

## Commercial Litigation and Class and Derivative Actions Client Service Groups

To: Our Clients and Friends

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### The French Blocking Statute: Effective Protection Against Cross-Border Discovery?

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European litigants widely regard blocking statutes as an important protection against cross-border discovery procedures. Blocking statutes, however, have limited impact on discovery in U.S. courts, which generally require foreign litigants to produce documents even if they are subject to a blocking statute in their home country. This bulletin examines some new developments concerning France and the U.S.

#### Principles of the French Blocking Statute

French law 68-678 of 26 July 1968 (the “French Blocking Statute”), is the most well known legislation aimed at restricting cross-border discovery of information. Blocking statutes reflect major differences between the legal traditions of common law and civil code jurisdictions. For example, a judge in the U.S. is likely to grant a request for extensive pre-trial discovery, unless the discovery requests are unreasonable in scope or otherwise seek irrelevant material. Civil code jurisdictions such as France, however, generally consider full disclosure, U.S.-style discovery procedures to be unnecessary and invasive “fishing expeditions.” In France, unless the court orders the parties to disclose specific documents, they are generally not required to produce documents that will not support their case.

In essence, the French Blocking Statute prohibits any communication of economic, commercial, industrial, financial, or technical documents or information to be used as evidence in legal proceedings outside of France, subject to mechanisms afforded under international agreements or treaties such as the Hague Evidence Convention. Violations are criminally punishable by fines up to €18,000 for individuals and €90,000 for legal entities, and/or up to six months’ imprisonment. The Hague Evidence Convention provides a specific framework for the cross-border communication of documents, notably through a Letter of Request sent by a court in the requesting State. France, however, has invoked an exception to the Hague Evidence Convention that allows it to refuse to execute Letters of Request “*issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries,*” if the scope of the Letter of Request is insufficiently defined.

As a result, French parties often challenge their obligation to comply with U.S. discovery processes. U.S. courts, however, have consistently decided that French litigants’ interests in complying with the French Blocking Statute are outweighed by U.S. interests in obtaining complete discovery.

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## U.S. Case Law Considering Blocking Statutes

U.S. courts often cite the following concerns when considering whether to limit discovery based on the French Blocking Statute:

- The French Blocking Statute is excessively broad and overly protective;
- The Hague Evidence Convention process is unnecessarily cumbersome and time-consuming;
- The French Blocking Statute is a paper tiger because violations are rarely prosecuted.

In *Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) (“*Aerospatiale*”), the U.S. Supreme Court held that the French Blocking Statute does not “deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” The Court instead articulated a balance-of-interests test to determine whether to order cross-border discovery.

The factors to be considered include:

- (a) the importance of the documents or information requested to the litigation;
- (b) the degree of specificity of the request;
- (c) whether the information requested originated in the U.S.;
- (d) the availability of alternative means of securing the information; and
- (e) the extent to which noncompliance with the request would undermine important interests of the U.S., or compliance with the requests would undermine important interests of the state where the information is located.

U.S. courts have issued a number of decisions applying this balancing test, and have consistently held that U.S. interests in obtaining discovery outweigh the foreign interests reflected in blocking statutes.

The Delaware Court of Chancery recently issued an interesting decision applying the *Aerospatiale* balancing test - and involving the French Blocking Statute - in *Activision Blizzard Inc. Stockholder Litig.*, 86 A.3d 531 (Del. Ch. 2014). Plaintiffs, who challenge an \$8 billion stock sale, requested documents from Vivendi S.A. and its directors, most of which were stored on servers in France. The French defendants argued that the French Blocking Statute prevented them from producing the requested documents unless the parties complied with the Hague Evidence Convention protocols. The plaintiffs moved to compel the defendants to produce the documents under Delaware discovery rules.

In ruling on the plaintiffs’ motion to compel, the Chancery Court conducted a detailed analysis of each of the *Aerospatiale* factors, though it weighed certain factors more heavily than others. Critical to the analysis was the fact that the requested documents, which the court found were essential to the case, were not available from any source that was located outside of France. The court also focused on the fact that Vivendi itself and the individual defendants submitted to the jurisdiction of the Delaware courts, and by implication, Delaware discovery procedures, as part of the challenged transaction or when the individuals became directors of the U.S. company that was the subject of the transaction. The court also took issue with the fact that Vivendi had filed prior cases in U.S. courts for the express purpose of using expansive U.S. discovery, but now sought to use the French Blocking Statute as a shield against those same discovery procedures.

The Chancery Court ultimately found that the French Blocking Statute did not bar U.S. discovery or mandate the use of the Hague Evidence Convention protocols. Nevertheless, the court adopted a practical solution of employing parallel proceedings: It ordered the parties to initiate discovery

proceedings under the Hague Evidence Convention protocols, stating that, if the Vivendi defendants could obtain the cooperation of the French authorities, their concerns under the Blocking Statute would be moot. However, the court also ordered the Vivendi defendants to produce the requested documents by a specific deadline or face sanctions, even if the French authorities did not cooperate. This decision is thus consistent with other U.S. courts' treatment of foreign blocking statutes.

### What Lies Ahead for the French Blocking Statute

Interestingly, France is considering a reform of its blocking statute. On January 23, 2012, the French National Assembly adopted a bill to limit the scope of the French Blocking Statute by restricting the definition of covered "business secrets." The only information that would be restricted under the proposed amendment would be information affecting the sovereignty, security, or essential economic interests of France, or seriously compromising a company's interest by affecting its technical and scientific potential, strategic positions, commercial or financial interests, or its competitiveness. The bill, however, has stalled because it has not been approved by the French Senate.

The French legislature's efforts may also be mitigated by new developments in U.S. discovery law aimed at limiting expansive discovery in U.S. litigation. Indeed, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has introduced proposed amendments to Federal Rule of Civil Procedure 26 that would expressly inject the concept of proportionality used in French and other discovery systems into the scope of permissible discovery:

*"Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.**"*

Although this new language may narrow the gap between the U.S. and French pretrial discovery systems, it is difficult to predict the actual impact of the proposed amendment at this time. For one thing, this amendment, if approved, would not be effective until at least December 2015, and its impact will be unclear for some time as courts wrestle with its interpretation and application to U.S. courts' deeply ingrained traditions of broad discovery, even if the evidence is ultimately inadmissible. It is, therefore, unlikely that the amendment will have any immediate effect on the scope of U.S. discovery. Furthermore, this amendment would only affect discovery in U.S. *federal* courts. State courts, such as the Delaware Court of Chancery, are not required to adopt or follow the Federal Rules of Civil Procedure (though many do), and several states have developed their own procedures that may be more or less expansive than the Federal Rules. In sum, while changes may be on the horizon, the tension between U.S. courts and foreign blocking statutes will not go away any time soon.

For more information on this subject, please contact the authors of this bulletin, your contact at Bryan Cave, or any member of the [Commercial Litigation](#) or [Class and Derivative Actions](#) Client Service Groups.

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