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Cross-Border Evidence Gathering

A Primer on Mutual Legal Assistance
Treaties and Letters Rogatory

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Introduction

Whether engaging in the civil discovery process or investigating criminal conduct, the need to collect evidence located in a foreign country arises more frequently today than ever before. That said, national sovereignty, international treaties, and international law, typically preclude U.S. law enforcement officials or litigation counsel from simply flying to a foreign country to conduct searches, question suspects/witnesses, or obtain documents. The two indispensable vehicles for obtaining foreign evidence – the focus of this article – continue to be Mutual Legal Assistance Treaties (MLATs) and Letters Rogatory.

On the whole, MLATs are the principal means by which law enforcement authorities make transnational requests for evidence gathering; in contrast, MLAT requests are typically not available to civil litigants, who would generally turn to letters rogatory, as we explain below. We also provide at the conclusion of the article a table that compares the key features of MLATs and Letters Rogatory.

LETTERS ROGATORY

Letters rogatory (also known in some circles as “letters of request” when presented by a nonparty “interested person”) are formal requests for judicial assistance made by a court in one country to a court in another country. Once issued, they may be conveyed through diplomatic channels, or they may be sent directly from court to court.

Letters rogatory are often used to obtain evidence, such as compelled testimony, which may not be available to a foreign criminal or civil litigant without judicial authorization. They are used primarily by non-government litigants who do not have access to the MLAT process. In contrast to MLATs, letters rogatory are not treaty-based; there is no guarantee that the requested country or tribunal will act on a request for assistance, or if it acts, how it will act.

OUTGOING

The letter rogatory process is less formal than pursuing evidence through an MLAT, but its execution can be more time-consuming. Outgoing letters rogatory--requests for assistance with obtaining evidence abroad, made by counsel through the U.S. court--are issued by the U.S. State Department pursuant to 28 U.S.C. § 1781, and provided for under Federal Rules of Civil Procedure 28(b) and 4(f)(2)(B). Section 1781(b), however, also allows a district court (and, for that matter, a foreign court) to bypass the State Department and transmit the outgoing letter rogatory directly to the “foreign tribunal, officer, or agency.” Although not as common in practice, there is nothing in 28 U.S. Code § 1781 or otherwise preventing a state court from similarly issuing a letter rogatory (though it is possible that the responsiveness by some foreign courts may be reduced if they are not as familiar with the state court issuing the letter). Because the letter rogatory process is time-consuming and may involve unique issues of foreign procedural law, moreover, parties seeking evidence should consider contacting local counsel to file the letter rogatory on their behalf, a strategy that may facilitate the process.

In most cases, foreign courts honor requests issued pursuant to letters rogatory. However, international judicial assistance is discretionary, based upon principles of comity rather than treaty, and is also subject to legal procedures in the requested country.

INCOMING

Incoming letters rogatory--requests for judicial assistance originating in a foreign or international tribunal--are also covered by 28 U.S.C. §§ 1781 and 1782. OIA receives incoming letters rogatory from foreign or international tribunals and transmits each approved request to the federal court in the district where the evidence is located or witness resides.

ESSENTIAL ELEMENTS OF A LETTER ROGATORY

In addition, to facilitate the process, courts should ensure that the letter includes the following:

- a statement that the request for international judicial assistance is being made in the interests of justice;
- a brief synopsis of the case, including identification of the parties and the nature of the claim and relief sought, to enable the foreign court to understand the issues involved;
- the type of case (e.g., civil, criminal, or administrative);
- the nature of the assistance required (e.g., compel testimony or production of evidence, serve process);
- the name, address, and other identifiers, such as corporate title, of the person abroad to be served or from whom evidence is to be compelled, and a description of any documents to be served;
- a list of questions to be asked, where applicable (generally in the form of written interrogatories);
- a statement from the requesting court expressing a willingness to provide similar reciprocal assistance to judicial authorities of the receiving state; and
- a statement that the requesting court or counsel is willing to reimburse the judicial authorities of the receiving state for any costs incurred in executing the requesting court's letter rogatory.

The following chart outlines the typical outgoing letter rogatory process

SUBMITTING A LETTER ROGATORY FOR EXECUTION BY A FOREIGN COURT

State or federal court (or counsel acting with their consent) transmits the letter rogatory to the U.S. Department of State (DOS)

DOS reviews the letter rogatory and, once approved, transmits it to the U.S. embassy in the applicable country

U.S. embassy transmits the letter rogatory to the Ministry of Foreign Affairs

Ministry of Foreign Affairs transmits the letter rogatory to the Ministry of Justice

Ministry of Justice transmits the letter rogatory to the foreign court

Provided the request comports with foreign laws and regulations, the foreign court provides requested assistance

Result of the assistance is transmitted to DOS via the diplomatic channels

DOS Office of American Citizens Services transmits the result to the requesting court in the United States via certified mail

Requesting counsel or party is notified

MUTUAL LEGAL ASSISTANCE TREATIES

OVERVIEW

MLATs are the principal vehicle through which law enforcement officials make transnational requests for assistance relating to evidence gathering and other law enforcement activities (MLATs are not available to non-law enforcement litigants). They are available for use by law enforcement officials involved in criminal investigations and proceedings (or in some civil matters where the case is related to a criminal matter). MLATs are legally binding negotiated commitments. Nonetheless, courts review specific requests for assistance and may deny them if they fail to comply with applicable domestic law or procedure.

STATUTORY SCHEME

28 U.S.C. § 1782

Originally enacted in the mid-nineteenth century to encourage reciprocal assistance with transnational litigation, the statute now codified at 28 U.S.C. § 1782 permits federal courts to provide cross-border assistance via MLATs.

18 U.S.C. § 3512

The Foreign Evidence Efficiency Act, codified at 18 U.S.C. § 3512, was enacted to help streamline the MLAT process, making it “easier for the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system.”

SCOPE

The United States has bilateral MLATs in force with every European Union member state, many of the Organization of American States member states, and many other countries around the world.

MLATs provide for cooperation between nations in the investigation and prosecution of transnational crime, and they do so through explicitly enumerated categories of law enforcement assistance unique to each treaty. Most MLATs also include a catchall provision authorizing the transfer of any evidence not prohibited by the requested nation’s law.

PROCEDURE

When a foreign country requests assistance pursuant to an MLAT, the U.S. court must determine whether (1) the terms of the MLAT prescribe practices or procedures for the taking of testimony and production of evidence, (2) the Federal Rules of Procedure and Evidence apply, or (3) the MLAT requires some sort of a hybrid approach. It is also acceptable to follow specified practices and procedures of the requesting *country-provided* they are consistent with U.S. law, including the rules relating to privilege. MLATs executed in the United States must follow U.S. constitutional requirements, including the protection of Fourth Amendment and Fifth Amendment rights.

That said, U.S. legal standards do not apply to the seizure of evidence overseas when the foreign country is conducting the investigation independently and seizes evidence later introduced in a U.S. court, nor does the Sixth Amendment right to counsel attach to civil depositions.

JUDICIAL REVIEW OF REQUESTS FOR MUTUAL LEGAL ASSISTANCE

Although there is a presumption in favor of honoring MLAT requests, the district court must still review the terms of each request, checking that they comply with the terms of the underlying treaty and comport with U.S. law. U.S. courts will also consider constitutional challenges to a request for legal assistance. Although such cases are rare, a district court may not enforce a subpoena that would offend a constitutional guarantee, such as a subpoena that would result in an egregious violation of human rights.

LEGAL ISSUES

Although most requests for assistance pursuant to an MLAT proceed uneventfully, courts sometimes are called upon to resolve related legal issues, such as dual criminality, defense access to evidence located abroad, delay, and statute of limitations.

Dual Criminality. Unlike extradition treaties enforced in U.S. courts, most MLATs do not require dual criminality—that the offense for which the foreign state seeks assistance also constitutes a crime in the requested state. The utilitarian reason for this deviation from the norm is to facilitate responsiveness.

Defense Access to Evidence Located Abroad. The MLAT process was created to facilitate international cooperation in the investigation and prosecution of criminal cases. Each treaty's terms apply only to the contracting nations' parties, and the benefits conferred are available only to the governmental officials of those nations.

As noted, access to evidence through an MLAT is almost always restricted to prosecutors, government agencies that investigate criminal conduct, and

government agencies that are responsible for matters ancillary to criminal conduct, including civil forfeiture.

Commentators have noted that the lack of compulsion parity between prosecutors and the defense in obtaining foreign evidence has due process implications. However, few, if any, courts have been receptive to such petitions in the absence of language in the MLAT that provides for defense access to evidence abroad. Courts have consistently held that MLATs create no private rights permitting an individual defendant to force the government to request evidence pursuant to an MLAT, even when the defendant invokes constitutional concerns.

STATUTE OF LIMITATIONS

When the government seeks evidence from abroad prior to the return of an indictment, it files an *ex parte* application with the court to toll the statute of limitations pursuant to 18 U.S.C. § 3292. The court must find by a preponderance of the evidence that “it reasonably appears” the evidence is in the foreign country, and the tolling of the statute may not exceed three years. The suspension of the statute of limitations begins on the date that the MLAT request is made; it ends when the foreign government takes its final action on the request. Section 3292, moreover, does not provide the defendant with a right to notice that the statute of limitations is being suspended or a hearing on the issue.

IMPACT OF THE 2018 CLOUD ACT

The Clarifying Lawful Overseas Use of Data Act (“CLOUD Act”) (H.R. 4943) is a United States federal law enacted in 2018 by the passing of the Consolidated Appropriations Act, 2018, PL 115–141, Division V.

The Act, which primarily amends the 1986 Stored Communications Act (SCA), permits federal law enforcement to compel U.S.-based technology companies via warrant or subpoena to provide requested data stored on servers regardless of whether the data are stored in the U.S. or overseas. It was enacted to address the difficulties agencies like the FBI had when seeking to obtain remote data through service providers using outdated SCA warrants (which were developed prior to the availability of cloud computing).

he CLOUD Act requires U.S. data and communication companies to provide, pursuant to a court-ordered warrant, stored data for a customer or subscriber on any server they own and operate anywhere in the world. It also provides mechanisms for the companies or the courts to reject or challenge these if they believe the request violates the privacy rights of the foreign country where the data is stored.

Though a detailed analysis of the CLOUD Act is outside of the scope of this article, critics have argued that the CLOUD Act in effect has created a legal shortcut to circumvent the MLAT system and its privacy and due process safeguards.

USING INFORMAL CHANNELS TO GATHER EVIDENCE

Although formal MLATs, letters rogatory, and other international conventions are the “public face” of transnational legal assistance, a significant amount of criminal investigation-related information is exchanged through informal channels: investigator to investigator, prosecutor to prosecutor, defense counsel to local counterpart. But to ensure admissibility and avoid issues with the relevant authorities, in most cases it is better to pursue the formal MLAT or Letters Rogatory channels.

CONCLUSION

Whether through MLATs, letters rogatory, or informal means, the process of obtaining evidence from abroad in criminal and civil cases can be time-consuming and frustrating to all parties involved, including the courts. Armed with a basic understanding of how these transnational evidence-gathering tools operate, prosecutors, litigants, and courts can plan for potential delays and facilitate the evidence-gathering process in a manner that promotes fairness and conserves resources.

Comparing the Key Features of MLATs and Letters Rogatory

Issue	MLAT	Letter Rogatory
Nature of instrument?	Bilateral cooperation treaty	Issued by state and federal courts as a matter of comity (and with the expectation of reciprocity)
Scope of use?	The primary method of obtaining foreign evidence and other assistance	Available to all parties in criminal and civil matters
Nature of judicial involvement?	U.S. district courts supervise issuance and execution only of incoming requests	Federal and state judiciaries supervise issuance and execution of outgoing and incoming requests
Available to criminal defendants?	No (except pursuant to the first three MLATS the United States signed)	Yes; in fact, is the primary formal means for defendants to obtain foreign evidence
Available to civil litigants?	No	Yes
Available to prosecutors?	Yes	Yes
Must a case have been filed for assistance to be available?	No	Yes
Available pre-indictment (during investigative phase)?	Yes	No
Efficient method of obtaining evidence?	Relatively speaking, yes	No, generally slow and cumbersome
Processed through diplomatic channels?	Always	Almost always

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