

## French Blocking Statute Still Gets No Respect from U.S. Court

December 15, 2009

On October 28, 2009, the U.S. Bankruptcy Court for the District of Delaware held in the matter of *In re Global Power Equipment Group, Inc.*, No. 06-11045, 2009 WL 3464212 (Bkrctcy. D. Del., Oct. 28, 2009) (*Global Power*), that a comity analysis weighed in favor of compliance with the Federal Rules of Civil Procedure (FRCP), even at the cost of possible criminal penalties under the French Blocking Statute.

In *Global Power*, Maasvlakte Energie B.V. (Maasvlakte), a Dutch subsidiary of Air Liquide, S.A. Group (Air Liquide), a French company, filed two proofs of claim against Deltak, L.L.C. as part of the bankruptcy of Global Power Equipment Group. These claims were made in relation to a construction project that was to have been completed in Rotterdam, the Netherlands. In the process of resolving those claims, the Deltak Plan Administrator (DPA) sought the production of documents and witnesses from Maasvlakte. These witnesses and documents were located in the Netherlands, Belgium, and France. In its initial disclosures, Maasvlakte indicated that the documents and witnesses sought by the DPA were in its control.

Three days before the deadline for discovery, Maasvlakte asserted that because many of the documents and witnesses sought were located in France, the French Blocking Statute prevented production. Instead, Maasvlakte requested discovery through Letters of Commission under the Hague Evidence Convention (Hague Convention). This process would take between two and six weeks to commence. The process requires the court to issue the Letters of Commission to a U.S. consular agent in France, who would then send them to the French Ministry of Justice for review and acceptance.<sup>1</sup>

Most of the documents and witness testimony requested were in the possession and control of Air Liquide Engineering (ALE), a French sister company of Maasvlakte. Maasvlakte asserted that the Hague Convention procedures were necessitated by the fact that ALE is a separate entity and a non-party to the present action. The Bankruptcy Court first had to determine whether the documents and testimony sought were in the control of Maasvlakte. To do this, the court utilized a three-pronged test to determine the nature of the relationship between the two companies. Using *Afros SPA v. Krauss-Maffei Corp.*<sup>2</sup> as a guide, the court looked at the corporate structure encompassing the entities, the non-party's connection to the transaction at issue, and the degree to which the non-party would receive the benefit of an award in the case.

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<sup>1</sup> *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, Mar. 18, 1970, 23 U.S.T. 2555, 1970 T.I.A.S. No. 7444, codified at 28 U.S.C. Section 1781.

<sup>2</sup> 113 F.R.D. 127 (D.Del. 1986).

Both Maasvlakte and ALE were sister companies under the Air Liquide umbrella. Maasvlakte only has two employees and was created entirely to manage the construction project in Rotterdam on behalf of Air Liquide. ALE worked on behalf of Maasvlakte “in regard to the Project and specifically the contract with Deltak that is at issue. In addition, Maasvlakte continually made it clear that ALE was the sole actor on ‘[a]ll matters relating to . . . the Project.’” The “close nexus” between Maasvlakte and ALE, the fact that ALE was directly involved in the transaction at issue, and the fact that ALE would receive benefits from a ruling in Maasvlakte’s favor, caused the court to determine that the two companies’ relationship passed the test of *Afros, supra*. Therefore, there should be no impediment to Maasvlakte requesting production of documents and witness testimony from ALE.

According to the U.S. Supreme Court, a party has two options to obtain documents and testimony located in a foreign nation: the FRCP) and the Hague Convention.<sup>3</sup> If a party requests production under the Hague Convention, the court must conduct a “comity analysis” to decide whether to employ the FRCP or the Hague Convention procedures.

The comity analysis comprises seven factors: (1) the importance of the discovery sought to the litigation, (2) the degree of specificity in the discovery request, (3) whether the information originated in the United States, (4) the availability of alternate means of obtaining the information sought, (5) the extent noncompliance with the request would undermine the interests of the United States or the state where the information is found, (6) good faith on the party resisting discovery, and (7) any hardship caused by compliance with discovery.<sup>4</sup>

In this case, the court determined the facts of the present case weighed both for and against compliance with the FRCP. The discovery sought was determined to be “central to resolving the contested matter.” The court also found that the discovery requests were sufficiently specific, as Maasvlakte did not object to any requests as overly broad or unduly burdensome. There is no alternative means of obtaining the information because the DPA does not have access to the documents and information in France. The Hague Convention process is not compulsory and would take a long time to undertake—especially as compared to the immediate enforcement of the FRCP.

While the court did concede that the case did not implicate broader U.S. interests, it did find that the United States has an interest in “securing the prompt, economical and orderly administration of its bankruptcy cases.” In contrast, Maasvlakte’s expert testified that, “[t]he French Ministry of Justice will have little interest in the depositions or document production concerning the breach of a contract which deals with a matter located in the Netherlands.”

Factors weighing against the application of the FRCP are the fact that the documents were created mainly in the Netherlands and the fact that most of the witnesses are French nationals residing in France who will be testifying about a facility in the Netherlands. None of the discovery sought was created in the United States. In addition, there is no evidence that Maasvlakte acted in bad faith or even that it knew about the Blocking Statute when it first agreed to produce. Also, Maasvlakte faced potential criminal and civil penalties in France for noncompliance with the Blocking Statute.

While the Court acknowledged that Maasvlakte faced potential prosecution under the Blocking Statute, it pointed out the fact that Maasvlakte “chose to file the proof of claim and subject itself to the jurisdiction” of U.S. courts. The Court also noted that “Maasvlakte also chose to move the documents related to this claim to France.” Furthermore, this hardship was given less weight due to the fact that the objecting

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<sup>3</sup> *Société Nationale Indust. Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 529, 533-34, 538 (1987).

<sup>4</sup> *Société Nationale*, 482 U.S. at 544 n.28.

litigant is a party to the action.<sup>5</sup> In addition, in the present case, the court found that “the chance of prosecution under the French Blocking Statute is minimal,” as Maasvlakte could identify only one case where the Blocking Statute was used to prosecute a French national for engaging in discovery without utilizing the procedures of the Hague Convention in the 20 years since *Société Nationale* allowed parties to take discovery in France under the FRCP.<sup>6</sup>

Because the majority of the seven factors of the comity analysis favored production under the FRCP, and because Maasvlakte “presented no evidence to suggest that ALE or Maasvlakte faces a significant risk of prosecution if it complies with the discovery requests,” the court granted the DPA’s motion to compel discovery of documents and witness testimony.

Businesses operating in the global economy are increasingly likely to face discovery obligations in the United States implicating non-domestic data. When the data and information reside in European and certain other countries, national laws and regulations may restrict or prohibit their use in the U.S. matter. As is clear from this case, U.S. courts may nevertheless require that discovery proceed under U.S. rules.

As a result of these conflicting legal duties, multinational corporations may be faced with weighing the likelihood of sanctions in U.S. courts against incurring civil or criminal penalties under another nation’s laws. Early identification of these issues and proactive data and litigation management may help to mitigate this exposure.

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<sup>5</sup> Citing *Strauss*, 249 F.R.D. at 454.

<sup>6</sup> The court also cited *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000), and *Strauss*, 249 F.R.D. at 455, which held that “the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court.”

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