

2. An order from the District of Massachusetts ordering discovery to proceed against a Defendant in France notwithstanding objections raised under the GDPR, concluding that the importance of evidence in the possession of the French Defendant supported the discovery notwithstanding concerns of international comity.

In *AnywhereCommerce, Inc. v. Ingenico, Inc.*, 2021 WL 2256273 (D. Mass. June 3, 2021), U.S. District Judge Indira Talwani granted reconsideration of an order in which she had applied the 2018 French analogue of the European GDPR to allow discovery to proceed against domestic defendants but not a French defendant, concluding that the importance of evidence in the possession of the French Defendant required the French Defendant to provide discovery notwithstanding concerns of international comity.

Plaintiffs in this action had filed a motion to compel discovery of material that was in the possession of one corporate Defendant in France, or that had originated in France but was now in the possession of domestic United States defendants. Defendants opposed the motion to compel on the grounds that the GDPR precluded all Defendants from producing the requested materials. *Id.* at *1.

In a prior order on the Plaintiffs' motion to compel, Judge Talwani had concluded that the GDPR did not limit the court's authority to order Defendants to produce evidence, even assuming that production of the documents would run afoul of the GDPR. She had considered the GDPR as an objection by a foreign state over the discovery sought by Plaintiffs to the extent that the requested discovery would impinge on protections the GDPR provides to French nationals and noted that the factors set out in the Restatement (Third) of Foreign Relations Law § 442(1)(c) applied to such an objection. These factors are (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 would undermine important interests of the United States, or compliance would undermine important interests of the state where the information is located.

In connection with the prior order, Plaintiffs had represented that they expected that much of the requested material was located in the United States and in the possession and control of the domestic Defendants. *Id.* at *2. Judge Talwani therefore had found that considerations of comity required avoiding potentially cumulative foreign discovery, and she bifurcated her analysis by excluding from her order any documents in the possession and control of the French Defendant and focused only on those documents in the possession and control of the domestic Defendants (even if they might have originated in France and be subject to the GDPR). She ultimately concluded that the restatement factors supported Plaintiffs' argument that the material should be produced over any objections arising from the GDPR, and she ordered the production of the requested documents by the domestic Defendants.

Plaintiffs moved for reconsideration of the prior order on the grounds that "important documents and evidence relevant to Plaintiffs' claims are in France," a point on which the parties seemed to agree. Judge Talwani found that reconsideration was appropriate because her prior order was based on her misapprehension that discovery in could meaningfully proceed while also being limited to the domestic Defendants.

Judge Talwani then moved on to addressing the relevant factors from the Restatement (Third) of Foreign Relations Law § 442(1)(c) as they applied to evidence in the possession of the French Defendant, noting that many of the same considerations from her prior order still applied and weighed in favor of disclosure. In particular, she explained that (1) the documents and information requested continued to be of substantial importance to the litigation; (2) Defendants did not contend that the discovery requests raised concerns about disclosure of individuals who were uninvolved in the events giving rise to the present dispute; (3) there remained no mechanism for Plaintiffs to discover substantially equivalent information through other means; and (4) the United States continued to hold an important interest in rendering an adequately informed decision as to the rights of the parties to this action.

Judge Talwani noted that the only factor that differed from her prior analysis was the question of whether the information at issue originated in the United States or abroad, and she noted that the parties seemed to agree that most of the responsive documents either originated abroad or were located abroad. And while the location of the materials is a “weighty consideration in the comity analysis,” Judge Talwani nonetheless found that this factor did not override the other four factors that “tilt heavily in favor of disclosure.” *Id.* at *3.

Judge Talwani concluded by noting that the protective order entered into by the parties and ordered by the court was “a final consideration that is central to the court’s analysis but does not fall squarely into the factors identified by the Restatement.” In this context, she stated that she was “cognizant of France’s interest in ensuring that its nationals are afforded the rights provided under the GDPR to protect against the commoditization and/or distribution of their personal information” but found that the protective order allowed Defendants to designate any material subject to the GDPR as “Highly Confidential-Attorneys’ Eyes Only.” This would require specific procedures in place as to how any such material could be disseminated and provided that upon the conclusion of the litigation, the materials were to be returned or destroyed, which ensured that the protections provided by the GDPR would be maintained throughout and following the proceeding.

Finally, Judge Talwani denied an alternate proposal by Defendants seeking to limit any order compelling the production of documents to those belonging to the custodians identified in the parties’ initial disclosures. She noted that initial disclosures are primarily a tool for a party to share the factual and legal contentions underlying their own cases, not witnesses or material that may be helpful to the opposing party.