HOW FEDERAL COURTS IN THE UNITED STATES APPROACH BLOCKING STATUTES

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United States courts permit board discovery. Rule 26 of the Federal Rules of Civil Procedure, for example, allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . .". Fed. R. Civ. P. 26(b)(1). When litigants are citizens of and maintain discoverable information in other countries, blocking statutes[1] can conflict with the broad scope of discovery allowed in United States courts. This paper addresses how Federal Courts in the United States approach this issue when faced with blocking statutes in countries that are signatories to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention").[2] When faced with such conflict, courts in the United States undertake a balancing test to consider whether to (1) order the production of discovery even though such production would require an international party to violate a blocking statute, (2) find substantial justification for noncompliance pursuant to Rule 37 of the Federal Rules of Civil Procedure and enter a protective order that provides the discovery need not be produced, or (3) order the parties to use the procedures set forth in the Hague Evidence Convention because if both countries are signatories, production of evidence pursuant to the Hague Evidence Convention does not violate the blocking statute.

Relevant Supreme Court Rulings

The leading case in the United States examining the conflict between civil discovery in United States courts and international blocking statutes is Société Internationale pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In Rogers, a Swiss holding company sued the United States Attorney General for recovery of property that was allegedly wrongfully seized during World War II. During the pendency of the case, the United States moved the District Court for an order requiring the Swiss company to comply with certain

[1] As used in this paper, "blocking statute" refers to the law of an international jurisdiction that hinders the application of the forum court's law. Typically, blocking statutes shield parties from foreign court rulings. For example, and relevant to the Recent Decisions discussed below, a French blocking statute forbids the disclosure of economic, commercial, industrial, financial, or technical information for the purpose of constituting evidence in foreign judicial proceedings. Similarly, Germany enacted a blocking statute that limits the disclosure of personal data, including telephone numbers, addresses, jobs, familial status, credit information, and medical history.

[2] The Hague Evidence Convention provides a set of minimum standards with which the signatories agree to comply and a flexible framework for international judicial cooperation. Currently, there are 60 signatories to the Hague Evidence Convention, including, among many others, the United States, France, and Germany. For a list of which countries are signatories, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.

discovery requests that sought the production of a large number of records maintained in a Swiss Bank. The Swiss company asserted disclosure of such records, though relevant, would violate a provision of the Swiss Penal Code governing secrecy of banking records.

The District Court for the District of Columbia dismissed the action, concluding: (1) the Swiss company had control of the records sought despite considerations of Swiss law, (2) such records were likely "crucial" to the outcome of the litigation, (3) "Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order, since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum," and (4) the United States court has the power to dismiss the complaint. Id. at 201–02. The United States Supreme Court reversed the dismissal. Id. at 208–09. The Court relied on the good faith efforts of the Swiss company given the nature of the Swiss laws and on the Swiss company's compliance with discovery that did not violate Swiss secrecy laws. Id. at 210. The Court then concluded that the Swiss company's "failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." Id. The Court remanded the case for further proceedings, reciting the District Court's discretion to explore plans for discovery or commence a trial on the merits. Id. at 213.

Thirty years later, the United States Supreme Court again considered the conflict between the broad scope of discovery in United States courts and international blocking statutes in Société Nationale Industrielle Aéropatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987). In Société Nationale, individuals injured in an airplane crash sought damages from a French manufacturer. Id. at 525. After receiving discovery requests, the French manufacturer sought a protective order, claiming the Hague Evidence Convention dictated the exclusive procedures that must be followed for discovery sought in France. Id.

The District Court of Iowa denied the motion. Id. The United States Supreme Court held that the Hague Evidence Convention does not provide exclusive or mandatory procedures for obtaining discovery in international territories; rather, use of the procedures provided as part of the Hague Evidence Convention ("Hague Procedures") constitutes an option depending on scrutiny of the particular facts, sovereign interests, and likelihood of success. Id. at 540–45. The Court advised, "American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary or unduly burdensome, discovery may place them in a disadvantageous position," including expensive discovery "sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence." Id. at 546.

Tests Developed by Lower Courts

Since the Supreme Court decided Rogers and Société Nationale, lower courts have developed factors to use in balancing the concerns identified. Some courts use a three-part test, balancing the three factors identified by the Supreme Court in Société Nationale, while other courts use four-, five-, or seven-factor tests in determining whether an international party must comply with discovery in litigation in the United States and whether to use the Hague Evidence Convention procedures. The chart below outlines the differing approaches. Importantly, each of the tests considers the national interests at issue as most important: "district courts should 'consider, with due caution, that many foreign countries, particularly civil law countries, do not subscribe to [the

United States courts'] open-ended views regarding pretrial discovery, and in some cases may even be offended by [such] pretrial procedures.'" In re Xarelto Products Liab. Litig., No. MDL 2592, 2016 WL 3923873, at *7 (E.D. La. July 21, 2016) (quoting In re Anschuetz & Co., GmbH, 838 F.2d 1362, 1363–64 (5th Cir. 1988)).

Test	Factors Considered	Jurisdiction(s)
Three-Factor Test	(1) The particular facts of the case and the nature of the discovery requested; (2) the sovereign interests at issue; and (3) the likelihood that foreign discovery procedures will prove effective.	Fifth Circuit[3] Connecticut[4] District of Illinois[5]
Four-Factor Test	(1) The competing interests of the nations whose laws are in conflict; (2) the hardship that compliance would impose on the party or witness from whom discovery is sought; (3) the importance to the litigation of the information and documents requested; and (4) the good faith of the party resisting discovery.	Second Circuit[6] (split)
Five-Factor Test	(1) The importance of the information requested to the case; (2) the specificity of the request; (3) the location of the information; (4) the availability of alternative means of securing the information; and (5) the competing national interests.	Restatement (Third)[7] Second Circuit[8] (split) Seventh Circuit[9] Louisiana[10] New York[11]

[3] In re Anschuetz & Co., GmbH, 838 F.2d 1362 (5th Cir. 1988).

[4] Valois of America, Inc. v. Risdon Corp., 183 F.R.D. 344 (D. Conn. 1997).

[5] In re Aircrash Disaster Near Roselawn, Ind., October 31, 1994, 172 F.R.D. 295 (N.D. III. 1997).

[6] First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16 (2d Cir. 1998).

[7] Restatement (Third) of Foreign Relations Law § 442 (1987).

[8] United States v. First Nat. City Bank, 396 F.2d 897 (2d Cir. 1968).

[9] United States v. First Nat. Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).

[10] In re: Xarelto (Rivaroxaban) Prod. Liab. Litig., No. MDL 2592, 2016 WL 3923873 (E.D. La. July 21, 2016).

[11] Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199 (E.D.N.Y. 2007).

Test	Factors Considered	Jurisdiction(s)
Seven-Factor Test	(1) The importance of the information requested to the case; (2) the specificity of the request; (3) the location of the information; (4) the availability of alternative means of securing the information; (5) the competing national interests; (6) the extent and nature of the hardship that inconsistent enforcement would impose upon the party; and (7) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance.	Ninth Circuit[12] District of Arizona[13] Second Circuit[14] (split)

When a discovery dispute arises, regardless of whether the jurisdiction applies the three-, four-, five-, or seven-factor test, the court must first determine whether there is a conflict between the discovery provisions in the United States court and the foreign law. If the court finds no conflict, discovery should proceed according to the rules of the United States jurisdiction. If the court finds a conflict, the court undertakes one of the above-referenced balancing tests to decide whether to (1) order the production of discovery that would require an international party to violate a blocking statute, (2) find substantial justification for noncompliance pursuant to Rule 37 of the Federal Rules of Civil Procedure and enter a protective order, or (3) order the parties to use the procedures set forth in the Hague Evidence Convention. This comity analysis involves some or all of these factors:

(1) **Importance of Discovery Requested.** When the evidence sought in discovery is "directly relevant", "absolutely essential", "critical or compelling", or likely dispositive to the outcome of the case, these factors weigh in favor of compelling the discovery. If Hague Procedures are a substantially equivalent alternative that is likely to result in production, use of Hague Procedures may be appropriate. Alternatively, if the litigation does not "stand or fall" on the discovery sought or it is cumulative of evidence that exists elsewhere, courts generally remain reluctant to compel a party to violate applicable blocking statutes and either order the parties to use the Hague Procedures or excuse noncompliance with the discovery requests.

[12] Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992); United States v. Vetco Inc., 691 F.2d 1281, 1288 (9th Cir. 1981).

[13] Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS, 303 F. Supp. 3d 1004 (D. Ariz. 2018).

[14] Wultz v. Bank of China Ltd., 298 F.R.D. 91(S.D.N.Y. 2014); Chevron Corp. v. Donziger, 296 F.R.D. 168, 204 (S.D.N.Y. 2013).

(2) **Specificity of Request.** Narrowly tailored, specific discovery requests weigh against use of the Hague Procedures and in favor of outright production. Broad, generalized discovery requests weigh in favor of using Hague Procedures.

(3) **Location of Evidence.** When the evidence to be produced and the person who will facilitate the production are located in a foreign country where the documents and individual will be subject to the laws of that country, this factor weighs in favor of using Hague Procedures.

(4) **Availability of Alternative Means.** Where evidence can be obtained through substantially equivalent alternative means, such as obtaining documents with the same information from a subsidiary located in a country without a blocking statute, this alternative means weighs against using Hague Procedures. However, when the discovery sought is only located in a jurisdiction that has a blocking statute, this lack of access weighs in favor of using Hague Procedures to obtain it. Given the length of time using Hague Procedures could take, invoking them may be an inadequate alternative. However, where there is ample time to conduct discovery, the procedures set forth in the Hague Evidence Convention are a substantial equivalent.

(5) **National Interests.** The United States has an interest in vindicating the rights of its citizens and preserving the fairness of litigation. Such interests generally will not be compromised by allowing discovery to proceed under the provisions of the Hague. International interests subject to blocking statutes vary, but generally include privacy. Requiring parties to produce certain discovery in American proceedings would impair such interests. These interests will generally weigh in favor of proceeding under the Hague Evidence Convention rather than compelling discovery contrary to international blocking statutes.

(6) **Hardship to International Litigant.** Blocking statutes that create the possibility of criminal prosecution, including large fines and/or imprisonment weigh in favor of the use of Hague Procedures to govern discovery.

(7) **Likelihood of Compliance.** An unenforceable order compelling discovery weighs against ordering discovery or use of Hague Procedures. Alternatively, if international litigants agree to comply with Hague Procedures and produce the requested discovery, that weighs in favor of using Hague Procedures.

Recent Decisions

Courts engage in this analysis regardless of whether the discovery sought is subject to required initial disclosures or party-drafted discovery requests. For example, in Salt River Project Agricultural Improvement and Power District v. Trench France SAS, the District Court of Arizona considered whether to use Hague Procedures to govern discovery of documents subject to a French

blocking statute. 303 F. Supp. 3d 1004.[15] Trench-France conceded that it had relevant, ordinarily discoverable information, which it maintained only in France, where it was barred from disclosure by a blocking statute. Id. Such information was subject to the Mandatory Initial Discovery Pilot Project ("MIDP"), which requires parties in civil cases to respond to a series of standard discovery requests before undertaking other, specific discovery in an effort to reduce costs and delays in litigation. Id. at 1006. By its very nature, MIDP broadly directs the production of documents that "may be relevant" to any of the claims or defenses at issue in the case. Id. at 1008. Accordingly, this factor weighed in favor of using Hague Procedures. Id. In weighing the above seven factors, the District Court of Arizona concluded each factor weighed in favor of using Hague Procedures for the purpose of discovery of information subject to the French blocking statute. Id. at 1007-10. Disclosures required by MIDP were (1) not necessarily pivotal to the outcome of the case, (2) broad in nature, (3) located exclusively in France and subject to the blocking statute, (4) subject to substantially similar alternative means of production (i.e., use of Hague Procedures), (5) more likely to impair French interests in privacy than US interests in transparent litigation, (6) subject to a blocking statute that could result in imprisonment and/or fines for individuals who violated it, and (7) likely to be made if Hague Procedures were followed. Id. Discovery from the Canadian co-defendant, which was not subject to a blocking statute, proceeded pursuant to the Federal Rules of Civil Procedure. Id. at 1010.

Though a different type of discovery request, the District Court of Louisiana engaged in the same analysis in multidistrict litigation. In Xarelto Products Liab. Litig., plaintiffs sought the production of custodial and personnel files. 2016 WL 3923873. The personnel files of certain employees were subject to a German blocking statute. Id. at *2. After weighing the above-explained factors, the court concluded the documents should be produced as they were highly relevant and likely to be pivotal to the outcome of the case. Id. at *19. The court also concluded that the discovery requested was narrowly tailored and the information sought could not be obtained through alternative means based on prior attempts, all of which weighed in favor of ordering production. Id. at *15-16. The information sought originated in Germany—a factor which weighed against ordering production—but was found to have limited weight given the company's voluntary partnership with an American corporation. Id. at *16. Similarly, the court found German privacy interests weighed against ordering production, but determined an in camera review before production to ensure only appropriate materials were produced would mitigate such concern. Id. at *15.

Finally, this analysis addresses not only discovery between parties, but also discovery sought from non-parties through subpoenas and other discovery mechanisms. See, e.g., Wultz, 298 F.R.D. 91 (denying a motion to quash a subpoena where the Israeli interests in privacy were not persuasive when no hardship could be identified).

Conclusion

In summary, where information sought though the discovery process in a United States court is subject to a foreign blocking statute, parties must be vigilant in making a discovery plan that takes into consideration the case-specific comity analysis that federal courts in the United

[15] Ellis & Winters LLP represented Trench France SAS in this litigation.

States use. For the best chances of obtaining discovery of information subject to blocking statutes, parties should serve narrowly tailored discovery early in the case. For the party resisting discovery, the court will be more likely to enter a protective order if the information can be obtained from a source not subject to a blocking statute. And if following Hague Procedures would allow production of the requested information without subjecting anyone to violation of the blocking statutes, then the court will be more likely to order that the parties go through the Hague Evidence Convention. In short, the parties should anticipate that federal courts in the United States will conduct a thorough, case-specific comity analysis to determine the scope and mechanisms of discovery.