NEXSEN | PRUET

Document Production and ESI Issues for Chinese Companies in US Litigation - Act Early!

Related Professionals

Val H. Stieglitz
803.253.8262
vstieglitz@nexsenpruet.com

Practices

Doing Business With China

International Law and Services

International Litigation

Litigation

Article
08.30.2021

Litigation in the US business environment poses unique challenges for Chinese companies. US rules dealing with preservation of evidence, and production of evidence (in both hardcopy and electronic form), require particular attention. The US rules differ greatly from the rules that Chinese businesses are familiar with, and can create unnecessary problems for Chinese businesses in the US Courts. By working closely with US counsel, many of these problems can be avoided.

1. The US litigation system revolves around the concept of placing all relevant evidence before the fact-finder (usually a jury, but sometimes a Judge), who reviews the evidence impartially and renders a decision. Thus, the US system places a high value on retaining, collecting, and producing all relevant evidence. A party that does not take reasonable steps to retain, collect, and produce evidence can expect to suffer negative consequences. If the evidence is related to a claim or defense in the case, it does not matter whether the party wants to produce it, or whether the evidence will "hurt" the party's case. The many US rules that deal with this subject all aim at the same thing – making sure potentially relevant evidence is kept and produced. This contrasts with the Chinese system, which neither requires nor allows broad discovery of the adverse party's documents and emails. In fact, disclosing certain types of information, or transferring if outside China, can be actionable under Chinese domestic law. This can easily create a tension with US production rules. The potential for such tension should be analyzed early.
2. There is no consistent pattern among the US Court decisions addressing how to manage this conflict. One point, however, is made frequently – if the Chinese business believes Chinese law restricts it from producing documents that the US rules require to be produced, it should raise this issue as soon as possible with the US Court. Waiting to raise this issue is not a good plan.
3. Modern business is conducted electronically. Unlike, perhaps, 30 years ago, most documents that will be relevant in a case are going to be in

electronic form. Also, there will have been internal email communications regarding the subject of the case – as well as communications on other platforms such as WeChat, and text / audio messages. Under US rules and practice, all of this material (which is called Electronically-Stored Information, or ESI) must be preserved, collected, and produced, to the extent relevant to the issues in the case. Working closely with your US attorney, Chinese companies can usually devise cost-efficient ways to assemble, review, and produce the required ESI. This requires, however, close cooperation between the Chinese company's relevant personnel, and the US attorney. The Chinese company must make the ESI aspect of a case a priority early in the case. Addressing ESI-compliance issues early will make it much more likely that solutions can be found to logistical and other problems. It is also important for the Chinese company to consider whether, under Chinese law, it is permitted to disclose and transmit the requested information. There may be situations in which the ESI is directly relevant to the claim in the US, but disclosure of the ESI could subject the Chinese company to legal difficulty in China. Again, there is no over-arching pattern to the US cases addressing this situation. However, a frequent theme in the cases that are unfavorable to the Chinese companies, is that the company waited too late in the case before raising this issue. Thus, as with all discovery issues Chinese companies face in US litigation, it is very important to take discovery seriously, analyze how far the Chinese company may go toward complying with the discovery without violating domestic Chinese law, then raise any compliance issues early.

Nexsen Pruet attorneys experienced in representing Chinese companies in the US can advise on these issues.