

## When U.S. Discovery And Foreign Blocking Statutes Conflict: Third Parties, Take Note

Nolan M. Goldberg

PROSKAUER ROSE LLP

On March 8, 2010, the U.S. District Court for the Southern District of New York issued the latest opinion addressing the conflict between U.S. discovery laws and foreign blocking statutes.

In *Gucci Amer., Inc. v. Curveal Fashion*, No. 09 Civ. 8458, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010), the court compelled third-party United Overseas Bank Limited, Singapore ("UOB"), the parent of a Malaysian-based bank, to

*Nolan M. Goldberg is an IP & Technology Counsel in Proskauer's Litigation & Dispute Resolution Department and a member of the Patent Law Group, resident in the New York office. As an intellectual property litigator, his practice focuses on patent, trademark, and trade secret litigation and counseling. As a founding member of the Litigation Department's Electronic Discovery Task Force, Mr. Goldberg is often called upon to develop e-discovery strategies to be used in all types of litigations, with a particular focus on managing the overall burden and cost of the electronic discovery process and obtaining often overlooked electronic evidence, including computer forensics.*

produce documents located at its subsidiary despite claims that such production was illegal under the Malaysian law.

The potential conflict between foreign blocking statutes and U.S. discovery laws is a well documented problem. See, e.g., Working Document 1/2009 on pre-trial discovery for cross border civil litigation (European Commission, Working Document No. WP 158, 2009).

When considering whether to order production despite the applicability of foreign law, Courts in the U.S. apply the test set forth in the Restatement (Third) of Foreign Relations Law of the United States, which includes consideration of:

[T]he importance of the documents or information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of retrieving 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 the important interests of the state where the information is located.

*Gucci* 2010 WL at \*2.

Further, in the Second Circuit, two

additional factors are considered, "the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery." *Id.*

In *Gucci*, the Plaintiff sought certain documents and information regarding Defendants' Malaysian bank accounts by serving a subpoena on UOB's New York Agency in midtown Manhattan. *Id.* at \*1. UOB took the position that complying with the subpoena would violate banking secrecy laws in Malaysia. *Id.* After consideration of the Restatement and Second Circuit factors, the court ordered the production of the sought after records because:

[T]he documents are vital to the litigation, the requests are direct and specific, the documents are not easily obtained through alternative means, the interest of the United States outweighs that of Malaysia under the circumstances, and the likelihood that UOB N.Y. would face civil or criminal penalties is speculative. Although UOB N.Y. has acted in good faith, and the documents are located abroad, this is insufficient to overcome those factors weighing in favor of disclosure.

*Id.* at \*8.

Putting aside the question of whether

the court's analysis was correct, there are two wrinkles to this case that are worthy of note.

First, UOB was a third party, and courts are generally less willing to impose burdens on third parties during discovery than they are on primary parties. The *Gucci* court considered UOB's third-party status during its analysis of the "hardship factor," but determined that this factor did not outweigh the Restatement factors favoring production. *Id.* at \*7.

Finally, with regard to the importance of the documents sought, it is worth noting that the requested documents were not relevant to a claim or defense, but were instead directed toward the enforcement of a judgment. The court noted that in the absence of the requested discovery, "Plaintiffs are left without a remedy and it cannot be said that the matter has been 'fully and fairly adjudicated.'" *Id.* at \*5.

This opinion illustrates the no-win situation that foreign corporations continue to be placed in by the tension between U.S. courts and foreign law, and underscores the importance of raising foreign-law-based discovery objections as early and in as detailed a manner as possible in order to maximize the chances of successfully navigating this conflict.

Please email the author at [ngoldberg@proskauer.com](mailto:ngoldberg@proskauer.com) with questions about this article.