

The Perils Of Taking Discovery To France



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Complying with a U.S. discovery order can violate the French blocking statute. To stay on the safe side, follow Hague Convention procedures.

DISCOVERY, the compulsory pre-hearing exchange of relevant documents between parties or from a third party, is a controversial practice in international dispute resolution. Litigants in the United States are accustomed to expansive discovery, as the Federal Rules of Civil Procedure allow it into “any nonprivileged matter that is relevant to any party’s claim or defense” Fed. R. Civ. P. 26(b)(1) “Discovery Scope and Limits.” However, in other countries and especially in civil law countries such as France, where the judge controls the presentation of the evidence, discovery is much more restricted in scope, if not totally unknown. Therefore, discovery directed at witnesses, documents, or other evidence located outside the United States could be problematic. Many countries will view this pretrial procedure as contrary to their sovereignty, customs, and national interests.

BLOCKING STATUTES • In order to prevent the discovery procedure from being executed in their territories, most Western countries (including the Netherlands in 1956, Canada in 1976, Australia in 1976, the United Kingdom in 1980, Italy in 1980) have enacted “blocking statutes.” Basically a “blocking statute is a law passed by

the foreign government imposing a penalty upon a national for complying with a foreign court's discovery request." See *In re Anschutz & Co.*, 754 F.2d 602, 614 n. 29 (5th Cir. 1985).

France: Strict Compliance With Hague Convention Procedures

For instance, in 1980, France enacted a law (Law n° 80-538 of July 16, 1980 on the communication of economic, industrial, financial, or technical documents or information to foreign individuals or legal entities) that prohibits the gathering of business-related information to be used in foreign litigation (the "Blocking Statute"). Nevertheless, the Blocking Statute makes an exception for discovery obtained through the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention").

French authorities wanted to force U.S. courts to comply with the strict procedures and requirements of the Hague Convention. Indeed, U.S. courts have often been reluctant to use the Hague Convention, considering that it was not the exclusive means of discovering evidence located in a signatory state. See *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 539 (1987). For a more recent decision, see also *In re Vivendi Universal, S.A. Securities Litigation*, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006), which illustrates the difficulty persuading a U.S. court to use the Hague Convention and defer to a blocking statute.

The French Blocking Statute

Article 1 bis of the Blocking Statute provides that:

"[s]ubject to international [agreements] or accords and laws and regulations in effect, any individual is prohibited from requesting, seeking, or disclosing, in writing, orally, or in any other form, documents or information of an economic, commercial, indus-

trial, financial or technical nature directed toward establishing evidence in view of legal or administrative proceedings abroad or in relation thereto."

Article 3 states that "[w]ithout prejudice to heavier penalties set out by law, any violation to [sic] the provisions of articles 1 and 1 bis of this law shall be punishable by imprisonment of two to six months and a fine of FRF 10,000 to FRF120,000 or by either one of these two penalties." Under French law, noncompliance with the above provision is a criminal offence. The applicable penalties are a prison sentence up to six months and/or a fine up to €18,000, or €90,000 if the accused is a legal entity. (See Article 3 of the Blocking Statute.)

WHAT EFFECT DO BLOCKING STATUTES HAVE ON DISCOVERY? •

Despite these criminal penalties, U.S. courts have required the production of documents even when production may trigger a violation of the Blocking Statute. The Supreme Court has noted that the French Blocking Statute does "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." See *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, *supra*.

Party Must Produce

As a general rule, blocking statutes will not provide a means for a company or a person within the jurisdiction of the U.S. to resist the production of the requested documents. Moreover, when a party fails to comply with a discovery order because of a blocking statute, U.S. courts may impose any of the sanctions set out in the Federal Rules of Civil Procedure. In order to decide whether to issue a discovery order and the sanctions to be imposed if it is violated, U.S. courts will engage in a "balancing test." Judges will consider, *inter alia*, the particular facts of the case, the importance of the information requested, the sovereign interests involved, the

good faith of the requested party, and the existence and severity of the sanctions incurred. Therefore, the existence of a blocking statute and criminal sanctions might influence the judges in the determination of the applicable sanctions.

Given the wide scope of the Blocking Statute, the disclosure of any information appears likely to be criminally sanctioned. However, one must immediately exclude from such prohibition evidence obtained by way of international judicial cooperation, which means that obtaining disclosure through the means available under the Hague Convention may not be punished pursuant to the Blocking Statute. The aim of the Blocking Statute is quite clear: It is simply to oblige any person disclosing elements of proof in their possession to do so by way of judicial cooperation, and hence under the supervision of the French Judge.

It must be noted here that the Hague Convention sets forth procedures for obtaining discovery abroad, hammered out by the signatories in an effort to provide an alternative means of securing the information. Therefore, the Hague Convention seems to offer a better solution to companies that would be bound by both U.S. discovery rules and another country's blocking statute. In a nutshell and as Justice Blackmun pointed out:

“The Convention furthers important United States interests by providing channels for discovery abroad that would not be available otherwise. In general, it establishes methods to reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with respect to the taking of evidence.”

Societe Nationale, supra, 482 U.S. at 550.

HAGUE CONVENTION OR FEDERAL RULES? • In deciding whether discovery should proceed under the Hague Convention or the Federal Rules of Civil Procedure, U.S. 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.” See *In re Vivendi*, supra, quoting *Société Nationale*, supra, 482 U.S. at 546.

U.S. Courts have identified four factors in determining whether comity justifies the use of the Hague Convention instead of the Federal Rules to obtain discovery:

- The competing interests of the nations whose laws are in conflict;
- The hardship of compliance on the party or witness from whom discovery is sought;
- The importance to the litigation of the information and documents requested; and
- The good faith of the party resisting discovery.

In re Vivendi, supra, at *2.

In that respect, U.S. courts have noted that the threat of a criminal sanction under the French Blocking Statute was highly theoretical. Indeed, until recently, no sanction has ever been imposed pursuant to this law.

The *Vivendi* litigation, in which the Southern District of New York applied these four factors, illustrates the difficulty persuading a U.S. court to use the Hague Convention and defer to a blocking statute. In *Vivendi*, plaintiffs claiming securities fraud sought to compel Lazard to produce, pursuant to a subpoena duces tecum, 53 categories of documents located in France. According to the Court, the Blocking Statute does not subject the defendants to a realistic risk of prosecution. Yet, on December 12, 2007, the French Supreme Court found a French lawyer criminally liable for violating the Blocking Statute (French Supreme Court, Criminal Section, December 12, 2007, n 07-83228).

This decision is a sequel of the *Executive Life* case. In the late 1990s, Californian authorities, led by the Insurance Commissioner, launched an

action against a French consortium led by Credit Lyonnais. It was alleged that Credit Lyonnais and other European entities conspired to fraudulently conceal the identity of the bank for the acquisition of Executive Life, thus breaching California laws regarding foreign ownership of insurance companies. After a lengthy procedure, the case ended in 2003 when Credit Lyonnais and other entities agreed to pay \$771 million.

During the investigation, the Insurance Commissioners requested French local counsel to carry out some investigations in France. In particular, the French counsel was asked to gather some information from a former director of MAAF, a major insurance company which was part of the consortium. With this mandate, the French counsel contacted the former employee, trying to get some information about the internal decision process. By doing so, the French Supreme Court considered that he had committed a criminal offence in violation of the Blocking Statute and fined him €10,000.

Safety On Both Sides: Follow The Hague Convention

This decision confirms that the Hague Convention is the exclusive means for obtaining evidence located in France in preparation for a foreign litigation. It also points out the difficult position of French companies and individuals, who are facing a dangerous quandary in which compliance with one country's laws constitutes a violation of another's. The difficulty is compounded by the fact that sanctions may now be ordered from both sides of the Atlantic. One could hope that the recent decision of the French Supreme Court will influence U.S. courts and that they will take into account the practical risk of criminal sanctions under French law.

In other words, the provisions of the French Blocking Statute would therefore directly conflict

with the freedom of the parties to gather elements of proof and raise numerous practical and theoretical problems. For instance, they would prevent a French or foreign claimant from adducing evidence available in France in support of its claims in proceedings pending in the United States or anywhere else. Similarly, it should be noted that the same provisions seem to prevent the defendant in a foreign proceeding from voluntarily producing evidence located in France that would enable it to make its defense. However, it must be borne in mind that refusal to submit the required evidence will lead to the intervention of the judge on the merits to rule on the problem. The judge is likely not only to refuse to uphold the Blocking Statute but may even punish the recalcitrant French party.

CONCLUSION • Given this fairly recent precedent in France and bearing in mind the difficulty of persuading U.S. courts to apply the Hague Convention and defer to foreign legislation that limits discovery, companies should put forward various strategies to address cross-border strategies. Indeed, with the rapid growth in electronic documents and data, companies need to be ready to respond to cross-border discovery. On top of that, it is very likely that U.S. courts will follow the federal rules rather than defer to other countries' restrictions on discovery.

One of those strategies could consist in identifying blocking statutes (or data protection statutes) in international jurisdictions critical to company business. As we have seen from the foregoing, while U.S. courts might be unwilling to defer to foreign legislation that would attempt to restrict discovery, other jurisdictions might be more receptive to the proposition that discovery violating such legislation should not be permitted.

PRACTICE CHECKLIST FOR The Perils Of Taking Discovery To France

A litigant who fails to produce economic, industrial, financial, or technical documents or information from France can face sanctions; but if the same litigant produces it, he or she can run afoul of the French Blocking statute and face criminal penalties. Hague Convention procedures present the only really safe course.

- Article 1 bis of the Blocking Statute provides that “[s]ubject to Treaties or International Agreements and to currently applicable laws and regulations, it is prohibited for any person to request, seek or disclose, in writing, orally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature directed toward establishing evidence in view of foreign judicial or administrative proceedings or in relation thereto.”
- Article 3 states that “[w]ithout prejudice to heavier penalties set out by law, any violation to [sic] the provisions of articles 1 and 1 bis of this law shall be punishable by imprisonment of two to six months and a fine of FRF 10,000 to FRF120,000 or by either one of these two penalties.” Under French law, noncompliance with the above provision is a criminal offence. The applicable penalties are a prison sentence up to six months and/or a fine up to €18,000, or €90, 000 if the accused is a legal entity.
- Although U.S. Courts are reluctant to invoke Hague Convention procedures instead of the Federal Rules to govern discovery, they have identified four factors in determining whether comity justifies the use of Hague Convention instead of the Federal Rules to obtain discovery:
 - ___The competing interests of the nations whose laws are in conflict;
 - ___The hardship of compliance on the party or witness from whom discovery is sought;
 - ___The importance to the litigation of the information and documents requested; and
 - ___The good faith of the party resisting discovery.
- In arguing for the invocation of Hague Convention procedures, counsel should remind the court of the facts of the *Executive Life* case, an action initiated in the United States that involved a French company. In *Executive Life*, French counsel contacted a former employee of the French company in France, trying to get some information about the internal decision-making process of the company. The French Supreme Court held that this was a criminal violation of the French Blocking Statute, and ordered the French counsel to pay a €10,000 fine.

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