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Compelled Waiver of Foreign Bank Secrecy for Discovery of Records Abroad

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There are many branches, agencies, and subsidiaries of foreign banks licensed to conduct banking business here in New York. These foreign-bank offices are often the targets of civil discovery requests seeking production of the bank's records located in their headquarters or branches overseas. Many foreign countries have bank-secrecy and data-privacy laws that prohibit the disclosure of a customer's banking information, including the customer's identity. These laws often impose criminal penalties (such as fines and imprisonment) and administrative penalties (such as license revocation) for violations. Well-known examples of countries with such laws are Switzerland and the Cayman Islands.

If the bank is within the jurisdiction of a federal or state court, it may face conflicting demands from (1) U.S. law, which requires disclosure of customer information relevant to the action, and (2) the law of the bank's home country, which prohibits disclosure. One way of avoiding such conflicts is through the customer's written consent to disclosure, given either voluntarily or pursuant to court order.

In virtually all countries, customer consent is an exception to bank secrecy. If the customer is unwilling to consent, a court can order a customer within its personal jurisdiction to execute a written consent. Such court-ordered waivers of bank secrecy are often called "consent directives." They are an underutilized means of obtaining civil discovery from foreign banks in a manner that may avoid violation of foreign law. This article will (a) summarize the rules governing the discovery of bank records shielded by foreign bank-secrecy law; and (b) argue that courts should, when possible, order the customer to waive bank secrecy rather than order the bank to violate another country's law.

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Personal Jurisdiction

Regardless of whether the foreign bank is within the court's personal jurisdiction, a consent directive can be useful to obtain the bank's records. Jurisdiction is a key issue, however, because it determines whether the court can compel production under U.S. rules and potentially in violation of foreign law. If the court lacks personal jurisdiction over the bank, the requesting party must pursue the discovery in the country where the records are located through the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention) or letters rogatory. Any production then will comply with the foreign country's law but probably be much narrower than under U.S. law.

> The court-ordered waiver may obtain evidence faster than a formal discovery request under either the FRCP or Hague Convention.

If the court has personal jurisdiction over the bank, it can compel the bank to produce records that are within its possession, custody or control anywhere in the world. A bank generally has control over the records of its branches, which are considered part of the same corporate entity. If the foreign bank is a non-party, the court typically will have personal jurisdiction if the bank operates, within the relevant federal district or state, either (1) a branch or (2) a subsidiary operating as a "mere department."[1] The court, however, must perform a comity analysis before ordering any production that would violate foreign law.

Comity Principles

In the U.S. Court of Appeals for the Second Circuit, courts consider seven comity factors: (1) importance of the information requested to the litigation; (2) degree of specificity of the request; (3) whether the information originated in the United States; (4) availability of alternative means of securing the information, such as the Hague Convention; (5) extent to which noncompliance with the request would undermine important interests of the United States, or compliance would undermine important interests of the state where the information is located; (6) hardship of compliance on the party from whom the discovery is sought; and (7) good faith of the party resisting discovery.[2]

The first five factors are from the Restatement (Third) of Foreign Relations Law of the United States, §442(1)(c)(1987), and were cited with approval in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543-44 & n.28 (1987). The last two factors were added by Second Circuit case law.

In *Aerospatiale*, the Supreme Court held that both the Federal Rules of Civil Procedure (FRCP) and the Hague Convention are available to obtain discovery overseas from a person within the district court's jurisdiction. The court did not prefer one method to the other, but rather cautioned that the choice between the FRCP or Hague Convention should be based on particularized analysis of the sovereign interests of the countries involved, the claims and interests of the parties, the likelihood that the chosen procedure will prove effective, and the reasonableness of the discovery requests. Id. at 543-46.

In practice, however, courts have tended to

prefer the FRCP over the Hague Convention. Although each case depends on its particular facts, the case law suggests that if (a) the party seeking discovery can demonstrate that the requested documents are important to the litigation; and (b) the requests are reasonably specific; and (c) the bank cannot prove it is likely to be criminally prosecuted if it produces the documents; then (d) a court will order production in violation of foreign bank-secrecy law.[3]

In my view, courts should be more sensitive to the sovereign interests of foreign countries embodied in their bank-secrecy laws, and to the risks imposed on banks and their personnel if forced to choose between violating their home country's or U.S. law. When possible, an international conflict of the laws should be avoided. Customer waivers of bank secrecy—both voluntary and involuntary—can help to reduce such conflicts.

Customer Waiver

Even in countries with strict bank-secrecy laws, banks normally are free to disclose information if the customer consents. Although a court can direct a party or bank within its jurisdiction to request the customer's consent, such requests usually will be futile. Customers often use the banks of certain countries precisely because of their bank-secrecy laws. The customer usually will have little incentive to consent to disclosure of its financial information, especially if the customer is a party against whom the information may be used. As a practical matter, therefore, customer consent usually means court-ordered consent.

The use of consent directives is well-established in criminal cases, with the Supreme Court approving them in *Doe v. United States*, 487 U.S. 201, 215-17 (1988). As long as the consent form contains no incriminating admissions of fact, and states it was signed pursuant to court order, a court can order a criminal defendant to consent in writing to the disclosure of bank records wherever located, and waiving any protection of foreign bank-secrecy law. In private civil cases, a few courts have used consent directives to help obtain foreign bank records concerning parties to the litigation.[4] There are several reasons to encourage this practice.

In *Aerospatiale*, the Supreme Court cautioned that "American courts should…take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." 482 U.S. at 546. An obvious example of a "special problem" is where a foreign bank is forced to violate bank-secrecy law and risk criminal penalties. If that bank is a non-party, as often is the case, any interest in enforcing U.S. discovery rules becomes even more attenuated, and a court should be extra vigilant to avoid imposing an undue burden.

In many cases, a consent directive will avoid forcing the bank to violate either foreign or U.S. law, and will respect the sovereign interests of the country whose law requires bank secrecy. If the bank customer is a party and therefore within the court's personal jurisdiction, and if the banking information is needed to fairly adjudicate the action, it is reasonable to require the customer to provide the information or remove a legal obstacle to the bank's providing it. The court-ordered waiver may obtain evidence faster than a formal discovery request under either the FRCP or Hague Convention.

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There is no guarantee, however, that the banks of every country with a bank-secrecy or data-privacy law will comply with a customer waiver signed under compulsion by a U.S. court. The party opposing the discovery might argue that production pursuant to a consent directive would violate the foreign country's law. But that issue should be resolved, if necessary, in the foreign country. In *Marsoner v. United States*, 40 F.3d 959, 966 (9th Cir. 1994), the court upheld the compelled waiver of Austrian bank secrecy, and reasoned that "the Austrian courts will be free to decide whether the directive constitutes valid consent under Austrian law." Likewise, in *Motorola Credit* and in *Bank of Crete* (supra note 4), defendants argued that consent directives would be ineffectual in Switzerland and other countries. Rather than adjudicate any issue of foreign law, the courts ordered defendants to sign waivers so that plaintiffs could use them to try to obtain records from foreign banks. This practice generally should be followed.

If the bank refuses to comply with the consent directive, the party seeking the discovery can (a) pursue it through the Hague Convention, if the foreign country is a signatory; (b) use letters rogatory; (c) apply to a court of the foreign country to compel disclosure, if permitted by local law; or (d) if the bank is within the U.S. court's jurisdiction, move to compel discovery under U.S. rules supported by comity analysis.

When a bank in a U.S. court's personal jurisdiction is served a discovery request seeking records shielded by foreign bank-secrecy law, the bank's counsel promptly should investigate if a U.S.-court-ordered customer consent would be an exception under that country's bank-secrecy law. If so, counsel should inform the requesting party (without admitting the existence of the customer relationship or of responsive documents, and preserving any other objections) of the bank-secrecy problem and of the bank's willingness to produce responsive documents, if any, if the customer provides written authorization either voluntarily or under court order. If the customer will not voluntarily waive bank secrecy, the burden of applying to the court for the consent directive should be on the party seeking the discovery. If necessary, the bank can raise the issue with the court in a motion to quash or for protective order.

Whenever possible, courts should try to avoid forcing foreign banks to violate either U.S. or foreign law concerning disclosure of information. Consent directives can be very useful to obtain such information while avoiding a conflict between the U.S. and foreign law. They should be considered, and used, more often by our courts.

1. See, e.g., *Tiffany (NJ) v. Forbse,* 2012 U.S. Dist. LEXIS 72148, at *8-9 (S.D.N.Y. May 23, 2012) (court had jurisdiction over Chinese bank through its New York branch); *King County, Wash. v. IKB Deutsche Industriebank*, 712 F.Supp.2d 104, 110-13 (S.D.N.Y. 2010) (court had jurisdiction over German bank whose New York subsidiary operated as mere department rather than independently).

2. See, e.g., *Gucci America v. Weixing Li*, 2011 U.S. Dist. LEXIS 97814, at *15-16 (S.D.N.Y. Aug. 23, 2011).

3. See, e.g., *NML Capital v. Republic of Argentina,* 2013 U.S. Dist. LEXIS 17572, at *45-50 (S.D.N.Y. Feb. 8, 2013) (ordering production violating laws of Uruguay and other countries where requested information was important to enforce judgment, and bank did not provide examples of criminal penalties suffered by banks under similar circumstances); *Gucci America v. Curveal Fashion*, 2010 U.S. Dist. LEXIS 20834, at *6-22 (S.D.N.Y. March 8, 2010) (same, except production violated Malaysian law).

4. See, e.g., *Motorola Credit v. Uzan*, 2003 WL 20311, at *6-8 (S.D.N.Y. Jan. 29, 2003) (ordering defendants to sign forms consenting to release of bank records in Switzerland and elsewhere, and disclosing execution under court order); *Hansel 'N Gretel Brand v. Savitsky*, 1997 WL 633467, at *1-2 (S.D.N.Y. Oct. 10, 1997) (same); *Bank of Crete v. Koskotas*, 1989 WL 46587, at *1-3 (S.D.N.Y. April 21, 1989) (same); cf. *Shamis v. Ambassador Factors,* 34 F.Supp.2d 879, 891 (S.D.N.Y.) (ordering plaintiff, assignee of company in receivership, to indemnify receiver against any claims resulting from receiver's waiving Hong Kong bank secrecy), modified in part on other grnds, 187 F.R.D. 148 (S.D.N.Y. 1999).