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GUEST ANALYSIS

Court Holds U.S. Discovery Rules Trump French Law and Hague Convention

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On October 28, 2009, a U.S. bankruptcy court ordered discovery from a third party French corporation, notwithstanding the French blocking statute and the availability of discovery procedures under the Hague Evidence Convention. *In re Global Power Equip. Group, Inc.*, Bankr. D. Del., Case No. 06-11045, 10/28/09 (2009 WL 3464212). This is at least the second time that a U.S. court has ordered discovery from France since the French Supreme Court in 2007 upheld criminal penalties against a French lawyer for violation of the blocking statute.

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The Dispute. Global Power Equipment Group, Inc. is a U.S. company that sought Chapter 11 protection in Delaware for itself and its related entities. *In re Global Power*, 2009 WL 3464212 at *2. One of its business segments dealt with heat recovery equipment, including heat recovery steam generators. Id.

In connection with the wind-down phase of declaring bankruptcy, Global Power obtained permission from the court to nullify existing steam generator contracts with customers and enter into entirely new contracts with customers who were still awaiting delivery. Id. One such customer was Maasvlakte, a Dutch company that was a subsidiary of a French corporation. Id. at *3.

Maasvlakte entered into a new contract, but also filed two proofs of claim based on the prior contract. Id. at *4. The bankruptcy plan administrator objected to the proofs of claim, and the parties began to litigate pursuant to the Federal Rules of Civil Procedure (which applied under the Federal Rules of Bankruptcy Procedure). Id. at *4 and *7 n.3.

The plan administrator propounded discovery, but three days before the discovery was due, Maasvlakte said it would be unable to comply in the time frame sought because documents were physically located in France, under the control of an affiliate in France, Air Liquide Engineering, and because the French blocking statute prevented foreign discovery conducted outside the Hague Convention procedures. Id. at *5. The plan

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administrator moved to compel Maasvlakte to produce documents and witnesses for deposition.

The Holding. The court held that even though the documents were in the possession of Air Liquide and not Maasvlakte, the latter nevertheless had ''control'' of the documents because Air Liquide and Maasvlakte were ''closely intertwined sister corporations'' with the same corporate parent. Id. at **8-10.

The court then held that comity favored use of the Federal Rules of Civil Procedure to govern the discovery at issue, notwithstanding the French blocking statute and the Hague Convention. Id. at *17. The court therefore granted the plan administrator's motion to compel the production of documents located in France. Id. The court also granted the motion to compel the testimony of witnesses located in France, although it did not require that depositions take place in the United States. Id.

The Court's Analysis. The court rejected both Maasvlakte's invocation of the French blocking statute and the Hague Convention. The blocking statute, French Penal Code Law No. 80-538, requires that foreign discovery of documents located in France must be conducted under the Hague Convention procedures and it prescribes criminal sanctions for a French national or corporation that violates this requirement. *In re Global Power,* 2009 WL 3464212 at *5.

The Hague Convention is an international treaty signed by the U.S. and France (among others) that allows the transmission of evidence from a signatory country to another country under certain guidelines. Id. The Hague Convention procedures are frequently criticized for being cumbersome and extremely slow. For example, the process involves the issuance of ''Letters of Rogatory'' or ''Letters of Commission,'' which would be issued by the U.S. court to a U.S. consular agent in France, and which would then be sent to the French Ministry of Justice for approval. Id.

In analyzing whether the Hague Convention procedures should be followed, the court relied on *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa,* 482 U.S. 522 (1987), in which the Supreme Court held that when a court is faced with a potential conflict between U.S. law and a foreign blocking statute, it must conduct a ''comity analysis'' to determine which procedures to use. See *Global Power,* 2009 WL 3464212 at * 12.

Based in part on the factors set forth in *Société Nationale,* the court considered the following in its comity analysis: (1) the importance of the documents or information requested to the litigation; (2) the degree of specificity of the request;(3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; [. . .] (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the requests would undermine important interests of the state where the information is located; (6) the good faith of the party resisting discovery; and (7) the hardship of compliance on the party or witness from whom discovery is sought.'' Id. at *12-13 (quoting *Société Nationale*, 482 U.S. at 544 n.28 for the first five factors; citing *Strauss v. Lyonnais, S.A.*, 249 F.R.D. 429, 454-56 (E.D.N.Y. 2008) for the last two factors).

The court held that six of the seven factors disfavored the use of the Hague Convention—the discovery sought was central to the dispute; the requests were specific; the documents were created mainly in the Netherlands, which is not subject to the French blocking statute; the Hague Convention procedures, are ''not efficient or feasible''; the U.S. interest in adjudicating the claim was substantial, whereas the French interest in the claim was attenuated; and there would be minimal hardship to Maasvlakte if the Federal Rules of Civil Procedure were applied. Id.

One Factor Favors Applying Hague Convention. The only factor favoring use of the Hague Convention was that there was no evidence that Maasvlakte acted in bad faith when the documents were moved to France. Id. at *15. This factor was not sufficient, however, to outweigh the other six factors which favored application of the Federal Rules of Civil Procedure.

Additionally, the court evaluated the risk of prosecution under the French blocking statute and deemed it to be ''minimal.'' Accordingly, the court granted the plan administrators' motions to compel the production of documents and depositions pursuant to U.S. discovery rules.

The French Blocking Statute Again Gets No Respect. The *Global Power* decision is not the first time that a foreign blocking statute has been trumped by U.S. law in a U.S. court. The Supreme Court has held that U.S. courts may order the production of documents that are governed by foreign blocking laws, even if the foreign blocking law has a valid purpose. See *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206 (1958).

Generally, U.S. courts have been unsympathetic to parties facing foreign blocking statutes that limit or prohibit the transfer of information to the United States for purposes of discovery. See, e.g., *United States v. Vetco,* 691 F.2d 1281, 1291 (9th Cir. 1981) (affirming sanctions award against defendant for not producing documents requested by Internal Revenue Service, even though doing so would arguably violate Swiss law); *United States v. First City Nat'l Bank*, 396 F.2d 897, 904-05 (2d. Cir. 1968) (ordering discovery in the United States and stating that chances were ''slight and speculative'' that German civil penalties would be enforced).

U.S. courts have opined that France's blocking statute is expressly designed to prevent any information from being used in foreign litigation and to give foreign nationals ''tactical weapons and bargaining chips'' in U.S. courts. See *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (internal citation and quotation marks omitted).

Consequently, it is not entirely surprising that the French blocking statute has been repeatedly rejected as a bar to discovery. See e.g., *Madden v. Wyeth*, 3-03-CV-0167, 2006 U.S. Dist. LEXIS 880 (N.D. Tex. Jan. 12, 2006) (declining to apply French blocking statute); *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (same), *Valois of America v. Risdon Corp.*, 183 F.R.D. 344 (D. Conn. 1997) (same); *Adidas (Can.) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911 (PNL), 82 Civ. 0375 (PNL), 1984 WL 423, *3-4 (S.D.N.Y. May 30, 1984) (same).

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Impact of *Christopher X.* The potential game changer in this analysis was the case of *In re Advocat Christopher X,* Cour de Cassation, Chambre Criminelle, Paris, Dec. 12, 2007, No. 07-83228.

Before *Christopher X,* various U.S. courts had downplayed the risk of criminal prosecution under the French blocking statute. See, e.g., *In re Vivendi Universal S.A. Secs. Litg.*, No. 02 Civ. 5571, 2006 WL 3378115, at *3 (S.D.N.Y. 2006) (quoting *Bodner* and observing, in a pre-*Christopher X* opinion, that the French blocking statute did not subject parties to a ''realistic risk of prosecution'').

Christopher X marked the first time the French blocking statute was used to prosecute a French national for failure to use the Hague Convention for U.S. discovery. The French attorney was prosecuted for taking steps to facilitate the collection of evidence for use in a foreign judicial proceeding. See *Strauss v. Credit Lyonnais S.A.*, 242 F.R.D. 199, 224-26, 228 (E.D.N.Y. 2007).

The French Supreme Court upheld his conviction and a €10,000 fine.

Nevertheless, as in decisions preceding *Christopher X*, the court in *Global Power* has again downplayed the potential impact of the French blocking statute. The court deemed the chance of prosecution under the French blocking statute to be ''minimal'' and observed that Maasvlakte had identified only one case—*Christopher X*—where the French blocking statute had been used to prosecute a French national without going through the Hague Convention procedures. *In re Global Power*, 2009 WL 346412 at *15.

Thus, although it seemed that the time was ripe for U.S. courts to reconsider their lack of respect for the French blocking statute, the holding in *Global Power* shows that the rules of the game seem to have stayed the same, at least from the perspective of the U.S. courts.