CLIENT ALERT

U.S. Courts Order Discovery Despite Foreign Privacy Laws

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Two recent opinions by federal district courts in New York highlight the ongoing tension between U.S. discovery rules and foreign "blocking statutes" and privacy laws. These two cases continue a trend of U.S. courts ordering parties to produce discovery materials located outside the U.S. even when such production might violate foreign laws. These cases have important implications for anyone who litigates in U.S. courts for or against parties that maintain documents or electronically stored information outside the U.S.

In ***Gucci America, Inc. v. Curveal Fashion***, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010), the court ordered a third-party Malaysian bank, United Overseas Bank Malaysia ("UOB"), to produce certain documents regarding the defendant's Malaysian bank accounts even though UOB argued that production would violate Malaysian banking secrecy laws. UOB submitted a legal opinion from a Malaysian attorney in defense of its position, but the court nonetheless decided that the disclosure was warranted. The court reached this decision by applying the multi-factor analysis set forth by the Supreme Court in *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. Of Iowa*, 482 U.S. 522 (1987). The most influential factors for the court were: (1) UOB provided no information on the likelihood that it would actually be prosecuted in Malaysia for disclosing the documents; and (2) The "Malaysian government had not voiced any objections to disclosure in this case."

In ***In re Air Cargo Shipping Services Antitrust Litig.***, 2010 WL 1189341 (E.D.N.Y Mar. 29, 2010), the probability that a foreign party would be prosecuted for violating a foreign law was also a key element of the court's decision. Air France, the defendant in a multidistrict antitrust action, refused to produce five boxes of responsive documents because doing so would violate the French blocking statute. The statute imposes criminal penalties for producing evidence located in France for use in foreign legal proceedings except where procedures under the Hague Evidence Convention or other international agreements are utilized. Of note, the documents sought had already been obtained by the U.S. Dept. of Justice in a criminal antitrust investigation through a Mutual Legal Assistance in Criminal Matters ("MLAT") agreement.

After analyzing the *Société Nationale* factors, the court ordered Air France to produce the documents. The court paid particular attention to the "hardship" factor and, after citing a series of cases where the French blocking statute was not enforced, decided prosecution was unlikely. The court acknowledged a 2007 French case, *In re Christopher X*, where a French attorney was convicted and fined €10,000 for violating the blocking statute, but it noted that this was the only prosecution that Air France could cite. The court also distinguished *In re Christopher X*, explaining that the French attorney had been convicted for trying to obtain testimonial evidence for a U.S. case under false pretenses--not for responding to discovery in a foreign action. Additionally, in balancing the interests of the U.S. and France, the court held that the U.S. interest in enforcing its antitrust laws outweighed France's interest in controlling access to information within its borders--especially when France had already allowed these documents to be disclosed in a U.S. proceeding.

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These two decisions indicate that parties relying on foreign privacy laws to oppose U.S. discovery requests would be well-advised to (1) demonstrate that the foreign laws have a likelihood of being enforced, and (2) request that the foreign government in question issue an official objection to the proposed disclosures and explain the national interest involved.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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