JONES DAY

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FRENCH BLOCKING STATUTE: A DEATH FORETOLD?

Originally enacted in response to a U.S. antitrust investigation into French shipping companies, the French Blocking Statute may soon live its last days.

The Statute was tailored to protect French citizens and corporations from the alleged excesses of discovery processes in U.S. claims. Generally speaking, the Statute prohibits any French party from disclosing commercial information whether originating from France or elsewhere in foreign litigation, absent a French court order.

PROVISIONS OF THE FRENCH BLOCKING STATUTE

Article 1 bis of the Blocking Statute provides that:

> Subject to Treaties or International Agreements and to currently applicable laws and regulations, it is prohibited for any person to request, seek or disclose, in writing, orally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature directed toward establishing evidence in view of foreign judicial or administrative proceedings or in relation thereto.

Any infringement of the Blocking Statute constitutes a criminal offense, the potential sanctions being imprisonment up to six months and/or a fine up to €18,000 for an individual and €90,000 for a company.

The scope of Article 1 bis is very broad, and the information requested or disclosed need not necessarily involve the sovereignty, security, or essential economic interests of France.

Under the Statute, foreign disclosures remain possible. The Statute makes an exception for discovery obtained through the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention").

The Blocking Statute compels any person willing to disclose evidence in his or her possession to do so by way of judicial cooperation, and therefore under

the supervision of a French judge. The Statute shows suspicion toward the discovery procedure, especially alleged abusive foreign discovery procedures such as, for example, the "long-arm statutes" approach to jurisdiction practiced in the United States.

The Hague Convention offers two main mechanisms for obtaining evidence. First, evidence can be collected by authorities in the requested state pursuant to a Letter of Request sent by a court in the requesting state. Second, evidence may be gathered by diplomatic or consular personnel of the requesting state, provided that appearances by persons in the requested state are voluntary. In any case, the process must accord with the laws of the requested state.

One significant issue is whether French courts actually enforce the provisions of the Blocking Statute.

A DEADLOCK SITUATION

The French Blocking Statute has two adverse effects. It presents French companies with a dilemma in choosing either to comply with the discovery process and possibly expose themselves to prosecution in France or comply with the provisions of the Blocking Statute and put in jeopardy their position in litigation pending in the U.S.

The Blocking Statute may actually deprive companies of their right to defend themselves efficiently before foreign courts, although the Statute's initial goal was to protect French economic interests.

RARE ENFORCEMENT BY FRENCH COURTS

Given the dilemma faced by both companies and foreign authorities, French authorities have rarely prosecuted offenders under these provisions.

On December 12, 2007, the French Supreme Court rendered a landmark decision, known as the *Christopher X / MAAF* case.[1] The court held that a French qualified lawyer had committed a criminal offense by seeking to obtain information—without complying with the requirements of the Hague Convention—from the director of a French insurance company, which would have served as evidence in court proceedings pending in the U.S. First, the Court held that the Hague Convention was the exclusive means of securing information in France for use in foreign litigation. Second, the Court held that bypassing the Hague Convention could lead to prosecution under the provisions of the French Blocking Statute.

However, on January 30, 2008, the French Supreme Court retraced its steps, upholding dismissal of a criminal complaint based on alleged breach of the Blocking Statute.[2] The Court ruled that the information disclosed in the course of a U.S. court proceeding was related to private matters, and stated that, despite the confidentiality of the information, it did not fall within the scope of the Statute, because this was not sensitive economic data.

RELUCTANCE OF COMMON LAW COURTS

Both U.S. and English courts appear reluctant to defer to the French Blocking Statute.

In the U.S., several landmark decisions reflect the view of the courts that the Federal Rules of Civil Procedure prevail over the Blocking Statute and, hence, the Hague Convention.

First, in the *Rogers* case,[3] the U.S. Supreme Court ruled that a court could order the production of documents in breach of a foreign blocking statute, provided that the court has jurisdiction over the party and the party has control over the documents. In the *Aérospatiale* case,[4] the Court decided that U.S. courts could order the production of evidence located in a foreign country despite the existence of a Blocking Statute, as long as no enforcement proceedings were to take place in the foreign country. A lower court identified, in the *Vivendi* case,[5] four factors to determine whether use of the Hague Convention should prevail over the Federal Rules. Those are (i) the competing interests of the nations whose laws are in conflict, (ii) the hardship of compliance on the party or witness from whom discovery is sought, (iii) the importance of the information to the litigation, and (iv) the good faith of the party resisting discovery.

The *Christopher X / MAAF* case in 2007 suggested that U.S. courts should comply strictly with the Vivendi test, given the risk of criminal liability under French law.

The United Kingdom similarly appears reluctant to defer to the French Blocking Statute. On October 22, 2013, the Court of Appeal handed down a judgment preventing French parties to English litigation from relying on the French Blocking Statute to set aside their obligations to provide information and disclosure in English legal proceedings.[6] The Court of Appeal held that English courts have full jurisdiction to apply their procedural rules to parties in proceedings before them. English courts thus may direct foreign parties even where such directions might cause the parties to breach foreign criminal law.

As a result of this UK judgment, French parties to English litigation may face obstacles in raising the French blocking statute as a ground to avoid disclosure of information.

If the UK Supreme Court upholds these decisions, the French Blocking Statute essentially likely will not apply in England and Wales.

TOWARD REFORM OF THE FRENCH BLOCKING STATUTE?

On January 23, 2012, a bill was adopted on its first reading by the French Assemblée Nationale, aimed at protecting business secrets. This bill intends to limit the scope of the French Blocking Statute to cover only defined information.

The bill provides that the prohibition set forth under Article 1 bis of the Blocking Statute would cover only information either affecting the sovereignty, security, or essential economic interests of France, or seriously compromising the interests of a company by affecting its technical and scientific potential, strategic positions, commercial or financial interests, or its competitiveness.

The bill, however, does not provide clear definitions of documents that fall into these categories. A company facing prosecution under such provisions would have to determine for itself what would be covered, for example, as a business secret.

The checkered history of the Blocking Statute since the *Christopher X / MAAF* landmark case, together with this new legislative development, suggests that the statute may be reaching the end of the road.

LAWYER CONTACTS

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ENDNOTES

1 French Supreme Court, Criminal Section, December 12, 2007, n°07-83.228.

2 French Supreme Court, Criminal Section, January 30, 2008, n°06-84.098.

3 *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

4 *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987).

5 *In re Vivendi Universal S.A. Securities Litig.*, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006).

6 *Secretary of State for Health and others v Servier Laboratories Ltd and others*; *National Grid Electricity Transmission plc v ABB Ltd and others* [2013] EWCA Civ 1234 ; [2013] WLR (D) 401.