D.C. CIRCUIT UPHOLDS FOREIGN BANKS' CONTEMPT FOR NONCOMPLIANCE WITH U.S. SUBPOENAS IN NORTH KOREA SANCTIONS INVESTIGATION

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U.S. Investigations, Enforcement, and White Collar Alert

On August 6, the D.C. Circuit Court of Appeals unsealed its partly redacted decision upholding a civil contempt order against three foreign banks that refused to comply with a subpoena from U.S. authorities to produce bank records as part of a U.S. investigation into North Korea's potential circumvention of U.S. economic sanctions. The court's decision is noteworthy due to its affirmation of the use by U.S. enforcement authorities of alternative means for investigating foreign entities and individuals despite the existence of bilateral agreements governing cross-border investigative cooperation.

The subpoenas at issue in the case stem from the U.S. government's ongoing investigation into how the North Korean regime utilizes third parties and financial institutions to fund its nuclear program and circumvent U.S. economic sanctions. According to U.S. authorities, the North Korean regime used a Chinese entity to make or receive payments in U.S. dollars through a variety of transactions, including the export of coal and other minerals. The U.S. government further asserted that the Chinese entity executed the scheme using so-called "correspondent accounts," or accounts held by the three state-owned Chinese banks at financial institutions located inside the United States. The Chinese banks, which were not identified in the court's opinion, challenged the U.S. government subpoenas on the grounds that compliance would result in violations of Chinese laws barring delivery of records to foreign authorities outside of the process outlined in a mutual legal assistance agreement ("MLAA") between the United States and China.

U.S. authorities argued that the Chinese government's historically slow and ineffective response to U.S. requests for assistance under MLAA left them with little choice but to issue the subpoenas. The federal district court sided with the United States, ruling that the Chinese banks must turn over the relevant customer records and face contempt for failure to comply. In the words of the district court, "international comity is not a reason to refrain from compelling compliance[.]" The D.C. Circuit concluded that the lower court did not abuse its discretion in finding that the U.S. national security interest in obtaining the foreign bank records outweighed any interest of the banks in avoiding potential penalties that the banks may face under Chinese law.

In its opinion, the appellate court made two key observations with potential implications for cross-border criminal investigations.

First, the court agreed with the district court that mere U.S. "domestic law enforcement matter[s]" may not justify such intrusions on the principles of international comity. The court distinguished an earlier decision in which it reversed a similar contempt order, noting that a foreign state-owned bank's interest in avoiding penalties under the banking privacy laws of the nation where a bank account was located outweighed the U.S. interest in

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obtaining documents to investigate violations of U.S. anti-money laundering laws. The subpoenas involving the Chinese banks, by contrast, aimed to reveal information relating to the means for acquiring nuclear weapons by a sanctioned foreign government.

Second, after acknowledging the district court's reliance on the weight of evidence in the record to support the claim by the United States that cooperation through the MLAA process would not be fruitful, the court also noted that there was "[n]othing in the MLAA…[that] designated it as the exclusive means of obtaining evidence in a criminal investigation."

Noting that it "proceed[s] with extreme caution when enforcing subpoenas that would require recipients to violate a foreign sovereign's domestic laws[,]" the court acknowledged the unsettled ground on which its opinion lands. While MLAAs have long governed the ways in which foreign enforcement authorities use and share information with the United States, the D.C. Circuit determined that, in certain circumstances, national security interests could enable U.S. enforcement arms to reach beyond borders despite the existence of any governing information-sharing arrangement and despite potential penalties that may exist in the foreign subject's home country.

The true test for how this ruling will be applied will come in future scenarios that emerge on the spectrum between the polar opposites of purely "domestic law enforcement matters" and matters involving perceived threats to global security, such as international bribery and corruption matters, international human trafficking matters, and other cross-border matters that are neither purely domestic in nature nor a clearly immediate security threat to the United States and its allies. Moreover, this decision could place increased scrutiny on U.S. and foreign agencies responsible for the timely execution of MLAAs, as timely compliance may now not be driven solely by the spirit of international comity but rather by the threat of subpoena, fine, and increased political tensions.

The case, *In re: Sealed Case*, No. 19-5068 (D.C. Cir. 2019), can be found here.

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