The French Blocking Statute and Cross-Border Discovery

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IN VIEW of improving mutual judicial cooperation in civil and commercial matters, 58 countries, including France and the U.S., concluded The Hague Convention of 18 March 1970 which sets out provisions for the communication of evidence in the scope of foreign court proceedings (hereafter "The Hague Evidence Convention"). Despite the ratification of The Hague Evidence

Convention in 1972 by the United States, U.S. courts have mainly refused to abide with the provisions of The Hague Evidence Convention and instead authorized parties to the broader discovery permitted under the U.S. Federal Rules of Civil Procedure.

Under the civil law culture, legally-compelled disclosure procedures do not exist: parties to civil litigation have no duty to inform the opposing party of any documents other than those they intend to rely on to support their own case. France has long viewed the recourse of parties to the U.S.-style discovery procedures to obtain evidence in France as an infringement of its national sovereignty. In an attempt to protect French nationals against U.S. discovery procedures, France enacted the so-called "French blocking statute", a criminal statute prohibiting anyone to engage in discovery under a foreign judicial system without using the cooperation mechanisms provided for by The Hague Evidence Convention. Along with data protection and privacy laws, the French blocking statute constitutes another hurdle for the transfer of certain information from the French jurisdiction to the United States.

Lack of enforcement of the French blocking statute since its enactment (only one conviction has been recorded in nearly forty years) led the U.S. courts to believe that the threat of criminal conviction under the statute was largely theoretical. Little deference was therefore given to the French blocking statute.

Although until recently the matter was the object of little debate, it seems to have become a hot topic again lately. The extraterritorial reach of United States laws has indeed been recently under the scrutiny of the French Parliament as a result of strong criticism following successive sanctions imposed on several French companies over the last few years for acts committed outside of the United States. In particular, the payment of an unprecedented fine of nearly 9 billion dollars by BNP Paribas in June 2014 on the grounds of the breach of the embargo on Sudan, Iran and Cuba and the fine of almost $800 million paid by Alstom on the grounds of the breach of the U.S. Foreign Corrupt Practices Act for acts of corruption of foreign government officials, led to public indignation and to an outcry from a large number of politicians. In both cases, the payments had been made on a voluntary basis by French companies following negotiations with the U.S. Department of Justice.

As a result, a parliamentary task force was created by the French National Assembly's commissions for foreign affairs and finances in March 2016 for the purpose of taking an exhaustive inventory of the cases of extraterritorial application of U.S. laws and to

analyze the impact of such an application on the French economy, in particular focusing on the distortion of competition and financial damage suffered by French companies. The report (the so-called "Rapport Lellouche") was published on October 5, 2016, and its conclusions are harsh: it blames the United States for using their laws to impose sanctions on the foreign companies that may harm their interests. In particular, it observes that the fines paid by European banks over the past few years amount to several dozens of billions of dollars and denounces "*a significant levy on European economies to the benefit of U.S. public finances*."

The French parliamentary task force has made suggestions to stop these practices at both national and European levels. One of the suggestions is to strengthen the French repressive arsenal to fight against corruption. Indeed, the absence of sufficiently constraining foreign legal mechanisms (in particular French ones) is one of the criticisms usually asserted by the U.S. to justify the extraterritorial application of its laws.

In this context, France enacted the so-called *"Sapin 2"* law on December 9, 2016, a new anti-corruption legislation aimed at implementing tangible measures to prevent, detect and sanction corruption.[1] The new legislation is expected to bring a significant change in the legal landscape with a possible impact on the French blocking statute and a better recourse to The Hague Evidence Convention. Indeed, this statute contains provisions that seek to effectively enforce the French blocking statute.

These recent legislative developments are expected to renew interest in the French blocking statute and revive discussions on its enforcement both in France and the U.S. This pending change provides timely support for revisiting the mechanisms set up by both the French blocking statute and The Hague Evidence Convention.

I. The French Blocking Statute

A. The origins of the French blocking statute

The French blocking statute (formally known as Law no. 68-678 of July 26, 1968, relating to the Communication of Economic, Commercial, Industrial, Financial or

[1] Legislation no. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic activity. The full original text is available at: https://www.legifrance.gouv.fr/eli/loi/2016/12/9/2016-1691/jo/texte.

Technical Documents and Information to Foreign Individuals or Legal Entities, as modified by French Law no. 80-538 dated July 16, 1980) results from a two-step enactment. Originally, the statute prohibited the disclosure of documents and information relating to the maritime trade area only. Its scope was extended in 1980 to establish a double prohibition under Article 1 and Article 1bis as follow:

Article 1

"Subject to treaties or international agreements, it is prohibited for any individual of French nationality or who usually resides on French territory and for any officer, representative, agent or employee of an entity having a head office or establishment in France to communicate **to foreign public authorities**, in writing, orally or by any other means, anywhere, documents or information relating to economic, commercial, industrial, financial or technical matters, the communication of which is capable of **harming the sovereignty, security or essential economic interests of France or contravening public policy**, specified by the administrative authorities as necessary".

Article 1bis

"Subject to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature **for the purposes of establishing evidence in view of foreign judicial or administrative procedures** or in the context of such procedures".

While Article 1 is only very rarely invoked by French companies, Article 1bis provided the French companies with a "legal excuse" to resist a foreign court's discovery request when such requests circumvented the judicial cooperation mechanisms provided for by The Hague Evidence Convention. As such, Article 1bis has been regularly invoked in U.S. discovery procedures by French companies.

Article 1bis does not make any distinction based on the nationality or domicile of the individual or entity searching for or disclosing the information or documents, nor on whether these documents or

information are held in or outside of France. However, the scope of Article 1bis is to be interpreted in light of the general provisions on the territorial application of French criminal law. The French Criminal Code notably provides that French criminal law is applicable to criminal offenses committed within French territory (i.e. if at least one of the constitutive elements of the criminal offense is committed in France) or to offenses committed outside French territory when the victim is a French citizen or legal entity.

Pursuant to Article 3 of the French blocking statute, a breach of provisions of Articles 1 and 1bis is punished by a six-month prison sentence and/or a fine of €18,000 (this amount being multiplied by five for legal entities, i.e. €90,000). The prohibition applies to "any person", irrespective of whether such person is related, in one way or another, to a party to the United States proceedings.

Article 2 of the French blocking statute imposes a duty on persons subject to Articles 1 and 1bis "to inform without delay the relevant minister when they are in receipt of any request concerning such communications". A decree on the application of Article 2 of the French blocking statute specifies that the relevant minister is the Minister of Foreign Affairs.[2] The decree, nevertheless, offers the possibility to inform the Minister of Justice, the Minister of the Economy or any minister supervising the company's activities. However, the French blocking statute does not contain any provisions on the procedure to be followed to inform the relevant minister nor on the nature of penalties in the event of breach.

In practice, it appears that the French authorities are very rarely informed of communication requests: about a dozen alerts are recorded each year by the Minister of Foreign Affairs. This is indeed significantly low compared to the high number of disclosure requests issued by the foreign jurisdictions, in particular the United States. This seems to suggest that, most of the time, when parties receive discovery requests in the context of foreign proceedings, parties choose to respond to the request and not to alert the French authorities.

[2] Decree no. 81-550 dated May 12, 1981, available at: https//www.legifrance.gouv.fr/affichTexteArticle.do?idArticle=LEGIARTI000006579057&cidTexte=LEGITEXT000006063538&dateTexte=19810516.

B. The scope and application of the French blocking statute by the French courts

The severity of the sanctions for breach of Article 1bis of the French blocking statute must be viewed in relation to the weak enforcement of the statute. Indeed, up until 2007, the French criminal courts did not convict anyone on this ground.

On December 12, 2007, the Criminal Chamber of the French Supreme Court upheld the criminal conviction of a French lawyer to pay a fine of €10,000 for a breach of the French blocking statute (the so-called "*Christopher X decision"*). In this case involving the French mutual insurance company MAAF and the California Department of Insurance, the French lawyer had been working with the American firm representing the California Department of Insurance. He had contacted and tricked a former director of MAAF (a defendant in the then-pending *Executive Life* litigation in California) in order to obtain information informally. The French Supreme Court upheld the lower courts' ruling sanctioning the abusive conduct of the French lawyer.

The conviction in 2007 was meant to "put some muscle" behind the French blocking statute (which was until then disregarded by U.S. courts), with a view to giving French parties grounds to resist the application of the discovery provisions of the U.S. Federal Rules of Civil Procedures. [3] Indeed, the French Supreme Court confirmed the decisions of the lower court's ruling that the Hague Evidence Convention constituted the exclusive means of providing documents and information in France for use in foreign judicial proceedings. The *Christopher X decision* also showed that parties bypassing The Hague Evidence Convention should expect to be effectively prosecuted to the full extent of the French blocking statute.

One might argue that since *Christopher X*, the likelihood of prosecution and conviction for a breach of the French blocking statute has become higher, to the point that it now really does constitute a legitimate reason to request that U.S. courts comply with the procedure set forth in The Hague Evidence Convention when information is to be obtained from a French individual domiciled in France. However, considering the specific facts and background of this case, this decision has generally been interpreted as an outlier, and therefore, the scope of this decision has been considered to be moderate,

[3] *See* Marc Gottridge and Thomas Rouhette, *France Puts Some Muscle Behind Its Blocking Statute*, 82 NEW YORK L.J. April 29, 2008.

both by legal authors and the U.S. courts.

While the French blocking statute has not given rise to any other conviction than in the 2007 *Christopher X decision*, the statute has nonetheless been occasionally invoked by parties to challenge production of evidence to be used in foreign proceedings.

For example, the Presiding Judge of the Nanterre Civil Court rejected an investigation request made by a former foreign head of state to search for and disclose documents and information located in France to enable him to testify before a parliamentary Committee and initiate legal proceedings abroad. The Presiding Judge considered that such a request was contrary to the provisions of the French blocking statute and urged the claimant to take recourse to available letters of request.[4] Similarly, the Paris Commercial Court held in a decision dated July 20, 2005 that the disclosure request issued by a U.S. judge constituted a breach of Article 1bis of the French blocking statute and noted that the applicant should have used one of the procedures set out by The Hague Evidence Convention.[5]

More notably, in a recent civil case, French courts expressly confirmed that the French blocking statute also applies where the communication would be voluntarily made by a party to defend its own interests in the course of U.S. proceedings. Interestingly, this case involved a United States corporation Arjowiggins, which was a defendant in a product liability case pending in the U.S. Arjowiggins was seeking to obtain information from a former French subsidiary for the purpose of its own defense in the U.S. proceedings. Arjowiggins sued the former French subsidiary seeking an injunction to communicate the required documents. On appeal, the Nancy Court of Appeal held that the former French subsidiary could not be compelled to produce the documents because of the blocking statute and suggested Arjowiggins resort to The Hague Evidence Convention, stating that "the exercise of Arjowiggins' rights of defense naturally flows from the guarantee attached to the procedures of The Hague Convention dated 18 March 1980".[6]

The French blocking statute has also been occasionally invoked in the course of the implementation of deferred prosecution agreements ("DPA") concluded between the U.S. authorities and French companies. For example, the DPAs signed respectively with French companies

[4] TGI Nanterre, summary proceedings, December 22, 1993, Jurisdata no. 1993-050136.

[5] Paris Commercial Court, July 20, 2005, Jurisdata no. 2005-288978.

[6] Nancy Court of Appeal, June 4, 2014, docket nos. 1335/14 and 14/01547.

Technip[7] and Total[8] both provided that the transmittal of information and documents obtained during the monitorship should comply with the blocking statute and be made through mutual legal assistance requests to the appropriate French authority. In both cases, French authorities designated the former inter-ministerial agency known as the Central Service for the Prevention of Corruption ("SCPC")[9] to control the information transmitted by the monitor to the U.S. authorities.[10]

C. U.S. Courts' deference (or lack thereof) to the French blocking statute

Despite its ratification of The Hague Evidence Convention in 1972, the U.S. never restricted parties seeking to obtain evidence from French companies to the exclusive use of the methods defined by this Convention. It has consistently also allowed them to use the discovery procedures available under the U.S. Federal Rules. The enactment of the French blocking statute did not change this approach, as the U.S. courts noted the lack of effective enforcement of the statute and therefore deemed it an ineffective threat to French corporations.

In its landmark decision, *Société Nationale Industrielle Aerospatiale v. U.S. District Court,* the United States Supreme Court held 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" and that "American courts are not required to adhere blindly to the directives of such a statute". With respect to The Hague Evidence Convention, the Supreme Court further noted that the Convention "does not speak in mandatory terms" and concluded that it "was intended as a permissive supplement, not a preemptive replacement, for other means of obtaining evidence located abroad".[11]

U.S. courts have always given little deference to the French blocking statute defense raised by the French companies. The *Christopher X decision* did not convince the U.S. courts that parties should limit discovery requests to the methods provided by The Hague Evidence Convention. Indeed, they have subsequently noted that this

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[7] United States v. Technip S.A., No. 10-CR-439 (S.D. Tex. June 28, 2010).

[8] United States v. Total S.A., No. 1:13CR239 (E.D. Va. May 24, 2013).

[9] Since the French anti-corruption law enacted on December 9, 2016, the SCPC has now been replaced by the newly-created AFAC.

[10] The French blocking statute has also been expressly mentioned in DPAs concluded with Alcatel-Lucent (United States v. Alcatel-Lucent S.A., No. 10:20907CR) and Alstom (United States v. Alstom S.A., No. 3:14-cf-00248 (December 22, 2014)).

[11] 482 U.S. 522 (1987).

isolated decision sanctioned facially reprehensible conduct and that there is no record of any party having been sanctioned by the French courts for responding in good faith to U.S. discovery requests.

Although a U.S. court recently seemed to have adopted a more lenient approach towards the French blocking statute and the recourse to The Hague Evidence Convention,[12] French companies are generally caught between, on the one hand, complying with the statute and facing the (adverse) consequences in the U.S. proceedings or, on the other hand, violating it and running the risk of being prosecuted in France.

It appears that in a significant number of cases, when faced with a disclosure request from foreign authorities, French companies decide for purely business reasons to abide by the order and take the risk of prosecution in France to avoid the disastrous effects of a ban from doing business in the U.S. However, one should not disregard the fact that dozens of letters of request are sent each year by U.S. courts to the French central authority to be enforced in France. This also shows that parties in the U.S. often agree on the application of The Hague Evidence Convention and therefore do not necessarily refer the case to the U.S. courts in order to obtain a ruling on the applicability of The Hague Evidence Convention.

D. France's previous attempts to reform the French blocking statute

Based on the principle that the French blocking statute was "inefficient and obsolete", several attempts have been made to reform it in order to enhance its "legitimacy" in the eyes of the foreign courts and thus increase its enforceability.

A bill was adopted on its first reading by the French *Assemblée Nationale* in January 2012 with the purpose of refocusing the French blocking statute on the information relating to trade secrets only. The so-called "Carayon bill" provided for the creation of a new criminal offense under the French Criminal Code: the violation of trade secrets, constituted by the disclosure of protected information relating to

[12] *In re* Activision Blizzard, Inc. Stockholder Litigation Cons. C.A. No. 8885-VCL (Del. Ch. February 21, 2014), the Delaware Court of Chancery compelled parties to seek discovery under both the Delaware procedural rules and the letters of request procedure provided by The Hague Evidence Convention to permit the French defendant not to violate the French blocking statute. However, the Court ordered the French defendant to use a good effort in trying to obtain permission from the French authorities to disclose the requested information and warned the defendant company that a disclosure failure within the deadline set by the court would trigger sanctions against it.

business secrets and sanctioned by three years of imprisonment and a fine of up to €375,000.

The French legislature thought that by restricting the scope of application of the French blocking statute, U.S. Courts be more likely to adhere to French procedures. However, this reasoning proved questionable insofar as the limited enforceability of the French blocking statute seemed to result more from a lack of efficiency of the legal mechanism rather than from its excessive scope in application. The bill was ultimately abandoned for timetable reasons because of the presidential elections scheduled in spring 2012.

Another attempt took place as part of the examination of the so-called "Macron bill", where the French *Assemblée Nationale*'s special Commission adopted an amendment modifying the French blocking statute. As with the Carayon bill, the Macron bill provided for the strengthening of the criminal aspect of the French blocking statute: three years of imprison- ment and a fine up to €375,000 in case of a violation of trade secrets, these sanctions being doubled in the event that the information unlawfully dis- closed related to France's national economic interests. Besides the criminal aspect, the Macron bill also conferred extensive power to the civil judge to protect French companies in the event of a breach (including the possibility for the civil judge to grant interim measures and seize documents containing the disputed information to prevent the occurrence of a breach of companies' trade secrets). Faced with many criticisms, the provisions relating to the business secrets were overall removed from the Macron bill.

These repeated attempts to reform the French blocking statute show the general consensus over the lack of effectiveness of the current legislative structure. They also reveal the heated discussions on whether and how such a reform should be conducted.

E. France's current stand to limit the extraterritorial application of U.S. laws in France and its impact on the French blocking statute

France's criticisms of U.S. legislative mechanisms deemed too intrusive extend beyond the discovery procedure and encompass more generally the extraterritoriality of many U.S. laws, in particular in the areas concerning anti-corruption, money-laundering, financing of terrorism and international sanctions.

The extraterritorial application of U.S. laws enables U.S. courts to sanction foreign natural and legal persons for acts committed outside the U.S. territory under certain

circumstances. The connecting factors most commonly used against French companies are the use of the U.S. currency or financial system. For instance, in the case involving BNP, the use of the U.S. Dollar in the disputed transactions and the observation that the payments went through the U.S. banking system were deemed sufficient to justify, according to the U.S. authorities, the launch of criminal proceedings against the French company. In *Alstom,* a company's listing on a U.S. market grounded the proceedings in the country.

As mentioned earlier, a parliamentary task force was specifically designated to investigate the impact of the extraterritoriality of the U.S. laws on the French economy. The so-called Lellouche Report was published on October 5, 2016. It condemns the U.S. use of the law to promote its economic interests and makes suggestions to end "abusive" sanctions imposed by U.S. authorities against foreign companies, in particular European companies, for acts committed outside of the United States.

One of the means of action suggested by the Lellouche Report is the use of the Euro (instead of the U.S. Dollar) as currency in transactions in order to avoid the extraterritorial application of U.S. laws. Yet, the practical applicability of such a measure for French companies can be questioned in light of the central role of the U.S. Dollar in the global financial system. Another suggestion is to strengthen the French repressive arsenal to fight against corruption. As discussed above, the absence of sufficiently constraining foreign legal mechanisms is indeed one of the criticisms usually asserted by the United States to justify the extraterritorial application of its laws.

The Lellouche Report also recommends amending the scope of the French blocking statute "by changing its wording in order to identify the information which is truly sensitive and whose transmission to foreign authorities should be either prohibited or limited". It further recommends that the French blocking statute include "a provision for a strict framework concerning the oversight or monitoring accepted by French companies concerning plea-bargaining with foreign authorities (checking by the administration concerning the choice of overseers/monitors and the information sent to these foreign authorities)". Finally, it stresses that by strengthening the legal sanctions in case of violation, the controversial statute will be more worthy of consideration by U.S. authorities and jurisdictions and

can thus be accepted as a "legal justification".[13]

It is in this framework that France has enacted a law on transparency on December 9, 2016, governing the fight against corruption and the modernization of economic activity (commonly referred to as *Sapin 2*, the new "anti-corruption law" or the "French Bribery Act").[14] This legislation seeks to enable France to catch up in the area of the fight against corruption. It establishes a set of measures to better prevent and detect acts of corruption, in particular by implementing mandatory compliance mechanisms within companies and the creation of a French national body, the Anti-corruption Agency ("AFAC") to control the application of these mechanisms. *Sapin 2* further provides for the expansion of the extraterritorial application of French legislation in relation to certain corruption-related offenses and introduces a French form of plea-bargaining similar to the DPA procedure. In the event of an established fraud, the applicable sanctions have also been significantly increased.

The French blocking statute is expressly referred to in Article 3 (5) of *Sapin 2*. Pursuant to this provision, the AFAC is entrusted with the mission to monitor the implementation of the French blocking statute, at the request of the French Prime Minister, in the context of compliance programs imposed by foreign authorities on companies incorporated in France.[15]

Prior to the entry into force of *Sapin 2*, the Prime Minister had only designated the former inter-ministerial agency known as the Central Service for the Prevention of Corruption ("SCPC") to control the information transmitted by the monitor to the U.S. authorities in the course of the implementation of

[13] For a summary of the Lellouche Report *see*: http://www2.assemblee-nationale.fr/static/14/missions_info/extraterritorialite/summary.pdf.

[14] Legislation no. 2016-1691 dated December 9, 2016 on transparency, the fight against corruption and the modernization of economic activity.

[15] Article 3 (5) provides that: "[the AFAC] *5°* Ensures, at the Prime Minister's request, compliance with Law no. 68-678 of July 26, 1968 on the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign individuals or legal entities, in the scope of the enforcement of decisions issued by foreign authorities imposing on a company having its registered office in France an obligation to submit to a conformity procedure affecting its internal corruption prevention and detection procedures."

DPAs.[16] With the new anti-corruption law, the AFAC, which has replaced the SCPC, has become the official channel through which information and documents issued by French companies will now have to be transmitted to foreign authorities.[17]

However, *Sapin 2* does not provide for a systematic use of the AFAC. Indeed, AFAC is only required to control compliance with the French blocking statute when expressly requested to do so by the Prime Minister. During the parliamentary debates, MPs have discussed the question of whether to delete the reference made to the Prime Minister so that the AFAC be systematically informed of any transmission of information or document. However, an amendment tabled to that effect has finally been rejected.[18] Further, the AFAC's supervision will be limited to the implementation of decisions issued by foreign authorities like DPAs and therefore excludes the investigation and discovery procedures.

On a separate note, on January 29, 2016, the French government issued a Decree establishing a new function called "Commissioner for strategic information and economic security". Among its many missions, the Commissioner has been granted the power to control compliance with the French blocking statute.[19] However, the scope of these powers still remains unclear today. To the best of our knowledge, there are no published precedents nor official guidelines on how the Commissioner may assist French companies subject to foreign production orders. We further note that there is no obligation under the

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[16] In the context of the DPAs concluded with French companies Technip (2010) and Total (2013) *see supra* notes 7 and 8.

[17] The French Anti-Corruption Agency has been empowered with broad prerogatives along with an increase of its human and financial resources (70 staff and an annual budget of 10-15 million euros). The AFAC is still currently in the process of being created. A Decree no. 2017-329 and a Government Order both dated March 14, 2017 specify the rules relating to the organization and functioning of the AFAC. The full original texts are available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034187670&dateTexte=&categorieLien=id and https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034187761&dateTexte=&categorieLien=id.

[18] Amendments nos. 212 and 62 defended respectively by MPs Olivier Marleix and Charles de Courson during the parliamentary debates held on September 28, 2016. Full text of the debates is available at: http://www.assemblee-nationale.fr/14/cri/2015-2016-extra2/20162003.asp.

[19] Article 4(4) of Decree no. 2016-66 dated January 29, 2016 provides that: "The mission of the strategic information and economic security department, together with the relevant Ministries is to: [...] Guarantee the application of the provisions of the Law of July 26, 1968 mentioned above by the people concerned by it, subject to the jurisdiction conferred by the Law in this field on another authority and, as the case may be, related to it".

French blocking statute to inform the Commissioner directly.

Under a combined reading of the January 29, 2016 Decree and the new anti-corruption law, we believe that either the Commissioner or the AFAC may be entrusted with the monitoring of the French blocking statute depending on the stage of the proceedings. Most likely, we would expect the Commissioner to withdraw from the case should the matter move towards a DPA. In both cases, there is no systematic recourse to these entities. Should the parties involved in the proceedings decide not to take recourse to the French blocking statute they may very well continue to do so at their own risk. In our view, this position is consistent with the primary goal of the French blocking statute, which is to provide compelled persons with a legal means to oppose communication requests concerning documents and information located on French territory.

To minimize the risks of prosecution in France, we strongly recommend parties to communicate evidence through the available mutual judicial cooperation mechanisms. Often, U.S. Counsel are reluctant to abide by The Hague Evidence Convention, which they consider too burdensome and time-consuming. We believe this is a common misperception: overall, The Hague Evidence Convention has proven to be a very efficient tool in France. The letter of request procedure set out in the Convention (and described below) is rather straightforward and able to achieve almost the same purpose as the one pursued under U.S. Federal Rules.

II. Execution in France of U.S. letters of request under The Hague Evidence Convention

A letter of request under The Hague Evidence Convention is a document issued by a court in a Contracting State in which it requests the competent authority of another Contracting State to obtain evidence or to perform a judicial act.[20]

A. Content of the letter of request

Article 3 of The Hague Evidence Convention provides that letters of request shall specify, among others:

> "a) the authority requesting its execution and the authority requested to execute it, if

[20] *See* the full English text of The Hague Evidence Convention, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=82.

> known, to the requesting authority;
>
> b) the names and addresses of the parties to the proceedings and their representatives, if any;
>
> c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
>
> d) the evidence to be obtained or other judicial act to be performed".

Among the "evidence to be obtained" or the "judicial act to be performed", a letter of request may request the deposition of individuals. Such a letter would not give rise to any difficulty and would be executed by the French judicial authorities (see *infra* for practical enforcement details).

The letter of request may also request that the individuals to be deposed bring with them documents for copying and production in the course of the proceedings pending abroad.

With respect to the production of documents, Article 23 of The Hague Evidence Convention provides that "[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

When France ratified The Hague Evidence Convention in 1974, the French government had reservations regarding the provisions of Article 23, whereby it stated that France would not execute requests having for purpose "pre-trial discovery of documents". This declaration was amended on January 19, 1987 in the following terms:

> "The declaration made by the French Republic in accordance with Article 23 relating to Letters of Request issued for the purpose of obtaining pre-trial discovery of documents does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure."

On September 18, 2003, the Paris Court of Appeal specified in this respect that:

> "[the requesting party] not having the documents in its possession, an exact description of the requested exhibit by the latter may not be required; within the meaning of the French reservation, the enumeration of the documents is

> limitative insofar as they are identified with a reasonable degree of specificity depending on a certain number of criteria such as their date, nature or author."[21]

A letter of request for the production of documents meeting the above requirements set forth above will likely be executed without difficulty in France without the individual or entity producing the documents becoming subject to the French blocking statute. In contrast, a "fishing expedition" will not be allowed in France.

B. Procedure for the execution of a letter of request in France

A letter of request must be submitted by the party seeking to obtain evidence located in France to the U.S. court before which the proceedings are pending for signature. We recommend that French counsel assist the U.S. counsel with the drafting and review of the letter of request.

The signed letter of request, together with a French certified translation, will then be formally sent by French counsel for the party seeking the deposition of witnesses and/or the production of documents to the French Ministry of Justice ("*Direction des Affaires Civiles et du Sceau*"), who acts as France's central authority for these matters. The Ministry of Justice will verify that the letter of request satisfies the requirements of The Hague Evidence Convention and the French declaration and will then forward it to the Public Prosecutor of the Civil Court in the jurisdiction of which the witness to be deposed is domiciled. This procedure will take approximately one to two weeks.

The Public Prosecutor next reviews the letter of request to ensure that the rights to a fair trial are not violated and sends it to the Presiding Judge of the Civil Court. The latter then assigns the execution of the letter of request to a civil judge (the "Enforcement Judge"). This step may take from a few days up to two-three weeks, depending on the courts.

The Enforcement Judge then issues a notice to the individuals named in the letter of request. Usually, the Enforcement Judge (or his clerk) calls the witnesses and asks them when they will be available. If the witnesses and the Enforcement Judge find an agreed date and time, the Enforcement Judge sends a notice to the witnesses to appear before the Court on the agreed date. Enforcement Judges are often

[21] Paris Court of Appeal, September 18, 2003, docket no. 2002/18509.

reluctant to force an individual to be deposed.

Article 9 of The Hague Evidence Convention provides that:

> "The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.
>
> However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties".

United States counsel may request the following special methods to be integrated in the letter of request:

- questioning of witnesses to be conducted by U.S. lawyers in direct and cross-examinations (and not through the Enforcement Judge),

- U.S.-law based objections raised during the depositions, if any, to be resolved by the U.S. trial judge when testimony is presented to the trial court,

- verbatim transcript of the deposition by a U.S. court reporter, and

- video recording of the deposition by a professional videographer.

In our experience, these special methods are usually accepted by French Enforcement Judges provided that they are expressly requested in the letter of request and paid for by the applicant (when relevant). In some instances, the video recording may be refused. Should the witness not speak English, the Enforcement Judge may ask that an interpreter be present and that a French stenographer draft a verbatim transcript of the deposition in French, in addition to a U.S. transcript. In that case, the applicant bears the associated costs.

A copy of the documents evidencing the execution of the letter of request by the Enforcement Judge (such as the verbatim transcript(s) of the deposition, the video recording or the documents obtained) are then transmitted to the French Ministry of Justice, after review by the Public Prosecutor. The French Ministry of Justice then returns such documents to the person specified in the letter (which may be the foreign court, or the French or foreign Counsel).

Pursuant to Article 17 of The Hague Evidence Convention, parties may also choose not to have the deposition take place before an

Enforcement Judge and instead agree on the designation of a commissioner:

> "In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if
>
> a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
>
> b) he complies with the conditions which the competent authority has specified in the permission.
>
> A Contracting State may declare that evidence may be taken under this Article without its prior per- mission" (emphasis added).

The parties generally agree in advance on the name of the commissioner. The com-missioner can be anyone deemed competent to organize and supervise the deposition process. The commissioner will be designated in the letter of request, together with the terms of payment of the commissioner's fees.

In theory, the deposition of witnesses should take place at the U.S. Embassy in France. Yet, the U.S. Embassy rarely accepts to host the depositions and usually lets the parties choose the location of the depositions. Appointing a commissioner usually provides more flexibility in terms of scheduling and organization. Given these points, the chosen commissioner should be more available and has less practical constraints than an Enforcement Judge. This being said, one needs to ensure in advance that witnesses will be willing to testify at the time of the deposition, as this needs to be specified in the letter of request signed by the U.S. court and submitted to the French Ministry of Justice.

III. Conclusion

Multiple attempts to reform the French blocking statute over the last decade have shown that there is general agreement in France that this legal mechanism is not effective, and as a result, the blocking statute is rarely taken seriously abroad. That several of these attempts have failed further reveals the difficulties in reaching a consensus on the most sensible reform to be implemented.

One proposed solution, changing the scope of the statute (e.g. by restricting it to trade secrets only), will not solve the main problem stifling the blocking statute. This problem is that the statute is a legal mechanism which is thought to be inappropriate to the realities of today's globalized world. The infrequent use of the mechanism by French companies themselves demonstrates that the latter often prefer to violate the French blocking statute and abide by the orders issued against them by the foreign jurisdictions, in particular U.S. courts, rather than taking the risk of being banned from doing business in the U.S.

Others believe that the widespread disregard for the French blocking statute reflects its non-enforceable nature and, more generally, the unenforceability of French criminal legislation. The newly enacted French anti-corruption law aims at answering these critics by reinforcing the legislative framework by improving detection, prevention and sanction of corruption. It will be interesting to see whether the French go beyond mere posturing (i.e. whether these new mechanisms will be effectively implemented in practice) and, if so, how the foreign courts, in particular U.S. courts, will react.

In the meantime, French companies that are requested to disclose information in the scope of legal proceedings in the United States may want to follow the letter of request procedure provided by The Hague Evidence Convention, which remains the safest means of communicating evidence and can be executed without difficulty in France.