New York Law Journal

Web address: http://www.nylj.com

VOLUME 239—NO. 82 TUESDAY, APRIL 29, 2008 ALM

OUTSIDE COUNSEL

BY MARC J. GOTTRIDGE AND THOMAS ROUHETTE

France Puts Some Muscle Behind Its Blocking Statute

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

Marc Gottridge Thomas Rouhette

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

Marc J. Gottridge *is a partner in the New York office of Lovells, and* **Thomas Rouhette** *is a partner in Lovells' Paris office. Both attorneys focus their practices on complex commercial litigation and have significant experience handling cross-border, multinational litigation.*

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).

Reprinted with permission from the April 29, 2008 edition of the NEW YORK LAW JOURNAL. © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212.545.6111 or cms@alm.com. #070-04-08-0056