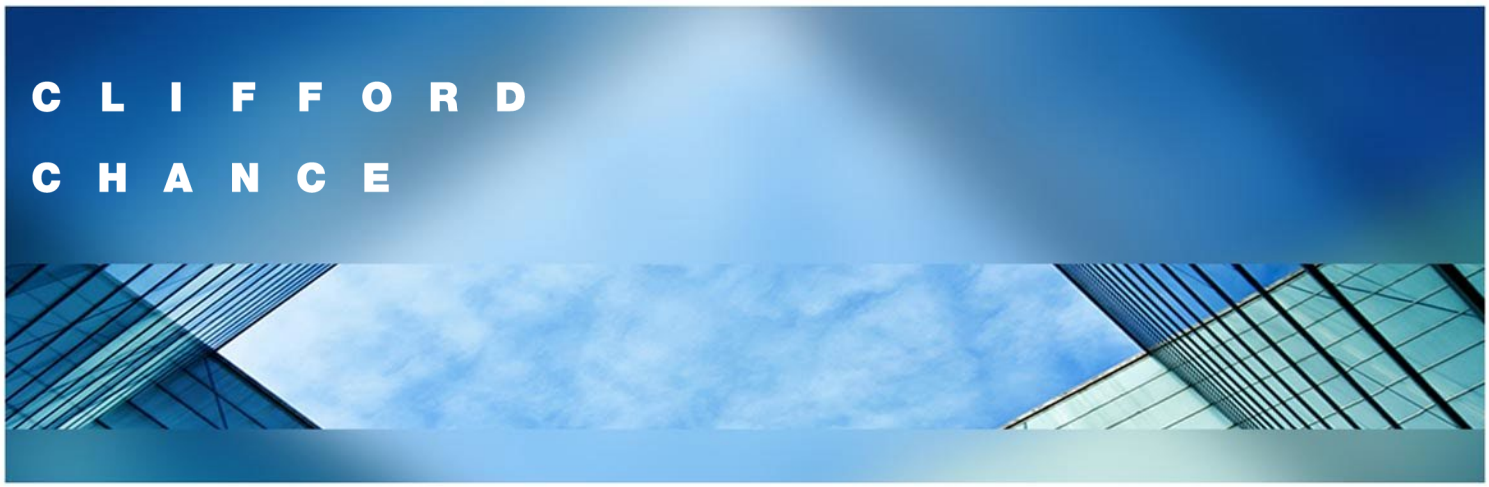

SUPREME COURT DECLINES OPPORTUNITY TO ADDRESS GDPR'S EFFECT ON U.S. DISCOVERY

The EU General Data Protection Regulation ("GDPR"), the EU's much publicized privacy law, which took effect in May 2018, is becoming increasingly relevant in U.S. litigation, as parties consider whether and to what extent the GDPR affects their discovery obligations. While lower courts have considered the issue, the U.S. Supreme Court has just declined an opportunity to do so in *Vesuvius USA Corp. v. Phillips*, No. 20-1275.

The GDPR regulates the use of personal data concerning individuals in the EU. Parties subject to the GDPR must comply with various privacy requirements, such as minimizing the processing of personal data and maintaining appropriate security measures. However, regardless of what the GDPR might require, such a party might also face U.S. discovery requests to produce personal data subject to the provisions of the GDPR. Since the effective date of the GDPR, various lower courts in the United States have had to address questions of whether and/or to what extent data subject to the GDPR should be required to be produced under U.S. discovery rules.

In *Vesuvius*, the party resisting discovery argued that any disclosure of GDPR-protected data should be allowed only pursuant to the procedures of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"). In other words, the argument was that an EU court should have a role in the process of deciding what evidence must be disclosed. The state courts of Ohio rejected that argument, and ordered the production of the requested material. The U.S. Supreme Court denied a petition for *certiorari*.

Without input at this time from the Supreme Court, the full scope of the GDPR's potential impact on U.S. discovery will continue to be addressed on a case-by-case basis in the lower courts.

GDPR Overview

The GDPR protects "personal data," defined broadly to include essentially any information that relates directly or indirectly to natural persons in the EU ("data subjects"). EU-based persons or entities and those who do business in the EU,

among others, are potentially subject to the restrictions and obligations set out in the GDPR.

To comply with the GDPR, the "processing" (or use) of personal data in any way must have a valid legal basis. For example, potential bases for processing include the consent of the data subject, or where the processing is necessary for other "legitimate interests" (subject to a balancing of those interests against competing privacy interests of the data subject). (*See* GDPR Art. 6(1).) Where processing is allowed, the GDPR imposes various additional restrictions, *e.g*., that the processing must be limited to what is necessary and that appropriate safeguards must be maintained.

The GDPR also restricts the transfer of personal data to countries outside the EEA which are not subject to an adequacy decision by the European Commission, and expressly provides that a foreign court order is not by itself a basis for such a transfer, unless "based on an international agreement." (Art. 48.) However, the GDPR elsewhere allows the transfer of data outside the EU where "necessary for the establishment, exercise or defence of legal claims." (Art. 49(1)(e).)

The GDPR provides that non-compliance can subject a party to administrative fines of as much as up to 4% of global annual turnover (or €20 million, whichever is higher), as well as private suits for damages by affected data subjects.

U.S. Discovery Background and the *Aerospatiale* Decision

In the U.S. discovery process, parties (and non-parties subject to the court's jurisdiction) generally must produce relevant information within their possession, custody, or control. Such information may be sought in various forms — *e.g*., requests for documents (including email) and interrogatories that seek names and contact information of potential witnesses.

As a matter of U.S. law, a party may be required to produce such information even if doing so would conflict with the party's obligations in another jurisdiction. The Supreme Court has stated:

> It is well settled that [foreign] statutes 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 that statute.

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.29 (1987).

Moreover, discovery ordinarily may be sought directly from a person subject to the court's jurisdiction. This is so regardless of where the information is located. In other words, a non-U.S. party can be required to produce information located abroad without any involvement of a foreign court. Notably, while the Hague Evidence Convention provides a system by which authorities in one nation can assist authorities in another nation in the collection of evidence located abroad, the Supreme Court held in *Aerospatiale* that those procedures are "optional" in U.S. litigation. *Id.* at 533-541. The Court reasoned that always requiring resort to the Hague for evidence located abroad "would subordinate the [U.S.] court's supervision of even the most routine of [] pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities." *Id.* at 539.

However, the Supreme Court also cautioned that, in the interest of international comity, "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." *Id.* at 546. Thus, when deciding whether to order discovery that conflicts with foreign law, courts should consider factors such as: (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 U.S.; (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 U.S., or compliance with the request would undermine important interests of the state where the information is located. *Id.* at 544-546 & n.28. This requires a case-by-case analysis.

Foreign Privacy Law Objections to U.S. Discovery

Based on the Supreme Court's guidance in *Aerospatiale*, lower courts generally have addressed objections to discovery based on foreign privacy law (including the GDPR) in a two-step analysis. *First*, the party resisting discovery has the burden of showing that complying with the requests would conflict with applicable foreign law. *Second*, if there is a conflict, the court conducts a comity-based analysis to determine whether the discovery should be required anyway and/or in what manner. This includes consideration of the factors suggested by the Supreme Court in *Aerospatiale*, as well as other factors such as the good faith of the party resisting discovery and the nature and extent of the hardship that party would face if the discovery were required. *See, e.g., Laydon v. Mizuho Bank Ltd*., 183 F. Supp. 3d 409, 413, 419-20 (S.D.N.Y. 2016).

In practice, the result of this analysis has usually been that relevant material must be produced notwithstanding foreign privacy law. This is sometimes because a party fails to show that there is any real conflict with foreign law. And in any event, courts often find that the need for relevant information outweighs concerns about foreign law. This is especially so where a confidentiality order would limit disclosure of the allegedly protected information and where a court considers that there is little likelihood that the producing party would be punished by foreign regulators. However, while denying blanket objections to all discovery, courts have at least indicated a willingness to consider more modest accommodations of foreign privacy interests.

In the context of the GDPR, U.S. courts have not yet engaged in much analysis of the substantive requirements of the GDPR (*i.e*., whether and to what extent there really is a conflict with U.S. law), and have tended to focus on the *Aerospatiale* factors. For example:

- In *AnywhereCommerce, Inc. v. Ingencio, Inc*., defendants failed to produce any documents at all based on GDPR objections. No. 19 Civ. 11457, 2020 WL 5947735 (D. Mass. Aug. 31, 2020). The court noted a potential "litigation exemption to the GDPR," such that there might be no real conflict. But even assuming a conflict, the court required document production without redaction, noting that "[w]here Plaintiff is effectively being precluded from proceeding in the normal course of litigation, concerns about comity carry less weight." However, the court directed

that, in the interests of comity, discovery should first focus on the U.S. defendants who had "much of the relevant information" at issue (with discovery from the foreign defendants to await further proceedings).

- In *In re Mercedes-Benz Emissions Litigation*, the court rejected defendants' argument that they be allowed to withhold the names and contact information of potential witnesses and redact names from emails. No. 16 Civ. 881, 2020 WL 487288 (D.N.J. Jan. 30, 2020). The court found that this information was "directly relevant" and so required defendants to make "the production of unredacted documents commonly produced in U.S. litigation." In part, the court reasoned that the interests of the U.S. litigation outweighed any foreign privacy interests in names and contact information, especially where the disclosure was to be kept highly confidential under the relevant protective order. The court also noted that defendants could redact "irrelevant personal information of an intimate or private nature[.]"
- Similarly, in *Finjan, Inc. v. Zscaler, Inc*., the court required the production of relevant emails from a UK witness without redacting names because those names were "relevant to determining who [the witness] communicated with about the issues in this case." No. 17 Civ. 6946, 2019 WL 618554, at *3 (N.D. Cal. Feb. 14, 2019). The court noted that the privacy concerns reflected in the GDPR were lessened given the relevance of the witness, the "limited search terms" being used, a protective order allowing highly confidential treatment, and "no evidence of the extent to which the government enforces its laws."

The *Vesuvius* Case

The *Vesuvius* case involves an employment discrimination suit. Plaintiff was an employee of Vesuvius USA Corporation ("Vesuvius") until his termination in 2018. He brought suit in Ohio state court, alleging various claims of age discrimination.

In the course of discovery, plaintiff requested that Vesuvius produce the personnel files of certain individuals employed by European affiliates of Vesuvius. Vesuvius objected, arguing that disclosing the files would run afoul of the GDPR. Plaintiff moved to compel production, and the trial court granted the motion. Vesuvius appealed.

The Ohio Court of Appeals affirmed in part. *See Phillips v. Vesuvius USA Corp*., No. 108888, 2020 WL 3118892 (Ohio Ct. App. June 11, 2020). The court did not decide whether the requested production actually would violate the GDPR. Instead, the court assumed that there was a conflict and went straight to a comity analysis. Noting that the GDPR is not "an absolute bar" to discovery in the U.S., the court found that the production should be made. Among other reasons:

- The requested personnel files were important to the litigation and represented "basic discovery in employment-related cases";
- The request related only to specified personnel files and so was not overbroad;
- Requiring plaintiff to proceed through the Hague Evidence Convention for documents that "have been requested for over a year [] is not a viable alternative to [Ohio's] liberal discovery rules";

- Ohio has a "clear public policy" against age discrimination; and
- Vesuvius failed to show that compliance "would lead to hardship or an enforcement action from an EU data protection supervisory authority for breach of the GDPR."

However, while overruling Vesuvius's objections, the court noted that the personnel files might contain information that was irrelevant and/or confidential. Therefore, prior to disclosure, the trial court should conduct an in camera review of the documents for potential redactions.

Vesuvius petitioned the U.S. Supreme Court for review. Vesuvius argued in part that the Court should provide "updated guidance" on the *Aerospatiale* framework in light of the increasing importance of foreign privacy laws. On May 17, 2021, the Court denied the petition.

Conclusion

Without further guidance from the Supreme Court, lower courts will have to continue to sort out the potential impact of the GDPR on a case-by-case basis. A few practical considerations are in order:

- Blanket objections to the production of relevant material based on the GDPR, or arguments that such discovery always must go through the Hague Evidence Convention, may face more resistance from U.S. courts looking to achieve a practical solution that balances the parties' interests and the discovery needs of the case.
- Courts may be open to more limited accommodations, such as heightened confidentiality protections or redactions of sensitive, irrelevant material. The extent to which courts accept these or other potential limits will depend on the circumstances of a given case.
- Parties making GDPR-based objections should be prepared to address with particularity how the GDPR affects the discovery at issue. This is especially so as U.S. courts and regulators become more familiar with the requirements of the GDPR.
- Courts may show more deference to third-parties who are required to produce information potentially in violation of foreign privacy law. *See, e.g., In re Hansainvest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243, 252 (S.D.N.Y. 2018) (requiring the party seeking Section 1782 discovery from third-party target to pay any costs of GDPR compliance and indemnify target for potential breaches thereof).
- In considering whether to order discovery in conflict with foreign privacy law generally, U.S. courts often consider whether the party resisting discovery is at real practical risk of being penalized for violating the foreign law. For this reason, it will be important to watch whether and how the GDPR is enforced in connection with disclosures of personal data in U.S. litigation.

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