

**The French blocking statute, the Hague Evidence Convention,
and the case law: lessons for French parties responding to
American discovery.**

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August 31, 2014

An updated version of this article is now available, and should be cited, as:

50 TEX. INT'L. L. J. F. 11 (2014)

See <http://www.tilj.org/forum/>

An early version of this article appeared on
Law.com's Corporate Counsel Practice Updates on Mar. 1, 2010.

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Summary

Foreign parties entangled in litigation in the United States can receive discovery requests to produce documents located in their home country. These litigants sometimes invoke their country's blocking statute to resist production. They argue that the blocking statute subjects them to possible criminal sanctions at home, and that transnational discovery must proceed under the aegis of the Hague Evidence Convention. Requesting parties eschew the Convention because its procedures are perceived as slow and burdensome, and it offers channels to obtain evidence only, not responses to much broader U.S.-style discovery requests. The French blocking statute is perhaps the most well-known of these statutes, but it is by no means the only one.

This "blocking statute defense" to discovery largely fails. The U.S. Supreme Court held in the first of two landmark decisions that U.S. courts owed no deference to foreign blocking statutes. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). *Rogers* held that courts could order the production of documents located overseas provided that the courts had jurisdiction over the parties and the latter had control of the documents. Thirty years later, in another landmark decision, the Court held that Hague Evidence Convention procedures were merely permissive. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987). To make these procedures mandatory would amount to a surrender of judicial power that the Court would not accept without more. But *Aérospatiale* also instructed lower courts to be mindful of the relative vulnerability of foreign litigants faced with possibly abusive discovery demands made for tactical reasons.

Neither *Rogers* nor *Aérospatiale* gave the lower courts any guidance to help them adjudicate blocking statute and Hague Convention defenses on a day-to-day basis. In time the lower courts developed two main tests to analyze these cases. Some courts use a balancing test culled from *Aérospatiale* that weighs facts, sovereign interests, and likelihood of success. Other courts use balancing tests based on variations of § 442 of the Restatement (Third) of Foreign Relations Law of the United States. The § 442 test considers the importance the requested documents; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and sovereign interests.

Regardless of the test used, the outcome of a French blocking statute and Hague Evidence Convention defense is almost uniformly the same. U.S. courts give no deference to the French blocking statute, and almost always refuse to compel production through Hague Evidence Convention procedures. These courts hold that the interests of the United States in adjudicating judicial disputes within the ambit of its courts trump the interests of France as manifested by its blocking statute. These courts direct the parties to proceed through the applicable rules of procedure. Courts are not deterred by the threat of penal sanctions that may befall a party responding to discovery in violation of the French blocking statute. As most courts have noted, the statute is rarely enforced. The only conviction on record sanctions facially reprehensible conduct. No one, it appears, has ever been sanctioned in France for responding in good faith to

U.S. discovery requests. This result should surprise no one. As one court noted, sanctions would discourage French plaintiffs from seeking redress in U.S. courts for *bona fide* wrongs for fear of being unable to export their evidence.

Only when discovery requests become abusive can a resisting foreign party hope that the presiding court will heed *Aérospatiale*'s words of caution regarding the vulnerability of foreign litigants. Courts might hold that Convention procedures are justified in these cases. Meanwhile, parties seeking the production of documents located in France must beware tactical discovery victories that let them bypass Hague Evidence Convention procedures. Judgment enforcement remains litigation's endgame. The assets that might satisfy a judgment might be located in France, but French courts might not enforce a U.S. judgment based on evidence obtained outside Convention procedures.

I. Introduction: the scope and purpose of this article

The breadth of United States (“U.S.”) discovery rules generates both consternation and controversy within foreign legal circles, even in the United Kingdom where discovery originated.¹ U.S.-style discovery offends the sovereignty of civil-law countries where court officers play an inquisitorial role and control the search for evidence.² Many countries, such as France, have taken two measures to streamline discovery demands made on their citizens by U.S. litigation. First, these countries have enacted blocking statutes that criminalize the very act of exporting information requested in the course of foreign legal proceedings.³ Second, these countries have signed the Hague Evidence Convention, which provides formal procedures for responding, to a limited extent, to these requests.⁴

Blocking statutes create tensions for both foreign litigants in U.S. courts, and for the courts themselves. Foreign litigants necessarily face a quandary from which they seemingly cannot escape unharmed, *i.e.*, either abide by the blocking statute and face the consequences in the U.S. proceeding, or violate the blocking statute and face the consequences at home. The case law shows that these threats are real. Litigants face sanctions in U.S. courts if they object to discovery on the basis of the French blocking statute. Additionally, a 2007 decision by the French *Cour de cassation* shows that the threat of prosecution for violating the French blocking statute is not an empty one.⁵

The tension for U.S. courts is one between the principles of *lex fori* and of international comity.⁶ The first of these principles holds that a court controls its procedure, whereas the second holds that a court should not give reason to violate the laws of another nation.⁷ The case law shows that the principle of *lex fori* more than often carries the day when litigants invoke the French blocking statute as a defense against requests for discovery of information located in France.

¹ See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. Rev. 747 (1998).

² See, e.g., *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991).

³ For the French blocking statute, see the *Loi no. 68-678*, modified by the *Loi no. 80-538*, discussed in Section II of this article.

⁴ Formally known as the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the “Hague Convention”), discussed in Section III of this article.

⁵ *In re Advocate Christopher X*, Cour de cassation [Cass. Crim.], Paris, Dec. 12, 2007, Juris-Data No. 2007-83228 (Fr.) (last accessed Mar. 31, 2014). See also 7 Digital Evidence & Elec. Signature L. Rev. 130 (2010) (professional English-language translation, available online at www.deaeslr.org/, or through vLex, HeinOnline, or EBSCOhost. The author is much obliged to Mr. Stephen Mason for alerting him to this translation).

⁶ Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612, 614 (1978–79).

⁷ *Id.* See, e.g., *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG) (JO), 2010 WL 342051, at ** 2–3, 12 (E.D.N.Y. Aug. 27, 2010) (granting “some degree of deference [to the European Commission] under the rubric of international comity,” and shielding from U.S. discovery confidential documents generated in the course of the Commission’s own antitrust investigations”) (applying the *Restatement (Third) of Foreign Relations Law of the United States* § 442(1)(c) test, discussed below.).

This article offers an overview of all recorded cases in U.S. courts where parties invoke the French blocking statute, or the Hague Convention (as it applies to France), or both.⁸ Its goal is to familiarize future litigants with the issues that typically arise in these cases, to summarize the most important court rulings, and to help these litigants prepare their arguments effectively.

This article is divided into six sections, in addition to this Introduction. Sections II and III present short overviews of the French blocking statute and the Hague Evidence Convention, respectively. Section IV discusses the main U.S. court rulings on blocking statutes and the Convention, which established the precedents for most of the decisions that followed. The common thread between these early rulings is that they establish several overlapping multi-factored tests to help courts decide whether or not to give deference to a blocking statute, and whether or not to force litigants to proceed through the Hague Convention. Section V summarizes the case law that developed after the main rulings and in cases where litigants invoked the French blocking statute, or the Hague Convention as it applies to France, or both.⁹ Section VI summarizes recent non-judicial developments regarding the French blocking statute. Concluding remarks are drawn in Section VII.

II. The French blocking statute

The French blocking statute owes its existence to French government resistance to post-World War II American antitrust law enforcement against international shipping cartels.¹⁰ Law no. 80-538 of July 16, 1980, imposes criminal sanctions on parties who export certain categories of documents, or respond to discovery requests.¹¹ The law consists of four articles, as follow:

Article 1

Subject to treaties or international agreements, it is prohibited for any individual of French nationality or who usually resides on French territory and for any officer, representative, agent or employee of an entity having a head office or establishment in France to communicate to foreign public authorities, in writing, orally or by any other means, anywhere, documents or information relating to economic, commercial, industrial, financial or technical matters, the

⁸ There are thirty three identified cases, as summarized in Table 1. Whenever possible, arguments in this article are made with cases that involve parties invoking French law. Several “non-French” cases are discussed, however, when they make an important point of law and no equivalent case exists wherein the French blocking statute is invoked.

⁹ For another analysis of the Hague Convention and the case law, see James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 Tul. J. Int'l & Comp. L. 189 (2000).

¹⁰ See, e.g., *Restatement (Second) of Foreign Relations Law of the United States* § 442 Note 4 (1965); see also the text of the original (1968) law, which blocked the production of documents related to maritime transport. French version available online at [Légifrance](http://legifrance.gouv.fr) (last accessed Mar. 31, 2014).

¹¹ For an early discussion of the French blocking statute and its genesis, see Bates C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l L. 585 (1981).

communication of which is capable of harming the sovereignty, security or essential economic interests of France or contravening public policy, specified by the administrative authorities as necessary.

Article 1 bis

Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.

Article 2

Persons aimed at by articles 1 and 1 bis are required to inform without delay the relevant minister when they are in receipt of any request concerning such communications.

Article 3

Without prejudice to any greater penalties provided by law, any violation of the provisions of articles 1 and 1 bis of this law will be punished by imprisonment of [six months] and by a fine of [18,000 euros] or by only one of these two penalties.¹²

Article 1 bis is usually invoked in discovery disputes and Article 1 only occasionally so. Article 1 bis's essential purpose is to force foreign litigants to respect French laws that govern the taking of evidence abroad.¹³ These laws consist of Articles 733–748 of the new French code of civil procedure, and the March 18, 1970, Hague Convention on the taking of evidence abroad.¹⁴ These laws allow French judicial authorities to control the answers to discovery requests coming (especially) from the United States.

Article 1 bis applies only to the gathering of documents or information *in view of judicial proceedings*. The same gathering activities for non-judicial ends, *e.g.*, market studies, investment analyses, etc., are not sanctioned.¹⁵ Likewise, Article 1 bis does not in any way

¹² *Id.* at 611 (with minor edits in brackets). Other unofficial translations available at *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at **3–4 (E.D. Pa. Mar. 6, 2012); *Vincent v. Ateliers de la Motobécane, S.A.*, 475 A.2d 686, 688 (N.J. Super. Ct. App. Div. 1984); and *Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269, 273–74 (N.D. Ill. 1983) (Exhibit A). French version available online at [Légifrance](#) (last accessed Mar. 31, 2014).

¹³ Journal officiel de l'Assemblée Nationale – Questions et Réponses, 26 janvier 1981, p. 373 (official journal of the National Assembly – questions and answers, January 26, 1981, p. 373). Reproduced in Toms, *supra* note 11, at 612–14.

¹⁴ *Id.*

¹⁵ *Id.*

impede communications between French parties and their foreign attorneys.¹⁶ But the disclosure prohibition applies to “any person,” which includes foreign attorneys. Presumably, therefore, Article 1 bis prohibits the American attorney of a French party in a U.S. action from answering a discovery demand with documents furnished by the French party. Such discovery requests, under French law, must be submitted through the Hague Convention.

Perhaps the most pertinent comment about the French blocking statute was made by the federal district judge in *Adidas (Canada) Ltd. v. S.S. Seatrain Bennington*.¹⁷ In rejecting a French defendant’s demand for a protective order, the judge refused to take “at face value” the law’s “blanket criminal prohibition against exporting evidence for use in foreign tribunals.”¹⁸ If taken seriously the law would effectively prevent French parties from suing their foreign counterparts, even legitimately, because they could be barred from exporting their supporting evidence.¹⁹ Indeed, a former *Cour de cassation* justice testified “categorically” in a recent French blocking statute case that “[i]t is not possible to obtain permission to disclose documents, the disclosure of which would otherwise be prohibited by [the Blocking Statute.]”²⁰ This testimony implies that French plaintiffs in a foreign judicial proceeding must themselves proceed through the Convention to export their evidence.

III. The Hague Evidence Convention

Officially known as the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters,²¹ the Convention was adopted at the Eleventh Session of The Hague Conference on Private International Law. The Convention entered into force for both the United States and France on October 7, 1972.²² Significantly, the text of the Convention is in both the French and English languages.²³

Under French law, the Hague Convention is the exclusive means through which foreign judicial authorities can secure evidence in France.²⁴ The Convention offers two main

¹⁶ *Id.*

¹⁷ Nos. 80 Civ. 1911 (PNL), 82 Civ. 0375 (PNL), 1984 WL 423, at *3 (S.D.N.Y. 1984).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *In re Activision Blizzard, Inc. Stockholder Litig.*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *4 (Del. Ch. Feb. 21, 2014) (Laster, V.C.).

²¹ Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555; 847 U.N.T.S. 231 (reprinted as a note following 28 U.S.C. § 1781). For the French version, see [la Convention sur l’obtention des preuves à l’étranger en matière civile ou commerciale](#) (last accessed Mar. 31, 2014).

²² Martindale-Hubbell Int’l Law Digest, Selected International Conventions, IC-22, 25 (LexisNexis Martindale-Hubbell 2007), hereinafter *Martindale Int’l Conventions*.

²³ 23 U.S.T. 2555, art. 42.

²⁴ Journal officiel de l’Assemblée Nationale – Questions et Réponses, 26 janvier 1981, p. 373 (official journal of the National Assembly – questions and answers, January 26, 1981, p. 373). Reproduced in Toms, *supra* note 11, at 612–14.

mechanisms for obtaining evidence abroad. Evidence can first be collected by authorities in the requested state pursuant to a Letter of Request sent by a court in the requesting state.²⁵ Evidence can also be collected by the diplomatic or consular personnel (or by an appointed commissioner) of the requesting state, provided that appearances by persons in the requested state are voluntary.²⁶ In all cases, the collection of evidence must be done in conformity with the laws of the requested state.²⁷

But as its plain language bears witness, the Convention is all about obtaining *evidence*. Article 1 of the Convention states that judicial authorities of contracting states can solicit one another “to obtain evidence, or to perform some other judicial act.”²⁸ There are very good reasons to believe that the Convention is not (and never was) intended to deal with *discovery* requests coming from common law countries, especially broad requests from the United States.²⁹

As a threshold matter, it is simply unthinkable that the French version of Article 1, which substitutes the expression “*tout acte d’instruction*” for the word “evidence” could be construed to include U.S.-style discovery.³⁰ Moreover, the Convention record shows no indication that the second expression “other judicial act” (in French, “*d’autres actes judiciaires*”) could have included discovery.³¹

Even more to the point, Article 23 of the Convention states that “[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”³² Therefore, the Convention itself singles out discovery for a different treatment. Finally, the *rapporteur* of the special commission organized by the Hague Conference to draft the Evidence Convention, an American lawyer, commented on the existence of Article 23 and its consequences.³³

The record shows, therefore, that jurists on both sides of the common law-civil law divide were well aware of the distinction between requests for evidence and for discovery when they drafted the Convention. These jurists included language that offered signatory countries the option to exclude discovery requests from the Convention’s scope. Most countries invoked the

²⁵ 23 U.S.T. 2555, art. 1.

²⁶ *Id.* at arts. 15–17.

²⁷ *Id.*

²⁸ *Id.* at art. 21.

²⁹ See generally Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 35 Int’l & Comp. L.Q. 765 (1986).

³⁰ *Id.* at 776–77. The Hague Convention Article 1 French language must be contrasted with that in Article 1 bis of the blocking statute, which describes discovery as “documents or information . . . directed toward establishing evidence” (in French “*documents ou renseignements . . . tendant à la constitution de preuves*”).

³¹ *Id.* at 777.

³² 23 U.S.T. 2555, art. 23. This article was apparently added at the request of the delegation from the United Kingdom, which feared that the Convention might be used to seek third-party discovery. Collins, *supra* note 29, at 775.

³³ Philip W. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 653 (1969).

Article 23 exception under one condition or another when they ratified the Convention.³⁴ Even the United Kingdom, where discovery was first introduced, invoked the exception.³⁵

France invoked the Article 23 exception when it ratified the Convention, using unambiguous language.³⁶ The French Government later softened its position when it declared (on January 19, 1987) that its Article 23 reservation “does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure.”³⁷ This concession has little practical effect given that the essence of discovery is to force parties to exchange documents the existence of which may not be known to the requesting party. U.S.-style discovery does not require parties to enumerate documents in their requests for production.

In summary, not only does France forbid and penalizes the production of documents in response to discovery requests, but is also refuses to allow the Hague Evidence Convention to be used to this end, except under narrowly enumerated conditions. The hostility of French authorities to U.S.-style discovery could not be more explicit.

IV. The case law from *Rogers* to *Aérospatiale*

The leading Supreme Court cases that deal with foreign blocking statutes and the Hague Convention are *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*,³⁸ and *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*,³⁹ respectively. This section of the article discusses these two Supreme Court rulings and the major lower-court decisions between them.

A. *Rogers*

In *Rogers*, a Swiss holding company sued to reclaim property seized by the U.S. government during World War II under the Trading with the Enemy Act.⁴⁰ The Swiss claimant argued that it was the rightful owner of assets that had been deemed German-owned, or held for the benefit of German interests, at the time of seizure.⁴¹ The U.S. government moved to force the claimant to produce numerous Swiss banking records.⁴² The claimant produced many of the documents after several iterations between the court and Swiss authorities, but invoked

³⁴ *Martindale Int'l Conventions* at IC-25–40.

³⁵ *Martindale Int'l Conventions* at IC-37.

³⁶ *Martindale Int'l Conventions* at IC-29 (“The French Government declares . . . [t]hat, in application of Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries”).

³⁷ *Martindale Int'l Conventions* at IC-29–30.

³⁸ 357 U.S. 197 (1958).

³⁹ 482 U.S. 522 (1987).

⁴⁰ *Rogers*, 357 U.S. at 198–99.

⁴¹ *Id.*

⁴² *Id.* at 199–200.

provisions of Swiss penal and banking laws as the excuse to withhold others.⁴³ The district court concluded and stressed that the claimant had acted in good faith in trying to achieve compliance.⁴⁴ Nonetheless, the judge dismissed the case because of the claimant's failure to comply with the production order, and the Court of Appeals affirmed.⁴⁵

The Supreme Court unanimously reversed the dismissal.⁴⁶ The Court first held that the claimant could not argue that it was not in control of the documents, within the meaning of Fed. R. Civ. P. 34, merely because of the existence of the blocking statute.⁴⁷ The Court also held that a District Court had the power "to order a party subject to its jurisdiction to produce evidence even though the act of production may violate [a blocking] statute."⁴⁸ The ruling did not apply to every situation, however, and courts had to decide when to exercise such power depending on the facts of the case.⁴⁹ The Supreme Court held only that, under the *Rogers* facts, the District Court did not abuse its power to compel.⁵⁰ To hold otherwise would defeat congressional policy expressed through the Trading with the Enemy Act of 1941.⁵¹

The Supreme Court then held narrowly that dismissal of the case was not warranted where, as in this case, the claimant's failure to produce was due to *bona fide* inability and not willfulness, fault, or bad faith.⁵² The Court left wide discretion to the District Court to proceed from this conclusion onward.⁵³

Rogers established unequivocally that a court may order the production of documents in breach of a foreign blocking statute, provided that the court has jurisdiction over the party and the latter has control over the documents.⁵⁴ But the decision offers no guideline to courts on when to give effect to such statutes and when to compel production, other than to suggest a case-by-case analysis.⁵⁵ Likewise, the court is silent on what sanctions to apply against parties in contempt, other than holding that, under the *Rogers* facts, dismissal was too strict a sanction when the party objecting to discovery acted in good faith.⁵⁶

B. The case law between *Rogers* and *Aérospatiale*

The first decisions that followed *Rogers* were spectacularly deferential to foreign blocking statutes. It seemed that the courts (at least those in the Second Circuit) were ignoring

⁴³ *Id.* at 200–201.

⁴⁴ *Id.* at 201.

⁴⁵ *Id.* at 203.

⁴⁶ *Id.* at 213.

⁴⁷ *Id.* at 204–06.

⁴⁸ *Aérospatiale*, 482 U.S. at 544 n.29 (citing *Rogers*, 357 U.S. at 204–06).

⁴⁹ *Rogers*, 357 U.S. at 205–06.

⁵⁰ *Id.* at 206.

⁵¹ *Id.* at 205.

⁵² *Id.* at 212.

⁵³ *Id.*

⁵⁴ *Id.* at 204–06.

⁵⁵ *Id.* at 205–06.

⁵⁶ *Id.* at 212.

the *Rogers dicta* that to give too much credit to such statutes was to invite parties to move their records to countries that assured them secrecy.⁵⁷ In *In re Chase Manhattan Bank*, for example, the Second Circuit affirmed a District Court's modification of a subpoena *duces tecum* in light of a Panamanian blocking statute.⁵⁸ The District Court had reached its decision despite the fact that the blocking statute was signed into law on the day that the bank, under court order, was to have produced its Panamanian records.⁵⁹ Clearly, such deference could only stymie federal efforts to enforce U.S. laws (especially antitrust and securities laws) in a world increasingly engaged in international trade.

i. *First Nat'l City Bank*

The cases took a different turn after the publication of the Restatement (Second) of Foreign Relations Law of the United States in 1965.⁶⁰ In *United States v. First Nat'l City Bank*, the Second Circuit moved away from its earlier rulings and affirmed a district court decision that found the bank and one of its officers in contempt for failure to produce subpoenaed documents held by the bank at its branches in Germany.⁶¹ The documents were sought in response to an antitrust investigation of several of the bank's clients.⁶² The order was affirmed despite the fact that compliance with the subpoena would have subjected the bank to civil liability under German law (but not to criminal liability).⁶³ The Court of Appeals based its decision in part on the balancing test contained in § 40 of the Restatement, which states:⁶⁴

§ 40. Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,

⁵⁷ *Id.* at 205; see, e.g., *Gen. Atomic Co. v. Exxon Nuclear Co., Inc.*, 90 F.R.D. 290, 296–99 (S.D. Cal. 1981) (storing documents in Canada with the intent to thwart discovery in anticipated antitrust action).

⁵⁸ 297 F.2d 611, 613 (2d Cir. 1962); see also *First Nat'l City Bank v. IRS*, 271 F.2d 616, 619–20 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (stating that production of bank's records located in Panama "should not be ordered" if doing so would require actions in Panama in breach of Panamanian law, but holding that no showing of illegality had been made (with respect to Panamanian law) that would excuse compliance with the subpoena); *In re Equitable Plan Co.*, 185 F. Supp. 57 (S.D.N.Y. 1960), *modified sub nom. Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (deferring to a Canadian provincial blocking statute where subpoenaed documents were held in Canada by banks not parties to the underlying action).

⁵⁹ *In re Chase Manhattan Bank*, 297 F.2d at 612.

⁶⁰ Hereinafter, the "Restatement" refers to the Restatement (Second) of Foreign Relations Law of the United States, or to the Restatement (Third) of same, as the case may be.

⁶¹ 396 F.2d 897 (2d Cir. 1968).

⁶² *Id.* at 898.

⁶³ *Id.* at 901, 904–05.

⁶⁴ *Id.* at 902.

- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.⁶⁵

In balancing the vital national interests of the states, the Second Circuit gave primacy to U.S. antitrust laws, which it described as “cornerstones of this nation’s economic policies.”⁶⁶ By contrast, the record showed that the German government attached little importance to its blocking statute.⁶⁷ In ruling in favor of enforcing the subpoena, the Court also considered the facts that the threat of hardship to the bank was minimal, and that the bank had not made a good faith effort to comply.⁶⁸

The Second Circuit distinguished this decision from its earlier rulings on the basis of the bank’s limited prospective liability.⁶⁹ First National City Bank faced only civil liability, whereas the parties in *In re Chase Manhattan* and *Ings v. Ferguson* faced criminal penalties, or sanctions of equivalent severity.⁷⁰ The Court refused to create a general rule that would require a showing of criminal liability to excuse compliance with a subpoena, however.⁷¹ Perhaps, as one commentator observed, the change in the Second Circuit’s stance toward blocking statutes simply reflected the changing attitudes toward the regulation of restrictive business practices.⁷²

First Nat’l City Bank is important because it is the first of a number of cases that use a Restatement § 40 analysis to decide whether or not to compel production or to affirm sanctions.⁷³ Yet, the relative success achieved by § 40 is somewhat of a surprise given its shaky legal basis and its ill-defined notion of “vital national interests” in § 40(a).⁷⁴ Even *First Nat’l City Bank*

⁶⁵ *Restatement (Second) of Foreign Relations Law of the United States* § 40 (1965); see also § 39(1) (echoing *Rogers*).

⁶⁶ *First Nat’l City Bank*, 396 F.2d at 903.

⁶⁷ *Id.* at 903–04.

⁶⁸ *Id.* at 900.

⁶⁹ *Id.* at 901.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Timothy G. Smith, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation, etc.*, 14 Va. J. Int’l L. 747, 760 (1974).

⁷³ See, e.g., *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977) (using a § 40 analysis to reverse sanctions for failure to comply with a subpoena because of a Canadian blocking statute).

⁷⁴ See generally Metzger, *The Restatement of Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. Rev. 7, 18–20 (1966) (no authority supports § 40); Anonymous Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612, 619–21 (1979) (§ 40 imposes decisions “based upon ill-defined notions of competing national interests”).

described the need to balance national interests as “troublesome.”⁷⁵ As a district judge later noted, “the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country.”⁷⁶

ii. *In re Uranium*

The next significant case from this era was one that resulted from the Uranium antitrust lawsuits of the late 1970’s. In *In re Uranium Antitrust Litig.*, defendants invoked the blocking statutes of Australia, South Africa and Canada to withhold foreign documents under their control.⁷⁷ The statutes were enacted for the “express purpose of frustrating the jurisdiction” of U.S. courts over the defendants.⁷⁸ The court reviewed *Rogers* to first conclude that it had the power to compel the production of documents located abroad because it had jurisdiction over the parties and the parties were in control of the documents.⁷⁹ The court also inferred from its review of *Rogers* that the decision to exercise this power was to be based on the outcome of a three-pronged analysis based on the following factors:⁸⁰

- (1) “the importance of the policies underlying the United States statute which forms the basis for the plaintiffs’ claims;”
- (2) “the importance of the requested documents in illuminating key elements of the claims;” and
- (3) “the degree of flexibility in the foreign nation’s application of its nondisclosure laws.”⁸¹

The court distilled this test from *Rogers* (hereinafter the “*Uranium*” test), and recognized its limited precedential value in light of *Rogers*’ narrow ruling.⁸² The first factor considers only the importance of the U.S. policies that underlie the request for production. Unlike in the first Restatement (second) § 40 factor, the first *Uranium* test factor accords no weight to the policies of the blocking country.⁸³ The second factor imposes a higher standard of need for the documents than that in the Rules of Civil Procedure.⁸⁴ The documents requested must be “vital” to the inquiry, and not just “relevant” or “calculated to lead to the discovery of admissible

⁷⁵ *First Nat’l City Bank*, 396 F.2d at 902.

⁷⁶ *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

⁷⁷ *Id.* at 1142.

⁷⁸ *Id.* at 1143.

⁷⁹ *Id.* at 1148, 1154.

⁸⁰ *Id.* at 1146–48.

⁸¹ *Id.* at 1148.

⁸² *Id.* at 1147. One court noted that the factors were “culled” from *Rogers*. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 515 (N.D. Ill. 1984).

⁸³ *In re Uranium*, 480 F. Supp. at 1146.

⁸⁴ *Id.*

evidence.”⁸⁵ The third factor applies only at the sanction phase of a proceeding, after a party has refused to comply with a production order.⁸⁶

The *In re Uranium* court explicitly rejected the Restatement (Second) § 40 test, and called it unworkable under the facts of the case.⁸⁷ Referring to the first part of the test, the court held that no weighing of national interests could resolve the conflict between orders to produce documents in a domestic antitrust investigation, and foreign blocking statutes enacted specifically to defeat those orders.⁸⁸

Applying the law to the facts of its case, and citing *First Nat’l City Bank*, the court stressed the importance of antitrust laws and their application.⁸⁹ The court next concluded that the requested documents were vital to the litigation, not just because of the “overwhelming” supporting evidence presented by the plaintiffs, but also because three foreign governments were trying to defeat the lawsuits.⁹⁰ On balance, the court’s analysis led it to grant plaintiffs’ motions to compel.⁹¹

iii. Graco

The most significant pre-*Aérospatiale* case involving a French party is *Graco, Inc. v. Kremlin, Inc.*⁹² *Graco* is the first of a long line of cases where a French party asserts both the French blocking statute and the Hague Convention as defenses against discovery requests.⁹³ The case is important for this reason, and also because the court’s analysis of Hague Convention issues is a harbinger of *Aérospatiale*’s. *Graco* sued Kremlin and SKM, its French parent

⁸⁵ *Id.*

⁸⁶ *Id.* at 1147–48.

⁸⁷ *Id.* at 1148.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1154–55.

⁹¹ *Id.* at 1156.

⁹² 101 F.R.D. 503 (N.D. Ill. 1984). Four French blocking statute cases of lesser significance precede *Graco*. The first case that mentions the revised (1980) version of the French blocking statute is *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1326 n.148 (D.C. Cir. 1980). But the case is about service of process, and the blocking statute is only discussed in *dicta*. *In re Oil Spill*, 93 F.R.D. 840 (N.D. Ill. 1982) is one of the many rulings issued during the protracted litigation that followed the 1978 crude oil spill caused by the grounding of the Amoco Cadiz off Portsall and Kersaint, Brittany. The ruling mentions the blocking statute but deals only with sanctions. The arguments on whether to order production must be in the preceding ruling in the case, MDL 376 Apr. 1, 1980 (unavailable). In *Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269 (N.D. Ill. 1983), the French parties, involuntary plaintiffs in the action, invoked the blocking statute to resist a discovery order. The judge applied the Restatement (Second) § 40 test and ordered production. The case is further discussed in Section V of this article. Finally, in *Wilson v. Stillman & Hoag, Inc.*, 121 Misc.2d 374 (N.Y. Sup. Ct. 1983), a judge denied the French party’s motion for a protective order without using a test. The case is unusual because it articulates on Article 1 of the French blocking statute. Arguments in most other French blocking statute cases are framed in terms of Article 1 bis.

⁹³ *Graco*, 101 F.R.D. at 507. The *Wilson* ruling, *supra* note 92, mentions both the blocking statute and the Hague Convention, but it is not clear that the French party invoked the latter in its argument.

company, for patent infringement, and SKM objected to discovery.⁹⁴ The court first held that the French blocking statute was not a bar to production, and secondly that the plaintiff was not compelled to proceed through the Hague Convention.⁹⁵

The court analyzed SKM's blocking statute claims in light of *Rogers*, the Restatement (Second) § 40 test, the *Uranium* test, and a new Restatement (Third) § 442 test.⁹⁶ The court noted that all four approaches required balancing analyses, and that none led to the conclusion that the French blocking statute was an absolute bar to a production order.⁹⁷ The novel element of the court's analysis is, of course, the Restatement (Third) § 442 test, which states that when a party asks for foreign discovery, the court should consider certain factors, even in the absence of a conflicting foreign law, *e.g.*, a blocking statute.⁹⁸ These factors are:

- (1) “the importance of the documents or information,
- (2) the specificity of the request,
- (3) the origin of the documents,
- (4) the extent to which the foreign state's interests are implicated, and
- (5) the possibility of securing the information through alternate means.”⁹⁹

Having ruled against SKM on the effect of the French blocking statute, the court turned its attention to the Hague Convention. Using arguments essentially identical to those later adopted by the U.S. Supreme Court in *Aérospatiale*, the court held that Convention procedures were not required to compel SKM to respond to Graco's document requests and written

⁹⁴ *Graco*, 101 F.R.D. at 507.

⁹⁵ *Id.* at 516, 524.

⁹⁶ *Id.* at 509–10. *Graco* cites to *Restatement of Foreign Relations Law of the United States (Revised)* § 420 (Tent. Draft No. 3, 1982). That section became *Restatement (Third) of Foreign Relations Law of the United States* § 442 (1987). The tests in the two versions are essentially the same, and this article cites to the *Restatement (Third)* § 442 for the sake of convenience. Note that *Aérospatiale* also cites to this section of the restatement. 482 U.S. at 543–44 n.28 (citing *Restatement of Foreign Relations Law of the United States (Revised)* § 437(1)(c) (Tent. Draft No. 7, 1986)). See also Section IV-C below.

⁹⁷ *Graco*, 101 F.R.D. at 510.

⁹⁸ *Id.* at 516.

⁹⁹ *Id.* Compare with *Restatement (Third) of Foreign Relations Law of the United States* § 442(1)(c) (“[i]n deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”).

interrogatories.¹⁰⁰ But the court was careful to state that it was “not ordering that any proceeding be conducted in France.”¹⁰¹

iv. *Minpeco*

Although *Minpeco, S.A. v. Conticommodity Servs., Inc.* post-dated *Aérospatiale* (by three weeks) it is best discussed in this section of this article because the parties did not invoke the Hague Convention, and the ruling created a new blocking statute test that has gained acceptance in the Second Circuit.¹⁰² The case arose out of the silver market manipulations of the late 1970s.¹⁰³ A former defendant in the case, a Swiss bank, objected to discovery on account of Swiss banking secrecy laws.¹⁰⁴ The plaintiffs still pressed for discovery to bolster their case against other defendants.¹⁰⁵ Citing *Rogers* and *Aérospatiale*, the court first held that it had the power to compel production.¹⁰⁶ The question was whether the court *should* exercise its power.¹⁰⁷

In deciding whether or not to compel production, the court considered in turn the five Restatement (Second) § 40 factors, the “importance of the information” factor from the *Uranium* test, and the “good faith” factor from *First Nat’l City Bank* and *Compagnie Française*.¹⁰⁸ These seven factors were summarized into four principal factors, which constitute the *Minpeco* test for giving (or not) effect to a blocking statute:

- “(1) the competing interests of the nations whose laws are in conflict,
- (2) the hardship of compliance on the party or witness from whom discovery is sought,

¹⁰⁰ *Graco*, 101 F.R.D. at 517, 520–24. These arguments are also adopted by the several cases that deal with the Hague Convention and that precede *Aérospatiale*. See, e.g., *Compagnie Française d’Assurance pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984); *Adidas*, 1984 WL 423. Because these arguments are best discussed in the context of *Aérospatiale* (see below), they are not discussed in this section of this article.

¹⁰¹ *Graco*, 101 F.R.D. at 517. The opinion also dedicates substantial prose to differentiating itself from earlier California rulings that had decided in favor of following Hague Convention procedures for discovery requests in Germany. *Id.* at 517–24 (citing *Pierburg GmbH v. Superior Court*, 186 Cal. Rptr. 876 (Cal. Ct. App. 1982); *Volkswagenwerk A.G. v. Superior Court*, 176 Cal. Rptr. 874 (Cal. Ct. App. 1981)).

¹⁰² 116 F.R.D. 517 (S.D.N.Y. 1987); see, e.g., *In re Enron Corp.*, No. 01-16034 (AJG), slip op. at 4 (S.D.N.Y. July 18, 2007) (Exhibit “A” of the court’s July 18, 2007, Minutes of Proceedings, available on WestlawNext case docket and Loislaw.com) (defendant invoking French blocking statute); *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02CIV5571RJHHBP, 2006 WL 3378115, at *2 (S.D.N.Y. Nov. 16, 2006) (same); *Bodner v. Banque Paribas*, 202 F.R.D. 370 (E.D.N.Y. 2000) (same); *First Am. Corp. v. Price Waterhouse LLP*, 988 F. Supp. 353, 364 (S.D.N.Y. 1997) (defendant invoking British blocking statutes); *aff’d*, 154 F.3d 16 (2d Cir. 1998).

¹⁰³ *Minpeco*, 116 F.R.D. at 519.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 520.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 522.

(3) the importance to the litigation of the information and documents requested, and

(4) the good faith of the party resisting discovery.”¹⁰⁹

The novel element in the *Minpeco* test is the presence of the good faith factor at the order stage. In *Rogers* and the tests that followed, good faith is taken into account only at the sanctions stage.¹¹⁰ Applying the test to the facts of the case, the court declined to compel the Swiss bank.¹¹¹ The fact that the bank was no longer a party to the action, and that the court had no leverage (other than fines) to enforce a motion to compel was a factor in its decision.¹¹²

C. *Aérospatiale*

Almost 30 years after *Rogers*, *Aérospatiale* concluded a lawsuit filed against the (then) French government-owned company following the crash of one of its airplanes in Iowa.¹¹³ *Aérospatiale* responded to a first round of production demands, but sought a protective order after a second round was served.¹¹⁴ The company argued that because the documents sought were located in France, the Hague Convention procedures applied to the exclusion of any other.¹¹⁵ The company also argued that it was blocked from responding to the request because of French law no. 80-538.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ *Rogers*, 357 U.S. at 212; *First Nat'l City Bank*, 396 F.2d at 900 & n.8, 905.

¹¹¹ *Id.* at 530.

¹¹² *Id.*

¹¹³ *Aérospatiale*, 482 U.S. at 525. Three French blocking statute and Hague Convention rulings were issued between *Graco* and *Aérospatiale*: *Compagnie Française*, 105 F.R.D. 16 (ordering production of French plaintiff's documents through the Rules of Procedure, and production of French Ministry documents through the Convention, but retaining the right to revisit the issue); *Adidas*, 1984 WL 423 (denying French defendant's protective order and ordering production of documents and depositions of witnesses through the Rules of Procedure because these activities will not take place in France and will not usurp French judicial authority); *Vincent v. Ateliers de la Motobécane, S.A.*, 475 A.2d 686 (N.J. Super. Ct. App. Div. 1984) (ordering production through Hague Convention procedures because third-party plaintiff, in agreeing to sell French products, could not complain about having to follow French law, but retaining the right to revisit the issue). *Compagnie Française* and *Adidas* make arguments similar to those in *Graco* in regard to the Hague Convention, as do other cases invoking the blocking statutes of other countries that are not discussed here.

¹¹⁴ *Aérospatiale*, 482 U.S. at 525.

¹¹⁵ *Id.* at 525–26.

¹¹⁶ *Id.* at 526. At the time of the trial court, the French government had not yet relaxed its position vis-à-vis Hague Convention Article 23, and France's strict exception was still in effect (the Eighth Circuit appellate opinion is dated Jan. 22, 1986, and France officially softened its Article 23 position in a letter dated Jan. 19, 1987. *Martindale Int'l Conventions* at IC-29–30). *Aérospatiale* must have known that it was sending the plaintiffs toward a *cul-de-sac* when it insisted that they proceed through the Convention. But neither the Eighth Circuit nor the Supreme Court opinions mention this possibility. This weakness in the Convention argument did not go unnoticed by another Federal Circuit Court in another lawsuit against *Aérospatiale* pursuant to a helicopter crash that occurred in Alaska. *Société Nationale Industrielle Aérospatiale v. United Dist. Ct. for the Dist. of Alaska*, 788 F.2d 1408, 1411 n.4 (9th Cir. 1986) (in light of France's Article 23 exception “it is difficult to assess whether France would even respond to a ‘letter of request’”). Other rulings make similar comments. The French government's softened position vis-à-vis

The presiding Magistrate Judge rejected Aérospatiale's arguments and denied the motion insofar as it related to the production of documents.¹¹⁷ The Judge first held that the Hague Convention could not override the Federal Rules of Civil Procedure lest the Convention frustrate the court's interests in protecting U.S. citizens' legal interests. This was especially the case in product liability cases.¹¹⁸ In regard to the French blocking statute, the Judge noted that the law seemed little-enforced in France, and questioned whether the law was intended to apply to pre-trial discovery.¹¹⁹ More significantly, the Judge balanced the interests of the court in protecting U.S. citizens from foreign-product injuries against the interest of the French governments in protecting its citizens from "intrusive foreign discovery procedures," and concluded that the former prevailed.¹²⁰ The Eighth Circuit affirmed and the Supreme Court granted *certiorari*.¹²¹

The Supreme Court immediately ruled out the idea that the Hague Convention could define the exclusive and obligatory procedures for gathering documents and information located abroad.¹²² The Court held that the use of the Convention was optional, and grounded its decision on textual and historical arguments.¹²³ The Court also took notice of Articles 23 and 27 of the Convention.¹²⁴ Had contracting countries agreed that the Convention exclusively replaced pre-existing procedures, the consequences of Article 23 would have amounted to a significant loss of power for U.S. courts.¹²⁵ Indeed, Article 23 meant that these courts could (and would) lose the broad discovery powers that they hitherto exercised over foreign defendants under their jurisdiction.¹²⁶ Absent explicit textual support, the Court could not accept such a surrender of judicial power.¹²⁷ Moreover, the Court noted that Article 27 authorized contracting states to use "more liberal methods of rendering evidence than those authorized by the Convention," which again showed that the Convention's procedures were not exclusive.¹²⁸

The Court noted that the exclusive application of the Convention would create unacceptable asymmetries among the parties.¹²⁹ First, production obligations would be unequal

Article 23 appears in the record for the first time in the Republic of France's *amicus curiae* brief in support of Aérospatiale. *Brief of Amicus Curiae of the Republic of France in Support of Petitioner* at *23, *Société Nationale Industrielle Aérospatiale v. United Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987), 1986 WL 727501.

¹¹⁷ *Aérospatiale*, 482 U.S. at 526.

¹¹⁸ *Id.* at 526–27.

¹¹⁹ *Id.* at 527.

¹²⁰ *Id.*

¹²¹ *Id.* at 527–29; *see also In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120 (8th Cir. 1986).

¹²² *Aérospatiale*, 482 U.S. at 529.

¹²³ *Id.* at 538 ("the Convention was intended as a permissive supplement, not a pre-emptive replacement").

¹²⁴ *Id.* at 536–38 (as noted earlier, Article 23 authorizes a contracting state to refuse to honor discovery requests).

¹²⁵ *Id.* at 539 (citing *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 612 (5th Cir. 1985), *vacated*, 483 U.S. 1002, *remanded to* 838 F.2d 1362 (5th Cir. 1988) (*vacated and remanded for further consideration in light of Aérospatiale*)).

¹²⁶ *Id.* at 536–37.

¹²⁷ *Id.* at 536–37, 539. The Court cited Amram for the proposition that "[The Convention] makes no major changes in United States procedure and requires no major changes in United States legislation or rules." *Id.* at 535 (citing Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, S. Exec. Doc. A, at pp. 1, 3; *see also* Amram, *supra* note 33, at 655 for the same statement).

¹²⁸ *Id.* at 537–38.

¹²⁹ *Id.* at 539–40 n.25.

as foreign parties would be somewhat “protected” by the Convention, unlike domestic parties. Second, parties would not compete on a level playing ground in the United States given that foreign companies would know that they would enjoy an advantage over domestic companies in the event of litigation. Third, foreign defendants from countries that signed the Convention would be treated differently from foreign defendants from countries that had not.¹³⁰

The Supreme Court also refused to create a rule of first resort for Convention procedures, as *Aérospatiale* argued that it should.¹³¹ *Aérospatiale* based its argument on the respect that courts owed to the sovereignty of foreign states where the evidence is located.¹³² Because civil-law countries have consented to the gathering of evidence only through Convention procedures, *Aérospatiale* argued, requesting courts have a duty to use these procedures whenever they are available.¹³³ The Court found this argument non-persuasive. The Convention itself mentioned no such duty, and a comity analysis in this context required a “more particularized analysis” of the sovereign interests at stake than *Aérospatiale*’s proposed rule implied.¹³⁴ In closing this argument, the Court wrote somewhat ambiguously that “[w]e therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.”¹³⁵ A plain reading of this last sentence indicates that the Court refused to establish a rule of *first* resort absent the enumerated conditions. Therefore, the rule arguably remained a dead letter. Nonetheless, many courts have since held that this sentence stands for the affirmative proposition that resort (*any* resort) to Convention procedures is to be decided in light of a three-factor analysis of facts, sovereign interests, and likelihood of success (hereinafter the *Aérospatiale* test).¹³⁶

The Supreme Court left the issue of whether or not to use the Convention to the discretion of the lower courts, in light of the reasonableness of the discovery demands.¹³⁷ The Convention procedures might well be reserved for burdensome discovery demands and,

¹³⁰ *Id.* Another court later noted that domestic businesses will be more likely to engage with French companies if they know that eventual discovery disputes “will be handled by the courts with a balanced approach,” *i.e.*, if they know in advance that the discovery playing field will be level. *Am. Home Assurance Co. v. Société Commerciale Toutélectric*, 104 Cal. Rptr. 2d 406, 426 (Cal. Ct. App. 2002).

¹³¹ *Aérospatiale*, 482 U.S. at 541–42.

¹³² *Id.* at 543.

¹³³ *Id.*

¹³⁴ *Id.* at 543–44 and n.28 (citing Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986), which became § 442 in the final Restatement version (1987)).

¹³⁵ *Id.* at 544. In a footnote, the Court also ruled that the French blocking statute did not alter its conclusion. *Id.* at 544 n.29. Citing *Rogers*, the Court reiterated that blocking statutes did not curtail an American court’s right to compel the production of evidence from defendants over which the court had jurisdiction. *Id.* Such laws were “an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge,” and American courts were under no obligation to give them effect. *Id.*

¹³⁶ See, e.g., *Rich v. KIS California, Inc.*, 121 F.R.D. 245, 257 (M.D.N.C. 1988), and other cases listed in Table 1; see also Chalmers, *supra* note 9, at 204 (although the “*Aérospatiale* test” “was not explicitly adumbrated in *Aérospatiale*, it has been accepted by a number of courts as an appropriate formulation.”).

¹³⁷ *Aérospatiale*, 482 U.S. at 545–46.

implicitly, the Rules of Civil Procedures used for simpler requests.¹³⁸ The “exact line between reasonableness and unreasonableness,” which, under this logic, would trigger the Convention, was to be drawn by the trial courts “based on [their] knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.”¹³⁹

Mindful of foreign litigants’ relative vulnerability, the Supreme Court concluded its ruling by exhorting district courts to exercise vigilance against abusive discovery demands.¹⁴⁰ Such demands might be sought for tactical reasons and, because of their costs, would place the foreign litigant at a disadvantage.¹⁴¹ District courts were also asked to show respect for foreign sovereign interests and for the special problems that foreign litigants faced. But the Court explicitly refused to “articulate specific rules to guide this delicate task of adjudication.”¹⁴²

In summary, shortly after the Supreme Court issued its *Aérospatiale* ruling, the law stood as follows:

(1) U.S. courts could order the production of evidence located in a foreign country despite the existence of a blocking statute, so long as no proceedings were to take place in the foreign country;¹⁴³

(2) a foreign blocking statute was to be given effect on the basis of one of four tests articulated by lower courts or by the *Restatements of Foreign Relations Law of the United States*, *i.e.*, the Restatement (Second) § 40 test, the *Uranium* test (inferred from *Rogers*), the Restatement (Third) § 442 test, and the *Minpeco* test;¹⁴⁴

(3) in the event of non-compliance with a production order, the severity of the sanctions that a court could apply was to be in relation to the good faith shown by the party resisting production;¹⁴⁵

(4) whether or not to compel a party to use the Hague Convention procedures for discovery was to be decided in light of the reasonableness of the discovery demands, with courts obligated to exercise vigilance to protect foreign parties from abusive discovery practices.¹⁴⁶

Significantly, the first four enumerated tests applied to blocking statutes, and not to the Hague Convention. Only the *Aérospatiale* “test,” if the Supreme Court’s language in this regard is not just *dicta*, applied to the Convention.¹⁴⁷

¹³⁸ *Id.*

¹³⁹ *Id.* at 546.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Aérospatiale*, 482 U.S. at 544; *Rogers*, 357 U.S. at 204–06; *Graco*, 101 F.R.D. at 517.

¹⁴⁴ *First Nat’l City Bank*, 396 F.2d at 902; *Minpeco*, 116 F.R.D. at 522; *Graco*, 101 F.R.D. at 516; *In re Uranium*, 480 F. Supp. at 1146–48.

¹⁴⁵ *Rogers*, 357 U.S. at 204–06, 212.

¹⁴⁶ *Aérospatiale*, 482 U.S. at 546.

In theory, therefore, in any lawsuit where a party invokes the French blocking statute and the Hague Convention, a court should first decide whether or not to give effect to the blocking statute. If the court rejects the blocking statute defense, it must still decide whether to order parties to proceed through the Hague Convention or through the Rules of Procedure. If the court defers to the blocking statute, the parties necessarily must proceed through the Convention.

With the exception of *Graco*, however, the case law shows that courts address the two issues in one discussion that centers on one or more of the four tests listed above plus the *Aérospatiale* test. Two broad lines of cases have evolved (*see* Table 1). Second and Third Circuit courts have followed the Restatement (Third) § 442 and *Minpeco*, and recently adopted a seven-part test that combines the five Restatement (Third) § 442 factors with *Minpeco*'s good-faith and hardship-to-the-defendant factors (the “*Strauss*” test).¹⁴⁸ Therefore, these courts sometimes deal with Hague Convention defenses with a test developed to address blocking statute claims.¹⁴⁹ Courts in other jurisdictions, including one Texas federal district court, have largely adopted the *Aérospatiale* test.¹⁵⁰

Irrespective of which test is used, the case law reveals a consistent pattern of rulings that generally reject the use of the Hague Convention and compel discovery through the Rules of Procedures. As one federal district judge wrote, foreign corporations that incorporate in the United States, enter their products in the stream of commerce in the United States, and otherwise promote their profit-making activities “have little to complain about when served with enforceable discovery requests under the Federal Rules of Civil Procedure.”¹⁵¹ Another federal court stated that the mere act of responding to discovery requests did not infringe on French judicial sovereignty.¹⁵² The French defendant in *Adidas* sought refuge behind the Hague Convention after it received requests for production and depositions in New York.¹⁵³ The judge held that the requested discovery did not intrude on “french (sic) sovereignty or judicial custom” because only acts preparatory to the giving of evidence would take place in France.¹⁵⁴ These acts, such as the selection of witnesses and the gathering of documents, in no way “affront[ed] or intrude[d] on French sovereignty.”¹⁵⁵ Moreover, these acts were no different from those that a French party would undertake—without involvement of the French judiciary—if it were a

¹⁴⁷ The *Aérospatiale* “test” is not even a West Headnote.

¹⁴⁸ *See Strauss v. Crédit Lyonnais, S.A.*, 242 F.R.D. 199, 211 (E.D.N.Y. 2007); *In re Enron Corp.*, No. 01-16034 (AJG), slip op. at 8; *see also Reino de Espana v. Am. Bureau of Shipping*, No. 03CIV3573LTSRLE, at *3 (S.D.N.Y. Aug. 1, 2005) (Spanish party resisting discovery); *Trueposition*, 2012 WL 707012, at *2 (finding precedent in the *Strauss* test’s Restatement (Third) § 442 factors in *Aérospatiale* language that is arguably *dicta*); *In re Global Power Equip. Group Inc.*, 418 B.R. 833, 847 (Bankr. D. Del. Oct. 28, 2009).

¹⁴⁹ *See, e.g., In re Vivendi*, 2006 WL 3378115, at *2 (rejecting a Hague Convention defense on basis of the *Minpeco* test—a blocking statute test).

¹⁵⁰ *See, e.g., Madden v. Wyeth*, No. 3-03-CV-0167-BD, slip op. at 3 (N.D. Tex. Jan. 12, 2006) (mem. op.) (available on WestlawNext case docket and Loislaw.com) (rejecting a French blocking statute defense on basis of the *Aérospatiale* test—a Hague Convention test).

¹⁵¹ *In re Aircrash Disaster Near Roselawn, Ind.*, 172 F.R.D. 295, 310 (N.D. Ill. 1997).

¹⁵² *Adidas*, 1984 WL 423, at *2.

¹⁵³ *Id.* at *1.

¹⁵⁴ *Id.* at *2.

¹⁵⁵ *Id.*

plaintiff in the United States.¹⁵⁶ Similarly, the *Compagnie Française* court described the intrusion of these preparatory acts as “*de minimis*.”¹⁵⁷

V. The case law since *Aérospatiale* and its implications for litigants who invoke French law as a defense against discovery.

A. Most courts give no deference to the French blocking statute, disregard the Hague Convention, and order production through the Rules of Procedure.

There are thirty three identified cases on record where parties invoke the French blocking statute, or the Hague Convention, or both, as defenses against production (Table 1). The French blocking statute defense was rejected every time that it was raised,¹⁵⁸ and courts agreed to proceed through Hague Convention procedures in only six cases.¹⁵⁹ Of these six cases, one involved discovery against the French government, and the other depositions of parties over which the court did not have jurisdiction.¹⁶⁰ Moreover, in the four cases where the court had jurisdiction, the rulings made clear that the court retained the option to proceed through the Rules of Procedure should Hague Convention procedures prove unsuccessful.¹⁶¹ In a recent case, the Delaware Court of Chancery gave a French defendant just five weeks to obtain discovery through the Hague Convention.¹⁶² Only the state courts of New Jersey have shown deference to the French blocking statute and compelled discovery through Hague Convention procedures.¹⁶³

In applying the various tests described in the preceding section, courts almost invariably hold that the “national interests” of the United States trump those of France. In *Compagnie Française*,¹⁶⁴ for example, the plaintiff, an arm of the French government, tried to withhold some

¹⁵⁶ *Id.*

¹⁵⁷ *Compagnie Française*, 105 F.R.D. at 31. *But see In re Perrier*, 138 F.R.D. at 355 (“foreign state’s sovereign interests are implicated [when] seeking discovery from citizens of the foreign state, within the boundaries of that state, without the permission of that state”).

¹⁵⁸ *See, e.g., Rich*, 121 F.R.D. at 258 (“[i]n general, broad blocking statutes, including those which purport to impose criminal sanctions, which have such extraordinary extraterritorial effect, do not warrant much deference”); *see also Minpeco*, 116 F.R.D. at 528 (describing a blocking statute as a “sham law”) (citing *Compagnie Française*, 105 F.R.D. 30).

¹⁵⁹ *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541; *Abbott labs. v. Impax labs., Inc.*, No. Civ. A 03-120-KAJ, 2004 WL 1622223 (D. Del. July 15, 2004); *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348 (D. Conn. 1991); *Compagnie Française*, 105 F.R.D. 16; *Husa v. Laboratoires Servier, S.A.*, 740 A.2d 1092 (N.J. Super. Ct. App. Div. 1999); *Vincent*, 475 A.2d 686.

¹⁶⁰ *Abbott labs.*, 2004 WL 1622223, at *1; *Compagnie Française*, 105 F.R.D. at 35.

¹⁶¹ *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *18; *In re Perrier*, 138 F.R.D. at 356; *Compagnie Française*, 105 F.R.D. at 36; *Husa*, 740 A.2d at 1097; *Vincent*, 475 A.2d at 690.

¹⁶² *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *18.

¹⁶³ *See Husa*, 740 A.2d 1092 (“[w]e are persuaded that the Convention should be utilized unless it is demonstrated that its use will substantially impair the search for truth, which is at the heart of all litigation, or will cause unduly prejudicial delay”); *see also Vincent*, 475 A.2d 686.

¹⁶⁴ A French blocking statute Article 1 case.

documents in a breach of contract lawsuit.¹⁶⁵ The court held that “France’s real interests in promulgating Article One [we]re dwarfed by American interests in complete discovery.”¹⁶⁶ Another court held that American interests in not enforcing an invalid patent outweighed French interests in protecting industrial documents, especially when the plaintiff was French and sought to avail the protection of American laws.¹⁶⁷ In a product liability case a court held that the interests of the United States in protecting its citizens against defective products prevailed over France’s interests, “if any really exist in the first place.”¹⁶⁸ A federal district court also held that United States and French interests in combating international terrorism outweighed France’s interest in its blocking statute.¹⁶⁹ American interests also prevailed in a case of restitution of assets of Holocaust victims to their families,¹⁷⁰ in cases of antitrust law enforcement,¹⁷¹ and in a bankruptcy case.¹⁷² These decisions are significant because at least one court has described the “national interests” factor as the most important of the five Restatement (Third) § 442 factors (it is also the first *Minpeco* factor).¹⁷³ Barring special circumstances, that factor may be outcome-determinative and doom a party’s efforts to invoke the Hague Convention to protect itself against violations of the French blocking statute.

Likewise, U.S. courts give very little credence to the “hardship” factor, *i.e.*, the threat of prosecution against parties that transgress the French blocking statute.¹⁷⁴ Because the blocking

¹⁶⁵ *Compagnie Française*, 105 F.R.D. at 22.

¹⁶⁶ *Id.* at 30.

¹⁶⁷ *Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269, 271 (N.D. Ill. 1983); *see also Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011) (French plaintiff “request[ed] the power of a United States court to enforce rights granted by a United States patent and should be deemed to have accepted the consequences of complying with the Federal Rules of Civil Procedure.”).

¹⁶⁸ *In re Aircrash*, 172 F.R.D. at 310 (N.D. Ill. 1997); *see also Aérospatiale*, 482 U.S. at 526–27.

¹⁶⁹ *Strauss*, 242 F.R.D. at 213–14. In *Strauss*, the plaintiffs, American victims of terrorist attacks in Israel, sued Crédit Lyonnais under the Antiterrorism Act for allegedly serving as conduit for funds ultimately received by terrorist organizations. *Id.* at 203–04.

¹⁷⁰ *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000).

¹⁷¹ *Trueposition*, 2012 WL 707012, at *6 (“French sovereign interest . . . pales in comparison to the [antitrust] interests at stake for the United States”); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2010 WL 1189341, at *7 (E.D.N.Y. Mar. 29, 2010) (noting that “[t]he interest in prohibiting price-fixing . . . is shared by France, . . . which has also adopted prohibitions against price-fixing [through the EEC].”); *First Nat’l City Bank*, 396 F.2d at 903. Antitrust cases are the nemeses of foreign blocking statutes. One court recently held that “the United States interest in enforcing antitrust laws through private civil actions is one of fundamental importance to this country’s effort to encourage and maintain a competitive economy.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2010 WL 2976220, at *3 (E.D.N.Y. July 23, 2010) (defendant airline invoking the South African blocking statute).

¹⁷² *In re Global Power*, 418 B.R. at 836.

¹⁷³ *Strauss*, 242 F.R.D. 214; *see also Coloplast*, No. C10-227BHS, 2011 WL 6330064, at *4 (weighing national interests and describing “the United States’ interests in vindicating the rights of American plaintiffs” as “vital”) (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992)); *but see In re Uranium*, 480 F. Supp. at 1148 (calling the balancing-of-interests test “inherently unworkable”); *Graco*, 101 F.R.D. at 513 (shying away from balancing the interests of France against those of the United States because it is “possibly somewhat presumptuous, to gauge the importance of the Blocking Statute to France”).

¹⁷⁴ *See, e.g., Aérospatiale*, 482 U.S. at 527 (the French blocking statute does “not appear to have been strictly enforced”); *Coloplast*, No. C10-227BHS, 2011 WL 6330064, at *4 (“[t]here is some case law suggesting that the

statute has, until recently, never been enforced, courts do not believe that it presents a credible threat.¹⁷⁵ All courts but one have declined to impose Hague Convention procedures *even after* it was shown that French courts would (and will) enforce the French blocking statute.¹⁷⁶ Moreover, some courts consider that a confidentiality order decreases the risk of hardship to the party invoking French law.¹⁷⁷

Therefore, U.S. courts routinely order litigants resisting discovery on the basis of French law to answer requests for documents, admissions, interrogatories, and depositions of witnesses under their control.¹⁷⁸ Depositions of third-party witnesses must proceed through the Hague Convention,¹⁷⁹ however, and courts will sometime explicitly state that they are not ordering depositions to be taken in France.¹⁸⁰ One federal district court also ordered the parties to proceed through the Hague Convention, at least initially, when the party resisting discovery was the

French ‘blocking statute’ is not enforced.”); *In re Enron*, No. 01-16034 (AJG), slip op. at 5–6 (hardship is “too remote and speculative to be given any weight”); *Strauss*, 242 F.R.D. at 226 (defendant “has not demonstrated any likelihood that it will be pursued civilly or criminally if it responds” to the discovery requests); *In re Vivendi*, 2006 WL 3378115, at *4 (“speculative possibility of prosecution is insufficient to displace the Federal Rules of Civil Procedure”); *Bodner*, 202 F.R.D. at 375 (“the French Blocking Statute does not subject defendants to a realistic risk of prosecution”); *Compagnie Française*, 105 F.R.D. at 30 (“[t]here is little evidence that the [French blocking] statute has been or will be enforced”); *Adidas*, 1984 WL 423, at *3 (“[t]he legislative history of the statute gives strong indications that it was never expected or intended to be enforced”); *Graco*, 101 F.R.D. at 514 (“SKM has been unable to point to a single case in which France enforced its blocking statute”); *Soletanche*, 99 F.R.D. at 271 (“we are not convinced that [French] plaintiff would be penalized for complying with our order” compelling discovery).

¹⁷⁵ For a recent enforcement case of the French blocking statute, see the *Cour de cassation*’s *In re Advocate Christopher X* decision, discussed below in Section V-K.

¹⁷⁶ See *In re Air Cargo*, 2010 WL 1189341, at *6–9 (referring to *In re Advocate Christopher X*) and subsequent cases listed in Table 1; *but see In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *18 (giving the French defendants five weeks to produce documents through the Hague Convention “or face the prospect of sanctions”).

¹⁷⁷ See, e.g., *Strauss*, 242 F.R.D. at 226.

¹⁷⁸ See, e.g., *SNP Boat Serv. S.A. v. Hôtel le St. James*, 483 B.R. 776, 787–88 (S.D. Fla. 2012) (ordering depositions of French party representatives); *In re Vitamin Antitrust Litig.*, No. 99-197 (TFH), 2001 WL 35814436, at *10 (D.D.C. Sep. 11, 2001) (ordering depositions in Washington D.C. and noting that “when depositions of foreign nationals are taken on American or neutral soil, courts have concluded that comity concerns are not implicated.”) (citing *In re Honda Am. Motor Co.*, 168 F.R.D. 535, 538 (D. Md. 1996)); *In re Meta Sys.*, 111 F.3d 142, at *3 (Fed. Cir. 1997) (unpublished opinion) (deposition of witnesses in employer-employee relationships with the party resisting discovery); *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 340 (D. Conn. 1997) (interrogatories and requests for documents and for admissions); *Graco*, 101 F.R.D. at 517 (interrogatories and document requests); see *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *19 (ordering the French directors of Delaware corporation to “make themselves available for deposition in the United States.”).

¹⁷⁹ See, e.g., *Coloplast*, No. C10-227BHS, 2011 WL 6330064, at *3 (international treaty procedures “must be followed” when witness is not within the subpoena power of a United States court); *Abbott labs.*, 2004 WL 1622223, at *1 (third-party witnesses “cannot be compelled to provide evidence in the absence of compliance with the Hague Evidence Convention”).

¹⁸⁰ *In re Vitamin*, 2001 WL 35814436, at **9–10 (ordering depositions in Washington D.C.); *Graco*, 101 F.R.D. at 517 (“the court does not order that any proceedings be conducted in France”); *but see In re Global Power*, 418 B.R. at 851 (holding that depositions of French witnesses “may take place in France or some other agreed upon location”).

French government.¹⁸¹ But ownership of a company by the French government is not enough to compel discovery through the Hague Convention.¹⁸²

Even non-parties in a lawsuit can be compelled to produce evidence that they hold in France, provided that the jurisdiction and control requirements are met.¹⁸³ The Lazard Group was a non-party witness in the securities class action lawsuit that plaintiffs initiated against Vivendi Universal.¹⁸⁴ The plaintiffs asked Lazard to produce documents concerning the services that it provided to Vivendi.¹⁸⁵ Lazard did not challenge the jurisdiction of the court, but argued that as a matter of comity discovery should proceed through Hague Convention procedures.¹⁸⁶

The *Vivendi* court analyzed Lazard's Hague Convention claim in light of the *Minpeco* test (despite the fact that this test was devised for *blocking statutes*).¹⁸⁷ The court concluded that three of the four *Minpeco* factors weighed in favor of applying the Rules of Procedures, and denied Lazard's motion for a protective order to proceed according to the Convention.¹⁸⁸ The fact that Lazard had acted in good faith (the fourth *Minpeco* factor) was not enough to compel the use of Convention procedures.¹⁸⁹

B. Parties invoking the Hague Convention bear the burden of proving that its procedures are justified.

In *Benton Graphics, Inc. v. Uddeholm Corp.*, the American plaintiff brought contract and tort claims against two Swedish companies. The plaintiffs sought discovery, and the defendants invoked the Hague Convention.¹⁹⁰ The parties disagreed over who bore the burden of establishing whether to proceed under the Rules of Procedure or under the Hague Convention.¹⁹¹ The court held, on the basis of the arguments in *Aérospatiale*, that the burden rested with the party that wanted to use Convention procedures.¹⁹² This rule was consistent with *Aérospatiale's* policy that parties voluntarily in the United States should be subject to the same rules as their

¹⁸¹ *Compagnie Française*, 105 F.R.D. at 35 (deciding to proceed through the Hague Convention in consideration of comity and international law).

¹⁸² *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449 and n.6 (6th Cir. 1988) (declining to "require conformity" with the Hague Convention for company 100%-owned by the French government).

¹⁸³ *In re Vivendi*, 2006 WL 3378115, at *1; see also *Aérospatiale*, 482 U.S. at 541 (noting that "the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves").

¹⁸⁴ *In re Vivendi*, 2006 WL 3378115, at *1.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *2.

¹⁸⁸ *Id.* at *4.

¹⁸⁹ *Id.*; see also *In re Enron*, No. 01-16034 (A.J.G.), slip op. at 6-7 (acknowledging that French defendant acted in good faith, but denying its motion to proceed under the Hague Convention).

¹⁹⁰ 118 F.R.D. 386, 387 (D.N.J. 1987).

¹⁹¹ *Id.* at 388.

¹⁹² *Id.* at 389. The *Benton Graphics* court explicitly disagreed with an earlier case that placed the burden of proof on the party resisting the use of Convention procedures. *Id.*; see *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987) (relying largely on Justice Blackmun's *dissent* in *Aérospatiale* for its analysis).

domestic counterparts, and bore the burden of changing these rules.¹⁹³ Therefore, these parties had to demonstrate why the three *Aérospatiale* factors of facts, sovereign interests, and likelihood of success justified the use of the Convention.¹⁹⁴ The court then analyzed the facts of the case in light of the *Aérospatiale* test and granted plaintiff's motion to compel discovery under the Rules of Procedure.¹⁹⁵ Subsequent cases involving parties invoking French law have all followed *Benton Graphics* on this burden-of-proof issue.¹⁹⁶

C. A French party cannot expect to impose Hague Convention procedures on discovery requests that concern only the issue of the court's personal jurisdiction over that party.

One of the defendants in *Rich v. KIS California, Inc.* was a French company that challenged the court's personal jurisdiction over the company.¹⁹⁷ The company argued that until this jurisdiction was established, the Federal Rules of Civil Procedures did not apply, and discovery should proceed under the Hague Convention.¹⁹⁸ The plaintiffs pared their discovery requests down to ten interrogatories limited to the issue of personal jurisdiction.¹⁹⁹ The court analyzed the facts of this limited discovery under the *Aérospatiale* test, and held that the defendant had not met its burden of showing that Hague Convention procedures were warranted.²⁰⁰ The court also held that *Aérospatiale* made no exceptions for personal jurisdiction disputes.²⁰¹ Citing the need to quickly resolve the jurisdiction issue to reach the merits of the case, the court held that the pared-down interrogatories were best answered through the Rules of Procedure.²⁰²

¹⁹³ *Benton Graphics*, 118 F.R.D. at 389.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 392.

¹⁹⁶ See *Trueposition*, 2012 WL 707012, at *3 (burden on party advocating the Hague Convention); *Meadwestvaco Corp. v. Rexam PLC*, No. 1:10cv511 (GBL/TRJ), 2010 WL 5574325, at *1 (E.D. Va. Dec. 14, 2010) (same); *In re Vivendi*, 2006 WL 3378115, at *2 (same); *Madden*, No. 3-03-CV-0167-BD, slip op. at 3 (same); *Bodner*, 202 F.R.D. at 372 (same); *Valois*, 183 F.R.D. at 346 (same); *In re Perrier*, 138 F.R.D. at 354 (same); *Rich v. KIS California, Inc.*, 121 F.R.D. 245, 257 (M.D.N.C. 1988) (same); *In re Global Power*, 418 B.R. at 847 (same); *Am. Home Assurance Co. v. Société Commerciale Toutélectric*, 104 Cal. Rptr. 2d 406, 427 (Cal. Ct. App. 2002) (same).

¹⁹⁷ *Rich*, 121 F.R.D. at 257.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 258.

²⁰⁰ *Id.* at 257–58.

²⁰¹ *Id.* at 260.

²⁰² *Id.*; see also *Trueposition*, 2012 WL 707012, at **2–3 (“point[ing] out that there is no exception to the *Aérospatiale* holding for jurisdictional discovery” and conducting “jurisdictional discovery . . . pursuant to the Federal Rules”); *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 305 (3d Cir. 2004) (concurring with *Rich* and rejecting German defendant's Hague Convention defense on the issue of jurisdictional discovery).

D. The Hague Convention can be used as a tactical tool against abusive discovery requests.

As Judge Pierre Leval noted in *Adidas*, the French blocking statute can provide foreign parties with a strong “tactical weapon” in U.S. courts.²⁰³ Nowhere is this observation better illustrated than in a ruling issued in the consolidated action that resulted after benzene was discovered in the mineral water that made the town of Vergèze famous. In *In re Perrier Bottled Water Litig.*, the defendants, various Perrier entities, argued that discovery should proceed under Hague Convention procedures.²⁰⁴ The plaintiffs moved to compel answers to interrogatories and to production requests under the Rules of Procedure.²⁰⁵ The judge analyzed the production dispute with the *Aérospatiale* test.²⁰⁶

Reviewing first the facts of the case, the judge characterized the plaintiffs’ interrogatories as “abusive,” in light of the vast amount of information requested, much of it of no apparent relevance to the dispute.²⁰⁷ It did not help the plaintiffs that they had already taxed the court’s patience by submitting over 100 interrogatories when court rules allowed for 30, and leave was granted to submit 60.²⁰⁸ Turning to the second *Aérospatiale* factor, the court noted that France had been most adamant in its objection to the use of the Rules of Procedure to compel discovery within its borders.²⁰⁹ The court also corrected the plaintiffs, who argued that no French sovereign interests were at stake because Source Perrier was a private business.²¹⁰ In fact, sovereign interests were implicated because discovery was required from French citizens in France.²¹¹ Finally, the court noted that there was no reason to believe that Convention procedures would be ineffective.²¹² The court concluded that the three factors of the *Aérospatiale* test all weighed in favor of using Convention procedures, and it ordered the plaintiffs to proceed accordingly.²¹³ Apparently mindful of the outcome, the court retained the option to proceed through the Rules of Procedure should Convention procedures prove ineffective.²¹⁴

The court noted, at the start of its analysis, that most lower courts that had applied the *Aérospatiale* test had held in favor of using the Rules of Procedure.²¹⁵ But the court also reiterated *Aérospatiale*’s holding that foreign defendants must be protected against abusive

²⁰³ *Adidas*, 1984 WL 423, at *3 (the French blocking statute was intended “to provide [French defendants] with tactical weapons and bargaining chips in foreign courts”).

²⁰⁴ 138 F.R.D. 348, 350 (D. Conn. 1991).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 354.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 350.

²⁰⁹ *Id.* at 355.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 356.

²¹⁴ *Id.*

²¹⁵ *Id.* at 353–54.

discovery practices.²¹⁶ *In re Perrier* shows that parties that makes excessive production demands against foreign defendants stand the chance of being forced to proceed through the Hague Convention.

A similar result was reached in *Valois of Am., Inc. v. Risdon Corp.*, a patent dispute initiated by Valois of America.²¹⁷ The French parent company, Valois S.A., a third-party defendant and counterclaimant, was subjected to discovery requests that the court described as clearly “too burdensome and too intrusive” in light of the concerns expressed by the Supreme Court in *Aérospatiale*.²¹⁸ The court denied Valois S.A.’s motion that discovery proceed under the Hague Convention.²¹⁹ Comparing the case to *In re Perrier*, the court also directed counsels for the parties to confer and attempt to narrow the scope of discovery.²²⁰ If counsels’ good faith efforts failed to bring about a compromise, the court would order another round of briefings to decide whether to compel production through the Convention or the Rules of Procedure.²²¹

E. A party cannot invoke the Hague Convention because discovery is too burdensome, and at the same time dismiss an opportunity to winnow down its scope.

The defendant in *Doster v. Schenk A.G.* was a German company answering personal injury claims.²²² The plaintiffs served interrogatories and requests for the production of documents that the defendant claimed were abusive, and warranted the use of Hague Convention procedures.²²³ The court applied the *Aérospatiale* test and denied the defendant’s motion for a protective order.²²⁴

Analyzing the facts of the case under the first *Aérospatiale* factor, the court found that the defendant had failed to meaningfully take advantage of plaintiff counsel’s offer to narrow the scope of the production requests in a discovery conference.²²⁵ The court held that “[b]y failing to take advantage of the discovery conference procedure, [the] defendant lo[st] the right to urge use of the Hague Convention based on the nature of alleged burden of the discovery requests.”²²⁶ Accordingly, the court denied the defendant’s motion to compel the plaintiffs to proceed according to the Hague Convention.²²⁷

The court also rejected defendant’s argument that plaintiffs’ failure to translate the production requests into German, as required by the Hague Convention, would increased its

²¹⁶ *Id.* at 353.

²¹⁷ 183 F.R.D. 344 (D. Conn. 1997).

²¹⁸ *Id.* at 349.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² 141 F.R.D. 50, 51 (M.D.N.C. 1991).

²²³ *Id.* at 52–53.

²²⁴ *Id.* at 52, 55.

²²⁵ *Id.* at 53.

²²⁶ *Id.*

²²⁷ *Id.* at 55.

burden.²²⁸ The court stated that because the defendant conducted substantial business in the United States and signed contracts in English, it would not be heard to claim that it could not litigate in that language.²²⁹

Defendant's argument that some of the documents that could not be obtained through the Convention might be available from third parties fared no better.²³⁰ The court held that the availability of documents from third parties did not "adequately compensate for deficient Hague Convention procedures."²³¹

F. A party must invoke the Hague Convention defense in a timely manner or risk losing the right to do so.

A French company learned an expensive lesson when a court struck its answer and awarded the plaintiff a \$25 million default judgment for its failure to respond to discovery.²³² Toutélectric responded to some of the plaintiff's discovery requests, but repeatedly invoked the French blocking statute to reject others.²³³ Toutélectric's counsel was well aware of Hague Convention procedures, but failed to raise the Convention as a defense until the court was ready to consider discovery sanctions.²³⁴ The trial court held that Toutélectric had waived the right to invoke the Convention's protection because it had partially complied with discovery requests outside the Convention's framework, and in violation of the French blocking statute.²³⁵ The court eventually awarded a default judgment against Toutélectric for willful failure to comply with its "legitimate discovery obligations."²³⁶

Toutélectric appealed on the ground that the trial court erred in not applying the Hague Convention, but the California court of appeals affirmed the lower court's decision.²³⁷ The court relied on two arguments to hold that the Convention could be waived. First, because *Aérospatiale* had concluded that Convention procedures were optional, it stood to reason that they could be waived.²³⁸ Second, because the party invoking the Convention bore the burden of justifying its use, it necessarily followed that a party could fail to properly raise the issue.²³⁹ The court stressed that courts should exercise caution, however.²⁴⁰ Substantial facts showing neglect of the Convention must be found before a court can imply that the Convention was waived.²⁴¹

²²⁸ *Id.* at 52.

²²⁹ *Id.*

²³⁰ *Id.* at 54.

²³¹ *Id.*

²³² *Am. Home Assurance Co. v. Société Commerciale Toutélectric*, 104 Cal. Rptr. 2d 406, 409 (Cal. Ct. App. 2002).

²³³ *Id.* at 412–15.

²³⁴ *Id.* at 416–17.

²³⁵ *Id.* at 417.

²³⁶ *Id.* at 421.

²³⁷ *Id.* at 409.

²³⁸ *Id.* at 428.

²³⁹ *Id.* at 429.

²⁴⁰ *Id.* at 430.

²⁴¹ *Id.*

In *Toutélectric*'s case, the facts clearly supported a finding of waiver.²⁴² Its counsel knew of the Convention from the start of litigation, acceded to some of the discovery requests, but only raised the defense with the court well into the case.²⁴³ If anything, *Toutélectric* had tried to circumvent the Convention by organizing depositions and producing boxes of documents outside the Convention.²⁴⁴ Such inconsistent behavior was clear and convincing evidence that *Toutélectric* had waived its Hague Convention defense.²⁴⁵

As the court of appeals stated, a Convention waiver should not be implied lightly.²⁴⁶ But *Toutélectric* clearly stands for the proposition that a party intent on invoking the Hague Convention should seek a protective order early in the discovery process, and should carefully consider the implications of partial production responses until the court rules on the matter.²⁴⁷

G. Parties invoking the French blocking statute or the Hague Convention must make a *bona fide* attempt to argue their case; simply invoking these defenses is not enough.

Rulings recurrently chide parties that invoke a blocking statute or the Hague Convention (or both), but fail to substantively argue their discovery objections. In *Benton Graphics*, for example, the defendants “made no attempt to relate the ‘particular facts’ of [their] case to the discovery sought.”²⁴⁸ In *Haynes v. Kleinwefers*, the defendant “failed to offer any cogent reasons to employ the Convention procedures.”²⁴⁹ In *Rich*, “defendants fail[ed] to show that the discovery is in any way abusive” and warranted the use of the Hague Convention.²⁵⁰ In *Bodner*, the defendants did not present “a compelling, competing French national interest” in support of French laws.²⁵¹ This problem persists. In *Metso*, decided in 2011, the French plaintiff resisting discovery did “little more than point to the blocking statute and assert that its fear of prosecution in France justify[ed] use of the Hague Convention rather than the Federal Rules.”²⁵²

²⁴² *Id.*

²⁴³ *Id.* at 430–33; see also *In re Enron*, No. 01-16034 (AJG), slip op. at 7 (denying French party’s motion to proceed under the Hague Convention, and noting that “it is difficult to understand why the issues [*i.e.*, the French blocking statute and Hague Convention defenses] before the court were not identified by [the French party] sooner”).

²⁴⁴ *Id.* at 432–35.

²⁴⁵ *Id.* at 433–35. Note that this result is consistent with Fed. R. Civ. P. 44.1 (“[a] party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing”).

²⁴⁶ *Id.* at 430.

²⁴⁷ But see *In re Enron*, No. 01-16034 (AJG), slip op. at 6 (“[a]lthough previous productions of documents could contribute to good faith conduct, courts usually require more.”). Parties invoking the French blocking statute and the Hague Convention might thus be caught in a legal quandary. Partial production of documents might convince a court of their good faith under the *Minpeco* blocking statute test, but might also result in a waiver of the Hague Convention defense under *Toutélectric*.

²⁴⁸ *Benton Graphics*, 118 F.R.D. at 390 (Swedish defendant invoking the Hague Convention).

²⁴⁹ 119 F.R.D. 335, 337 (E.D.N.Y. 1988) (German defendant invoking the Hague Convention).

²⁵⁰ 121 F.R.D. at 258 (defendant invoking French blocking statute and the Hague Convention).

²⁵¹ 202 F.R.D. at 375.

²⁵² *Metso Minerals Indus., Inc. v. Johnson Crushers Int’l*, 276 F.R.D. 504 (E.D. Wis. 2011).

One case demonstrates that parties must argue their blocking statute and Hague Convention defenses in terms of the appropriate test, or run the risk that the judge will choose the test for them, and usually to their detriment. In *Madden*, the defendant invoked the French blocking statute to resist the production of a report prepared by a French physician.²⁵³ The ruling suggests that Wyeth did not properly argue its blocking statute defense. The judge stated that Wyeth was really arguing a Hague Convention defense, and it applied the *Aérospatiale* test *sua sponte*.²⁵⁴ Noting that the “defendant wholly fail[ed] to address any of the three factors articulated in [*Aérospatiale*], much less prove that discovery should be conducted under the Hague Convention,” the judge rejected Wyeth’s *blocking statute* defense and ordered production under the Rules of Procedure.²⁵⁵

Moreover, at least in the Second Circuit, good faith is part of the *Minpeco* test to give deference (or not) to a blocking statute.²⁵⁶ A party that asserts a blocking statute defense but makes no effort to articulate its argument should hardly expect a court to find that it acted in good faith.

H. Good faith, or even substantial compliance with discovery requests, are not enough to convince a court to proceed through the Hague Convention.

A finding of “good faith” on the part of the party objecting to discovery is never enough to convince a court to force the parties to proceed through the Hague Convention.²⁵⁷ Even substantial compliance with discovery requests will not bring the balance of the resisting party’s documents under the protection of the French blocking statute. In *Compagnie Française*, the plaintiffs were authorized by the French government to produce, in whole or in part, 1056 of 1204 documents requested by the defendants.²⁵⁸ The plaintiffs asserted an “Article 1” defense over the balance of the documents, argued that they had substantially complied with the discovery requests, and that further discovery should proceed through the Hague Convention.²⁵⁹ The court disagreed and granted the defendants’ motion to compel.²⁶⁰ The court analyzed the facts of the case under the Restatement (Second) § 40 analysis, to which it added a good faith factor at the order stage.²⁶¹ In ruling to compel production, the court concluded that the French

²⁵³ *Madden*, No. 3-03-CV-0167-BD, slip op. at 1.

²⁵⁴ *Id.* at 2.

²⁵⁵ *Id.* at 3–4.

²⁵⁶ *Minpeco*, 116 F.R.D. at 522.

²⁵⁷ See, e.g., *In re Air Cargo*, 2010 WL 1189341, at *4 (finding “scant evidence” that Air France’s blocking statute defense “lacks good faith,” but granting plaintiff’s motion to compel discovery); *In re Enron*, No. 01-16034 (AJG), slip op. at 7–8 (finding good faith on basis of the record but ordering discovery through the rules of procedure); *Strauss*, 242 F.R.D. at 226 (ruling that defendant’s good faith was insufficient “to tilt the balance in its favor”); *In re Vivendi*, 2006 WL 3378115, at *4 (finding good faith but ordering discovery through the rules of procedure); *Compagnie Française*, 105 F.R.D. at 31–32 (same); *In re Global Power*, 418 B.R. at 849 (same).

²⁵⁸ *Compagnie Française*, 105 F.R.D. at 24.

²⁵⁹ *Id.* at 24, 26. The French plaintiffs also asserted an executive privilege defense that the court likewise rejected. *Id.* at 25–26.

²⁶⁰ *Id.* at 24.

²⁶¹ *Id.* at 29–31.

plaintiffs could not “avail themselves” of the protection offered by U.S. courts and not abide by their discovery obligation to disclose *all* the relevant facts of their case.²⁶²

I. Parties must mind their prior positions vis-à-vis U.S.-style discovery.

In *in re Activision*, the Delaware Court of Chancery analyzed the French defendants’ (“Vivendi”) classic French blocking statute defense in light of the Restatement’s (Third) § 442.²⁶³ The Court chastised Vivendi for its inconsistent positions in this and a previous lawsuit wherein Vivendi, as plaintiff, openly professed its affinity for broad U.S.-style discovery.²⁶⁴ In *T-Mobile*, Vivendi sued in “—of all places—the United States District Court for the Western District of Washington” for wrongs that allegedly took place in Europe.²⁶⁵ Vivendi admitted then that it sued in U.S. federal court to leverage its U.S. presence and ““maximize its access to evidence.””²⁶⁶ The Court concluded that

Vivendi’s prior decisions to disregard the Blocking Statute when advantageous undercut its ability to invoke the Blocking Statute now, when the shoe is on the other foot. Rather than taking a consistent and principled stance, Vivendi appears to be adopting positions of convenience.²⁶⁷

Skeletons in closets matter. Parties arguing for or against a blocking statute defense should consider their prior conduct and their pleadings indefinitely kept in store in legal databases. A party’s prior inconsistent position regarding the merits of U.S.-style discovery might well impact a blocking statute defense, as it seemingly did in *In re Activision*.

J. French laws apply to information that originated in France, even if the information is located in the United States when the discovery requests are served.

Parties objecting to discovery can invoke French law to protect documents located in the United States, but that originated in France. In *Strauss*, the plaintiffs argued that French laws did not apply to documents located in the United States and already in their hands.²⁶⁸ The plaintiffs rested their argument on the language of the Restatement (Third) § 442, which speaks of information *located* outside the United States.²⁶⁹ The court called this argument “flawed” and

²⁶² *Id.* at 32; *see also In re Aircrash*, 172 F.R.D. at 310 (French defendants ordered to produce evidence through the Rules of Civil Procedure regarding ATR-42 aircraft even though they had substantially complied with discovery requests for successor ATR-72 aircraft that was involved in fatal winter crash).

²⁶³ *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *9 (citing *Aérospatiale*, 482 U.S. at 544 n.28).

²⁶⁴ *Id.* at *17 (citing *Vivendi S.A. v. T-Mobile USA Inc.*, 586 F.3d 689 (9th Cir. 2009) (affirming the dismissal for forum non conveniens of a case brought by Vivendi against German corporations and T-Mobile USA, Inc. for the allegedly fraudulent take-over of a Polish wireless telephone company)).

²⁶⁵ *T-Mobile*, 586 F.3d at 690.

²⁶⁶ *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *17 (citation omitted).

²⁶⁷ *Id.*

²⁶⁸ *Strauss*, 242 F.R.D. at 208–09.

²⁶⁹ *Id.* at 209.

rejected it on the ground that one of the Restatement (Third) § 442(c) factors is whether the “‘information *originated* in the United States,’ not whether it is *located* in the United States.”²⁷⁰ Invoking the bank-customer relationship, the court held that documents obtained without Crédit Lyonnais’ consent and located in the United States were no less protected because of their location.²⁷¹

K. Prior production of requested documents through the Mutual Legal Assistance in Criminal Matters Treaty (MLAT) increases the likelihood that a court will compel production in a civil case.

The plaintiffs in *In re Air Cargo Shipping Servs. Antitrust Litig.* moved to compel Air France to produce documents withheld on basis of the French blocking statute.²⁷² The Department of Justice (DOJ) had already received the documents in the context of its criminal air cargo antitrust investigation.²⁷³ DOJ obtained the documents through an MLAT request to French authorities in order to circumvent the blocking statute.²⁷⁴ Air France argued that the civil plaintiffs should likewise proceed through the Hague Convention.²⁷⁵ The District Court rejected Air France’s argument.²⁷⁶ Like its peers, the court discounted the risk of criminal prosecution in France if the airline surrendered the documents.²⁷⁷ The court noted that the fact that French authorities had disclosed the documents to DOJ “undercut[ed] any reason to believe that French authorities would seek to prosecute Air France for disclosing the same documents.”²⁷⁸ The court also stressed the importance of U.S. national interests in enforcing antitrust legislation, which was shared by France.²⁷⁹ France’s countervailing sovereign interests were not to be denigrated, but were “eroded in this case because the information sought here has already been disclosed outside France’s borders with France’s consent.”²⁸⁰

L. Failure to comply will bring sanctions to the resisting party, including dismissal of the case.

The Republic of France, plaintiff in *In re Oil Spill*, refused to produce documents assembled by French legislative inquiries into the grounding of the Amoco Cadiz off Brittany, despite compelling court orders.²⁸¹ Citing *Rogers*, the court refused to dismiss the case, as the

²⁷⁰ *Id.*

²⁷¹ *Id.*; see also *In re Air Cargo*, 2010 WL 1189341, at *4 (“it is equally undisputed that the information originated in France; it would not be subject to the blocking statute if it had not.”).

²⁷² *Id.* at *1.

²⁷³ *Id.* at *2.

²⁷⁴ *Id.* MLAT is the Mutual Legal Assistance Treaty in criminal matters, signed Dec. 10, 1998, entered into force Dec. 1 2001, and codified at 2172 UNTS 69.

²⁷⁵ *Id.* at *2.

²⁷⁶ *Id.* at *9.

²⁷⁷ *Id.* at 6–7.

²⁷⁸ *Id.* at 7.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 8.

²⁸¹ 93 F.R.D. at 841.

defendants argued, in part because counsel for France had acted in good faith.²⁸² The court imposed evidentiary sanctions against France, barring it from introducing into “evidence the documents or testimony withheld from discovery.”²⁸³ The court also ordered France to pay Amoco’s fees incurred in litigating the issue.²⁸⁴

In *Soletanche*, the court dismissed without prejudice a French plaintiff’s patent infringement claim because of its refusal to answer interrogatories.²⁸⁵ The court found that plaintiff’s failure to even try to secure a blocking statute waiver from the French government prevented it from finding good faith, thus distinguishing it from *Rogers*.²⁸⁶ The plaintiff would be allowed to reinstate its claims if it answered the interrogatories and paid defendant’s attorney fees.²⁸⁷

M. The implications of the *Cour de cassation*’s *In re Advocate Christopher X* decision

Despite the unambiguous language of Law no. 80-538, it is no secret that parties routinely take depositions in France without notice to French judicial authorities.²⁸⁸ The depositions of witnesses in *In re Vitamin* reveal that:

“it is not uncommon for U.S. litigants to resort to taking voluntary and agreed upon depositions in France of French nationals without following the requirements of the Evidence Convention. This practice has arisen, in part, because the French State has yet to engage in any criminal prosecution under the blocking statute, and accordingly no jail terms, fines, penalties or other sanctions have been raised by the French State in connection with the blocking statute. Nonetheless, such depositions without question violate French domestic law and in consequence, it is unlikely that a French court would enforce any judgment from a foreign jurisdiction such as the United States resulting from such improperly obtained evidence.”²⁸⁹

These depositions take place among willing parties in hotels or private offices.²⁹⁰ Such behavior is consistent with the feeling, widespread through U.S. legal circles and largely echoed in U.S. court rulings, that the French blocking statute is not enforced and, therefore, not to be feared.²⁹¹ It is in this context that the legal community took notice of the *Cour de cassation*’s *In*

²⁸² *Id.* at 843.

²⁸³ *Id.* at 844.

²⁸⁴ *Id.*

²⁸⁵ 99 F.R.D. at 272–73.

²⁸⁶ *Id.* at 272.

²⁸⁷ *Id.* at 273.

²⁸⁸ *In re Vitamin*, 2001 WL 35814436, at *9.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at *10.

²⁹¹ See Section V-A of this article and the cases cited in note 171; but see *U.S. v. Searles*, No. 07-CR-195-CVE, 2009 WL 801837, at *2 and n.2 (N.D. Okla. Mar. 25, 2009) (expressing “concern about the legality, under French

re Advocate Christopher X decision, which affirmed a lower court's ruling that fined a lawyer 10,000 euros for a violation of the French blocking statute.²⁹²

The *Christopher X* decision was a distant ripple of the Executive Life litigation in which the California Insurance Commissioner took to task the French entities that purchased Executive Life Insurance Company of California. Mutuelle d'assurance artisanale de France ("MAAF") was one of the implicated French entities.²⁹³ Christopher X, a French attorney, acting at the behest of the U.S. counsel of the Commissioner, contacted Lecarpentier, a former MAAF board member, to determine under what conditions the board approved the purchase of Executive Life.²⁹⁴ Hoping to "reap the truth by sowing lies,"²⁹⁵ Christopher X falsely alleged to Lecarpentier that the board had been ill-informed and had allegedly taken decisions outside the board room, "in the corridors."²⁹⁶ MAAF filed a criminal complaint against Christopher X, who was indicted and convicted on the basis of Articles 1 bis and 3 of the French blocking statute.²⁹⁷

The lower court found that Christopher X approached Lecarpentier with the intent to obtain proof that the MAAF board had made its decision to buy Executive Life knowingly.²⁹⁸ In doing so, Christopher X had tried to obtain information relating to economic, commercial, or financial matters leading to the establishment of proof, with a view to designate Lecarpentier as a witness in the California proceeding, and to influence his testimony.²⁹⁹ Moreover, Christopher X did so completely outside the aegis of the Hague Convention.³⁰⁰ Finding no error in the lower court's decision, the *Cour de cassation* rejected the appeal.³⁰¹

The facts of *Christopher X* are both very specific and incriminating.³⁰² It is perhaps for this reason that U.S. courts have not been given the case any deference. One federal district judge wrote in *dicta* that he was "not convinced that the circumstances surrounding *Christopher*

law," of taking a deposition in France or London outside formal legal channels, and directing attorneys "to demonstrate that the deposition would comply with French law.").

²⁹² 7 Digital Evidence & Elec. Signature L. Rev. 130 (2010) (English-language version); *see also supra* note 5 for French case citation.

²⁹³ *Id.* at 130, 132.

²⁹⁴ *Id.* at 132–33.

²⁹⁵ *Id.* at 131 (author's translation; in French: "prêché le faux pour savoir le vrai").

²⁹⁶ *Id.* at 133 (in French: "les décisions auraient été prises dans les couloirs").

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² As the *In re Air Cargo* Magistrate Judge noted, Christopher X did not act pursuant to a discovery request or order emanating from a California court. 2010 WL 1189341, at *6. Therefore, the case is not necessarily indicative of whether French authorities would prosecute a litigant responding in good faith to a U.S. court order. *Id.*

X [we]re comparable to those present” in a typical French blocking statute case such as the one the judge had to decide.³⁰³

The implications of the decision are nonetheless clear. First, the *Cour de cassation* confirmed that the Hague Convention is the exclusive means of securing information in France for use in foreign litigation.³⁰⁴ Second, parties caught in France bypassing the Hague Convention can expect to be prosecuted to the full extent of the French blocking statute. Parties that conduct depositions “under the radar” in France, as admitted in *In re Vitamin*, do so at their own “*risques et périls*.” Logically, the same risks exist when a party solicits a French witness to testify outside of France as a way to dodge the Hague Convention.

VI. Recent non-judicial developments regarding the French blocking statute.

The French blocking statute’s failure to stem U.S.-style discovery of documents located in France has not gone unnoticed by both French legislators and U.S. commentators. The French response has been to draft a narrower and stricter blocking statute in conjunction with a proposed new French “business secrets” law (in French: “*le secret des affaires*”).³⁰⁵ U.S. commentators, meanwhile, have focused on the conflict between U.S.-style discovery and foreign data protection statutes.³⁰⁶ This last topic is beyond the scope of this article and is not addressed here, other than to note that the court-adopted foreign blocking statute and Hague Convention tests discussed in this article do not include a factor for data protection issues.³⁰⁷ Foreign sovereignty-inspired blocking statutes and data protection statutes arguably raise different issues within the context of U.S.-style discovery that require different judicial analyses and solutions.³⁰⁸

³⁰³ *Meadwestvaco*, 2010 WL 5574325, at *2 n.1; see also *Trueposition*, 2012 WL 707012, at *6 n.6 (noting that *Christopher X* “involve[s] allegations of false statements” that differ significantly from the jurisdictional discovery issues facing the court.”).

³⁰⁴ See generally *Christopher X*, at **6–8.

³⁰⁵ Bernard Accoyer, [Proposition de loi adoptée par l’Assemblée Nationale, visant à sanctionner la violation du secret des affaires, transmise par M. le Président de l’Assemblée Nationale à M. le Président du sénat, No. 284 \(24 janvier 2012\)](#) (last accessed Mar. 31, 2014); see also Bernard Carayon, [Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l’administration générale de la république sur la proposition de loi \(N° 3985\) de M. Bernard Carayon visant à sanctionner la violation du secret des affaires, N° 4159 \(11 janvier 2012\)](#) (last accessed Mar. 31, 2014).

³⁰⁶ See, e.g., American Bar Association, Section of International Law, *Resolution 103*, Feb. 2012; The Sedona Conference®, *International Principles on Discovery, Disclosure & Data Protection*, Dec. 2011.

³⁰⁷ See Section IV-C above, notes 142–145.

³⁰⁸ A recent attempt to invoke the French Data Protection Act to compel discovery through the Hague Convention failed in the Delaware Court of Chancery. *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at **17–18; see also Pierre Grosdidier, *Expect Foreign Privacy Law Defense to US Discovery to Fail*, Law360 (March 7, 2014).

A. The proposed French business secrets law and the revised Article 1 bis.

On January 23, 2012, the French National Assembly voted a proposed new penal law to protect business secrets.³⁰⁹ The law is effectively a broadly-worded U.S.-inspired trade secrets and confidential information act. It broadly defines business secrets and criminalizes their unauthorized disclosure.³¹⁰ The law also narrows the scope of the blocking statute's Article 1 bis to business secrets, but increases maximum penalties to three years of jail and a fine of 375,000 euros.³¹¹ Despite its merits, the law is not without its detractors within France for reasons that are outside the scope of this article.³¹² The law presently flounders in the French Senate, its fate uncertain. Further complicating the issue, the European Commission recently drafted a Directive regarding trade secrets.³¹³ The French Senate will not likely move the business secrets law to a vote until the Commission completes its work in this domain.

Nonetheless, the French business secrets law's supporting legislative report presents an interesting French perspective regarding U.S.-style discovery and France's blocking statute.³¹⁴ The report candidly concedes that the blocking statute is "ineffective and obsolete."³¹⁵ But the report asserts that unscrupulous corporations sometimes "instrumentalize" justice to gain access to their competitors' business secrets.³¹⁶ The report specifically points the finger at discovery procedures emanating from American courts, and alleges that

[French] companies are sometimes subjected to truly scandalous investigations: foreign jurisdiction, notably American jurisdictions, take advantage of the law to obtain information that often bear no relationship to the reasons for the request.³¹⁷

These claims are understandable in light of the frustration that U.S.-style discovery generates abroad. But they are rebuttable.

The argument that parties abuse discovery to gain access to their opponents' business secrets is not one made by parties resisting discovery in the cases listed in Table 1. This fact will surprise no one on the U.S. side of the blocking statute debate: U.S. courts routinely issue protective orders regarding confidentiality to protect litigants forced to disclose their business secrets. Moreover, the playing field is level. *Each party* can demand the production of its

³⁰⁹ Accoyer, *supra* note 305, *passim*; Carayon, *supra* note 305, *passim*.

³¹⁰ Accoyer, *supra* note 305, at 3–4.

³¹¹ *Id.* at 4.

³¹² See, e.g., Jérôme Lasserre Capdeville, [La reconnaissance légale du secret des affaires](#), Lettre Prometheus, Jan. 2013 (last accessed Mar. 31, 2014); Kami Haeri, [Laissez la loi de blocage tranquille !](#), Gazette du Palais, 7, Fév. 29, 2012 (last accessed Mar. 31, 2014).

³¹³ [Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information \(trade secrets\) against their unlawful acquisition, use and disclosure](#), Nov. 28, 2013 (last accessed Mar. 31, 2014).

³¹⁴ Carayon, *supra* note 305, *passim*. Interestingly, the legislative report makes no mention of data privacy issues as a reason to rejuvenate the French blocking statute.

³¹⁵ *Id.* at 22, 24, 58.

³¹⁶ *Id.* at 19.

³¹⁷ *Id.* at 19–20, 48. In fairness, the report also takes aim at the United Kingdom. *Id.* at 23.

opponent's business secrets. *Au contraire*, unfair and unacceptable asymmetries would arise if the French party alone could hide its business secrets behind the blocking statute and the Hague convention.³¹⁸

Moreover, black-letter law makes clear that U.S.-style discovery does not give requesting parties free reins to launch fishing expeditions.³¹⁹ U.S. judges routinely decline to enforce, and can sanction, abusive discovery requests.³²⁰ Discovery casts a wide net but the intended catch must be relevant to the underlying dispute.³²¹ Parties can cite *Aérospatiale*'s holding that courts should exercise vigilance against abusive discovery demands in light of foreign litigants' relative vulnerability.³²² *In re Perrier* shows that courts heed the Supreme Court's directive.³²³

The proposed new blocking statute Article 1^{er} bis merges the old Articles 1 and 1 bis and states that:

Art. 1^{er} bis. – Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, and leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings:

1° Documents or information relating to economic, commercial, industrial, financial, *scientific*, technical, or *strategic* matters, the communication of which is capable of harming the sovereignty, security or essential economic interests of France or contravening public policy;

2° *Documents or information relating to economic, commercial, industrial, financial, scientific, technical, or strategic non-public matters, the disclosure of which could gravely compromise a company's interests by harming its scientific and technical potential, its strategic positions, its commercial or financial interests, or its competitive capacity, notably those interests subjected to specific protective measures as described in penal code article 325-1.*³²⁴

French Penal Code Article 325-1 is the proposed new business secrets law, which sanctions transgressions with up to three years of imprisonment and a fine of 375,000 euros.³²⁵

³¹⁸ *Aérospatiale*, 482 U.S. at 539–40 n.25.

³¹⁹ *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 531 (2009) (“[j]udges are trusted to prevent ‘fishing expeditions’”).

³²⁰ *Id.* (“civil litigant . . . risk[s] sanctions if his claim is frivolous or his discovery tactics abusive.”).

³²¹ Fed. R. Civ. P. 26(b)(1) (“[p]arties may obtain discovery regarding any non-privileged matter that is *relevant* to any party’s claim or defenses”); Tex. R. Civ. P. 192.3(a) (“a party may obtain discovery regarding any matter that is not privileged and is *relevant* to the subject matter of the pending action”) (emphases added).

³²² *Aérospatiale*, 482 U.S. at 546.

³²³ See Section V-D above.

³²⁴ Accoyer, *supra* note 305, at 4 (author’s translation based on that in Toms, *supra* note 11, at 611; new language in italics).

³²⁵ *Id.* at 3.

This language seeks to restore the blocking statute's credibility vis-à-vis foreign legal jurisdictions.³²⁶ It narrows the law's scope to information that is legitimately protected, namely business secrets, and strengthens the sanctions.³²⁷

How might U.S. courts react to this new language, assuming it ever becomes law? The extent to which requested documents are secret or confidential is not a factor in any of the tests used in the case law.³²⁸ Judges might, therefore, simply issue a protective order to dispose of the argument. Parties resisting discovery will be left to argue the severity of the new blocking statute's sanctions—assuming the new law is ever enforced. If the law is enforced, its immediate effect might be to deter French plaintiffs from pursuing legitimate claims in U.S. courts for fear of being unable to present some of their evidence, or of being harshly sanctioned in France if they do. Judge Pierre Leval's argument in *Adidas* that the blocking statute is a liability for French plaintiffs gains strength with the severity of the sanctions.³²⁹ Surely no one desires this result, least of all advocates of the new French business secrets law who seek to preserve France's hard-earned economic edge in the context of today's *guerre économique*.³³⁰ French businesses must necessarily contemplate having to litigate their rights in U.S. court and would not want to be hamstrung by their own country's legislation.³³¹

VII. Conclusion

As the cases discussed in this article show, a U.S. litigant's odds of prevailing on a French blocking statute or Hague Convention defense are thin. U.S. courts do not hesitate to impose their rules of procedure to further discovery, even if these rules force litigants to breach a French law—at least when the breach is construed as *de minimis*. The courts give preference to U.S. interests in litigation and are simply not swayed by the hardship that may befall on the breaching parties. One court federal district judge went so far as to conclude that post-*Aérospatiale* “[c]ourts that have addressed the issue have held that the Hague Evidence Convention is inapplicable to a French defendant resisting document production in an American lawsuit.”³³²

³²⁶ Carayon, *supra* note 305, at 38.

³²⁷ *Id.* at 41, 45.

³²⁸ See Section IV-C above, notes 142–145.

³²⁹ *Adidas*, 1984 WL 423, at *3 (blocking statute effectively prevents French parties from suing their foreign counterparts, even legitimately, because they could be barred from exporting their supporting evidence).

³³⁰ Carayon, *supra* note 305, at 6–7.

³³¹ *In re Activision*, C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *4 (no derogation allowed for French blocking statute, per former French *Cour de cassation* justice).

³³² *Crystal Cruises, Inc. v. Rolls-Royce PLC*, No. 10-24607-Lenard/O'Sullivan, 2011 WL 11555506, at *1 (S.D. Fla. Nov. 8, 2011) (citing *Compagnie Française*, 105 F.R.D. at 28).

Because the risk of hardship is not the most important factor in the blocking statute and Hague Convention tests developed by U.S. courts,³³³ it is not surprising that *Christopher X* has not changed the outcome of discovery disputes. As post-*Christopher X* cases demonstrate, U.S. judges are likely to continue to demand that French parties respond to discovery requests that they consider infringe minimally on French judicial sovereignty, such as requests for documents, interrogatories, and admissions.³³⁴ Therefore, *Christopher X* leaves parties objecting to discovery on the basis of French law in a very difficult position: resist U.S. discovery and face certain sanctions, or comply and risk prosecution in France. These parties should proceed with extreme caution, and should clearly articulate in their U.S. briefs the tangible risks that they face in France if they comply with discovery requests outside the framework of the Hague Convention.³³⁵

That is not to say that the balance of forces is completely skewed in a discovery dispute where the parties argue over the French blocking statute and the Hague Evidence Convention. Parties invoking French laws can resist excessive discovery requests by relying on *Aérospatiale*'s holding that foreign litigants must be protected against abusive discovery practices, as the defendants in *In re Perrier* successfully did.³³⁶ Meanwhile, parties requesting discovery in France should never forget that judgment enforcement remains the endgame, and that French courts are not likely to enforce foreign judgments based on evidence obtained outside of official French legal channels.³³⁷

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³³³ See, e.g., *Strauss*, 242 F.R.D. 214 (calling the “national interests” factor the most important in the Restatement (Third) § 442 test); see also *In re Payment Card*, 2010 WL 342051, at *14 (same).

³³⁴ See, e.g., *Compagnie Française*, 105 F.R.D. at 31 (gathering of documents is “*de minimis*” intrusion on French judicial sovereignty); *Adidas*, 1984 WL 423, at *2 (mere act of responding to discovery requests does not infringe on French judicial sovereignty).

³³⁵ See, e.g., *Madden*, No. 3-03-CV-0167-BD, slip op. at 3–4 (chiding the party resisting discovery for not articulating its case); *Bodner*, 202 F.R.D. at 375 (Same); *Rich*, 121 F.R.D. at 258 (same); *Haynes*, 119 F.R.D. at 337 (same); *Benton Graphics*, 118 F.R.D. at 390 (same).

³³⁶ *Aérospatiale*, 482 U.S. at 545–546; *In re Perrier*, 138 F.R.D. at 353.

³³⁷ *In re Vitamin*, 2001 WL 35814436, at *9.

Table 1. List of cases wherein French litigants invoke the French blocking statute, or the Hague Convention, or both.³³⁸

Case citation	Test used	Deferred to French blocking statute?	Imposed the Hague Convention?
<i>In re Oil Spill</i> , 93 F.R.D. 840 (N.D. Ill. 1982).	Issue not raised	No	Issue not raised
<i>Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.</i> , 99 F.R.D. 269 (N.D. Ill. 1983).	Restatement (Second) § 40	No	Issue not raised
<i>Wilson v. Stillman & Hoag, Inc.</i> , 121 Misc. 2d 374 (N.Y. Sup. Ct. 1983).	None used	No	No
<i>Graco, Inc. v. Kremlin, Inc.</i> , 101 F.R.D. 503 (N.D. Ill. 1984).	Rest. (Second) § 40, <i>Uranium</i> , Restatement (Third) § 442	No	No
<i>Vincent v. Ateliers de la Motobécane, S.A.</i> , 475 A.2d 686 (N.J. Super. Ct. App. Div. 1984).	None used	No	Yes
<i>Adidas (Canada) Ltd. v. S.S. Seatrain Bennington</i> , Nos. 80 Civ. 1911 (PNL), 82 Civ. 0375 (PNL), 1984 WL 423 (S.D.N.Y. 1984).	None used	No	No
<i>Compagnie Française d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co.</i> , 105 F.R.D. 16 (S.D.N.Y. 1984).	Rest. (Second) § 40 plus good faith factor	No	Yes and No ³³⁹
<i>Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa</i> , 482 U.S. 522 (1987).	None used	No	No
<i>Rich v. KIS California, Inc.</i> , 121 F.R.D. 254 (M.D.N.C. 1988).	<i>Aérospatiale</i>	No	No
<i>Gould, Inc. v. Pechiney Ugine Kuhlmann</i> , 853 F.2d 445 (6th Cir. 1988).	<i>Aérospatiale</i>	No	No
<i>In re Perrier Bottled Water Litigation</i> , 138 F.R.D. 348 (D. Conn. 1991).	<i>Aérospatiale</i>	No	Yes

³³⁸ The author has done his best, but cannot guarantee that this case list is exhaustive.

³³⁹ Defendant seeking discovery from the French Government was to proceed under the Hague Convention, but not so with other defendants.

Case citation	Test used	Deferred to FBS?	Imposed the HC?
<i>Alfadda v. Fenn</i> , Nos. 89 Civ. 6217 (LMM), 90 Civ. 4470 (LMM), 1993 WL 33445 (S.D.N.Y. Feb. 1, 1993).	None used	No	Issue not raised
<i>In re Aircrash Disaster Near Roselawn, Ind.</i> , 172 F.R.D. 295 (N.D. Ill. 1997).	<i>Aérospatiale</i>	No	No
<i>In re Meta Sys.</i> , 111 F.3d 142 (Fed. Cir. 1997) (unpublished opinion).	<i>Aérospatiale</i>	Issue not raised	No
<i>Valois of Am., Inc. v. Risdon Corp.</i> , 183 F.R.D. 344 (D. Conn. 1997).	<i>Aérospatiale</i>	No	No ³⁴⁰
<i>Husa v. Laboratoires Servier, S.A.</i> , 740 A.2d 1092 (N.J. Super. Ct. App. Div. 1999).	None	No	Yes
<i>Bodner v. Banque Paribas</i> , 202 F.R.D. 370 (E.D.N.Y. 2000).	<i>Minpeco</i>	No	No
<i>In re Vitamin Antitrust Litig.</i> , No. 99-197 (TFH), 2001 WL 35814436 (D.D.C. Sep. 11, 2001) (Loislaw.com).	Issue not raised	No	No
<i>Am. Home Assurance Co. v. Société Commerciale Toutélectrique</i> , 104 Cal. Rptr. 2d 406 (Cal. Ct. App. 2002).	Issue not raised	No	No
<i>Abbott labs. v. Impax labs., Inc.</i> , No. Civ. A 03-120-KAJ, 2004 WL 1622223 (D. Del. July 15, 2004).	Issue not raised	Issue not raised	Yes
<i>Madden v. Wyeth</i> , No. 3-03-CV-0167-BD (N.D. Tex. Jan. 12, 2006) (mem. op.) (available on WestlawNext case docket and Loislaw.com).	<i>Aérospatiale</i>	No	No
<i>In re Vivendi Universal, S.A. Sec. Litig.</i> , No. 02CIV5571RJHHBP, 2006 WL 3378115 (S.D.N.Y. 2006).	<i>Minpeco</i>	No	No
<i>Strauss v. Credit Lyonnais, S.A.</i> , 242 F.R.D. 199 (E.D.N.Y. 2007).	Rest. (Third) § 442 plus <i>Minpeco</i> 's good faith and hardship factors	No	No

³⁴⁰ Unless the parties cannot agree to streamline discovery requests, at which time the French party (Valois) can renew its motion to proceed through the Hague Convention.

Case citation	Test used	Deferred to FBS?	Imposed the HC?
<i>In re Enron Corp.</i> , No. 01-16034 (AJG) (Bankr. S.D.N.Y. July 18, 2007) (Exhibit “A” of the court’s July 18, 2007, Minutes of Proceedings, available on WestlawNext case docket and Loislaw.com).	<i>Strauss</i>	No	No
<i>In re Global Power Equip. Group Inc.</i> , 418 B.R. 833 (Bankr. D. Del. Oct. 28, 2009).	<i>Strauss</i>	No	No
<i>In re Air Cargo Shipping Servs. Antitrust Litig.</i> , No. 06-MD-1775, 2010 WL 1189341 (E.D.N.Y. Mar. 29, 2010).	<i>Strauss</i>	No	No
<i>Meadwestvaco Corp. v. Rexam PLC</i> , No. 1:10cv511 (GBL/TRJ), 2010 WL 5574325 (E.D. Va. Dec. 14, 2010).	<i>Aérospatiale</i>	No	No
<i>Metso Minerals Indus., Inc. v. Johnson Crushers Int’l</i> , 276 F.R.D. 504 (E.D. Wis. 2011).	<i>Aérospatiale</i>	No	No
<i>Coloplast A/S v. Generic Med. Devices, Inc.</i> , No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011).	Rest. (Third) § 442 plus Rest. (Second) § 40’s hardship and expected compliance factors	No	No
<i>Crystal Cruises, Inc. v. Rolls-Royce PLC</i> , No. 10-24607-Lenard/O’Sullivan, 2011 WL 11555506 (S.D. Fla. Nov. 8, 2011).	None	No	No
<i>Trueposition, Inc. v. LM Ericsson Tel. Co.</i> , No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012).	<i>Strauss</i>	No	No
<i>SNP Boat Serv. S.A. v. Hôtel le St. James</i> , 483 B.R. 776 (S.D. Fla. 2012).	None	No	No

Case citation	Test used	Deferred to FBS?	Imposed the HC?
<i>In re Activision Blizzard, Inc. Stockholder Litig.</i> , C.A. No. 8885-VCL, --- A.3d ---, 2014 WL 717541, at *4 (Del. Ch. Feb. 21, 2014)	Rest. (Third) § 442	No	Yes