



THE WHY AND HOW OF **INTERNATIONAL** RECORDS RETENTION



For a multinational organization with global business operations, records retention for its overseas business units is just as important as it is for its domestic operations. Unless the overseas units have well-developed and aggressively implemented records retention programs, they cannot control the growth of their records, ensure compliance with records retention laws and regulations, or reduce the legal liabilities that can sometimes be associated with document retention and disposal. Thus, records and information management (RIM) staff for these multinational organizations need workable strategies for expanding the scope of their records retention programs to ensure global coverage.

Multinational organizations are today confronted with explosive growth in the quantities of information they

expires, it is the principal tool by which the growth of records can be controlled.

Governments throughout the world impose numerous laws and regulations requiring regulated parties to retain certain records for specified lengths of time, and regulated parties are obliged to comply with them fully, in letter, spirit, and good faith. These government-imposed retention requirements frequently add confusion and uncertainty to questions concerning what an organization's information retention policies and practices should be. They must, however, be carefully considered by every enterprise that wishes to develop a formal program for the management of the information life cycle. A methodology for doing this is prescribed later in this article.

Finally, organizations everywhere must conduct business in a litigation-intensive environment. Because lawsuits are often decided largely, if not solely,

foundation upon which international retention programs should be built. The standard states that "Records systems should be capable of facilitating and implementing decisions on the retention and disposition of records. It should be possible for these decisions to be made at any time in the existence of records, including during the design stage of records systems."

Multinational RIM managers should develop and implement global records retention programs that can claim compliance with the following characteristics.

Cultural Factors in International Retention

In the United States, the systematic disposal of business records under authority of a formal records retention program is a widely known and accepted business practice. While some business managers may be reluctant to agree to the

Multinational organizations require records retention programs that are founded on the international records management standard and ensure global coverage

create and retain. This is particularly true for information in digital form which, according to many sources, is growing at rates somewhere between 20 and 60 percent per year. Most IT departments have devoted considerable attention to the capture, processing, and retrieval aspects of data management, but they have given very little attention to managing the life cycle of computer data. Moreover, the quantity of paper records continues to grow in most enterprises, even as a higher percentage of the total information resources of the enterprise exist as digital records. New information technologies have given organizations much greater capabilities to produce records in all formats, and this is exactly what is happening. Because the essential purpose of records retention is to effect the systematic disposal of records as soon as their value for any and all purposes

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At the Core

This article

- ▶ Describes the characteristics of international retention
- ▶ Reviews the types of records that retention programs target
- ▶ Outlines a research plan to seek retention laws

on the basis of information contained in records, organizations must be very careful about what information they retain and for how long.

ISO 15489 and Retention

ISO15489-1 Information and Documentation – Records Management – Part 1: General, which is the international standard for records management, is the

disposal of their records, they generally understand the need for records retention. However, in many countries outside the United States, these factors may not be present.

The best method of dealing with this situation is to obtain a firm commitment from the senior executives of the organization and then conduct management briefings for many or all employees at each overseas location. These briefings should emphasize that all records retention policies will be developed such that they comply with the law and meet the organization's business needs.

Global "Baseline" Retention Policies

The concept of global "baseline" retention policies is increasingly popular among multinational organizations in their efforts to develop records reten-

tion policies of worldwide applicability. Under this concept, the corporate office establishes a "baseline" or minimum retention policy that is of mandatory, worldwide applicability for certain types of records. However, the policy provides flexibility for countries to exercise their discretion to lengthen or extend these baseline retention periods, based on valid legal or business needs.

Enterprise-wide Consistency in Retention Policies

Whether or not a company is multinational, it is a good idea to develop consistent retention policies (identical retention periods for the same types of

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records). If this practice is not followed, the organization may be placed in the uncomfortable position of explaining to legal authorities why a record exists in one location but not in another.

On the other hand, there are frequently valid reasons for developing different retention policies for the same type of records in different locations. For one thing, the records may be used for different business purposes and thus have different retention values in various domestic and overseas locations. Also, the legal requirements to retain records and cultural factors may necessitate differing retention periods.

Multinational RIM managers should deal with this issue by documenting the reasons for the retention decisions contained in the retention schedules for various country locations. Valid reasons would include legal requirements, business needs, and common business practices. For all retention decisions based on a legal requirement, the documentation should show a brief digest of the law, together with its citation.

Compliance with International Retention Laws

First and foremost, records retention must be about complying with the law. When organizations establish business offices in other countries, they are obliged to comply with the laws in those countries as well as the laws in their domestic country.

With the exception of the United States, Canada, Australia, and the United Kingdom, however, most countries have enacted only a few laws related to records retention, and most of those laws apply to accounting and general business records and were imposed primarily for tax administration purposes. This is in sharp contrast to the U.S. regulatory climate with its thousands of records retention statutes and regulations that make compliance much more difficult.

Following is a synopsis of the types of records for which many countries have enacted laws prescribing retention. (Note: The legal retention periods mentioned in this article are based on legal

research in the countries mentioned. However, these laws can and do change. Readers are warned to verify any requirements mentioned here before using them to formulate any retention policies for their organizations.)

Accounting and Tax Records

Perhaps the most important reason why governments impose records retention requirements on businesses is to protect their ability to collect taxes. To do this, they must have access to accounting records to scrutinize during tax audits. Thus, virtually every country known to impose records retention requirements has enacted laws that mandate the retention of ledgers, journals and other books of account, and other supporting documentation such as vouchers, balance sheets, records of goods bought and sold, and inventories of stock. These retention requirements are found in the commercial codes of country laws and/or in the tax codes. Typically the retention period is five to 10 years; Argentina's requirement is among the lengthiest with its mandate for retention until the closure of the business plus 10 years.

General Business Correspondence

In addition to retention requirements covering general corporate and accounting records, a number of countries (mostly in Europe and Latin America) mandate the retention of letters, telegrams, and other general business correspondence. These retention periods generally range from 5 to 10 years, but Uruguay's requirement is for 20 years, and Costa Rica's requirement is for the life of business plus four years.

It should be recognized that most if not all these laws were enacted many years ago, in a "pre-technology" era, when business recordkeeping was exclusively paper-based. The first question that leaps out is whether these requirements apply also to correspondence that is created in e-mail environments. If so, these retention periods are greatly in excess of common practices. Consultation with international attorneys should help organizations find resolutions that make sense for them.

Once the relevant laws have been discovered, multinational records managers should work with their legal counsel to incorporate them into retention policies of global coverage.



General Corporate / Legal Documents

After accounting records, general corporate/legal documents are the most frequent target for international retention laws. These requirements mainly appear in the business corporation laws or commercial codes of the countries, and they typically apply to all businesses domiciled within the country, including units of foreign-owned, multinational corporations. Although they vary in coverage and specificity, these laws typically mandate the retention of records such as minute books, articles of incorporation, shareholder registers,

financial statements, deeds, and other documents serving as evidence of the legal status and ownership of the business. The laws of some countries are very specific concerning which records are required to be retained, while others are very general. The retention periods range from three years to permanent; 10 years is the average. In a few cases, such as in Costa Rica, the requirement is life of the business plus four years. The intent here is to ensure the preservation of records of closed businesses through the period of receivership and payment of creditors or other legal distribution of assets.

Statutes of Limitations

Statutes of limitations – or periods of prescription, as they are called in civil law countries – are a major factor in establishing retention periods for business records. These laws are not requirements to retain records; they simply specify how long parties can sue or be sued concerning a certain matter.

Multinational companies have a major interest in retaining such records as may be needed to institute legal proceedings against other parties or to defend themselves against unwarranted claims brought by other parties. Thus, they may define and limit risk and liability where the retention of records is concerned. The following matters are most relevant to records retention.

- **General contracts:** Retention requirements range from one year from discovery of breach in China to an average of six years from the last date on which action took place in the United Kingdom.
- **Taxation:** Retention requirements range from an average of five years in Brazil and Germany to 10 years, in cases where taxpayers fail to file a return or file a false return for purposes of evading taxes in Thailand.
- **Product liability:** Retention requirements range from 3 years from the plaintiff's awareness of damage in Finland to 30 years in cases where product defects have been fraudulently concealed by the seller in Germany.

- **Personal injury:** Retention requirements range from 3 years from the date on which the cause of action occurred in Ireland to as much as 20 years following the event that caused the damage in the Netherlands.

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Locating International Retention Requirements

Locating international retention requirements is the most challenging research task in all of records management. Conducting this type of research is a process of doing the easiest tasks first, followed by the harder and then the hardest tasks. While a researcher can spend literally months – if not years – in this research, the goal is to be practical. Do the best job possible using readily obtainable sources, and then see whether any in-country research will be required to do an acceptable, if not definitive, job.

First, investigate internal organizational sources. If records personnel are scattered in offices around the world, ask them to advise of any retention laws and regulations in their possession.

Next, if the organization has corporate counsel in those other countries, ask them for any information they have and to recommend sources or areas of the law that need to be checked. However, most corporate attorneys specializing in international law have neither the time nor the inclination to perform research of this nature. So, they typically will make a quick check and send whatever they can easily find, but this almost never yields anything close to definitive results.

For these reasons, this type of research is usually best performed by a researcher who has experience in conducting legal records retention research and thus knows what to look for and how to evaluate the relevance of what is found.

If possible, though, request the par-

ticipation of attorneys in the research project, particularly in making decisions concerning its scope and methodology and in reviewing the results and applying them to the company's information management policies and programs. These matters are described below.

Conducting International Retention Research

The legal research that is required to discover all the laws and regulations related to recordkeeping with which a multinational company must apply is an extremely difficult and time-consuming endeavor. Many sources are very hard to obtain, and there are language problems when dealing with countries whose official language is foreign to the organization. Sources such as *Commercial Laws of the World* and *Tax Laws of the World* contain basic recordkeeping requirements applicable to businesses in general, and these are not too difficult to obtain. However, for many multinational businesses operating in specialized industries, these basic sources will by no means be sufficient for assuring that the research is definitive. On the other hand, the global reach of the Internet is making this research somewhat easier than it was just a few years ago. Many countries now have their laws posted to websites, where they are obtainable by desktop access, without the necessity of visiting a law library.

Scope of Legal Research

Multinational companies that want to undertake international retention projects should first define the scope of the legal research. For comprehensive retention projects, locate all laws and regulations pertaining to:

- Records retention
- Record maintenance/storage
- Limit of action/statutes of limitations
- Laws pertaining to the location of records
- Laws pertaining to record media; conversion of record material to electronic or other non-paper media formats

Organizational Scope

The scope of the research task should be further defined in terms of specific types of organizational units. For example:

- Administrative offices
- Manufacturing facilities
- Distribution facilities
- Sales and marketing facilities
- Research and development facilities

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Business Function Scope

Further, the legal research should be defined by business functions. For example:

- Antitrust
- Business formation, qualifications, incorporation, and closure
- Contracts and agreements
- Customs (import/export)
- Environmental management
- Facility and property management
- Finance/accounting
- Human resources/personnel management, including employee/labor relations, benefits, employee health and safety
- Insurance/risk management
- Intellectual property (patents, copyrights, and trademarks)
- Manufacturing
- Payroll/compensation, salary and wage administration
- Property/land management
- Purchasing/procurement
- Quality control/assurance
- Regulatory affairs
- Research and development
- Sales/marketing
- Security
- Shareholder relations
- Taxation

Research Sources

Next, the type of research sources should be defined. The research should be performed by using the following electronic, Internet-based sources as well as published law books and other traditional library source materials.

- **Electronic sources** – Proprietary online compilations of comparative law; proprietary collections of law on CD-ROMs; proprietary Internet services; public Internet sites
- **Library sources** – Current compilations of country law and regulations; loose-leaf collections of subject

specific regulations (i.e., business laws, labor laws, etc.); compilations of regional law and regulations; books devoted specifically to specific areas of business (i.e. pharmaceutical law and regulation)

The initial search should be confined to Internet websites and, where those are not available, law books in large libraries having substantial collections of laws from around the world (for example, in the United States, Harvard University, Columbia, or the University of California at Berkeley). Only when the above sources of full-text are thoroughly exhausted should the search be extended to published works. The overall goal should be to perform the best research effort that is practical and affordable, using the best available sources. Research in other countries may be required, but it should be done as the last step.

Search Strategy

To execute electronically based searches on Internet websites, search capabilities range from Boolean engines/websites, as well as PDF copies of laws and regulations used by some national governments for posting their national laws and regulations to online searchable sites. The basic search query statements to be used should be as follows: “record” or “records” or “record-keeping” or “file” or “document” and “retain” or “retention” or “keep” or “maintain” and “years.” This search strategy is intended to cast a rather broad net, designed to tag as many record retention citations as possible. The resulting “hit-list” should then be browsed, title-by-title and section-by-section, by manually scanning for any potentially relevant requirements. Moreover, single-word searches on key terms such as “record” or “document” or “file” should be made initially, and if this yields results, further searching on the word “years” should be performed to identify specific record retention requirements.

Note that the above search strategy includes only record retention requirements, not any limitation of action or prescription statutes, which are commonly used to guide record retention rec-

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ommendations. For these statutes, a search query statement of “limit” or “limitation of action” or “prescription” and “years” from the Boolean-capable sources should be used. For the less robust resources, browsing among civil procedure titles will be required.

Translation of Non-English Sources

In cases where original sources of laws and regulations are in a foreign language, the best approach is to use in-house translation services where they are available. Where they are not, it will often be necessary to use special trans-

lation software. This will produce a rough translation, which may be good enough for the purpose of identifying what records are required to be retained, by whom, and for how long. Some international lawyers may say that rough translations are not legally sufficient, that translations by qualified legal specialists are required should the legal basis for the retention schedules ever have to be defended in court. This matter should be discussed with international attorneys.

Results of the Research

Multinational companies should collect the results of the research in two formats.

1. A “quick reference” summary matrix, by country, of laws and regulations resulting from research. This can be prepared in spreadsheet (e.g., Excel) format. This quick reference summary should show, by country, what records are required to be retained, who must retain them (the regulated party), how long they must be retained (if specified), and the source of the requirement, that is, the applicable legal citation.
2. The text of all discovered and applicable requirements, presented in a searchable/usable format and with a detailed table of contents. This is often done in word processing format.

Finally, the citations and retention requirements must be linked to their applicable records series appearing in the records retention schedules. This is often a difficult task, as the language used in the laws and regulations is difficult to match to the records appearing in the organization’s retention schedules. Nevertheless, it must be done using the best possible judgment. Questions should be posed to attorneys, business managers, and other professional specialists so that reasonable judgments can be made.

Litigation Risk Reduction

As previously mentioned, this issue is somewhat less onerous in other countries than in the United States with its highly litigious climate in which lawsuits are often the means of resolving business disputes. Companies that manufacture products that may be harmful to consumers or the environment are particularly vulnerable to liability lawsuits, but no organization is immune from them. Because these lawsuits are often decided on the basis of documentary evidence, U.S.-based corporations have strong incentives to be very careful about what documents they retain and for how long. In countries that are not “litigation-intensive,” this problem is not as acute. Even so, records retention as a tool for minimizing the risks of the documents in litigation remains a valid strategy for multinational companies.

For example, manufacturing operations conducted abroad do not necessarily render U.S.-based multinationals invulnerable to the risks of liability lawsuits. If products are made abroad, and if their use causes harm to the user, the manufacturer can still be sued on account of the unsafe performance of the product. And, in the event of a lawsuit, records maintained in overseas jurisdictions are discoverable in the same manner as those stored in the United States, and failure to produce them may subject the multinational company to sanctions.

In developing retention policies of global coverage, the best advice is to ensure that retention schedules comply with all applicable laws and regulations, and that the retention periods can be demonstrated to meet the test of reasonableness and good faith. Retention periods can be demonstrated to be reasonable when they are neither too short nor too long. Moreover, in cases where a particular type of record is likely to be used in litigation, regulated parties may feel at liberty to establish short retention periods (assuming all relevant statutory and regulatory requirements have been satisfied), but not so short so

as to raise questions of bad faith. This means that, in cases where multinational companies “knew or should have known” that a given set of records is likely to encounter usage in resolving legal disputes, the retention period

should be established with such usage in mind. Thus, the retention period should be long enough so that opposing parties cannot impute bad faith in cases where the records have been discarded in an otherwise lawful manner. ■

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