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International Information for International Business

VOLUME 15, NUMBER 4 >>> APRIL 2015

U.S. District Court Treats French Blocking Statute, Swiss Bank Secrecy Law Differently in Same Case on Same Set of Facts

By Pierre Grosdidier, of Haynes and Boone, LLP, Houston.

The U.S. District Court for the Southern District of New York recently upheld subpoenas requesting banks to produce documents kept in France but quashed those seeking documents held in Switzerland, highlighting the different treatment that U.S. courts afford the French blocking statute and the Swiss bank secrecy law (*Motorola Credit Corp. v. Uzan*, No. 02-CV-666 (JSR), 2014 BL 360203 (S.D.N.Y. Dec. 22, 2014)).

The case illustrates the importance of the national interests and hardship-of-compliance factors in the multi-factor comity analysis that U.S. courts must perform when dealing with foreign "blocking" statutes.[1] Parties resisting U.S.-style discovery on the basis of blocking statutes cannot merely invoke these laws to prevail. In the words of the U.S. Supreme Court, these parties must "identify the nature of the sovereign interests" that these laws and their enforcement serve.[2]

Motorola Served Subpoenas to Collect a $3 Billion Judgment

For over a decade Motorola has been trying to collect a $3 billion judgment against Kemal Uzan *et al.* This sum includes $2 billion that the Uzans allegedly diverted from a Motorola investment in a Turkish Uzan-owned telecommunications company, and $1 billion in punitive damages. The Uzans have ostensibly evaded payment through an international network of proxy and front entities.

The district court authorized Motorola to serve discovery subpoenas on third parties (the New York offices of international banks) in an attempt to track down the Uzans' assets. The banks challenged the subpoenas, as they applied to their foreign branches.[3]

The court acknowledged that whether Motorola could obtain discovery from the banks' foreign branches turned on the deference granted to the corresponding countries' laws barring discovery. "More often than not," the court noted, "such deference has not been accorded."[4] Citing the U.S. Supreme Court's keystone *Aérospatiale* decision, the court reiterated that it indisputably had the power to directly compel production of documents located abroad from parties within its jurisdiction.[5] Whether the court should exercise this power turned on considerations of international comity.

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The court performed its comity analysis using the five factors of the *Restatement (Third) of Foreign Relations Law of the United States* § 442 (hereinafter "*Restatement* § 442") listed in *Aérospatiale*.[6] These factors are:

(1) the importance to the . . . litigation of the documents or other information requested;

(2) the degree of specificity of the request;

(3) whether the information originated in the United States;

(4) the availability of alternative means of securing the information; and

(5) 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.[7]

The court eschewed the four-factor *Minpeco* and seven-factor *Strauss* tests that have recently prevailed in the Second Circuit.[8] The seven *Strauss* factors are the five factors of *Restatement* § 442 plus *Minpeco*'s good faith and hardship factors (*i.e.,* good faith of, and hardship to, the party invoking a blocking statute defense). Stressing that it was primarily engaged in a comity analysis, the court stated that the national interests factor (*i.e.,* the fifth *Restatement* § 442 factor) was the most important one.

In analyzing foreign interests, and in reference to foreign legislation prohibiting the release of information in response to U.S.-style discovery, the court wrote:

> But is this for real? If a given country truly values its national policy of, say, criminalizing compliance with a U.S. court subpoena, it will prosecute its citizens for so complying. More generally, whether the prohibition against disclosure be civil or criminal in nature, the extent to which the relevant country has actually enforced the prohibition is a strong indicator of the strength of the state interest.[9]

The court thus effectively fused the national interests factor of *Restatement* § 442 with *Minpeco*'s hardship factor, which courts have designated as the two most important *Minpeco* factors.[10] The court then applied its analysis to the objections raised by French, Swiss, Jordanian, and United Arab Emirates (UAE) banks.

The Court Deferred to the Swiss Bank Secrecy Law But Not to the French Blocking Statute

Describing the French blocking statute as "riddled with loopholes that make it substantially unenforceable," *sans plus*, the court cited *Aérospatiale*'s holding that "American courts are not required to adhere blindly to the directions of such a statute."[11] Noting that French authorities did not prosecute blocking statute violators, the court held that U.S. interests prevailed over French interests and ordered compliance with the subpoenas as they applied to documents located in France. Likewise, the court ordered the production of documents located in Jordan and the UAE in light of the "total paucity of published prosecutions [in these countries] for complying with discovery ordered by a foreign court."[12]

Turning to Switzerland, the court observed that, "[i]n contrast with the French situation, Switzerland's bank secrecy regime constitutes, not just a seriously enforced national interest, but almost an element of that nation's national identity."[13] The zeal with which Swiss authorities enforce the Swiss Banking Act's Article 47 is "expressive of a public interest." The court refuted the suggestion that Article 47 merely protected tax evaders by pointing to "Switzerland's recent cooperation with U.S. authorities in pursuing such tax evasion."[14] Switzerland, the court concluded, "regards bank secrecy as a positive social value and benefit, to be used but not abused." In these circumstances, the court found that the *Restatement* § 442 factors "strongly favor[ed]" Swiss interests, and it quashed the subpoenas to the extent they applied to documents located in Switzerland.

The court's *dicta* downplaying Switzerland's reputation as a tax haven in light of its cooperation with U.S. authorities suggests that the court was mindful of the message it conveyed by the deference it afforded to the "social value and benefit" of Swiss banking secrecy. But the tamper has its limitations. "Cooperation with U.S. authorities" in fighting tax evasion is not a factor in the *Restatement* § 442, *Minpeco*, or *Strauss* tests and, in any event, fraud — not tax evasion — is the underlying substantive issue in *Motorola*.

Key Factors in the Comity Analysis: The Competing National Interests at Stake and the Hardship of Compliance on the Party from whom Discovery Is Sought

U.S. courts have long viewed differently foreign blocking statutes, on the one hand, and bank secrecy laws, on the other, even as they have addressed both using the same multi-factor tests. In *Minpeco,* another case where the plaintiff sought discovery from a third-party Swiss bank, the court distinguished Switzerland's Banking Act Article 47 from "sham" blocking statutes "designed to frustrate" U.S.-style discovery.[15] These statutes warranted no deference from U.S. courts, in contrast to bank secrecy laws (such as Article 47) that legitimately protected commercial privacy.

   ISSN 1473-3579

Parties resisting U.S.-style discovery on the basis of blocking statutes cannot merely invoke these laws to prevail. In the words of the U.S. Supreme Court, these parties must "identify the nature of the sovereign interests" that these laws and their enforcement serve.

As the U.S. Supreme Court noted in *Aérospatiale*, a blocking statute (including a bank secrecy law) is "relevant to [a] court's particularized comity analysis only to the extent that its terms and its enforcement *identify the nature of the sovereign interests in nondisclosure of specific kinds of material*."[16] Parties invoking the French blocking statute have struggled to articulate these interests, especially in light of the statute's breadth and avowed purpose.[17] U.S. courts have had an easy time reminding parties that the statute's *raison d'être* was merely to counter discovery requests emanating from the U.S., as the court unfailingly did in this case.[18] In *Minpeco*, in contrast, Swiss authorities "submitted . . . two official statements [that] express[ed their] general position as to the importance of Swiss banking secrecy laws to the interests of Switzerland."[19] Another district court addressing U.S.-France transnational discovery requests contrasted the Swiss authorities' statements in *Minpeco* with, in its case, a French Ministry letter that "mention[ed] only [France's] blocking statute," did "little more than generally state [France's] interest in sovereignty," and remained "inexplicably silent regarding [France's] national interest in combating terrorist financing."[20]

Much of the *Motorola* record is sealed. It is not known what Swiss official statements, if any, supported the court's holding that, in this case, "a balancing of interests strongly favor[ed]" Swiss banking secrecy over a U.S. plaintiff's attempt to collect a $3 billion judgment in a U.S. district court. Swiss banking secrecy prevailed, therefore, notwithstanding the United States' "substantial interest in fully and fairly adjudicating matters before its courts."[21] As the court held elsewhere, in the absence of a remedy to collect these $3 billion, "it cannot be said that the matter has been 'fully and fairly adjudicated.' "[22]

Motorola, like the blocking statute case law in general, shows that whether courts afford deference to a blocking statute turns on the two most important factors in the *Minpeco* test, namely the nature of the competing national interests and the hardship factors.[23]

France's blocking statute protects " 'vital' interests like security and sovereignty" that are not "as specific as . . . confidence in the banking system."[24] Switzerland "definitely enforce[s]" its bank secrecy laws, but France, one lone case aside, has not policed its blocking statute.[25]

Under these conditions, the Southern District of New York "strongly favors" quashing subpoenas aimed at Swiss banks, and holds that France's interests in its blocking statute "are dwarfed by American interests in complete discovery."[26]

In *Gucci America, Inc. v. Curveal Fashion*, in contrast, the Southern District of New York compelled discovery from a third-party Malaysian bank notwithstanding the secrecy provisions of Malaysia's banking act. The Malaysian government manifested no interest in preventing disclosure, which undermined the claim of a Malaysian national interest, and the court found the likelihood of banking law enforcement merely speculative.[27] The bank, therefore, upheld subpoenas designed to help plaintiffs collect a $13.7 million default judgment. Similarly, in *SEC v. Banca Della Svizzera Italiana*, the court compelled the defendant Swiss bank to comply with discovery requests where the Swiss government, "though made expressly aware of the litigation, . . . expressed no opposition."[28]

The balancing-of-interest analysis has not been without its detractors.[29] Be that as it may, *Motorola* complies with Second Circuit precedent, *e.g.*, *Minpeco*. Both *Motorola* and *Minpeco* involved quashed subpoenas addressed to third-party Swiss banks. In *Minpeco*, the court declined to compel production, in part because the Swiss bank had been released from the action and the court had no leverage other than fines.[30] In *Motorola*, the court gave no indication that the Swiss banks' third-party status influenced its decision. But this might be the unspoken factor, as this court has not hesitated to compel direct-party Swiss banks to comply with discovery in the past, Swiss bank secrecy laws notwithstanding. In *SEC*, the threat of "severe contempt sanctions" catalyzed a "waiver of Swiss confidentiality" and bank discovery responses in a $2 million insider-trading dispute.[31] The court cited the congressional record to stress that "[s]ecret foreign accounts" thwart United States interests in the integrity of its financial markets and have "vast" and "debilitating effects" on the American economy.

NOTES

[1] *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523–25 (S.D.N.Y. 1987). A "blocking" statute is a law in a foreign jurisdiction that bars the production of documents in response to (mostly) U.S.-style discovery, unless the requesting party proceeds through the Hague Evidence Convention.

[2] *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987).

[3] *Motorola*, 2014 WL 7269724, at *1.

[4] *Id.* at *2 (citing cases denying deference to Chinese, French, Mexican, Swiss, Hong Kong, Spanish, Brazilian, Bolivian, Chilean, Panamanian, Paraguayan, Cayman, Argentinian, and Uruguayan blocking statutes, data protection and bank secrecy laws, and constitutions).

[5] *Id.* at *3 (citing *Aérospatiale*, 482 U.S. at 54344). The court did not address the issue of its jurisdiction over the banks in this decision. *See Daimler AG v. Bauman*, 134 S. Ct. 746, — U.S. — (2014); *Gucci America, Inc. v. Li*, 768 F.3d 122 (2d Cir. 2014).

[6] *Motorola*, 2014 WL 7269724, at **34. The opinion refers to the *Restatement* § 442 factors as the "*Aérospatiale*" factors. *See Aérospatiale*, 482 U.S. at 544 n.28.

[7] *Motorola*, 2014 WL 7269724, at *3 (citing *Aérospatiale*, 482 U.S. at 544 n.28).

[8] *Minpeco*, 116 F.R.D. at 523; *Strauss v. Crédit Lyonnais, S.A.*, 242 F.R.D. 199, 210–11 (E.D.N.Y. 2007) ("*Strauss I*"). For a discussion of the various tests that courts have applied to foreign blocking statutes, *see* Pierre Grosdidier, *The French blocking statute, the Hague Evidence Convention, and the case law: lessons for French parties responding to American dis-*

covery, 50 Tex. Int'l. L. J. F. 11 (2014), available at http://www.tilj.org/content/forum/forum_GROSDIDIER.pdf.

[9] *Motorola*, 2014 WL 7269724 at *4.

[10] *Id.* at *3 n.2; *Minpeco*, 116 F.R.D. at 523–525; *see also Reino de España v. Am. Bureau of Shipping*, No. 03 Civ. 3573, 2005 WL 1813017, at **3, 8 (S.D.N.Y. Aug. 1, 2005) (national interests, followed by hardship, are the most important factors).

[11] *Motorola*, 2014 WL 7269724 at *5.

[12] *Id.* at *7.

[13] *Id.* at *6.

[14] *Id.*

[15] *Minpeco*, 116 F.R.D. at 524, 528.

[16] *Aérospatiale*, 482 U.S. at 544 n.29 (emphasis added).

[17] *See generally*, Grosdidier, *supra* note 8, at 42.

[18] *See, e.g.*, *Restatement* § 442 reporters' note 4 (1987); *Motorola*, 2014 WL 7269724 at *5–6 (citing *Adidas (Can.) Ltd. V. SS Seatrain Bennington*, Nos. 80 Civ. 1911 (PNL), 82 Civ. 0375 (PNL), 1984 WL 423, at *4 n.4 (S.D.N.Y. May 30, 1984)).

[19] *Minpeco*, 116 F.R.D. at 525.

[20] *Strauss v. Crédit Lyonnais, S.A.*, 249 F.R.D. 429, 448–49 (E.D.N.Y. 2008) (mem. op.) ("*Strauss II*").

[21] *Minpeco*, 116 F.R.D. at 524.

[22] *Gucci America, Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RSJ)(THK), 2010 WL 808639, at *5 (S.D.N.Y. March 8, 2010) (mem. op.); *see also Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) ("the courts of the United States undoubtedly have a vital interest in providing a forum for the final resolution of disputes and for enforcing these judgments.").

[23] *Minpeco*, 116 F.R.D. at 52325. In *Motorola*, the Court quashed the Swiss bank subpoenas despite the fact that four of the *Restatement* § 442 factors "generally favor[ed]" Motorola. *Motorola*, 2014 WL 7269724 at *4.

[24] *Id.* at *5.

[25] *Id.* at *6; Grosdidier, *supra* note 8, at 46–47 (Christopher X was acquitted in the lower court and lost on appeal and in the *Cour de Cassation*. *Strauss II*, 249 F.R.D. at 435–36. The author thanks Frederick T. Davis for pointing out this small but important detail).

[26] *Id.* at *5; *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02CIV5571RJHHBP, 2006 WL 3378115, at *3 (S.D.N.Y. Nov. 16, 2006).

[27] *Gucci*, 2010 WL 808639, at *6–7. The Second Circuit Court of Appeals has stressed that foreign authorities' failure to express their sovereign interests "militates against a finding that strong national interests of the foreign country are at stake. *Minpeco*, 116 F.R.D. at 525 (citing *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985)).

[28] 92 F.R.D. 111, 117, 119 (S.D.N.Y. 1981). The case law's emphasis on the national interests and hardship-of-compliance factors might seemingly justify French legislators' recent attempts to narrowly focus the scope of France's blocking statute on some colorable national interest, enact deterring sanctions, and forcefully prosecute violators. *See* Grosdidier, *supra* note 8, at 48–51; *see also* Proposition de loi relative à la protection du secret des affaires, No. 2139 (July 16, 2014), available in French at http://www.assemblee-nationale.fr/14/propositions/pion2139.asp. But the protection of trade secrets — the current proposed legislative focus — is hardly a credible national interest given the ease with which U.S. court-issued protective orders deal with confidentiality matters, as the expansively sealed *Motorola* record aptly demonstrates.

[29] *See* Grosdidier, *supra* note 8, at 24 and nn.83–84, 35 n.197; *see also Reinsurance*, 902 F.2d at 1280 ("when allegedly considering only 'vital national interests,' we are left with the rather ridiculous assignment of determining which competing national interest is the more vital.").

[30] *Minpeco*, 116 F.R.D. at 530.

[31] *SEC*, 92 F.R.D. at 113; *see also Minpeco*, 116 F.R.D. at 530 (Swiss bank arguably should be compelled to respond to discovery if it were a direct party to the action).

The text of the district court's decision is available at http://bit.ly/1GDy38e.

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  WDPR ISSN 1473-3579