil Rules in the ESI context. From case to case, clarity of the effects on ESI of concurrent jurisdiction or extraterritorial discovery will be determined by application of the Civil Rules in accordance with extant precedents otherwise governing discrete foreign and international law questions.

The 2006 Amendments to the Civil Rules, of which so much has been said elsewhere, implicate this globalization and impact pivotal elements of conflicts and also extraterritoriality regarding U.S. discovery rules. The Advisory Committee on Civil Rules authored these Amendments which the U.S. Supreme Court ultimately approved without comment.¹⁵ That Committee's recognition of the critical differences between paper and electronic information—the latter's dynamic nature as compared to the former's static; the latter's susceptibility to unconscious or inadvertent alteration or destruction—precipitated the broad revisions to the FRCP. A basic impetus for the 2006 Amendments is that virtually "all document discovery is or will soon be e-discovery."¹⁶ Further, all discovery law must apply to ESI and, in many respects, has been and will continue to be changed by the material differences between ESI and traditional records.

Most of the Amendments merely augmented existing language to define and expressly include "electronically stored information" as an element subject to discovery, addressed matters of production format, contemplated inaccessibility of storage as a basis for not producing information or producing with cost-sharing or shifting, or emphasized early coordination of discovery matters among parties.¹⁷ In addition to these more orientational or ministerial changes, the Advisory Committee took the bolder step to reformulate essential elements of the FRCP.

The core factors animating these bolder reformulations can be distilled to this: The nature of ESI raises preservation issues not

itself, end their control over documents of the organization (which was not a party to the action) and thus plaintiffs were subject to sanctions for not producing responsive documents of the organization); *In re Flag Telecom Holdings, Ltd. Securities Litigation*, 236 F.R.D. 177, 180, 64 Fed. R. Serv. 3d 1043 (S.D. N.Y. 2006); *Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, 233 F.R.D. 338, 341, 63 Fed. R. Serv. 3d 566 (S.D. N.Y. 2005).

¹⁵April 12, 2006 Order of the Supreme Court of the United States Adopting and Amending Rules.

¹⁶Shira A. Scheindlin, *Moore's Federal Practice, E-discovery: The Newly Amended Federal Rules of Civil Procedure, Part I* (2006).

¹⁷See generally Advisory Committee Notes to 2006 Amendments to the Federal Rules of Civil Procedure (see Notes to Fed. R. Civ. P. 16, 26, 44, 34 and 45).

posed by traditional records, problems emanating from these preservation issues can lead to spoliation, and spoliation can authorize sanctions.¹⁸ Preservation, spoliation, and sanctions are rendered more complex in transnational ESI discovery than in the exclusively domestic context because a U.S. court, in its exercise of extraterritorial jurisdiction, must reconcile foreign and international law with the operation of the court's own discovery procedure. Further, the underlying facts of the organization and management of the physical components of ESI (e.g., data servers) dispersed across national boundaries can be expected to complicate this judicial task further by weaving into the court's inquiry many facts involving often-esoteric technical elements.¹⁹ Despite these overarching concerns, the 2006 Amendments are silent as to foreign or international implications for the operation of the Civil Rules. Decisional law speaking to these muted issues should be expected to accumulate in the coming years.

In addition to navigating discovery in the context of overlapping and competing jurisdictions (as outlined above), divining the discovery scope and attachment date of a preservation duty is of acute importance to multinationals managing complex, cross-border information environments. Crucial legal consequences flow from the pivotal two-part question concerning preservation: At what moment and to what information has the duty to preserve attached?²⁰ The inherent difference between ESI and traditional forms of discovery elevates the significance of this inquiry. Historically, spoliation has required the affirmative step of destroying something—that is, a manila file does not shred itself and an automobile does not tow itself to the junkyard; rather people perform these destructive steps.²¹ In contrast to the prior conventional understanding that destruction, the typical predicate for spoliation, results from a purposeful act, ESI destruction most frequently occurs without an actor taking affirmative steps to select information and destroy it. Indeed, the “Safe Harbor” rule of the 2006 Amendments is premised on the recognition that routine, automated information destruction has been needed in virtually any electronic information system. Civil Rule

¹⁸Scheidlin, Moore's Federal Practice, E-Discovery, at Part I.

¹⁹See Brooke Pietrzak & Joseph Perkovich, Extraterritorial ESI Preservation, *N.Y.L.J.*, Nov. 5, 2007, S8.

²⁰See, e.g., *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Kronisch v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998).

²¹See, e.g., *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 42 Fed. R. Serv. 3d 1161 (2d Cir. 1999).

37(e),²² a new rule added to the FRCP under the 2006 Amendments is known as the Safe Harbor provision because it accounts for this necessity for routine destruction. When the “good faith operation of an electronic information system” is responsible for the loss of otherwise discoverable information, this Safe Harbor protects a party from sanctions. However, this protection should be understood as limited to information destroyed by routine operations before the duty to preserve such information had attached in the given litigation context. Destruction from failure to interrupt routine operations after the preservation duty attaches does not enjoy this Safe Harbor protection and thus may precipitate Rule 37 spoliation sanctions.²³ It is settled that the duty to preserve is triggered “when a party should have known that the evidence may be relevant to future litigation.”²⁴ Determination of the trigger date is a fact issue for the trial court,²⁵ although courts may avoid, where feasible, ruling as to a hard date.²⁶ Especially because a trigger date often precedes the filing of suit, the spoliation case law possesses implications discovery of ESI abroad.

The specter of Rule 37 sanctions for spoliation of ESI destroyed abroad due to nonintervention upon routine, good-faith business operations raises jurisdictional questions under international law as reflected in U.S. jurisprudence and preeminent commentary.²⁷ As discussed below, the reach of U.S. discovery rules that may

²²Fed. R. Civ. P. 37(e) was enumerated paragraph (f) at the time of its introduction in the 2006 Amendments. The 2007 Amendments, which were limited to a mere “restyling” of the Civil Rules re-enumerated many rules, including 37.

²³See Fed. R. Civ. P. 37(b)(2)(A).

²⁴*Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (citing *Kronisch v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998). See also *Silvestri v. General Motors Corp.*, 271 F.3d 583, 51 Fed. R. Serv. 3d 694 (4th Cir. 2001); *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112, Prod. Liab. Rep. (CCH) P 11662, 24 Fed. R. Evid. Serv. 516 (8th Cir. 1988).

²⁵See *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 62 Fed. R. Serv. 3d 817 (D. Md. 2005)

²⁶See, e.g., *Reino de Espana v. American Bureau of Shipping*, 2007 WL 210018 (S.D. N.Y. 2007) (denying reconsideration of sanctions against plaintiff, Spain, stating that a precise “trigger-date” was unnecessary given that plaintiff failed to initiate its hold until six months after filing action and a year after marine casualty).

²⁷*Cf. F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164, 124 S. Ct. 2359, 159 L. Ed. 2d 226, 2004-1 Trade Cas. (CCH) ¶ 74448 (2004) (statutory construction ordinarily avoids “unreasonable interference with the sovereign authority of other nations”) (citing Restatement Third, Foreign Relations Law of the United States §§ 403(1), 403(2) (“limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612, 1993-1 Trade Cas. (CCH) ¶ 70280

warrant sanctions in certain instances calls into question the international jurisdiction and reasonableness of applying U.S. judicial rules to punish the failure to take affirmative preservation measures outside U.S. territorial jurisdiction. That prospect is a very different matter from whether sanctions are appropriate when a litigant takes affirmative steps to destroy discoverable material outside the jurisdiction. This novel provision raises whether it is always reasonable under international law to impute, based on domestic rules, notice of a duty to take steps to preserve discoverable information stored abroad.

Thus, clarity with respect to preservation duties and scope is of patent importance in transnational litigation. The noted “sea change” for practitioners in their meet and confer requirements under the 2006 Amendments to Civil Rule 26(f) should be used to foster clarity in that critical area.²⁸ The 2006 Amendment to Rule 26(f)(2) requires that parties “discuss any issues about preserving discoverable information; and develop a proposed discovery plan.” Under the “Discovery Plan” subsection (26(f)(3)), the revised rule entails that the “plan must state the parties’ views and proposals on: . . . (C) any issues about disclosure or discovery of electronically stored information . . .” The emphasis on attending to discovery, and, in particular, ESI preservation, at the immediate outset of litigation should redound to the benefit of litigants possessing foreign or international issues concerning their preservation and discovery requirements under the federal judicial rules. Further, in cases concerning ESI sited abroad or otherwise subject to concurrent jurisdiction, the planning and reporting should include in the court’s initial scheduling order pursuant to Rule 16(b) an express consideration of the foreign and international facets of implicated ESI. The initial scheduling order, it is submitted, should supply groundwork for sufficiently comprehensive court control of the discovery practice in such cases.²⁹

The presence of the aforementioned issues of foreign and international law typically militates against litigants using interparty discovery requests rather than court orders. A judicial order often will be the soundest, and in certain situations, the only way to proceed in obtaining information discoverable under U.S. rules yet also subject to a foreign system’s concurrent

(1993) (Scalia, J., dissenting) (“identifying rule of construction as derived from the principle of ‘prescriptive comity.’”).

²⁸Scheindlin, *Moore’s Federal Practice, E-Discovery*, at Part II.

²⁹See Fed. R. Civ. P. 16(c)(2)(L) (matters for pretrial conference consideration include “adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems”).

jurisdiction.³⁰ Frequently, the foreign law implicated in these matters is of a public law nature and can raise heightened concerns above those respecting merely the legal interests of private parties in a civil litigation. Obtaining discovery, in many cases, will entail judicial assistance from a foreign court and thereby need the application of the U.S. court seized of the underlying matter. Further, the extraterritorial application of a preservation duty can raise jurisdictional questions under international law that are most satisfactorily addressed through formal measures taken prior to litigating spoliation questions rather than after the destruction of information occasioned in the absence of any formal notice to responsible persons outside U.S. territorial jurisdiction.

The Restatement (Third) of Foreign Relations Law, § 442, “contemplates that, in civil litigation in the United States affecting foreign interests, courts control discovery practice from the outset of the litigation pursuant to Rule 16 of the Federal Rules of Civil Procedure and comparable State rules.”³¹ This comment relates to subsection (1) of § 442. “Requests For Disclosure: Law Of The United States.” This section of the Restatement, even in tentative draft form,³² has long provided a framework for pursuing discovery abroad.³³ While drafted in the 1980s prior to the global ascendance of electronic telecommunications networks, the prescriptions in § 442 should become more necessary in the realm of ESI discovery than in the earlier period of paper records. Subsection 1(c) of § 442 has proven to be of particular importance in its enumeration of five factors for a U.S. court to weigh in “deciding whether to issue an order directing production of information located abroad.”³⁴ With respect to discovery sought from a nonparty, courts applying the international comity analysis set

³⁰But cf., e.g., *Treppel v. Biovail Corp.*, 2008 WL 866594 (S.D. N.Y. 2008) (discovery of ESI maintained in Canada and Barbados produced apparently without defendant raising jurisdictional or foreign law issues).

³¹Restatement (Third) Of Foreign Relations Law (hereinafter, “Restat. (Third) For. Rel.”) § 442 Requests for Disclosure: Law Of The United States, Comment a (1987).

³²*Aérospatiale*, 482 U.S. at 544 n. 28 (quoting the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986); see also *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 37, 9 Fed. R. Serv. 3d 301 (N.D. N.Y. 1987); *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 616 (M.D. Tenn. 1986).

³³See, e.g., *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078, 1082, 2007-1 Trade Cas. (CCH) ¶ 75721 (N.D. Cal. 2007); *In re Air Crash at Taipei, Taiwan*, on October 31, 2000, 211 F.R.D. 374, 377 (C.D. Cal. 2002); *In re Auction Houses Antitrust Litigation*, 196 F.R.D. 444, 446, 2000-2 Trade Cas. (CCH) ¶ 73069, 48 Fed. R. Serv. 3d 43 (S.D. N.Y. 2000).

³⁴Restat. (Third) Foreign Relations § 442 (1)(c) (infra at 20:8). See, e.g., *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474-1478, 22

forth in § 442(1)(c) should also consider the prospective “hardship” of compelling such discovery.³⁵ Practitioners should anticipate an increase in litigations raising questions of reasonableness in the issuance of judicial orders for discovery of information stored abroad or otherwise subject to concurrent foreign jurisdiction.

Close judicial supervision, as the Supreme Court espoused in *Aérospatiale* and as numerous subsequent courts have subscribed, is called for in order to “prevent discovery abuses” abroad.³⁶ Such judicial supervision will continue to encompass any order for discovery of information which raises comity interests or is argued to be subject to foreign compulsion. In those cases, a flexible and “higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation” will supplant the normally applicable discovery scope of mere relevance to a party’s claim or defense.³⁷ Thus, procedure has evolved to entail departures from the Civil Rules’ general authorizations to conduct discovery through demands, and courts have assumed greater control and responsibility with regard to discovery conduct in extraterritorial situations. In keeping with the FRCP, the complexity often found in ESI discovery should generally continue to strengthen that development.

As outlined above, other legal systems may affect the applica-

Fed. R. Serv. 3d 703 (9th Cir. 1992) (considering each of the five factors in turn, deeming the “balance of national interests” as the most important); *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1281–1283, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) (comparing Restat. (Second) § 40 balancing test with addition in Restat. (Third) § 442 of “good faith” criterion; see also Easterbrook, J., concurring opinion discussing method for applying § 442).

³⁵*Linde v. Arab Bank, PLC*, 2009 WL 1456573, at *11 (E.D. N.Y. 2009).

³⁶*Aérospatiale*, 482 U.S. at 546. See also *In re Anschuetz & Co., GmbH*, 838 F.2d 1362, 1364, 10 Fed. R. Serv. 3d 1296 (5th Cir. 1988) (on remand from Supreme Court to rule in keeping with *Aérospatiale*); *Adams v. Unione Mediterranea Di Sicurta*, 2002 WL 472252 (E.D. La. 2002) (“Under the reasoning of [*Aérospatiale*], this court must avoid placing any excessive burden on the foreign defendant who contests jurisdiction”); *Bodner v. Paribas*, 202 F.R.D. 370 (E.D. N.Y. 2000) (quoting *Aérospatiale* in support of district court’s duty to “supervise pretrial proceedings particularly closely to prevent discovery abuses” and thus oversee discovery despite French blocking statute and bank secrecy laws); *Madanes v. Madanes*, 186 F.R.D. 279, 286, R.I.C.O. Bus. Disp. Guide (CCH) P 9823 (S.D. N.Y. 1999) (quoting *Aérospatiale* in support of need for district court to supervise pretrial proceedings with due respect to national interest of Argentina in suit “among Argentine nationals over their family’s assets”).

³⁷*In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1146, 1980-1 Trade Cas. (CCH) ¶ 63124, 29 Fed. R. Serv. 2d 414 (N.D. Ill. 1979) (rehearsing the determinations in *Société Internationale*, 357 U.S. 197 (1958)); see also Restat. Foreign Relations § 442, Reporters’ Note 2. See Fed. R. Civ. P. 26(b)(1) for scope of discovery criteria.

tion of U.S. process in discrete, consequential ways. This is true despite the vast breadth of in personam jurisdiction and, in many areas, subject-matter jurisdiction, under U.S. law and the inveterate, universal conflict of laws rule that the procedural law of the forum governs any given proceeding regardless of the source of the applicable substantive law.³⁸ Its comparatively vast breadth makes U.S. jurisdiction rather prone to conflicts with foreign systems. As explained in the following section (*infra* at 20:3), particular external affects thus modify the application of procedural rules and commend certain steps over others available to courts concerning discovery of ESI abroad or with a foreign law connection.

§ 20:3 Discovery sanctions against foreign defendants not consenting to personal jurisdiction

The comparatively slight legal impediments to bringing an action in a U.S. court against a party anywhere in the world warrants consideration of the role ESI discovery may play in a district court's assumption of personal jurisdiction over a foreign, nonconsenting defendant. Civil Rule 4(f) bases for process service in a foreign country permit a variety of ways, including electronic means, of providing a defendant with service of a summons and notice of a pending action.¹ While most foreign parties in suits in U.S. courts do not raise a serious question as to their satisfaction of the broad and long-standing "minimum contacts" due process

³⁸See Ailes, *Substance and Procedure in the Conflict of Laws*, 39 Mich. L. Rev. 392 (1941) ("It is perhaps the most inveterate doctrine of the conflict of laws that all questions of procedure in a given instance are governed by the *lex fori*, or the law of the court invoked, regardless of the law under which the substantive rights of the parties accrued. For seven centuries, at least, courts and lawyers have broadly stated or assumed to be axiomatic the rule that substantive rights are fixed and immutable whilst the procedural devices by which such rights may be vindicated and enforced depend solely upon the law of the forum."). See also Collins, *Dicey & Morris: The Conflict Of Laws*, 157 (Sweet & Maxwell, 13th ed. 2000) (citing Ailes's classic characterization of this rule).

[Section 20:3]

¹Under Fed. R. Civ. P. 4(f)(3), courts have the power, subject to international agreements, to "unilaterally define an appropriate method for service." See *In re International Telemedia Associates, Inc.*, 245 B.R. 713, 720, 35 Bankr. Ct. Dec. (CRR) 201, 46 Fed. R. Serv. 3d 188 (Bankr. N.D. Ga. 2000) (service by electronic mail on a party deemed to take "frequent and unexpected travel" was found to be "fully authorized" by the Civil Rules) (quoting *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 460, 41 Fed. R. Serv. 3d 347 (S.D. Fla. 1998)). See also *BP Products North America, Inc. v. Dagra*, 236 F.R.D. 270, 65 Fed. R. Serv. 3d 611 (E.D. Va. 2006) (granting plaintiff's request for an order of alternative service by publication in two Pakistani newspapers).

standard for personal jurisdiction, some foreign defendants will.² Discovery rules to precipitate the assumption of in personam jurisdiction over a recalcitrant foreign defendant remain at the disposal of a plaintiff bringing a suit in a domestic court.

The resistant foreign defendant objecting to the district court's jurisdiction and choosing to address the issue directly (rather than by ignoring the initial proceeding and addressing jurisdiction through a subsequent enforcement action)³ can expect the choice between, on the one hand, complying with a discovery order and litigating the merits of personal jurisdiction upon producing discovery or, on the other hand, not complying and risking an adverse inference order establishing the jurisdictional facts as claimed by the plaintiff.⁴ Case law reflects the consequences likely to befall defendants who litigate the jurisdictional issue in the first instance yet, through dilatory tactics and other half-measures often in the manner of belated motions to dismiss, fail to comply with ordered discovery.⁵

While a defendant's challenge to the court's personal jurisdiction places the burden on the plaintiff to evidence sufficient facts that the defendant's activities satisfy due process,⁶ that burden may be reversed, in effect, with ease via the imposition of jurisdictional discovery, which is entitled upon making a prima facie case of personal jurisdiction.⁷ Further, absent such a showing, it is within the "broad discretion" of the district court to

²See, e.g., *In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000) (where antitrust defendants resisted jurisdiction, special master was free to compel personal jurisdictional discovery via the FRCP rather than the Hague Convention).

³See § 20:4.

⁴Fed. R. Civ. P. 37(b)(2)(A)(i).

⁵See, e.g., *Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 882, 31 Fed. R. Serv. 2d 937 (3d Cir. 1981), judgment aff'd, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982); *Knox v. Palestine Liberation Organization*, 229 F.R.D. 65, 70 (S.D. N.Y. 2005); *Volkart Bros., Inc. v. M/V Palm Trader*, 130 F.R.D. 285, 288, 1990 A.M.C. 1567 (S.D. N.Y. 1990).

⁶See, e.g., *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001).

⁷See, e.g., *In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45, 56-57, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000) (district court adopted special master's recommendation of jurisdictional discovery against Japanese defendant under the FRCP and same against Belgium defendant notwithstanding marked comity concerns due to hostility to U.S. discovery in Japanese and Belgian systems); see also, e.g., *Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2d Cir. 2007) (citing *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 175 (2d Cir. 1998)); *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 186 (2d Cir. 1998).

grant jurisdictional discovery.⁸ When deciding whether to compel jurisdictional discovery from an instrument of a foreign jurisdiction, the comity principles at the heart of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., require that “a district court must balance competing needs between discovery to substantiate exceptions to statutory foreign sovereign immunity” and to “protect[] a sovereign agency’s legitimate claim to immunity from discovery.”⁹ If the defendant fails to comply with such ordered discovery, sanctions establishing “facts that form the basis for personal jurisdiction over a defendant” may result.¹⁰ A federal court may impose Rule 37 sanctions for failure to comply with such a discovery order even absent a record establishing the “minimum contacts” needed for personal jurisdiction under *International Shoe Co. v. Washington*.¹¹ Thus, a U.S. court can assume in personam jurisdiction over a nonconsenting foreign defendant on the basis of that defendant’s failure to comply with a discovery order given in connection with its objection to jurisdiction.¹²

Litigation of jurisdictional discovery will beget a “minimum

⁸*Tese-Milner v. De Beers Centenary A.G.*, 613 F. Supp. 2d 404, 417, 2009-1 Trade Cas. (CCH) ¶ 76498 (S.D. N.Y. 2009) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 2008 WL 591869, at *9 (S.D. N.Y. 2008), vacated and remanded, 2009 WL 1560197 (2d Cir. 2009)); see also *In re South African Apartheid Litigation*, 2009 WL 1788051 (S.D. N.Y. 2009) (citing *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 79 (2d Cir. 2008), cert. denied, 129 S. Ct. 2859, 174 L. Ed. 2d 576 (2009); see also *Freund v. Republic of France*, 592 F. Supp. 2d 540, 562 (S.D. N.Y. 2008) (“[W]here jurisdictional facts are placed in dispute [a] district court retains considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction.” (quoting *APWU v. Potter*, 343 F.3d 619, 627, 57 Env’t. Rep. Cas. (BNA) 1033, 33 Env’t. L. Rep. 20271 (2d Cir. 2003) (internal quotation marks omitted))).

⁹*Butler v. Sukhoi Co.*, 579 F.3d 1307 (11th Cir. 2009) (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (quotation marks and citation omitted)). See also *Freund v. Republic of France*, 592 F. Supp. 2d 540, 564 (S.D. N.Y. 2008) (due to “[a]ppropriate deference to principles of international comity,” denying plaintiff’s request relating to the closed archives of a foreign state and seeking broad discovery on behalf of a potentially large class).

¹⁰*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982). Compare *Occidental Hoteles Management, S.L. v. Hargrave Arts, LLC*, 2009 WL 2252263, at *2-3 (N.D. Ill. 2009) (discussing *Insurance Corp. of Ireland, Ltd.*, denying plaintiff’s request, made in opposition to a motion to dismiss, that the court exercise jurisdiction over defendant as a discovery sanction where plaintiff had yet to make a Rule 37 motion to compel).

¹¹*International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹²*Lawrence Collins*, 35 Int’l & Comp. L.Q. 766, 785 (1986) (considering the effect of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982)). The exercise of jurisdictional discovery over a nonparty, however, should neces-

contacts” analysis in order to establish personal jurisdiction as a predicate for discovery sanctions or, in the case of a defendant’s cross-motion, grounds for dismissal.¹³ As provided in Civil Rule 4(k), this analysis typically entails connecting minimum contacts with the state where the district court sits.¹⁴ Personal jurisdiction comprises “general jurisdiction” and “specific jurisdiction,” one of which must be shown to exist with respect to any given defendant.¹⁵ Specific jurisdiction is established upon a defendant’s “purposefully directed activities” at the forum,¹⁶ out of which the cause of action arises.¹⁷ Internet activity including a single transaction in the foreign jurisdiction may suffice, depending on the

sitate a higher showing than that which is needed in relation to a defendant. *Linde v. Arab Bank, PLC*, 2009 WL 1456573, at *7 (E.D. N.Y. 2009) (denying request for jurisdictional discovery from nonparty respondent Israel incorporated and headquartered bank, the court explained that “the considerations for permitting jurisdictional discovery must of necessity differ when the issue concerns whether to require a non-party to provide evidence rather than whether to permit a lawsuit to proceed against a defendant. And it is at least arguable that a somewhat greater showing is necessary with respect to jurisdictional discovery for the former purpose than for the latter.” The court noted that denial of defendant’s request for jurisdictional discovery did not prevent the defendant from seeking information from the nonparty respondent foreign bank through letters of request via the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Convention”) (TIAS 7444, 23 UST 2555). *Id.*

¹³See, e.g., *Womack v. Nissan North America, Inc.*, 2007 WL 5160790 (E.D. Tex. 2007); *Volkart Bros., Inc. v. M/V Palm Trader*, 130 F.R.D. 285, 1990 A.M.C. 1567 (S.D. N.Y. 1990).

¹⁴Fed. R. Civ. P. 4(k)(1). See also Fed. R. Civ. P. 4(k)(2). The “federal long-arm statute” provides effective service and thus jurisdiction for a claim arising “under federal law” so long as exercising such jurisdiction is consistent with the United States Constitution and laws even though the foreign defendant lacks sufficient contacts to satisfy due process with respect to any particular state. See also, e.g., *In re Complaint of Rationis Enterprises, Inc. of Panama*, 210 F. Supp. 2d 421, 2002 A.M.C. 1848 (S.D. N.Y. 2002) (jurisdiction found where service made under Civil Rule 4(k)(1)(B) on foreign defendant’s office within 100 mile “bulge area”).

¹⁵*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–415, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); see also *Del Ponte v. Universal City Development Partners, Ltd.*, 2008 WL 169358, at *5 (S.D. N.Y. 2008) (citing *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 152, 2001 A.M.C. 2080 (2d Cir. 2001)).

¹⁶*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

¹⁷See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265, 24 Media L. Rep. (BNA) 2100, 39 U.S.P.Q.2d 1502, 1996 FED App. 0228P (6th Cir. 1996) (citing *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110, 1116–117, 28 Fed. R. Serv. 3d 1455, 1994 FED App. 0158P (6th Cir. 1994) (personal jurisdiction in Ohio district court established over Texas defendant based on contract with Ohio plaintiff and defendant’s repeated delivery of “computer software, via electronic links, to the CompuServe system in Ohio”).

implicated long-arm statute, if the cause of action arises from the subject matter of the transaction.¹⁸ Specific jurisdiction may result from a showing of communication activity (e.g., telephone calls, mail) between the foreign defendant and the plaintiff while the latter is within the applicable state jurisdiction.¹⁹ Thus, a plaintiff, because of the likelihood of possessing his own copy of email communications or other records of electronic exchanges (e.g., bank transactions), may benefit from ESI discovery but will often already possess information upon which the party would seek to establish the court's specific jurisdiction over the defendant. However, while the plaintiff may possess much or even all of the ESI evidence supporting the contention of specific jurisdiction, the matter of whether the ESI is of a sufficient measure and nature to precipitate specific jurisdiction is another question.²⁰ It is also quite conceivable that substantial ESI relating to "the operative facts of the controversy,"²¹ and thereby relevant to the establishment of specific jurisdiction, would exist outside of the possession or control of the plaintiff. Further, given the recognition that data stored on a server situated in a given state jurisdiction can contribute substantially to a finding of in personam jurisdiction in a district court in that state, the prospect of discoverable ESI relating to a given controversy in the same jurisdiction may be expected in some cases.²²

¹⁸*Societe Des Bains De Mer Et Du Cercle Des Etrangers a Monaco v. MGM Mirage*, 90 U.S.P.Q.2d 1028, 2008 WL 4974800, at *3-4 (S.D. N.Y. 2008) (citing *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D. N.Y. 2000)) (application of New York long-arm jurisdiction statute CPLR 302(a)(1)).

¹⁹See, e.g., *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312 (3d Cir. 2007); but see *N.V.E. v. Englert*, 2008 WL 4449611, at *6 (D.N.J. 2008) (granting motion to dismiss for lack of specific personal jurisdiction where delivery of an email from the forum to defendant did not suffice for minimum contacts).

²⁰See, e.g., *Machulsky v. Hall*, 210 F. Supp. 2d 531, 542 (D.N.J. 2002) ("minimal email correspondence" along with a single purchase did not establish minimum contacts); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 726, 27 Media L. Rep. (BNA) 2153 (E.D. Pa. 1999) (exchange of three e-mails between plaintiff and defendant regarding defendant's Web site did not "amount to the level of purposeful targeting required under the minimum contacts analysis"). But see, *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, R.I.C.O. Bus. Disp. Guide (CCH) P 8251, 25 Fed. R. Serv. 3d 440 (3d Cir. 1993) (minimum contacts found where defendant directed at least 12 communications to the forum in his individual and corporate capacities).

²¹*CompuServe*, 89 F.3d at 1267 (citing *Reynolds*, 23 F.3d at 1119).

²²See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 24 Media L. Rep. (BNA) 2100, 39 U.S.P.Q.2d 1502, 1996 FED App. 0228P (6th Cir. 1996); *Gourmet Video, Inc. v. Alpha Blue Archives, Inc.*, 2008 Copr. L. Dec. P 29656, 2008 WL 4755350, at *3-4 (D.N.J. 2008).

The second type of personal jurisdiction is general jurisdiction, which results from “systematic and continuous” activity.²³ “Even if a cause of action is unrelated to the defendant’s forum activities, jurisdiction may still be asserted if corporate activities within the forum are sufficiently substantial.”²⁴ However, even rather extensive commercial intercourse in the jurisdiction by the foreign defendant is unlikely to elevate to establishing general jurisdiction.²⁵ Further, the distinction between doing business with a state (e.g., license agreements with two television networks and a handful of vendors in California) and the higher standard of doing business in that state to an extent sufficient to establish minimum contacts has been articulated.²⁶ Notwithstanding the high threshold for establishing general jurisdiction, ESI discovery may aid a plaintiff’s effort to establish the needed jurisdictional facts by disclosing the resistant defendant’s relationships with other entities and the manner and location of the defendant’s information management and storage.²⁷ Further, the mere burdening of a foreign defendant with discovery obligations can expose that defendant to the variety of litigation risks related to ESI discovery.

Due process must be satisfied with respect to any sanction establishing jurisdictional facts against the defendant which the plaintiff had sought via its jurisdictional discovery.²⁸ The considerations here are slight, as such Rule 37 sanctions will not violate *International Shoe* “notions of fair play and substantial

²³*International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).

²⁴*Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240 (9th Cir. 1984) (citing *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 446–447, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio L. Abs. 146 (1952) (citing *International Shoe*, 326 U.S. at 318–319)). See also *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 149 (3d Cir. 1992) (general jurisdiction “may be invoked when the claim does not ‘arise out of or is unrelated to the defendant’s contacts with the forum.’”) (quoting *Dollar Sav. Bank v. First Sec. Bank of Utah, N.A.*, 746 F.2d 208, 211 (3d Cir. 1984)).

²⁵*Helicopteros*, 466 U.S. at 418 (finding no general jurisdiction in Texas over helicopter transportation company that, over a four year period, purchased eighty percent of its helicopters, spare parts, and accessories from Texas sources).

²⁶*Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086, 55 U.S.P.Q.2d 1941 (9th Cir. 2000) (holding modified by *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006)).

²⁷*Cf. Oyuela v. Seacor Marine (Nigeria), Inc.*, 290 F. Supp. 2d 713 (E.D. La. 2003) (general jurisdiction established against Bahamian corporation that relied extensively on Louisiana-based corporation to administer personnel matters involving foreign seamen).

²⁸*Insurance Corp. of Ireland*, 456 U.S. at 705–706.

justice”²⁹ when the trial “court merely adopts the presumption — based on a defendant’s non-compliance — that that party’s factual allegations in opposition to personal jurisdiction are untrue.”³⁰ Rule 37 sanctions establishing jurisdictional facts are considered to violate due process “only if such jurisdiction is determined as a ‘punishment’ for that party’s non-compliance.”³¹ Where the defendant accumulates a record of repeated delays and discovery order violations, a jurisdictional sanction may be found to specifically relate to the facts at issue in the underlying discovery order.³²

Under the *Insurance Corp. of Ireland* analysis, the due process “presumption” threshold is readily surpassed when the plaintiff forms specific discovery requests speaking to the resistant defendant’s contacts with the jurisdiction and thereby to the question of personal jurisdiction.³³ Requests framed to obtain responses which could support a cognizable basis for personal jurisdiction over a given foreign entity (e.g., “vicarious jurisdiction” via “corporate interrelatedness”), followed by the resistant defendant’s noncompliance, have satisfied this discovery sanctions requirement.³⁴ The premium, then, is on the tailoring of requests to frame questions that merely could be answered in a way that would provide a prima facie claim to personal jurisdiction. The proliferation of ESI discovery sources in the form of mailboxes and data networks, it is submitted, has thus increased the jurisdictional exposure of nonconsenting foreign defendants litigating their personal jurisdiction in a domestic court.

In the event of noncompliance with jurisdictional discovery, evidence of a sustained good faith attempt to comply with discovery coupled with, when applicable, foreign affects of sufficient consequence may permit (or even require) a trial court to not employ Rule 37 sanctions to establish jurisdictional facts. Foreign Relations Law balance of interests considerations, as specified in the Restatement (Third) § 442(1)(c),³⁵ may be brought to bear al-

²⁹*International Shoe*, 326 U.S. at 320.

³⁰*Volkart Bros., Inc. v. M/V Palm Trader*, 130 F.R.D. 285, 288, 1990 A.M.C. 1567 (S.D. N.Y. 1990).

³¹*Volkart Bros.*, 130 F.R.D. at 288, (quoting *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 706).

³²*Knox v. Palestine Liberation Organization*, 229 F.R.D. 65, 70 (S.D. N.Y. 2005) (quoting *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 707).

³³*Volkart Bros.*, 130 F.R.D. at 289.

³⁴*Volkart Bros.*, 130 F.R.D. at 289.

³⁵Cf. *Adams v. Unione Mediterranea Di Sicurta*, 2002 WL 472252, 3 (E.D. La. 2002) (citing *Aérospatiale*, 482 U.S. at 544 n.28 for position that district

though such foreign affects are properly addressed at the order stage and should be fully litigated then, when possible.³⁶

It is clear from the foregoing that nonconsenting defendants who elect to participate in pretrial proceedings but do so without complying with ordered jurisdictional discovery and providing credible mitigation via Foreign Relations Law do themselves few favors in U.S. courts. The case law reflects a consensus in the importance of staking out early the lack of personal jurisdiction defense and advancing it vigorously and unequivocally.³⁷ Dalliance in the jurisdictional defense should be expected to result in its eventual forfeiture.³⁸

Before electing to litigate personal jurisdiction in a given suit, a nonconsenting foreign defendant faces the option of ignoring initial proceedings and, subsequent to a default judgment, litigating the jurisdictional question in an enforcement proceeding either outside the U.S. or in a U.S. court, the latter being more likely in instances where attachable assets are within reach of the U.S. jurisdiction.

As the *Insurance Corp. of Ireland* Court pointed out, a defendant is always free to ignore proceedings, take a default judgment and “then challenge that judgment on jurisdictional grounds

court “must avoid placing any excessive burden on the foreign defendant who contests jurisdiction.” (quoting Tentative Draft No. 7, 1986 437(1)(c)).

³⁶See *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987) (citing *Trade Development Bank*, 469 F.2d 39–42; *First National City Bank*, 396 F.2d 900–905; *U.S. v. Davis*, 767 F.2d 1025, 1033–1036, 18 Fed. R. Evid. Serv. 53 (2d Cir. 1985). But cf., *Banca Della Svizzera*, 92 F.R.D. 117 n.3; *Remington Products, Inc. v. North American Philips Corp.*, 107 F.R.D. 642, 648 n.4, 3 Fed. R. Serv. 3d 241 (D. Conn. 1985).

³⁷See, e.g., *Knox*, 229 F.R.D. at 70 (“If Defendants instead wished to stand on principle and refuse to accede to the Court’s assertion of personal jurisdiction over them [reference omitted], then they should have informed the Court of their decision and allowed it to determine whether jurisdictional sanctions were appropriate without generating more than year’s delay and thousands of dollars in legal expenses.”).

³⁸See, e.g., *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, Prod. Liab. Rep. (CCH) P 15807, 45 Fed. R. Serv. 3d 51 (2d Cir. 1999) (“In the extreme, a defendant, despite having asserted in its answer to the complaint its defense of lack of personal jurisdiction, may be held to have waived its right to challenge personal jurisdiction where it participates in extensive pretrial proceedings over several years before moving to dismiss for want of jurisdiction.”); see also *In re Complaint of Rationis Enterprises, Inc. of Pananma*, 210 F. Supp. 2d 421, 426–427, 2002 A.M.C. 1848 (S.D. N.Y. 2002) (“Thus, by participating in the litigation, including full discovery, while not affirmatively asserting its jurisdictional defense in a timely manner, HMD forfeited that defense.”).

in a collateral proceeding.”³⁹ As an alternative to directly litigating personal jurisdiction, a nonconsenting defendant can cooperatively engage the adversary seeking to bring the foreign party into U.S. court, showing respect to the jurisdiction and the plaintiff while clearly not submitting to personal jurisdiction. After first staking out a lack of jurisdiction position, the nonconsenting defendant may benefit from polite and cautious reactions to process and discovery requests, making a clear and consistent record as to the jurisdictional deficiency of the underlying proceedings or, at a minimum, its desire to preserve its jurisdictional position and express its lack of certainty in the procedural implications of direct participation in the domestic proceedings.⁴⁰ In the event that default judgment enforcement is undertaken in a U.S. court, the circumspect yet properly engaged foreign defendant may have preserved its ability to fully litigate personal jurisdiction while requiring its adversary to take considerable steps to reach its assets and thereby force the issue.⁴¹

In some cases, a judgment creditor is unable to enforce judgment in a U.S. court due to the absence of attachable assets of the judgment debtor. The conflict of laws of a foreign system may bar enforcement claims of a judgment from a U.S. court absent certain procedural criteria. Consideration of the English conflicts rule on this question is illustrative of the general concept. The English position, in outline, is that “[a] foreign judgment is impeachable if the courts of the foreign country did not, in the circumstances of the case, have jurisdiction to give that judgment in the view of English law in accordance with [enumerated

³⁹*Insurance Corp. of Ireland, 456 U.S. at 706* (citing *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931) (personal jurisdiction ruling has issue-preclusive effect)).

⁴⁰See, e.g., *Feliciano v. Reliant Tooling Co., Ltd.*, 691 F.2d 653, 35 Fed. R. Serv. 2d 32 (3d Cir. 1982).

⁴¹In *Feliciano v. Reliant Tooling Co., Ltd.*, 691 F.2d 653, 35 Fed. R. Serv. 2d 32 (3d Cir. 1982), the solicitors representing an English defendant, the liability insurer to a third-party defendant in a personal injury action in the Eastern District of Pennsylvania, demurred participation in the initial district court proceedings relating to the garnishment action brought by the third-party defendant. The third-party defendant obtained a default judgment against the English defendant followed by writs of execution and garnishment and the attachment of U.S. assets of the English defendant. The district court denied the English defendant’s motion to reopen the default judgment but the Third Circuit, based on the English defendant’s conduct during the initial proceedings (in which the English defendant did not submit to the court’s jurisdiction), vacated the district court’s judgment, and remanded the matter so that the English defendant could litigate the controversy, including personal jurisdiction, on the merits.

jurisdictional] principles.”⁴² English courts will not enforce a judgment where the given judgment debtor (i) was not present in the U.S. when the given proceedings were instituted, (ii) had not agreed prior to commencement of the proceedings to submit to the jurisdiction of the courts with respect to the subject matter concerned in the proceedings, and (iii) did not submit to the jurisdiction of the court by voluntarily appearing in the proceedings.⁴³

Thus, litigation against foreign defendants raises factors regarding prospective enforcement actions in one or another foreign tribunal that may inform parties’ choices at the initiation of proceedings in a U.S. court. In weighing options, a non-consenting foreign defendant is advised to closely evaluate the expanding quality of ESI discovery in the context of litigating personal jurisdiction and, especially, the considerable prospect of Rule 37 discovery sanctions against a foreign defendant objecting to the U.S. court’s jurisdiction.

⁴²Dacey & Morris, Rule 42 at 516.

⁴³Dacey & Morris, Rule 36 at 487.