No More Safe Harbour: Cross-Border Discovery and Compliance with Data Protection Laws

French Blocking Statute & Cross-Border Discovery

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Under French Law no. 68-678 of July 26, 1968, relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents and Information to Foreign Individuals or Legal Entities, as modified by French Law no. 80-538 dated July 16, 1980 (the "French blocking statute"), the communication of information or documents in the scope of US judicial proceedings, if performed outside the provisions of the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention"), may give rise to criminal penalties.

We will first address the scope of the French blocking statute (**1**) before briefly explaining the execution in France of US Letters of Request under the Hague Convention (**2**).

1. SCOPE OF THE FRENCH BLOCKING STATUTE

Article 1 bis of the French blocking statute provides that:

> "*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*".

Pursuant to Article 3 of the French blocking statute, a breach of the above provision is punished by a six-month prison sentence and/or a fine of €18,000 (see the full text of the French blocking statute in French and English in Appendix 1).

The prohibition applies to "*any person*", irrespective of whether such person is related, in a way or another, to a party to the US proceedings.

Also, Article 1 bis 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 whether these documents or information are held in or outside of France. However, the scope of Article 1 bis 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 in the 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 the French territory when the victim is a French citizen or legal entity.

The French blocking statute was intended to provide French companies with a "legal excuse" to resist abuses of pre-trial discovery requests from the US when such requests were not issued following one of the procedures set forth in the Hague Convention, which entered into force in the US in 1972 and in France in 1974.

Up until recently, the French blocking statute had never been enforced and US courts considered that it was an ineffective threat to French corporations. In the *Aerospatiale* decision dated June 15, 1987, the US

Supreme Court held that the Hague Convention was not a mandatory and exclusive procedure for obtaining documents and did not pre-empt the discovery provisions of the Federal Rules of Civil Procedure.

Then, 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 "*Christopher X* decision", see our Dispute Resolution Newsflash in Appendix 2).

As explained in an article we published in the New York Law Journal (Appendix 3), this conviction was meant to "put some muscles" behind the French blocking statute, which was up until then disregarded by US courts.

Since the *Christopher X* decision, the likelihood of prosecution and conviction for a breach of the French blocking statute is higher, meaning that it now really does constitute a legitimate reason to request that US courts comply with the procedure set forth in the Hague Convention when information is to be obtained from a French individual domiciled in France (see for an update, a recent article on this topic in Appendix 5).

It should be stressed that, in a recent civil case, the 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 US proceedings. Interestingly, the case at stake involved the US corporation Arjowiggins, defendant in a product liability case pending in the US, which was seeking to obtain information from a former French subsidiary for the purpose of its own defense in the US 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 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*" (4 June 2014, docket nos. 1335/14 and 14/01547).

Finally, it ought to be noted that the French blocking statute is expressly referred to in Article 3 (4) of the bill on transparency, anti-corruption and modernization of the economy (the so-called "loi Sapin 2" or French Bribery Act), which falls under the scope of jurisdiction of the future French anti-corruption national agency. This agency will have to ensure that the French blocking statute is duly enforced. The issue of the application of the French blocking statute should, therefore, be closely monitored as it may be subject to further developments in the next months and years.

2. EXECUTION IN FRANCE OF US LETTERS OF REQUEST UNDER THE HAGUE CONVENTION

A Letter of Request under the Hague 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 (see the full English text of the Hague Convention in Appendix 4). We will explain below the basic content of a Letter of Request (**2.1**) and the procedure to be followed for its execution in France (**2.2**).

2.1 Content of the Letter of Request

Article 3 of the Hague Convention provides that Letters of Request shall specify, among others:

> "*a) the authority requesting its execution and the authority requested to execute it, if 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* §2.2 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 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 Convention, the French government issued a declaration pursuant to the above 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 (the "French declaration") 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*" (emphasis added).

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*" (emphasis added).

Therefore, a Letter of Request for the production of documents complying with the above requirements would be executed without difficulty in France without the individual or entity disclosing the documents being subject to the prohibition of the French blocking statute.

2.2 Procedure for the execution of a Letter of Request in France

The Letter of Request is submitted by the party seeking to obtain evidence located in France to the US court before which the proceedings are pending for signature of the latter. We recommend that a French Counsel assist US Counsel with the drafting of the Letter of Request, or at least that a French Counsel review the draft Letter of Request before it is submitted to the US court for signature.

The signed Letter of Request, together with a French certified translation, is formally sent by the 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*), acting as France's central authority for these matters.

The latter verifies that the Letter of Request satisfies the requirements of the Hague Convention and the French declaration and then forwards it to the Public Prosecutor of the Civil Court in the jurisdiction of which the witness to be deposed is domiciled. This takes approximately one to two weeks.

The Public Prosecutor reviews the Letter of Request to ensure that the rights to a fair trial are complied with and sends it to the President of the Civil Court. The latter then assigns the execution of the Letter of Request to a civil judge (the "executing Judge"). This step may take from a few days up to two-three weeks, depending on the courts.

The executing Judge then issues a notice to the individuals named in the Letter of Request. Usually, the executing Judge (or his clerk) calls the witnesses and asks them when they are available. If the latter are available on a certain date and that it is also the case of the executing Judge, the latter sends a notice to the witnesses to appear before the Court on the agreed date. Executing Judges are often reluctant to force an individual to be deposed.

Article 9 of the Hague 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*".

Executing Judges usually accept that the following special methods be followed, provided that they are expressly requested in the Letter of Request and paid for by the requesting party (when relevant):

- Questions asked by the US lawyers in direct and cross-examinations,
- Verbatim transcript of the deposition by a US court reporter, and
- Video recording of the deposition by a professional videographer.

In all the Letters of Request that we have dealt with in the past, the first two special methods have always been accepted by executing Judges. In a few instances only, the video recording was refused. Also, when the witness does not speak English, the executing Judge asks that an interpreter be present and that a French stenographer draft a verbatim transcript of the deposition in French, in addition to a US transcript. In such a situation, the interpreter and the French stenographer are paid for by the requesting party.

A copy of the documents evidencing the execution of the Letter of Request by the executing 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 French or foreign Counsel).

Please note that it is also possible, under Article 17 of the Hague Convention, not to have the deposition take place before an executing Judge:

> "*In a civil or commercial matter, <u>a person duly appointed as a commissioner</u> for the purpose may, <u>without compulsion</u>, 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 permission" (emphasis added).

As a result, if the witnesses have no objection to being deposed, one may opt for a deposition before a commissioner. He/she is designated in the Letter of Request. The parties generally agree in advance on the name of the commissioner, who can be anyone deemed competent to organize and supervise the deposition process. The parties can also agree that one or both of them will pay the commissioner's fees (to be agreed in advance with him/her prior to inserting his/her name in the Letter of Request).

In theory, such deposition should take place at the US Embassy in France. Yet, the US 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 schedule given that the chosen commissioner should be more available and have less practical constraints than an executing Judge. This being said, one needs to ensure in advance that witnesses will be willing to testify at the time of the depositions because this needs to be specified in the Letter of Request signed by the US court and submitted to the French Ministry of Justice.

Thomas Rouhette & Ela Barda

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- Appendix 1: French blocking statute in French and English
- Appendix 2: Lovells Dispute Resolution Newsflash, February 12, 2008
- Appendix 3: "*France Puts Some Muscle Behind Its Blocking Statute*", Marc Gottridge and Thomas Rouhette, New York Law Journal, no. 82, April 29, 2008
- Appendix 4: The Hague Convention of March 18, 1970 in French and English
- Appendix 5: "*Four Years After Christopher X: U.S. Courts Afford French Blocking Statute Little Deference*", Christina Taber-Kewene and Cécile Di Meglio, International Law Quarterly, Vol. XXX, no. 1, Winter 2012

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Appendix 1

LOI

Loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères

Article 1

Modifié par Loi 80-538 1980-07-16 art. 2 I JORF 17 juillet 1980

Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire français et à tout dirigeant, représentant, agent ou préposé d'une personne morale y ayant son siège ou un établissement de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d'ordre économique, commercial, industriel, financier ou technique dont la communication est de nature à porter atteinte à la souveraineté, à la sécurité, aux intérêts économiques essentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que de besoin.

Article 1 bis

Créé par Loi 80-538 1980-07-16 art. 2 II JORF 17 juillet 1980

Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci.

Article 2

Modifié par Loi 80-538 1980-07-16 art. 3 JORF 17 juillet 1980

Les personnes visées aux articles 1er et 1er bis sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications.

Article 3

Modifié par Ordonnance n°2000-916 du 19 septembre 2000 - art. 3 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002

Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles 1er et 1er bis de la présente loi sera punie d'un emprisonnement de six mois et d'une amende de 18000 euros ou de l'une de ces deux peines seulement.

Law n°68-678 of July 26, 1968 relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents and Information to Foreign Individuals or Legal Entities, as modified by the Law n° 80-538 dated July 16, 1980 and by the Order n° 2000-916 of September 19, 2000

Article 1

Without prejudice to international treaties or agreements, no individual of French nationality or habitually residing on the French territory, nor any officer, representative, agent or employee of a legal entity, having its registered office or business establishment in France, may communicate, in writing, orally or in any other form, in whatever place, to foreign public authorities, documents or information of an economic, commercial, industrial, financial or technical nature, when such disclosure is likely to affect the sovereignty, the security or the fundamental economic interests of France or its public order, as specified whenever necessary by the Administrative Authority.

Article 1 bis

Without prejudice 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 proceedings or in relation thereto.

Article 2

The persons referred to in Articles 1 and 1bis shall promptly inform the competent Minister, upon the receipt of any request concerning such communications.

Article 3

Without prejudice to harsher penalties provided for by law, any breach of the provisions of Articles 1 and 1bis of the present law shall be punished by a six month imprisonment and a fine of 18,000 Euros or either one of these penalties only.

Appendix 2

Meglio, Cecile Di

From: Lovells Paris
Sent: mardi 12 février 2008 16:08
To: Lovells Paris
Subject: Lovells - Paris Dispute Resolution Newsflash
Attachments: editdata.txt

Lovells

PARIS DISPUTE RESOLUTION NEWSFL

February 2008

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THE FRENCH SUPREME COURT RECENTLY UPHELD THE FIRST CRIMINAL SANCTION ORDERED UNDER THE FRENCH BLOCKING STATUTE

In an unprecedented decision, the Criminal Chamber of the French Supreme Court upheld on 12 December 2007 a decision dated 28 March 2007 in which the Paris Court of Appeal ordered a French lawyer to pay 10,000 euros for violation of the French "blocking statute". It is thereby the first time since the enactment of this statute almost 30 years ago that an individual is criminally sanctioned in a final decision by a French court. The "legal excuse" created by the French legislature for the French companies and individuals unwilling to comply with discovery requests from the US now becomes reality.

This French Supreme Court decision was handed down in the larger case Executive Life, in which the French mutual insurer MAAF, among other French corporations, was sued before a Federal Court in Los Angeles by the California Insurance Department for fraud in connection with the 1991 purchase of Executive Life Insurance Co.

In April and December 2000, the Federal Court issued a number of requests for evidence under the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil and Commercial Matters to obtain from MAAF documents located in France relating to the allegedly fraudulent purchase. The French corresponding lawyer for the American attorney representing the California Insurance Department took the initiative to call an ex-director of MAAF. According to the Paris Court of Appeal, during this call, the French lawyer alleged that the members of the MAAF's board of directors had not been properly informed at the time of the purchase and that this transaction had been taken in the "hallway" without any debate. In other words, still according to the Court of Appeal decision, "*he told a lie in order to get at the truth*". In a letter produced before the Court, the ex-director denied the allegations made by the French lawyer on the way the purchase decision had been taken.

Thereafter, MAAF filed a criminal complaint against the French lawyer before the French criminal courts for violation of the French blocking statute (law no. 80-538 of 16 July 1980), which prohibits, except when international treaties or agreements provide otherwise, "*any person from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of constituting evidence in view of foreign judicial or administrative proceedings or in relation thereto*".

The Paris Court of Appeal held that the French lawyer did not content himself with approaching, in a neutral manner, individuals whose testimony could have been obtained in accordance with the provisions of the Hague Convention, but rather sought, without due authorization, economic and commercial information aiming at constituting evidence, since the information obtained could enable the plaintiff to choose the ex-director as a witness and to orient his future testimony. The Court noted that the criminal offence, which is aimed at "*limiting the abuses which could be committed in the search for evidence*", does not constitute a disproportionate obstruction to due process, which is guaranteed by the procedures set forth in the Hague Convention.

The Paris Court of Appeal therefore found the French lawyer guilty of violating the French blocking statute and sentenced him to pay a fine of 10,000 euros.

The convicted lawyer thereafter filed a challenge against this decision before the French Supreme Court, alleging, among other arguments, that he never solicited the information given by the ex-director, which on the contrary was given spontaneously. He also put forward that in placing the call, he only attempted to obtain from the ex-director his consent for giving testimony, as a person appointed as commissioner under Article 17 of the Hague Convention may not use compulsion on the witness to force him to testify.

The Criminal Chamber of the Supreme Court dismissed the above arguments and confirmed the Court of Appeal decision, noting that the information sought on the way the decision to purchase Executive Life had been taken by the MAAF's board of directors was of an economic, financial or commercial nature and was aimed at constituting evidence in a foreign judicial procedure.

THE EFFECT OF THIS DECISION ON DISCOVERY REQUESTS

This criminal decision is the first of its kind, as it is the first time that anyone is convicted of violating the French blocking statute. The sanctions provided for by this statute (maximum of six months of imprisonment and/or 18,000 euros of fine) which remained until recently purely theoretical, may now effectively dissuade any litigant from obtaining in France outside the scope of international conventions information that could be used in foreign proceedings.

This effect is exactly the one intended by the French legislature when it enacted this statute in reaction against the extra-territorial effect on French companies of the American anti-trust rules: it intended to provide to French companies and their employees with a "legal excuse" to resist abuses of pre-trial discovery requests from the United States when such requests were not issued following one of the procedures set forth by the Hague Convention, which entered into force in the US in 1972 and in France in 1974. However, since up until recently no one had ever been convicted under the French blocking statute, US courts could, and often did, reasonably consider this statute was not a real obstacle to "direct" discovery requests. Litigants and third parties now have the means to prove that this statute is enforced by the French judicial authorities.

Litigants, as well as their French and US counsel, should now be more reluctant than in the past to bypass the Hague Convention system when evidence is located in France, even when the individual or the company volunteers to provide the requested evidence.

For any questions regarding the contents of this article, please contact **Thomas Rouhette** or **Cécile Di Meglio**.

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OUTSIDE COUNSEL

BY MARC J. GOTTRIDGE AND THOMAS ROUHETTE

France Puts Some Muscle Behind Its Blocking Statute

Marc Gottridge *Thomas Rouhette*

When should American litigators care about a judgment of the French Cour de Cassation (Supreme Court) requiring a French lawyer to pay a 10,000 euro fine? When that decision may shake up the conventional wisdom about what discovery may be obtained from French (and perhaps other foreign) parties and nonparties.

Cross-border discovery is a subject on which France (and, for that matter, much of the world) and the United States do not see eye to eye. The U.S. Supreme Court in 1987 held, in *Societe Nationale Industrielle Aerospatiale v. United States District Court*,[1] a case involving a French party, that the Hague Evidence Convention does not preempt the discovery provisions of the Federal Rules of Civil Procedure. Litigants therefore generally may obtain discovery from foreign parties in a U.S. court simply by serving discovery requests or notices, as in cases involving only domestic litigants. To obtain documents located in France or the deposition testimony of a party's employees residing there, an American litigator need not resort to the more cumbersome (and far less useful) Hague process. Outside the United States, the *Aerospatiale* decision was criticized as showing disrespect to the sovereignty of other Hague signatories.[2]

Blocking Statutes

• ***And the 'Aerospatiale' Decision.*** A number of countries, including France,[3] have enacted "blocking" statutes forbidding their nationals from cooperating with American discovery requests or orders. Enacted in 1980, the French statute prohibits nationals or residents of France, or the employees, agents or officers of a French company anywhere, from disclosing "to foreign public authorities documents or information of an economic, commercial, industrial, financial or technical nature" when such disclosure is liable to affect French sovereignty, security or "fundamental economic interests."[4]

Under *Aerospatiale*, however, the enactment of such a statute does not justify resistance by a foreign party to an American lawsuit. The Supreme Court there found it "well-settled" that such statutes "do 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 stated that the existence of a blocking statute "is relevant to the Court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material."[5] The Court in *Aerospatiale* declined to "articulate specific rules to guide this delicate task of adjudication,"[6] but instead directed lower courts to balance various factors in the comity analysis.[7]

Courts applying *Aerospatiale* have generally treated the French blocking statute as something of a paper tiger: Although the French law provides for criminal sanctions, it had never, in its nearly 30-year history, been enforced. The seemingly hollow French threat of criminal prosecution for cooperating with American discovery has been cited by U.S. courts as a factor weighing against treating French parties, and nonparties, differently from their domestic counterparts in terms of their discovery obligations.[8]

For example, in a securities fraud class action against *Vivendi Universal SA*, in the U.S. District Court for the Southern District of New York in 2006, Magistrate Judge Henry Pitman granted plaintiffs' motion to compel nonparty Lazard Group LLC to provide documents located in France. Judge Pitman observed that although Lazard had been threatened with prosecution by two French agencies, "the United States' experience with the French Blocking statute teaches that there is little likelihood these threats will ever be carried out"; the "speculative possibility of prosecution" was "insufficient to displace the Federal Rules of Civil Procedure."[9]

In *Bodner v. Banque Paribas*,[10] in which Holocaust victims sought compensation for the allegedly wrongful taking of assets by financial institutions in France during World War II, defendants moved for a protective order against production of defendants' documents which had previously been provided to a French public investigative commission. Magistrate Judge Marilyn Dolan Go in the Eastern District of New York denied the defendants' motion on the grounds that the French blocking statute did not "subject defendants to a realistic risk of prosecution" and that the United States' interest in assuring the restitution to Holocaust victims and their families was paramount.[11] To similar effect is Eastern District Magistrate Judge Kiyo Matsumoto's decision last year in *Strauss v. Credit Lyonnais SA*,[12] an action by victims of a Hamas terrorist attack in Israel against a French bank for alleged aiding and abetting. The court compelled the bank to produce documents, finding "that there is no

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significant risk of prosecution" for violating the French blocking statute.[13]

The 'MAAF' Decision

That analysis may no longer hold true in light of the Cour de Cassation's recent decision in a case involving the French mutual insurance company MAAF and the California Insurance Department. In the *MAAF* case,[14] a French lawyer working with an American law firm representing the California department made a telephone call in an attempt to obtain information informally from MAAF, which was a defendant in the then-pending Executive Life litigation in federal court in Los Angeles. The French Court upheld a finding that the lawyer violated the blocking statute and affirmed his sentence (a 10,000 euro fine). Although this sanction is far from draconian, it marks the first time that anyone has ever been convicted of violating the French blocking statute. The previously theoretical threat of criminal penalties under that statute has finally become a reality.

MAAF may alter the balance in discovery disputes in U.S. courts involving French parties. Armed with proof that France will now enforce the criminal provisions of its blocking statute, French parties may now have stronger grounds to resist application of the discovery provisions of the Federal Rules, and to insist that their adversaries utilize the Hague Evidence Convention procedures, in cases pending in American courts.[15]

Under the Hague Convention

If such an argument prevails, the requesting party will find discovery in France under the Hague Convention considerably more limited, and cumbersome, than under the Federal Rules of Civil Procedure.[16] Requests for documents may be presented to the French authorities through letters of requests issued by American courts, but French law requires that the documents requested be identified with reasonable specificity and bear a definite link to the dispute. A request for documents lacking a limitation period can be categorized as a "fishing expedition" and be held invalid.[17]

Depositions of French parties may be conducted before a diplomatic or consular officer of the United States or before a person commissioned by the U.S. court, provided prior authorization has been granted by the French Ministry of Justice. In order to depose party witnesses who are French nationals or residents, authorization must be obtained in advance from the relevant bureau of the Ministry of Justice who must receive all the documents pertaining to the case at least forty five days before the deposition is to be held.[18]

The recent *MAAF* decision may have a greater effect on cases in which French nonparties with offices in the United States receive subpoenas for production of documents under Rule 45 of the Federal Rules of Civil Procedure. Federal courts are ordinarily more solicitous of the burdens that discovery imposes on nonparties than on parties.[19] French nonparties may now be able to argue that if their employees in France were to provide discovery materials they would run a real risk of criminal prosecution. This not only provides stronger evidence of French sovereign interests, but also significantly increases the burdens that a nonparty subpoena recipient would face.

'MAAF' may alter the balance in discovery disputes in U.S. courts. Armed with proof that France will now enforce its blocking statute, French parties may now have grounds to resist application of the discovery provisions of the Federal Rules.

If federal courts become more reluctant to enforce Rule 45 subpoenas extraterritorially, the evidence sought by such subpoenas would likely become unavailable. French courts rarely compel an unwilling nonparty witness either to produce documents or to provide deposition testimony, and do not require nonparties to produce documents unless there is a reasonable belief that the nonparties possess the identified documents.

Conclusion

Beyond these direct effects, other countries with blocking statutes may be emboldened to follow France's lead, and enforce previously dormant criminal sanctions. It will be interesting to see whether other countries' prosecutors and courts follow the French example, as well as what effect that example has on American courts considering cross-border discovery issues.

1. 482 U.S. 522 (1987).

2. See, e.g., Peter L. Murray, "Taking Evidence Abroad: Understanding American Exceptionalism," 10 Zeitschrift fuer Zivilprocess International 343 (2005); Lawrence N. Minch, "U.S. Obligations Under the Hague Evidence Convention: More Than Mere Good Will?," 22 Int'l Law. 511, 512 (1988).

3. These include United Kingdom, Canada, Australia, Sweden, the Netherlands, and Japan, although many "blocking" statutes are more limited in scope than France's.

4. Law No. 80-538 of July 16, 1980, Journal Officiel de la Republique Francaise, July 17, 1980, p. 1799.

5. *Aerospatiale*, 482 U.S. at 544 n.29.

6. Id.

7. Id. at 544 n.28. The five factors enumerated by the Court, and codified in the Restatement (Third) of Foreign Relations Law §442(1)(c), are: the importance to the 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 alternate means to secure the information; and the extent to which noncompliance with the request would undermine important American interests or compliance with the request would undermine important interests of the state where the information is located. Id. Courts in the Second Circuit have identified two additional factors—the hardship to the party from which discovery is requested and that party's good faith in resisting discovery. See *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998); *Minpeco, S.A. v. ContiCommodity Servs. Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987) (Lasker, J.).

8. Even before *Aerospatiale*, in *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum*, 105 F.R.D. 16 (S.D.N.Y. 1984), District Judge John F. Keenan gave considerable weight to the lack of any significant risk of prosecution in denying a motion for a protective order. See also *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, No. 80 Civ. 1911 (PNL), 1984 WL 423, at *3 (S.D.N.Y. May 30, 1984) (Leval, J.) (French party made no "showing that it faces any realistic threat of prosecution under the statute.").

9. *In re Vivendi Universal, S.A. Secs. Litig*, No. 02 Civ. 5571(RJH) (HBP), 2006 WL 3378115 at *2-3 (S.D.N.Y. Nov. 16, 2006). Federal courts have rendered similar rulings with respect to laws of other countries which have been cited as shields against discovery under the Federal Rules of Civil Procedure. See, e.g., *First American*, 154 F.3d at 21 (U.K. confidentiality laws); *Remington Prods. Inc. v. N. Am. Philips Corp.*, 107 F.R.D. 642 (D. Conn. 1985) (the Netherlands' blocking statute, which had never been enforced); but see *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 355 (D. Conn. 1991) (requiring plaintiffs to employ Hague Evidence convention to obtain discovery from French defendant and citing the French blocking statute); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987) (requiring plaintiff to utilize Hague Evidence Convention procedures to obtain discovery from a German defendant).

10. 202 F.R.D. 370 (E.D.N.Y. 2000). Magistrate Judge Go in *Bodner* distinguished *Minpeco S.A. v. Conticommodity Services Inc.*, 116 F.R.D. 517, 525-26 (S.D.N.Y. 1987), in which Judge Morris Lasker denied plaintiff's motion to compel discovery from a bank of information protected by the Swiss bank secrecy law, finding that the Swiss law was significantly unlike other foreign anti-disclosure laws, such as the French blocking statute, because it provided for a real threat of prosecution.

11. *Bodner*, 202 F.R.D. at 374-75.

12. 242 F.R.D. 199 (E.D.N.Y. 2007).

13. Id. at 221; see also *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 348 (D. Conn. 1997) (Margolis, Mag. J.).

14. Cour de Cassation Chambre Criminelle (Cass. Crim.), Paris, Dec. 12, 2007, Juris-Data no. 2007-332254.

15. Of course, under the multiple-factor comity analysis endorsed by the Supreme Court and the Second Circuit Court of Appeals, see n. 7, supra, it is possible in a given case that other concerns (e.g., the perceived importance of the requested discovery to the litigation or its unavailability from other sources) may nevertheless outweigh the sovereignty interests of the affected foreign country and the hardships to which the receiving party would be subjected.

16. *Valois*, 183 F.R.D. at 349; See also Richard M. Dunn & Raquel M. Gonzalez, "The Thing About Non-US Discovery for U.S. Litigation: It's Expensive and Complex," 67 Def. Couns. J. 342, 347-49 (2000).

17. See Cour d'Appel [regional court of appeal] Paris, 1e ch., Dec. 18, 2003, RG No. 2002/18509 (granting the request for documents because, among other things, the requests were limited to a sufficiently precise time period).

18. U.S. Department of State, Bureau of Consular Affairs (http://travel.state.gov/law/info/judicial/judicial_647.html, last visited Feb. 24, 2008).

19. See, e.g., *First American*, 154 F.3d at 22; *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983).

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20. CONVENTION SUR L'OBTENTION DES PREUVES À L'ÉTRANGER EN MATIÈRE CIVILE OU COMMERCIALE[1]

(Conclue le 18 mars 1970)

Les Etats signataires de la présente Convention,
Désirant faciliter la transmission et l'exécution des commissions rogatoires et promouvoir le rapprochement des diverses méthodes qu'ils utilisent à ces fins,
Soucieux d'accroître l'efficacité de la coopération judiciaire mutuelle en matière civile ou commerciale,
Ont résolu de conclure une Convention à ces effets et sont convenus des dispositions suivantes :

CHAPITRE I – COMMISSIONS ROGATOIRES

Article premier

En matière civile ou commerciale, l'autorité judiciaire d'un Etat contractant peut, conformément aux dispositions de sa législation, demander par commission rogatoire à l'autorité compétente d'un autre Etat contractant de faire tout acte d'instruction, ainsi que d'autres actes judiciaires.
Un acte d'instruction ne peut pas être demandé pour permettre aux parties d'obtenir des moyens de preuves qui ne soient pas destinés à être utilisés dans une procédure engagée ou future.
L'expression « autres actes judiciaires » ne vise ni la signification ou la notification d'actes judiciaires, ni les mesures conservatoires ou d'exécution.

Article 2

Chaque Etat contractant désigne une Autorité centrale qui assume la charge de recevoir les commissions rogatoires émanant d'une autorité judiciaire d'un autre Etat contractant et de les transmettre à l'autorité compétente aux fins d'exécution. L'Autorité centrale est organisée selon les modalités prévues par l'Etat requis.
Les commissions rogatoires sont transmises à l'Autorité centrale de l'Etat requis sans intervention d'une autre autorité de cet Etat.

Article 3

La commission rogatoire contient les indications suivantes :
a) l'autorité requérante et, si possible, l'autorité requise ;
b) l'identité et l'adresse des parties et, le cas échéant, de leurs représentants ;
c) la nature et l'objet de l'instance et un exposé sommaire des faits ;
d) les actes d'instruction ou autres actes judiciaires à accomplir.
Le cas échéant, la commission rogatoire contient en outre :
e) les nom et adresse des personnes à entendre ;

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[1] Cette Convention, y compris la documentation y afférente, est disponible sur le site Internet de la Conférence de La Haye de droit international privé (www.hcch.net), sous la rubrique « Conventions » ou sous l'« Espace Preuves ». Concernant l'historique complet de la Convention, voir Conférence de La Haye de droit international privé, *Actes et documents de la Onzième session (1968)*, tome IV, *Obtention des preuves* (219 p.).

f) les questions à poser aux personnes à entendre ou les faits sur lesquels elles doivent être entendues ;
g) les documents ou autres objets à examiner ;
h) la demande de recevoir la déposition sous serment ou avec affirmation et, le cas échéant, l'indication de la formule à utiliser ;
i) les formes spéciales dont l'application est demandée conformément à l'article 9.

La commission rogatoire mentionne aussi, s'il y a lieu, les renseignements nécessaires à l'application de l'article 11.
Aucune légalisation ni formalité analogue ne peut être exigée.

Article 4

La commission rogatoire doit être rédigée dans la langue de l'autorité requise ou accompagnée d'une traduction faite dans cette langue.
Toutefois, chaque Etat contractant doit accepter la commission rogatoire rédigée en langue française ou anglaise, ou accompagnée d'une traduction dans l'une de ces langues, à moins qu'il ne s'y soit opposé en faisant la réserve prévue à l'article 33.
Tout Etat contractant qui a plusieurs langues officielles et ne peut, pour des raisons de droit interne, accepter les commissions rogatoires dans l'une de ces langues pour l'ensemble de son territoire, doit faire connaître, au moyen d'une déclaration, la langue dans laquelle la commission rogatoire doit être rédigée ou traduite en vue de son exécution dans les parties de son territoire qu'il a déterminées. En cas d'inobservation sans justes motifs de l'obligation découlant de cette déclaration, les frais de la traduction dans la langue exigée sont à la charge de l'Etat requérant.
Tout Etat contractant peut, au moyen d'une déclaration, faire connaître la ou les langues autres que celles prévues aux alinéas précédents dans lesquelles la commission rogatoire peut être adressée à son Autorité centrale.
Toute traduction annexée à une commission rogatoire doit être certifiée conforme, soit par un agent diplomatique ou consulaire, soit par un traducteur assermenté ou juré, soit par toute autre personne autorisée à cet effet dans l'un des deux Etats.

Article 5

Si l'Autorité centrale estime que les dispositions de la Convention n'ont pas été respectées, elle en informe immédiatement l'autorité de l'Etat requérant qui lui a transmis la commission rogatoire, en précisant les griefs articulés à l'encontre de la demande.

Article 6

En cas d'incompétence de l'autorité requise, la commission rogatoire est transmise d'office et sans retard à l'autorité judiciaire compétente du même Etat suivant les règles établies par la législation de celui-ci.

Article 7

L'autorité requérante est, si elle le demande, informée de la date et du lieu où il sera procédé à la mesure sollicitée, afin que les parties intéressées et, le cas échéant, leurs représentants puissent y assister.
Cette communication est adressée directement auxdites parties ou à leurs représentants, lorsque l'autorité requérante en a fait la demande.

Article 8

Tout Etat contractant peut déclarer que des magistrats de l'autorité requérante d'un autre Etat contractant peuvent assister à l'exécution d'une commission rogatoire. Cette mesure peut être soumise à l'autorisation préalable de l'autorité compétente désignée par l'Etat déclarant.

Article 9

L'autorité judiciaire qui procède à l'exécution d'une commission rogatoire, applique les lois de son pays en ce qui concerne les formes à suivre.
Toutefois, il est déféré à la demande de l'autorité requérante tendant à ce qu'il soit procédé suivant une forme spéciale, à moins que celle-ci ne soit incompatible avec la loi de l'Etat requis, ou que son application ne soit pas possible, soit en raison des usages judiciaires de l'Etat requis, soit de difficultés pratiques.
La commission rogatoire doit être exécutée d'urgence.

Article 10

En exécutant la commission rogatoire, l'autorité requise applique les moyens de contrainte appropriés et prévus par sa loi interne dans les cas et dans la même mesure où elle y serait obligée pour l'exécution d'une commission des autorités de l'Etat requis ou d'une demande formulée à cet effet par une partie intéressée.

Article 11

La commission rogatoire n'est pas exécutée pour autant que la personne qu'elle vise invoque une dispense ou une interdiction de déposer, établies :
a) soit par la loi de l'Etat requis ; ou
b) soit par la loi de l'Etat requérant et spécifiées dans la commission rogatoire ou, le cas échéant, attestées par l'autorité requérante à la demande de l'autorité requise.

En outre, tout Etat contractant peut déclarer qu'il reconnaît de telles dispenses et interdictions établies par la loi d'autres Etats que l'Etat requérant et l'Etat requis, dans la mesure spécifiée dans cette déclaration.

Article 12

L'exécution de la commission rogatoire ne peut être refusée que dans la mesure où :
a) l'exécution, dans l'Etat requis, ne rentre pas dans les attributions du pouvoir judiciaire ; ou
b) l'Etat requis la juge de nature à porter atteinte à sa souveraineté ou à sa sécurité.

L'exécution ne peut être refusée pour le seul motif que la loi de l'Etat requis revendique une compétence judiciaire exclusive dans l'affaire en cause ou ne connaît pas de voies de droit répondant à l'objet de la demande portée devant l'autorité requérante.

Article 13

Les pièces constatant l'exécution de la commission rogatoire sont transmises par l'autorité requise à l'autorité requérante par la même voie que celle utilisée par cette dernière.
Lorsque la commission rogatoire n'est pas exécutée en tout ou en partie, l'autorité requérante en est informée immédiatement par la même voie et les raisons lui en sont communiquées.

Article 14

L'exécution de la commission rogatoire ne peut donner lieu au remboursement de taxes ou de frais, de quelque nature que ce soit.
Toutefois, l'Etat requis a le droit d'exiger de l'Etat requérant le remboursement des indemnités payées aux experts et interprètes et des frais résultant de l'application d'une forme spéciale demandée par l'Etat requérant, conformément à l'article 9, alinéa 2.
L'autorité requise, dont la loi laisse aux parties le soin de réunir les preuves et qui n'est pas en mesure d'exécuter elle-même la commission rogatoire, peut en charger une personne habilitée à cet effet, après avoir obtenu le consentement de l'autorité requérante. En demandant celui-ci, l'autorité requise indique le montant approximatif des frais qui résulteraient de cette intervention. Le consentement implique pour l'autorité requérante l'obligation de rembourser ces frais. A défaut de celui-ci, l'autorité requérante n'est pas redevable de ces frais.

CHAPITRE II – OBTENTION DES PREUVES PAR DES AGENTS DIPLOMATIQUES OU CONSULAIRES ET PAR DES COMMISSAIRES

Article 15

En matière civile ou commerciale, un agent diplomatique ou consulaire d'un Etat contractant peut procéder, sans contrainte, sur le territoire d'un autre Etat contractant et dans la circonscription où il exerce ses fonctions, à tout acte d'instruction ne visant que les ressortissants d'un Etat qu'il représente et concernant une procédure engagée devant un tribunal dudit Etat.
Tout Etat contractant a la faculté de déclarer que cet acte ne peut être effectué que moyennant l'autorisation accordée sur demande faite par cet agent ou en son nom par l'autorité compétente désignée par l'Etat déclarant.

Article 16

Un agent diplomatique ou consulaire d'un Etat contractant peut en outre procéder, sans contrainte, sur le territoire d'un autre Etat contractant et dans la circonscription où il exerce ses fonctions, à tout acte d'instruction visant les ressortissants de l'Etat de résidence ou d'un Etat tiers, et concernant une procédure engagée devant un tribunal d'un Etat qu'il représente :
a) si une autorité compétente désignée par l'Etat de résidence a donné son autorisation, soit d'une manière générale, soit pour chaque cas particulier, et
b) s'il respecte les conditions que l'autorité compétente a fixées dans l'autorisation.

Tout Etat contractant peut déclarer que les actes d'instruction prévus ci-dessus peuvent être accomplis sans son autorisation préalable.

Article 17

En matière civile ou commerciale, toute personne régulièrement désignée à cet effet comme commissaire, peut procéder, sans contrainte, sur le territoire d'un Etat contractant à tout acte d'instruction concernant une procédure engagée devant un tribunal d'un autre Etat contractant :
a) si une autorité compétente désignée par l'Etat de l'exécution a donné son autorisation, soit d'une manière générale, soit pour chaque cas particulier ; et
b) si elle respecte les conditions que l'autorité compétente a fixées dans l'autorisation.

Tout Etat contractant peut déclarer que les actes d'instruction prévus ci-dessus peuvent être accomplis sans son autorisation préalable.

Article 18

Tout Etat contractant peut déclarer qu'un agent diplomatique ou consulaire ou un commissaire, autorisé à procéder à un acte d'instruction conformément aux articles 15, 16 et 17, a la faculté de s'adresser à l'autorité compétente désignée par ledit Etat, pour obtenir l'assistance nécessaire à l'accomplissement de cet acte par voie de contrainte. La déclaration peut comporter toute condition que l'Etat déclarant juge convenable d'imposer.
Lorsque l'autorité compétente fait droit à la requête, elle applique les moyens de contrainte appropriés et prévus par sa loi interne.

Article 19

L'autorité compétente, en donnant l'autorisation prévue aux articles 15, 16 et 17 ou dans l'ordonnance prévue à l'article 18, peut déterminer les conditions qu'elle juge convenables, relatives notamment aux heure, date et lieu de l'acte d'instruction. Elle peut de même demander que ces heure, date et lieu lui soient notifiés au préalable et en temps utile ; en ce cas, un représentant de ladite autorité peut être présent à l'acte d'instruction.

Article 20

Les personnes visées par un acte d'instruction prévu dans ce chapitre peuvent se faire assister par leur conseil.

Article 21

Lorsqu'un agent diplomatique ou consulaire ou un commissaire est autorisé à procéder à un acte d'instruction en vertu des articles 15, 16 et 17 :
a) il peut procéder à tout acte d'instruction qui n'est pas incompatible avec la loi de l'Etat de l'exécution ou contraire à l'autorisation accordée en vertu desdits articles et recevoir, dans les mêmes conditions, une déposition sous serment ou avec affirmation ;
b) à moins que la personne visée par l'acte d'instruction ne soit ressortissante de l'Etat dans lequel la procédure est engagée, toute convocation à comparaître ou à participer à un acte d'instruction est rédigée dans la langue du lieu où l'acte d'instruction doit être accompli, ou accompagnée d'une traduction dans cette langue ;
c) la convocation indique que la personne peut être assistée de son conseil, et, dans tout Etat qui n'a pas fait la déclaration prévue à l'article 18, qu'elle n'est pas tenue de comparaître ni de participer à l'acte d'instruction ;
d) l'acte d'instruction peut être accompli suivant les formes prévues par la loi du tribunal devant lequel la procédure est engagée, à condition qu'elles ne soient pas interdites par la loi de l'Etat de l'exécution ;
e) la personne visée par l'acte d'instruction peut invoquer les dispenses et interdictions prévues à l'article 11.

Article 22

Le fait qu'un acte d'instruction n'ait pu être accompli conformément aux dispositions du présent chapitre en raison du refus d'une personne d'y participer, n'empêche pas qu'une commission rogatoire soit adressée ultérieurement pour le même acte, conformément aux dispositions du chapitre premier.

CHAPITRE III – DISPOSITIONS GÉNÉRALES

Article 23

Tout Etat contractant peut, au moment de la signature, de la ratification ou de l'adhésion, déclarer qu'il n'exécute pas les commissions rogatoires qui ont pour objet une procédure connue dans les Etats du Common Law sous le nom de « pre-trial discovery of documents ».

Article 24

Tout Etat contractant peut désigner, outre l'Autorité centrale, d'autres autorités dont il détermine les compétences. Toutefois, les commissions rogatoires peuvent toujours être transmises à l'Autorité centrale.
Les Etats fédéraux ont la faculté de désigner plusieurs Autorités centrales.

Article 25

Tout Etat contractant, dans lequel plusieurs systèmes de droit sont en vigueur, peut désigner les autorités de l'un de ces systèmes, qui auront compétence exclusive pour l'exécution des commissions rogatoires en application de la présente Convention.

Article 26

Tout Etat contractant, s'il y est tenu pour des raisons de droit constitutionnel, peut inviter l'Etat requérant à rembourser les frais d'exécution de la commission rogatoire et concernant la signification ou la notification à comparaître, les indemnités dues à la personne qui fait la déposition et l'établissement du procès-verbal de l'acte d'instruction.
Lorsqu'un Etat a fait usage des dispositions de l'alinéa précédent, tout autre Etat contractant peut inviter cet Etat à rembourser les frais correspondants.

Article 27

Les dispositions de la présente Convention ne font pas obstacle à ce qu'un Etat contractant :
a) déclare que des commissions rogatoires peuvent être transmises à ses autorités judiciaires par d'autres voies que celles prévues à l'article 2 ;
b) permette, aux termes de sa loi ou de sa coutume interne, d'exécuter les actes auxquels elle s'applique dans des conditions moins restrictives ;
c) permette, aux termes de sa loi ou de sa coutume interne, des méthodes d'obtention de preuves autres que celles prévues par la présente Convention.

Article 28

La présente Convention ne s'oppose pas à ce que des Etats contractants s'entendent pour déroger :
a) à l'article 2, en ce qui concerne la voie de transmission des commissions rogatoires ;
b) à l'article 4, en ce qui concerne l'emploi des langues ;
c) à l'article 8, en ce qui concerne la présence de magistrats à l'exécution des commissions rogatoires ;
d) à l'article 11, en ce qui concerne les dispenses et interdictions de déposer ;
e) à l'article 13, en ce qui concerne la transmission des pièces constatant l'exécution ;
f) à l'article 14, en ce qui concerne le règlement des frais ;
g) aux dispositions du chapitre II.

Article 29

La présente Convention remplacera, dans les rapports entre les Etats qui l'auront ratifiée, les articles 8 à 16 des Conventions relatives à la procédure civile, respectivement signées à La Haye le 17 juillet 1905 et le premier mars 1954, dans la mesure où lesdits Etats sont Parties à l'une ou l'autre de ces Conventions.

Article 30

La présente Convention ne porte pas atteinte à l'application de l'article 23 de la Convention de 1905, ni de l'article 24 de celle de 1954.

Article 31

Les accords additionnels aux Conventions de 1905 et de 1954, conclus par les Etats contractants, sont considérés comme également applicables à la présente Convention, à moins que les Etats intéressés n'en conviennent autrement.

Article 32

Sans préjudice de l'application des articles 29 et 31, la présente Convention ne déroge pas aux conventions auxquelles les Etats contractants sont ou seront Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention.

Article 33

Tout Etat, au moment de la signature, de la ratification ou de l'adhésion, a la faculté d'exclure en tout ou en partie l'application des dispositions de l'alinéa 2 de l'article 4, ainsi que du chapitre II. Aucune autre réserve ne sera admise.
Tout Etat contractant pourra, à tout moment, retirer une réserve qu'il aura faite ; l'effet de la réserve cessera le soixantième jour après la notification du retrait.
Lorsqu'un Etat aura fait une réserve, tout autre Etat affecté par celle-ci peut appliquer la même règle à l'égard de l'Etat qui a fait la réserve.

Article 34

Tout Etat peut à tout moment retirer ou modifier une déclaration.

Article 35

Tout Etat contractant indiquera au Ministère des Affaires Etrangères des Pays-Bas, soit au moment du dépôt de son instrument de ratification ou d'adhésion, soit ultérieurement, les autorités prévues aux articles 2, 8, 24 et 25.
Il notifiera, le cas échéant, dans les mêmes conditions :
a) la désignation des autorités auxquelles les agents diplomatiques ou consulaires doivent s'adresser en vertu de l'article 16 et de celles qui peuvent accorder l'autorisation ou l'assistance prévues aux articles 15, 16 et 18 ;
b) la désignation des autorités qui peuvent accorder au commissaire l'autorisation prévue à l'article 17 ou l'assistance prévue à l'article 18 ;
c) les déclarations visées aux articles 4, 8, 11, 15, 16, 17, 18, 23 et 27 ;
d) tout retrait ou modification des désignations et déclarations mentionnées ci-dessus ;
e) tout retrait de réserves.

Article 36

Les difficultés qui s'élèveraient entre les Etats contractants à l'occasion de l'application de la présente Convention seront réglées par la voie diplomatique.

Article 37

La présente Convention est ouverte à la signature des Etats représentés à la Onzième session de la Conférence de La Haye de droit international privé.
Elle sera ratifiée et les instruments de ratification seront déposés auprès du Ministère des Affaires Etrangères des Pays-Bas.

Article 38

La présente Convention entrera en vigueur le soixantième jour après le dépôt du troisième instrument de ratification prévu par l'article 37, alinéa 2.
La Convention entrera en vigueur, pour chaque Etat signataire ratifiant postérieurement, le soixantième jour après le dépôt de son instrument de ratification.

Article 39

Tout Etat non représenté à la Onzième session de la Conférence de La Haye de droit international privé qui est Membre de la Conférence ou de l'Organisation des Nations Unies ou d'une institution spécialisée de celle-ci ou Partie au Statut de la Cour internationale de Justice pourra adhérer à la présente Convention après son entrée en vigueur en vertu de l'article 38, alinéa premier.
L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères des Pays-Bas.
La Convention entrera en vigueur, pour l'Etat adhérant, le soixantième jour après le dépôt de son instrument d'adhésion.
L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion. Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères des Pays-Bas ; celui-ci en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des Etats contractants.
La Convention entrera en vigueur entre l'Etat adhérant et l'Etat ayant déclaré accepter cette adhésion soixante jours après le dépôt de la déclaration d'acceptation.

Article 40

Tout Etat, au moment de la signature, de la ratification ou de l'adhésion, pourra déclarer que la présente Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international, ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment de l'entrée en vigueur de la Convention pour ledit Etat.
Par la suite, toute extension de cette nature sera notifiée au Ministère des Affaires Etrangères des Pays-Bas.
La Convention entrera en vigueur, pour les territoires visés par l'extension, le soixantième jour après la notification mentionnée à l'alinéa précédent.

Article 41

La présente Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur, conformément à l'article 38, alinéa premier, même pour les Etats qui l'auront ratifiée ou y auront adhéré postérieurement.
La Convention sera renouvelée tacitement de cinq en cinq ans, sauf dénonciation.
La dénonciation sera, au moins six mois avant l'expiration du délai de cinq ans, notifiée au Ministère des Affaires Etrangères des Pays-Bas.
Elle pourra se limiter à certains des territoires auxquels s'applique la Convention.
La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 42

Le Ministère des Affaires Etrangères des Pays-Bas notifiera aux Etats visés à l'article 37, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 39 :
a) les signatures et ratifications visées à l'article 37 ;
b) la date à laquelle la présente Convention entrera en vigueur conformément aux dispositions de l'article 38, alinéa premier ;
c) les adhésions visées à l'article 39 et la date à laquelle elles auront effet ;
d) les extensions visées à l'article 40 et la date à laquelle elles auront effet ;
e) les désignations, réserves et déclarations mentionnées aux articles 33 et 35 ;
f) les dénonciations visées à l'article 41, alinéa 3.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 18 mars 1970, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats représentés à la Onzième session de la Conférence de La Haye de droit international privé.

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

20. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 18 March 1970)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions –

CHAPTER I – LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.
Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify –
a) the authority requesting its execution and the authority requested to execute it, if 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.

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Evidence Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves* (219 pp.).

Where appropriate, the Letter shall specify, *inter alia* –

e) the names and addresses of the persons to be examined;

f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

g) the documents or other property, real or personal, to be inspected;

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.
No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.
Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.
A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.
A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.
Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

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.
A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.
In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.
Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.
The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.
A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

a) a competent authority designated by the State in which he exercises his functions 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 permission.

Article 17

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 permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.
If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence –

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

Article 23

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.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.
Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of

Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.
Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from –

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

b) the provisions of Article 4 with respect to the languages which may be used;

c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

f) the provisions of Article 14 with respect to fees and costs;

g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.
Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.
When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.
A Contracting State shall likewise inform the Ministry, where appropriate, of the following –

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
d) any withdrawal or modification of the above designations and declarations;
e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Four years after the *Christopher X* decision, US courts still give little deference to the French blocking statute

France has long viewed the application of US style discovery procedures to obtain evidence located in France as an attack against its sovereignty. Although both France and the US ratified The Hague Convention on the Taking of Evidence Abroad ("The Hague Evidence Convention") more than 35 years ago, US courts have still not limited extraterritorial discovery to the methods prescribed by The Hague Evidence Convention and authorised parties to seek the broader discovery allowed under the US Federal Rules of Civil Procedure ("Federal Rules").

As a result, in 1980, France enacted a criminal statute prohibiting individuals from cooperating with US discovery requests not made in accordance with The Hague Evidence Convention. No French court convicted anyone under the statute before the French Supreme Court's decision on 12 December 2007. Despite that decision, and with awareness of it, US courts still discount the prospects of criminal sanctions under the French blocking statute when considering whether or not to compel production of evidence from France under the Federal Rules or to limit it to the discovery available under The Hague Evidence Convention.

The French Blocking Statute: The intention to provide French companies with a legal excuse for not complying with US discovery requests

For the purpose of improving mutual judicial cooperation in civil or commercial matters, France, the US and multiple other countries ratified The Hague Evidence Convention of 18 March 1970, which entered into force in 1972 in the US and 1974 in France. This Convention prescribes means by which a judicial authority in one Contracting Country may request evidence located in another Contracting Country.

When it ratified The Hague Evidence Convention, France decided, in accordance with Article 23 (and together with many other European countries), that it would not execute letters of request issued for the purpose of obtaining "*pre-trial discovery of documents*". On 19 January 1987, France limited its Article 23 reservation declaring that it 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*".

Despite the accession of the US to The Hague Evidence Convention, US courts never limited parties seeking discovery to the methods allowed by this Convention and always permitted them to obtain evidence from French companies in accordance with the broader discovery available under the Federal Rules. French companies perceived such discovery as abusive and, in 1980, the French legislature therefore enacted a blocking statute prohibiting anyone, under threat of criminal sanction, 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 constituting evidence in view of foreign judicial or administrative proceedings or in relation thereto*", except when such communication is authorised pursuant to an international treaty or regulation, such as The Hague Evidence Convention (Law no. 80-538 of 16 July 1980, Article 1 Bis).

The goal of this criminal statute, which is purposefully broadly drafted to encompass all types of documents and information, was to provide French companies with a legal basis for refusing to comply with US discovery requests under the Federal Rules. Nonetheless, French criminal courts did not convict anyone under this statute until 2007, which is one of the reasons why US courts historically gave little heed to the French law.

The 1987 US Supreme Court decision in *Aerospatiale*: The Hague Evidence Convention does not pre-empt the Federal Rules

US courts' approach was confirmed on 15 June 1987 when the US Supreme Court held in *Société Nationale Industrielle Aerospatiale v. U.S. District Court* (482 U.S. 522 (1987)) that The Hague Evidence Convention did not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory country. Moreover, the Supreme Court gave little deference to the French blocking statute by holding that, "[i]*t is well settled that such* [blocking] *statutes do 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 "*American courts are not required to adhere blindly to the directives of such a statute*" (*Id.* at 544 n. 29).

Rather, the Supreme Court directed lower courts to undertake a case-by-case comity analysis in order to determine in each situation whether it would be appropriate to resort to The Hague Evidence Convention procedures. The existence of a blocking statute such as France's "*is relevant to the Court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in non disclosure of specific kinds of material*" (*Id.*).

When the likelihood of prosecution becomes a reality: France's first criminal conviction under the blocking statute

On 12 December 2007, the Criminal Chamber of the French Supreme Court upheld a decision in which the Paris Court of Appeal ordered a French lawyer, *Maître* Christopher X, to pay 10,000 Euros for violating the French blocking statute (Bull. Crim. 2007, no. 309). This French Supreme Court decision was handed down in the larger case *Executive Life*, in which the French mutual insurer MAAF was sued before a Federal Court in Los Angeles, along other French corporations, by the California Insurance Department for fraud in connection with the 1991 purchase of Executive Life Insurance Co.

In April and December 2000, the Federal Court issued a number of requests for evidence under The Hague Evidence Convention to obtain from MAAF documents located in France relating to the allegedly fraudulent purchase. The French lawyer, agent of the American attorney representing

the California Insurance Department, took the initiative to call an ex-director of MAAF. According to the Paris Court of Appeal, during this call, the French lawyer alleged that the members of MAAF's board of directors had not been properly informed at the time of the purchase. In other words, "*he told a lie in order to get to the truth*". Thereafter, MAAF filed a criminal complaint against the French lawyer for violation of the French blocking statute.

The Paris Court of Appeal held that the French lawyer did not solely approach, in a neutral manner, individuals whose testimony could have been obtained in accordance with the provisions of The Hague Evidence Convention. To the contrary, it held that he had sought, without due authorisation, economic, commercial or financial information aimed at constituting evidence, because the information obtained could enable the plaintiff to select the ex-director as a witness and to guide his future testimony. The Paris Court of Appeal therefore found the French lawyer guilty of violating the French blocking statute and sentenced him to pay a fine of 10,000 Euros.

The convicted lawyer thereafter filed a challenge against this decision before the French Supreme Court, alleging, among other arguments, that he never solicited the information given by the ex-director, which, he alleged, had been provided spontaneously. He also claimed that in placing the call, he only attempted to obtain the ex-director's consent for giving testimony, as a person appointed as Commissioner under Article 17 of The Hague Evidence Convention may not use compulsion on the witness to force him/her to testify. The Criminal Chamber of the French Supreme Court dismissed the above arguments and upheld the Court of Appeal decision. This unprecedented decision made it clear that risks of prosecution and conviction under the French blocking statute are real.

The *Christopher X* decision was shortly followed by another decision from the Criminal Chamber of the French Supreme Court on 30 January 2008. Although it upheld the lower court's refusal to prosecute because of insufficient charges, the French Supreme Court did not award the latter's position according to which the French blocking statute does not apply to the "*communication to French people who request them, of contractual documents held on the US territory by American attorneys*". The French Supreme Court confirmed that the French blocking statute applies even if the requested documents are located in the US as long as, pursuant to Articles 113-7 and 113-8 of the French Criminal Code, there is a French victim at the time the offence is committed and that this French victim files a complaint with the French criminal authorities (French Supreme Court, Criminal Chamber, 30 January 2008, *Pourvoi* no. 06-84.098).

Four recent US decisions: Despite *Christopher X*, US courts refuse to find in the blocking statute grounds for requiring parties to use The Hague Evidence Convention

The recent conviction by the French Supreme Court, and its reminder of the broad scope of application of the French blocking statute, has not convinced US federal courts that applicants seeking discovery in France should limit themselves to the means available under The Hague Evidence Convention. Four cases decided in the federal courts since the *Christopher X* decision have considered the French decision but given it little weight, and concluded that applicants for discovery from a French party may use the Federal Rules and are not bound by the strictures of discovery under The Hague Evidence Convention.

Strauss v. Credit Lyonnais

The first court to consider the import of the French blocking statute after *Christopher X* was the Federal District Court for the Eastern District of New York in its decision of 10 March 2008 in *Strauss v. Credit Lyonnais S.A.* (249 F.R.D. 429). In this case, the victims (and their estates) of multiple terrorist attacks allegedly perpetrated by Hamas in Israel alleged that, among others, Crédit Lyonnais, a financial institution incorporated and headquartered in France, had provided material support to terrorists in violation of US antiterrorism laws. The plaintiffs sought discovery from Crédit Lyonnais under the Federal Rules, and Crédit Lyonnais moved for a protective order compelling plaintiffs to seek discovery through The Hague Evidence Convention and excusing it from discovery that Crédit Lyonnais claimed was protected under the French blocking statute (*Id*. at 435, 437).

To determine whether plaintiffs should have to seek discovery only under The Hague Evidence Convention, the Court applied factors enumerated in Paragraph 442(1)(c) of the Restatement (Third) of Foreign Relations Law, as well as those articulated by the Supreme Court in *Aerospatiale*, and those previously mentioned in decisions of the district courts for the Second Circuit. Together, these seven factors were:

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 from the US;
4. the availability of alternative means of securing the information;
5. the extent to which non-compliance with the request would undermine important US interests or compliance with the request would undermine important interests of the State where the information is located;
6. the hardship of compliance on the party from which discovery is sought; and
7. the resisting party's good faith (*Id*. at 438, 439).

The Court considered the effect of the French blocking statute only with respect to the fifth and sixth factors. With respect to the fifth factor (the comity analysis), the Court adopted the US Supreme Court's ruling in *Aerospatiale* according to which "*American courts are not required to adhere blindly to the directives of such a statute*" (*Id.* at 450). It also distinguished

the facts of *Christopher X* from those in the present case on the following grounds. In *Christopher X,* the prosecuted lawyer was not conducting discovery against a party within the confines of the Federal Rules or pursuant to court order. The lawyer had made false statements and MAAF filed a complaint with the French authorities to initiate the prosecution under the blocking statute (*Id.* at 451). These distinguishing facts, along with the interest the Court found that France would have in eliminating terror financing, weighed in favour of allowing discovery under the Federal Rules on the ground of the comity analysis.

With respect to the sixth factor, the hardship on Crédit Lyonnais of complying with the discovery request, the Court found that the prospect of facing criminal penalties for compliance weighed in favour of the objecting party. Nonetheless, the Court held that if the objecting party were a party to the action, as in that case, such hardship would be afforded less weight in the analysis (*Id.* at 454). Moreover, the Court found that Crédit Lyonnais had failed to show that the French government was likely to prosecute or otherwise sanction Crédit Lyonnais for having complied with a US court order compelling discovery.

Because on balance the factors weighed in favour of the plaintiffs (except possibly the foreign origination of the sought-after documents and Crédit Lyonnais' good faith), the Court denied Crédit Lyonnais' motion for a protective order and ordered it to produce all documents pursuant to the plaintiffs' discovery requests in accordance with the Federal Rules (*Id.* at 456). Thus, although the Court considered the possibility that Crédit Lyonnais could be prosecuted for complying with its order, the Court found such possibility to be remote because of distinguishing facts between this case and *Christopher X* and accorded the *Christopher X* decision little weight in the comity and hardship analyses, particularly in light of the fact that Crédit Lyonnais was a party to the action itself.

Subsequent case law

In October 2009, the Federal Bankruptcy Court for the District of Delaware also considered the effects of the French blocking statute in a discovery dispute in which a party sought discovery from a Dutch party that had claimed that the information sought was located at its affiliate's premises in France. After determining that the discovery sought was in the control of the Dutch party, Maasvlakte, and could be compelled, the Court in *In re Global Power Equipment Group* (no. 06-11045, 2009 WL 346212), applied the seven balancing factors articulated in *Strauss*.

In assessing France's comity interests, the Court concluded that "*the French interest here is particularly attenuated*" (*Id.* at *14). Maasvlakte was not a French company, the facility at issue in the litigation was not located in France, the majority of the information sought was not developed in France and the information sought in discovery was only transferred to France by the Dutch company, a party to the trial, subject to the Court's jurisdiction. Moreover, witnesses had testified at deposition that the French government would have little interest in protecting such information from discovery (*Id*. at *14).

In considering the potential hardship on the party, the Court noted that Maasvlakte voluntarily submitted a proof of claim in the bankruptcy and thereby submitted to the jurisdiction of the Court. On the other hand, the Court acknowledged the possibility that Maasvlakte could expose itself to prosecution in France if it complied with discovery under the Federal Rules. The Court found, however, that the risk of prosecution was remote, because in the twenty years since the enactment of the blocking statute, the French authorities had only prosecuted under it once, and because Maasvlakte had not shown that there was any likelihood that it or its French affiliate would be prosecuted for complying with the discovery requests. In particular, the Court rejected Maasvlakte's argument according to which with respect to its affiliate in France, a non-party, The Hague Evidence Convention was the only means for obtaining discovery from it. The Court cited *Aerospatiale* for the Supreme Court's failure to make a distinction between discovery taken from a litigant or a third party (*Id.* at *16-17).

As in *Strauss*, the Court thus concluded that on balance the factors weighed in favour of permitting the party seeking discovery to employ the Federal Rules and did not require it to use the more limited means available under The Hague Evidence Convention.

Two cases in 2010 again gave short shrift to the French blocking statute. In *In re Air Cargo Shipping Services Antitrust Litig. MDL* (no. 06-MD-1775, 2010 WL 1189341 (29 March 2010)), the Federal District Court for the Eastern District of New York ordered the French airline Air France to produce documents that it had withheld on the ground that their production would be prohibited by the French blocking statute. The documents in question consisted of documents that the US Department of Justice had already obtained in the course of its criminal antitrust investigation into the same activities that formed the basis for the civil antitrust claims at issue in the case.

The Court applied the seven *Strauss* factors and particularly focused on the potential hardship on the defendant of producing the documents. The Court noted that although the Supreme Court had held that "*fear of criminal prosecution constitutes a weighty excuse for non production*" (*Id.* at *3, citing *Aerospatiale*, 357 U.S., at 2011), other courts had found that the legislative history of the statute showed that it "*was never expected or intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts*" (*Id.* at *3, citing *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, nos. 80 Civ. 1911, 82 Civ. 0375, 1984 WL 423, at *3 (S.D.N.Y., 30 May 1984) and citing *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984)).

The Court recognised that "*but one prosecution* [...] *has ever been brought for violation of the blocking statute*" and

distinguished the *Christopher X* case on its facts, specifically because in this case the defendant had "*sought to circumvent the blocking statute through deceptive means*". The Court concluded that, with the hardship factor undercut by the unlikelihood of France pursuing the defendant under the blocking statute and with the US strong national interest in enforcing its antitrust laws, the comity analysis weighed in favour of compelling production of documents under the Federal Rules (*Id.* at *4).

On 14 December 2010, the Magistrate Judge for the Federal Court for the Eastern District of Virginia in *MeadWestvaco Corp. v. Rexam PLC* (no. Civ. A. 1:10-511, 2010 WL 5574325), rejected the defendant's attempt to resist discovery by relying on the French blocking statute. The Court acknowledged France's interest in preventing disclosure of the information, but cited other courts in finding that the statute should not be accorded much deference. Although the Court took note of the *Christopher X* decision, it found the facts distinguishable and concluded that the comity analysis weighed in favour of allowing discovery under the Federal Rules (*Id.* at *2).

Conclusion

Although US courts are aware of – and have explicitly considered – France's first conviction of a French national for violation of its blocking statute, they have continued in the vein of *Aerospatiale* and accorded the statute little weight in determining whether to protect French defendants from discovery under the Federal Rules. US Courts have uniformly distinguished the facts of *Christopher X* from the facts at issue in the cases in which they ruled. They have concluded that the blocking statute presented little or no hardship on parties seeking to resist discovery. It may be that for a US court to give a French conviction any import it will have to be under circumstances where the prosecuted party would be a party to the suit and would actually be acting in accordance with the Federal Rules. Even then, however, US courts appear reluctant to allow a French law to undermine the US courts' sovereign power to compel the type of broad discovery available to litigants under the Federal Rules.

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