The US Judicial Approach to Foreign State Bank Secrecy Rules in Civil Anti-Terror Litigation

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Private civil lawsuits brought by terror victims against financial institutions alleged to have facilitated the funding of terror attacks that injured or killed them, have brought US federal courts face-to-face with foreign state bank secrecy rules. The victim plaintiffs in these cases bear the burden of proving their allegations. They use the broad discovery powers available under the Federal Rules of Civil Procedure and the local rules applicable in federal court districts as a sword, in order to compel the production of incriminating bank records. The financial institution defendants respond by refusing to produce the records, relying on foreign state bank secrecy rules as their justification and shield. The clash is forcing courts to revisit bank secrecy in a new context, and in the process to develop the contours of bank secrecy jurisprudence. We will not know the final outcome until these cases have wound their way through the trial and appellate courts, and in those cases where a court has issued a protective order we may never know the final outcome. However, in the meantime, we may be able to anticipate the trend.

Section 442(1)(c) of The Restatement (Third) of the Foreign Relations Law of the United States (1987), provides some important guidance to US courts trying to decide whether to issue an order requiring the production of information located abroad, notwithstanding the presence of a foreign blocking statute. It states:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which non-compliance 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.

In *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa,* the US Supreme Court endorsed the Section 442(1)(c) analysis, and federal district and appellate courts have approved its application in the specific context of discovery conflicts.

In most civil anti-terror litigation, the application of Section 442(1)(c) is likely to result in an order to disclose targeted banking records. Courts are likely to find that the interest of the United States in staunching the financing of terrorist attacks that kill and maim is an overriding interest that outweighs any conceivable interest of any foreign state that is served by its bank secrecy rules. Firstly, the interests protected by bank secrecy rules are really private interests - the financial privacy interests of depositors, and the commercial interests of financial institutions in stimulating and retaining business on the basis of promised financial privacy – and as such subordinate to the public interest of stopping terrorist attacks. For example, in Minpeco, SA v. Conticommodity Services, Inc., the court held that the Swiss bank secrecy statute is not an expression of Swiss sovereignty, but a codification of a merely private interest:

> [A]lthough the bank secrecy privilege is codified in the Swiss criminal code, it differs from the traditional criminal proscription in that it remains a personal privilege that can be waived by the bank customer. In this sense, then, the Swiss bank secrecy law primarily protects the right of commercial privacy of bank clients, not the Swiss government itself or some other public institution or interest.

Secondly, as far as private interests go, this particular private interest, the interest in financial privacy, has been denigrated by US courts. In *U.S. v. Miller*, the US Supreme Court held there is "no legitimate 'expectation of privacy'" and thus no constitutionally protected privacy right in banking records and "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." In *Clayton Brokerage Co., Inc. of St. Louis v. Clement,* the court held that a bank had to comply with a civil discovery request for the production of bank records because "the issuance of a subpoena requiring the bank to produce its records is not violative of any cognizable privacy right of the [account holder]."

Courts may also find that the overriding interest of the United States in combating terror financing is actually an interest shared by the very foreign state whose bank secrecy rules the defendants have invoked. This is the case because combating terror financing is an international imperative, and prohibitions against terror financing have been incorporated into universally applicable customary international law. The incorporation into customary international law is evidenced in part by the adoption by the General Assembly of the United Nations of the *International Convention for the Suppression of the Financing of Terrorism* (the "Financing Convention"), which has been ratified by over 130 countries and states in Article 2:

> 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
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> ... (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict,

> when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Even if a foreign state has not ratified the Financing Convention, it is still evidence of the content of customary international law, which applies universally to all states. But especially where a foreign state has ratified the Financing Convention, or where it has signed onto similar international treaties or programmes aimed at stopping terror financing, it will be difficult for it to claim that it does not share the overriding interest. For example, the Middle East and North Africa Financial Action Task Force (MENAFATF) has adopted the Forty Recommendations on Money Laundering and the Special Recommendations on Terrorist Financing that were created by the Financial Action Task Force. Recommendation 4 states "[c]ountries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations." Recommendation 36 states "...countries should not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality." The MENAFATF Member States include more than one Arab State that hosts locally incorporated operated banks and/or branches alleged to be involved in terror financing.

Some Arab financial institution defendants have attempted to escape liability by denying that there is any consensus on the legal definition of terrorism, and by making a distinction between illegal acts of terrorism on the one hand and violent but nevertheless legitimate acts of self-determination on the other. In other words, they have agreed in principle that bank secrecy rules will not protect bank records related to the financing of terrorism, but where the bank records relate to the financing of violent acts of self-determination they remain protected. They point out that the 1998 Arab Convention on Combating Terrorism, the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism, and the 1999 Convention of the Organization of African Unity on the Prevention and Combating of Terrorism, all exclude certain violent acts from their scope. For example, Article 3(1) of the Organization of African Unity (OAU) provides:

> [T]he struggles waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces, shall not be considered as terrorist acts.

Furthermore, the Hashemite Kingdom of Jordan, the Syrian Arab Republic and the Arab Republic of Egypt have submitted very similarly worded declarations to the Financing Convention that are related to acts of self-determination.

Thus far, this line of argument advanced by the financial institution defendants has not been well received by the courts. The courts have held that while there is indeed a right under international law to self-determination, the right must be exercised legitimately, *in accordance with the principles of international law* (keying on the restrictive language appearing in the OAU Convention itself), and that the suicide bombing of shoppers in crowded street markets manifestly *is not* in accordance with the principles of international law.

In the first instance, US courts may seek to resolve the bank secrecy concerns of financial institution defendants by forcing the victim plaintiffs to narrow the terms of their discovery. US courts may also require the financial institution defendants to make a good faith effort to obtain the authorisation of the relevant foreign state authority for the release of the banking records. The courts may also seek to accommodate a legitimate need for bank secrecy by making the records disclosed and the attendant testimony and legal argument subject to a protective order prohibiting further disclosure to anyone who is not a party to the litigation. However, if an order to disclose has been made, and a financial institution defendant fails to comply with the order, and has also failed to make a good faith effort to obtain foreign state authorisation, or has deliberately concealed or removed records, then the courts may impose sanctions including a finding of contempt, dismissal of a claim or defence or default judgment. Even where a financial institution defendant has made a good faith effort to obtain foreign state authorisation, if it has failed to do so and has not complied with the production order, then in appropriate cases US courts may also make findings of fact adverse to the defendant.

Theoretically, even if a US court issues an order requiring the disclosure of banking records notwithstanding the assertion of a foreign bank secrecy law, individual defendants and witnesses might be able to invoke the Fifth Amendment privilege against self-incrimination, which states that "No person...shall be compelled in any criminal case to be a witness against himself...." It is unclear whether, in this circumstance, without a grant of immunity to the individual defendant or witness, the court would retain the same ability to impose sanctions and make adverse findings of fact. There is some case law to indicate that it would.

The approach outlined in the Restatement (Third) and adopted by US courts is a carefully tailored, thoughtful and even handed approach to dealing with foreign state bank secrecy rules in the context of civil litigation against international terrorism. There is yet another, and very different arena in which US courts are grappling intensely with foreign bank secrecy, the arena of international tax investigations and enforcement. The battle is unfolding notoriously in the UBS litigation now pending in the US federal district court in Florida, where the Internal Revenue Service has petitioned the court to enforce a so called "John Doe" summons seeking information on thousands of client accounts located in Switzerland. The way in which the courts approach bank secrecy in that case may differ dramatically, given the different policy issues and treaty frameworks.

END NOTES:

1. *The Restatement is produced by the American Law Institute www.ali.org, a private organisation comprised of eminent legal scholars, practitioners and jurists, founded to "promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." The Restatement is not a primary source of law, such as statutes, regulations or judicial decisions, but it is persuasive and relied upon as a secondary source of law.*
2. *See Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522, 544 n. 28, 556 (1987).*
3. *See eg British Intern. Ins. Co. Ltd., 2000 WL 713057; Madanes v. Madanes, 186 F.R.D. 279, 285-86 (S.D.N.Y. 1999).*
4. *Minpeco, SA v. Conticommodity Services, Inc., 116 F.R.D. 517 (S.D.N.Y. 1987).*
5. *U.S. v. Miller, 425 U.S. 435, 442-43 (1976).*
6. *Clayton Brokerage Co., Inc. of St. Louis v. Clement, 87 F.R.D. 569, 571 (D.Md. 1980).*
7. *International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, ¶ 1, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).*
8. *See Memorandum of Understanding Between the Governments of the Member States of the Middle East and North Africa Financial Action Task Force Against Money Laundering and Terrorist Financing, November 30, 2004, www.menafatf.org/images/UploadFiles/MOU-Eng.pdf*
9. *The original signatory Member States include the Hashemite Kingdom of Jordan, the United Arab Emirates, the Kingdom of Bahrain, the Republic of Tunisia, the People's Democratic Republic of Algeria, the Kingdom of Saudi Arabia, the Syrian Arab Republic, the Sultanate of Oman, the Republic of Yemen, the Kingdom of Morocco, the Arab Republic of Egypt, the Republic of Lebanon, the State of Kuwait and the State of Qatar.*
10. *See eg Oran Almog et al. v. Arab Bank, Plc, No. 04-CV-5564 (NG)(VVP) (E.D.N.Y. January 29, 2007).*
11. *Section 442(2) of The Restatement (Third) of the Foreign Relations Law of the United States (1987).*
12. *Baxter v. Palmigiano, 425 US 308 (1976).*