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Tips For Taking Depositions In India For US Litigation

Law360, New York (October 03, 2014, 9:39 AM ET) -- India has in the past decade arrived on the world stage as an economic powerhouse. This factor combined with its surplus of highly skilled technical workers in burgeoning tech centers, especially in cities such as Bangalore, Karnataka and Hyderabad, makes it an attractive location for technology firms to establish a foothold. With a projected growth of 30 percent in the information technology sector in 2015, it will be increasingly commonplace that the engineering development of products marketed in the United States will take place in India.



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In the above scenario, intellectual property-related issues would gain much importance. This reality has implications for attorneys in the United States who focus on patent litigation and other litigation with a technical nexus. If you find it necessary to conduct a deposition in India in a matter pending before a court in the United States, you should be familiar with the nuances of such an endeavor and how it may differ from your experience with discovery practices in the United States.

This short guide will highlight some issues an attorney may encounter when the need to travel to India arises and the nuances of the procedure of taking evidence.

Business Visa

As an attorney entering India for business purposes, you will need to obtain a business visa. The application may be completed online, but must be supported by various other documents. These other documents include a business letter from your organization verifying your employment and that you will have adequate means to support yourself while in the country. Further, the other documents include a letter of invitation from an Indian organization stating the purpose of your visit. If you are working with an Indian law firm to navigate the formal process of authorizing a deposition (as we advise below), that firm should be able to provide you with a letter of invitation.

Request for International Judicial Assistance Under the Hague Evidence Convention

Except for the circumstance in which you will be taking the voluntary deposition of a U.S.

citizen, you will have to proceed by filing a request for international judicial assistance pursuant to the Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters. The said request is a formal communication in writing sent by the court in which an action is pending to a foreign court, requesting that the testimony of a witness residing within the jurisdiction of that foreign court be taken under its directions and subsequently forwarded to the court issuing the request for use in a pending court action.

Fortunately, the Hague Conference on Private International Law provides a model letter of request that can be tailored to one's needs. The request should be sent to the relevant central authority appointed for accepting and processing the same in the country where testimony is sought, after which the request would be transmitted to the competent authority for necessary action.

Procedure In India

India is a party to the Evidence Convention and has designated the Ministry of Law and Justice, Department of Legal Affairs, New Delhi as the central authority for receiving and processing letters of request in pending civil cases. Once accepted, the central authority transmits the request to the relevant High Court (competent authority) within whose territory the evidence is to be taken. If you plan to take your deposition for example in Bangalore, which is located in the State of Karnataka, the High Court of Karnataka must approve the request. This is a step at which experienced local counsel are a must. The procedures for dealing with the letter of request through Evidence Convention are not uniform across the various states. It will serve you and your client well to have local counsel who is familiar with the practice in the High Court.

Indian courts do not adopt a technical approach by going into the proprietary of the letter of request or the questions of relevance or admissibility of the evidence sought but they do require a physical seal from the requesting authority, meaning thereby that you will have to arrange for the physical delivery and return of the letter of request to and from the U.S. court to the court in India.

A note of caution — requests under the Evidence Convention are usually not processed quickly by the central authority on account of backlog, and you should expect a time of at least six to nine months for the said process to conclude.

Alternate Approach

Whilst India is a signatory to the Evidence Convention, it has not enacted the provisions of the Evidence Convention into a municipal law so as to give effect to the same. Resultantly, Indian courts have in certain cases not taken cognizance and/or executed the letter of request issued under the Evidence Convention. Nevertheless, Indian courts can give effect to a letter of request under the provisions of the enabling law of the country, i.e., The Code of Civil Procedure, 1908. Therefore, notwithstanding any earlier request to the central authority, it is open to a party seeking testimony in India to request the issuing authority to forward a fresh letter of request directly to the High Court of the state in which the witness resides or carries on business for taking evidence, which includes oral testimony as well as production of documents through the witness.

Upon obtaining the letter, a petition under the relevant provisions of The Code of Civil Procedure, 1908 will be required to be filed in the High Court requesting the appointment of a commissioner — generally a judicial officer or experienced attorney — to oversee the taking of evidence and post conclusion, file his report and the evidence with the High Court. Although one may request that the High Court refer the matter for hearing at a local

United States consular office, in most cases the High Court will appoint a commissioner upon hearing the parties. The commissioner will be authorized to administer the oath to the witness and will certify the transcript upon the completion of the deposition. Upon completion of taking of evidence, the commissioner will submit his report to the High Court, which in turn would forward the same to the U.S. court through the Ministry of Law and Justice.

Allow for the possibility that this process may take several months.

Deposition Procedures May Vary

Just as navigating the various High Courts requires knowledgeable local counsel, so too will the arrangements for recording the evidence. The permissible means for making a record of the proceedings can vary from state to state. For example, some states may not allow the use of videography, whilst others have facilities for recordal of evidence, even through videoconferencing.

When one of the authors visited India for a deposition in Bangalore he was not allowed to use a shorthand stenographer and the transcript was recorded by a typist instead. In Bangalore the author was allowed to question the witness directly. In contrast, when the author made a petition to conduct a deposition in the city of Hyderabad, the High Court would only allow examination by advocates entitled to practice under Section 29 and 30 of India's Advocates Act, i.e., attorneys licensed to practice in India.

Attorneys who arrive in country assuming they may proceed exactly as they would in the United States can be quite surprised if they have not thoroughly worked through the deposition procedures with their local counsel.

With proper planning, you should be able to obtain the evidence you need in India efficiently. Have a pleasant trip.

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