

Good faith standard for cross-border discovery subject to foreign nondisclosure laws

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Litigants are increasingly facing challenges concerning international discovery in connection with New York litigation. Given the broad scope of discovery permitted in the American judicial system, including the Commercial Division, litigants and courts alike wrestle with the conflict between broad, domestic discovery rules and foreign nondisclosure laws that preclude or limit the disclosure of certain information, at times presenting parties with the difficult choice of defying a New York court discovery order or violating a foreign nondisclosure law. When presented with this challenge, an increasingly important element in the court's consideration is whether the responding party has made a good faith effort to comply with the discovery request.

US Supreme Court guidance

The leading United States decision on the tension between United States discovery and foreign nondisclosure laws is *Société Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 78 S. Ct. 1087 (1958). As the *Rogers* court noted: "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." The Supreme Court subsequently reaffirmed this principle in *Société Nationale Industrielle Aérospatiale v. US Dist. Court for S. Dist. of Iowa*, 107 S.Ct. 2542 (1987) ("*Aérospatiale*").

In both *Rogers* and *Aérospatiale*, however, the Supreme Court held that foreign nondisclosure laws "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate th[ose] statute[s]." *Aérospatiale*, 107 S.Ct. at 2556 n.29 (citing *Rogers*, 78 S.Ct. at 1091–92). Rather, the *Aérospatiale* court found that a "more particularized analysis" is required where a party claims that foreign law prohibits disclosure

of information sought. In a footnote, the *Aérospatiale* court endorsed the following factors, from a draft of what is now Section 442 of the Restatement (Third) of Foreign Relations Law of the United States, as relevant to this analysis: "(1) the importance to the ... litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." *Id.* at 2556 n.28.

The good faith factor

Subsequent federal cases drew on different aspects of the *Rogers* and *Aérospatiale* decisions. Federal courts in the Second Circuit have consistently construed those decisions as considering a resisting party's good faith efforts to comply with discovery in deciding whether to grant a motion to compel.

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For example, in the often cited case *Minpeco v. Conticommodity Servs.*, 116 F.R.D. 517 (S.D.N.Y. 1987), the Southern District of New York declined to issue an order compelling a Swiss defendant to produce certain documents and interrogatory answers containing information the disclosure of which would violate Swiss bank secrecy laws. In making that determination, the court considered as a “principal” factor whether the defendant demonstrated good faith in addressing its discovery obligations. The district court interpreted the *Rogers* decision as imposing a good faith requirement because the *Rogers* court “considered a Swiss company’s good faith efforts to comply with a production order” in determining whether sanctions were warranted. *Id.* at 522 (citing *Rogers*, 78 S.Ct. at 1093–96). In assessing the defendant’s good faith effort, the court recognized that the defendant had previously “made extensive attempts to secure waivers of bank secrecy rights” and, therefore, the district court was not presented with “a situation in which the resisting party has not made reasonable efforts to apply to the appropriate governmental authority for an exemption to such a statute.” In denying the plaintiffs’ motion to compel, the court also found that it was “fairly clear” that ordering the defendant to disclose the information sought would place it in violation of Swiss criminal law, “with little likelihood of asserting a successful defense based on foreign judicial compulsion.”

First department guidance

The First Department considered this issue on an appeal from a decision by Justice Karla Moskowitz of the New York County Commercial Division in *Richbell Info. Servs. v. Jupiter Partners*, 32 A.D.3d 150 (1st Dep’t 2006). In *Richbell*, the defendant sought to depose the plaintiff, a resident of Malaysia. The plaintiff, however, invoked the Malaysia Offshore Companies Act 1990 in response to the defendant’s notice of deposition and motion to compel questioning as to the plaintiff’s current employment, among other noticed topics. While the plaintiff did provide answers to general questions as to his line of business and dates of employment, he refused to answer the remaining noticed topics on the ground that disclosing such information would necessarily violate the Malaysia Act.

After the Commercial Division compelled the plaintiff to answer the lines of questioning, the plaintiff appealed. On appeal, the First Department adopted the approach of federal courts in the Second Circuit and expressly recognized that when “a conflicting foreign statute such as the [Malaysia Offshore Companies] Act exists, courts also consider, *inter alia*, the good faith of the party resisting discovery; the hardship of compliance on the party from whom discovery is sought; the nationality of the person who must provide the information; whether the party resisting discovery is the plaintiff; and, the amount of discovery already provided.” *Id.* at 156 (citing *In re Grand Jury Subpoena dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002); *Minpeco*, 116 F.R.D. 517). The plaintiff’s good faith was implicit in his willingness to answer certain lines of questioning. However, the First Department partly agreed with the defendant that the Malaysia Act “did not prohibit all of the disclosure” sought. Accordingly, to the extent that the court concluded the information sought was relevant under the heightened standard of relevance for international discovery, the First

Department ordered the plaintiff to disclose any such information that would not violate the Malaysia Act.

Commercial division analysis

The most recent Commercial Division decision addressing this issue comes from Justice Andrew Borrok of the New York County Commercial Division in *Starr Russia Investments III B.V. v. Deloitte Touche Tohmatsu Ltd.*, No. 652251/2017, 2019 WL 5423753 (N.Y. Co. Oct. 23, 2019). In *Starr Russia*, the plaintiff Starr Russia brought suit against several entities associated with Deloitte. Starr Russia alleged that, in reliance on Deloitte’s reputation, it invested approximately \$110 million in Investment Trade Bank (“ITB”), a Russian joint stock company, and then chose not to exit its ITB investment due to reassurances from Deloitte. When the Central Bank of Russia revealed that ITB was insolvent and ordered another Russian bank to take it over, Starr Russia allegedly lost the entire value of its investment, and thus Starr Russia sued Deloitte for fraud.

After surviving a motion to dismiss and commencing discovery, Starr Russia moved for an order compelling defendant Deloitte-ZAO, a Russia-based Deloitte entity, to produce documents located in Russia pertaining to Deloitte-ZAO’s relationships with ITB, Starr Russia, and other Deloitte entities, as well as Deloitte-ZAO’s other business activities. While Deloitte-ZAO produced some of the requested documents, it claimed that it was precluded from making further document productions due to disclosure restrictions imposed by Russia’s Auditing Law, Banking Law and Personal Data Law. Deloitte-ZAO argued that each Russian law contains provisions that prevent disclosure of confidential information, subject to limited exceptions.

In support of its position that certain document production is restricted under Russian law, Deloitte-ZAO proffered an affidavit from a Russian law expert. The expert explained that while the Auditing Law likely did not preclude production because of an exception for court proceedings, the Banking Law and Personal Data Law prohibited the disclosure of the information sought unless it was produced in redacted form in accordance with Russian law, and certain documents about bank operations that had been provided to auditors could not be produced at all, even in redacted form. The expert also noted, however, that the documents sought could be produced in accordance with Russian law if the custodians of the documents consented to their disclosure.

Based on these available exceptions, Justice Borrok granted Starr Russia’s motion and ordered Deloitte-ZAO to make a good faith effort to seek the consent of all parties from whom consent was required under Russian law. In the event Deloitte-ZAO was unable to obtain consent, Justice Borrok ordered Deloitte-ZAO to produce any remaining documents in redacted form.

Although not cited, Justice Borrok’s decision is consistent with the First Department’s analysis in *Richbell*, which considered the good faith effort of the party resisting discovery to comply with its discovery obligations.

Accordingly, the *Starr Russia* decision suggests that when faced with conflicting foreign law, the Commercial Division will consider, and possibly require, a party's good faith efforts to comply with New York discovery obligations in deciding a motion to compel.

The conflict between New York's expansive discovery rules and foreign nondisclosure laws can also impact the forum non conveniens analysis. For example, in *Peters v. Peters*, No. 6004562004, 2011 WL 11076564 (N.Y. Co. July 12, 2011), Justice Barbara R. Kapnick of the New York County Commercial Division considered the effect of Swiss secrecy laws in ruling on a motion to dismiss on forum non conveniens grounds. The complaint alleged a conspiracy arising out of the administration of a trust established by the plaintiff's aunt, based on advice from Swiss advisors and funded with assets in Swiss bank accounts. In granting the motion to dismiss, Justice Kapnick found that one of the difficulties in litigating the dispute in New York was the "conflict between New York discovery practices and Swiss bank secrecy laws, which could involve litigation in the Swiss courts anyway and subject the witnesses to criminal penalties if they responded without authorization by a Swiss court." *Id.* at *9 (citing *Minpeco*, 116 F.R.D. 517). In addition, a court will likely consider in the good faith analysis whether the party resisting discovery has provided discovery that is not barred by the foreign privacy law, including perhaps in redacted form, as opposed to an outright refusal to comply.

Conclusion

Litigants resisting discovery on the basis of conflicting foreign privacy laws should be prepared to demonstrate that they made a good faith effort to comply with the New York discovery demands. Such good faith efforts can take various forms, depending on the factual context. As in *Rogers*, those good faith efforts can take the form of seeking waivers from foreign authorities of the privacy law restrictions where possible or, as in *Starr Russia*, by seeking the consent of custodians authorized to waive the privacy law restrictions. In any event, a litigant's good faith would be further demonstrated by responding to the discovery to the extent permitted by foreign law rather than a wholesale refusal to respond.

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