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United States Discovery and Foreign Blocking Statutes

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It is a privilege to contribute to this Issue of the *Louisiana Law Review* dedicated to the career of my dear friend and admired colleague, Alain Levasseur. His contributions to mutual common law and civil law understanding are without parallel. The following Essay is intended as a "translation" between the two legal cultures that Alain Levasseur has illuminated for us throughout his professional life.

The reality between discovery in the United States and the foreign blocking statutes that impede discovery in numerous civil law countries has been an uncomfortable mixture of resistance, insistence, and conflict for the nations involved. American courts grapple with the challenge of understanding why they should adhere to strictures that seem to compromise the fundamental rights of American plaintiffs, while French and German lawyers and judges struggle with the challenges that United States discovery rules pose to equally fundamental values in their legal systems. This Essay seeks to address these issues.

In an era of transnationalized commerce, discovery in the United States finds itself pitted against the blocking statutes that foreign nations enacted to impede. Discovery in the United States has reached the status of a quasi-constitutional—if not an outright constitutional—right.[1] Judges are highly reluctant to allow foreign defendants to diminish an American plaintiff's ability to discover evidence and frequently are also suspicious that the blocking statute, offered as the reason for a foreign national's motion to withhold evidence, may be no more than a façade designed to interfere with the American court's jurisdiction. In *Adidas (Canada) Ltd.*

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1. *See* Imre Stephen Szalai, *A Constitutional Right to Discovery? Creating and Reinforcing Due Process Norms Through the Procedural Laboratory of Arbitration*, 15 PEPP. DISP. RESOL. L.J. 337, 374–75 (2015); Ganesh Bala, Note, *Discovery—First and Fifth Amendment Privileges—District Court Should Balance Threatened Harm to Constitutional Rights Against Requesting Party's Need for Relevant Information in Deciding Whether to Order Civil Discovery of Information Privileged Under the First and Fifth Amendments*, 27 VILL. L. REV. 198, 200 (1981).

v. S/S Seatrain Bennington,[2] the District Court for the Southern District of New York quoted a report made to France's National Assembly during the process of debates that were a precursor to the blocking statute's enactment. The report highlighted the possibility that the law would not in fact pose a risk to French nationals of incurring the statute's ostensible penalties, but would merely be a way for French defendants to evade United States discovery:

> A report to the French National Assembly recommended the law's adoption on the ground that it would offer French nationals "a legal excuse for refusing to supply the information and documents demanded of them [and] a judicial weapon which will at least make it possible for them to gain time. The conflict thus created will block matters for a time and will make it possible to raise the conflict to a governmental level." With respect to the potential penalties, the report noted that "it is necessary not to misunderstand the actual scope of these penalties . . . [because] . . . these penalties are applied only on the improbable assumption that the companies would refuse to make use of the protective provisions offered to them. In all other cases, these potential fines will assure foreign judges of the judicial basis for the legal excuse which companies will not fail to make use of."[3]

France and Germany enacted blocking legislation in response to what those countries considered the excessive and abusive intrusion of American litigants into the affairs of their companies, often by competitors.[4] Further,

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2. Nos. 80 Civ. 1911 (PNL), 82 Civ. 0375 (PNL), 1984 WL 423 (S.D.N.Y. May 30, 1984).

3. *Id.* at *3 n.4 (quoting Report No. 1814, Nat'l Assembly Comm. on Prod. & Exchs., 1979–1980, 2d Sess., at 61, 63–64 (June 19, 1980) (Fr.)).

4. *See* Kami Haeri, *Laissez la loi de blocage tranquille!*, GAZETTE DU PALAIS, Feb. 29, 2012, at 7; Noëlle Lenoir, *Le droit de la preuve à l'heure de l'extraterritorialité*, REVUE FRANÇAISE DE DROIT ADMINISTRATIF [R.F.D.A.], May–June 2014, at 487; *see generally* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 972 (5th ed. 2011) ("[M]ost foreign blocking statutes . . . were precipitated by unilateral extraterritorial discovery efforts."). Born and Rutledge also point out that this is not universally the case, as with older blocking statutes, such as the Swiss law of 1934, which was enacted in response to Nazi German examinations of Swiss banking matters. *Id.* On the impact of U.S. antitrust laws, see Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, LAW & CONTEMP. PROBS., Summer 1987, at 197, 197; Bate C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585, 590 (1981).

in continental Europe, the American-style pretrial evidence acquisition is not permissible within domestic practice.[5] In both France and Germany, a deeply entrenched principle of law directly derived from Roman law shields parties from an obligation to assist their opponent in litigation.[6] This principle of law, however, exists in an overarching legal system in which the legal representatives are committed to assisting in a search for the truth that is less partisan than the American equivalent of zealous advocacy. The judge, rather than the parties, conducts that search for the truth.[7]

In France and Germany, documents and other information in the possession of an adversary can be requested only through the judge and then only with specificity.[8] Thus, in advance of the request to the judge for discovery from the other party, an adversary would need to know what information the other party possesses and be able to explain to the judge how that information is relevant to the requesting party's case. Normally, only the judge, rather than the parties, can request information in the form of documents or other pertinent facts from each party and direct the course of information gathering.[9] Because American litigants are not used to seeking judicial approval for each document sought and each witness questioned, many of those litigants have a tendency to arrange for American-style discovery in France and Germany without the knowledge of French or German legal authorities.

The *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* of 1970[10] was negotiated to facilitate foreign discovery, create a systematic method that would shorten what could be unpredictable time lengths for obtaining evidence abroad, and develop a system that no state would consider an intrusion on its national

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5. *See, e.g.*, UGO A. MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW 762 (7th ed. 2009) ("In most civil-law countries, discovery is almost non-existent.").

6. For Germany, see David B. Adler, *Schritt in Richtung Beilegung des deutsch-amerikanischen Justizkonflikts? – Zur geplanten Einschränkung des Totalvorbehalts gegenüber exterritorialer discovery-Anfragen US-amerikanischer Gerichte*, IPRax, July–Aug. 2015, at 364, 365 ("[N]iemand verpflichtet ist, dem Gegner die Waffen für einen Prozess in die Hand zu legen . . . ."). For France, see JEAN HILAIRE, ADAGES ET MAXIMES DU DROIT FRANÇAIS 157 (2d ed. 2015) ("*Nul n'est tenu de produire contre lui-même*."). The phrase from Roman law is *Nemo contra se edere tenetur. Id.*

7. PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 10–11 (2004).

8. For France, see James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 460–61, 466 (1986). For Germany, see OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 223 (2007).

9. *See supra* note 8.

10. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241.

sovereignty.[11] In the landmark United States Supreme Court case of *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*,[12] however, the Court held that domestic discovery rules from the Federal Rules of Civil Procedure instead of the Hague Convention may be applied when appropriate on a case-by-case basis.[13] In the almost three decades that have followed, United States courts have been inclined to favor domestic rules over the Hague Convention.[14]

When documents are located outside of the United States, this means by definition that the rules of civil procedure under which discovery is conducted have an extraterritorial effect. This situation is problematic to the extent that United States rules of procedure contravene foreign laws in the nation in which the discovery is to occur. To the United States judge and plaintiff, the procedure may not seem extraterritorial inasmuch as discovery abroad merely subjects a litigant, who is a party to a United States action and over whom the United States court has jurisdiction, to discovery of documents that the party has chosen to keep abroad. On the other hand, to the nation whose legal system has fundamental problems with the nature of United States discovery in terms of privacy and other concerns discussed herein, United States discovery seems both extraterritorial and a breach of its national sovereignty.[15] Similarly, when foreign nations enact blocking statutes that forbid information from being divulged in United States pretrial discovery, the blocking laws have an extraterritorial effect to the extent that they will impact legal rights and options of United States litigants in actions brought in a United States court and intrude on the jurisdiction of those courts.[16]

United States courts generally have not been deferential to blocking statutes that, as in the case of France, may make acceding to American discovery a criminal violation.[17] Indeed, some United States courts have

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11. Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, LAW & CONTEMP. PROBS., Summer 1996, at 77, 78.

12. 482 U.S. 522 (1987).

13. *Id.* at 534–38.

14. Born, *supra* note 11, at 86.

15. *See* BORN & RUTLEDGE, *supra* note 4, at 971–72 (citing relevant sources).

16. The French Supreme Court (*Cour de cassation*) has specifically held that the mere fact of being extraterritorial in effect does not make a French law unconstitutional. Conseil constitutionnel [CC] [Constitutional Court] decision No. 81-132DC, Jan. 16, 1982 (Fr.).

17. Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères [Law 80-538 of 16 July 1980 on the Disclosure of Documents and Information of an Economic, Commercial or Technical Nature

been highly dismissive of these blocking statutes, describing them as a ploy to evade legitimate discovery through sham punishments that need never be applied.[18]

In France, the blocking statute had indeed never actually been applied until 2007, when the French Supreme Court, the *Cour de cassation*, affirmed a lower court application.[19] In the years following, however, its application has not seemed to alter the tendency of United States courts to overlook the existence of the statute, as the French blocking statute was not met with greater deference after 2007 than before. Meanwhile, the ability of American courts to allow discovery that affects other nations has only expanded.

In particular, under Section 1782 of the United States Code,[20] litigants in foreign suits in foreign nations may apply to an American court for assistance in evidence gathering.[21] While that legal provision is not of recent vintage, the United States Supreme Court in *Intel v. AMD*[22] held that Section 1782 would be available to foreign litigants even if the information sought was not discoverable in the foreign jurisdiction in which the action had been brought and was proceeding.[23] One may well surmise that, although Congress intended Section 1782 to provide the assistance of the American courts to foreign nations and thus to be a positive contribution to their courts, the nations involved may perceive the statute as a reinforced intrusion into the national sovereignty of foreign

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to Foreign Individuals or Legal Entities], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], July 17, 1980, at 1700.

18. *See* Bodner v. Paribas, 202 F.R.D. 370, 374–75 (E.D.N.Y. 2000) ("As held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court. Thus, applying *Aerospatiale* and *Minpeco*, other courts have uniformly declined to give effect to the French Blocking Statute, or to hold that the existence of the statute requires that discovery of French defendants take place under the Hague Convention.").

19. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 12, 2007, Bull. Crim., No. 07-83228 (Fr.).

20. 28 U.S.C. § 1782 (2014).

21. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004).

22. *Id.*

23. *Id.* at 263.

states.[24] In *Kulzer v. Biomet*,[25] for instance, the Seventh Circuit Court of Appeals held that a German company, Hereus—which had sued the defendant company in Germany—was entitled to American-style discovery of documents located in the United States, even though obtaining those documents through the German court system would have been impossible because such discovery of an open nature is not allowed there.[26] Despite acknowledging the unavailability of such discovery in Germany, the forum jurisdiction, the United States appellate court opined that the plaintiff had not been trying to "circumvent German law" through its broad discovery requests to the American court.[27]

Germany, like France, opted out of its duty to comply with the Hague Convention letters of request under the Convention's Article 23 opt-out provision with regard to requests "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[28] Germany also has blocking legislation, but is now amending the legislation to end what is known as the *deutsch-amerikanischer*[29] *Justizkonflikt* or conflict between the two countries on the matter of evidence gathering.[30] Whereas the current law forbids the discovery of any documents located in Germany, under the pending legislation, some American document

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24. *See* Pauline Dubarry et al., *L'Obtention des preuves en France et à l'étranger*, LA SEMAINE JURIDIQUE, July 14, 2014, at 1418, 1419 (referring to Section 1782 as a "destabilizing" mechanism, allowing a private party to seek an advantage of surprise in what strikes them as an ex parte procedure that can result in a "traumatic" effect on its adversary, despite the adversary's having an opportunity to voice its opposition to the judge. The authors characterize Section 1782 as affording the opportunity to manoeuver around the Hague Convention's letters rogatory and note that French law has always taken the position that every signatory State to the Hague Convention is obliged to follow its procedures in lieu of national procedures on evidence gathering.).

25. 633 F.3d 591 (7th Cir. 2011).

26. *Id.* at 595.

27. *Id.* at 597.

28. 847 U.N.T.S. at 245. Most contracting states have opted out of article 23, thus avoiding an obligation to comply with United States pre-trial discovery. In addition to article 23, article 33 offers an opt-out of deposition mechanisms. It should be noted that the traditional civil law legal system does not permit a lawyer to have any direct contact with an opposing party or witness. Only judges may conduct the equivalent of depositions. In France in particular, in a civil (non-criminal) case, generally every communication would be in writing. *See, e.g.*, Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The* Lipietz *Case*, 56 AM J. COMP. L. 363, 377 (2008).

29. "German-American."

30. On the *Justizkonflikt*, see Anke Meier, *U.S. Discovery: The German Perspective*, DAJV NEWSL., Nov. 1, 2012, at 9–11.

discovery, in principle, will be allowed to take place in Germany.[31] Substantively, however, the amended legislation will go no further than allowing what the Hague Convention prescribes.[32] According to Dr. Adler, the new law is intended to encourage American judges to modify their inclination to use United States domestic laws of civil procedure on discovery in lieu of the Hague Convention.[33] However, given that a strong body of case law has been developed over decades in the United States—a common law system operating under stare decisis—the chances of this modification reaching its desired effect seem doubtful.

Of course, as of December 1, 2015, the Federal Rules of Civil Procedure as they relate to discovery also underwent amendment.[34] Although the thrust of the amendments has been to curtail "fishing expeditions" or the excessive scope of discovery, the amendments do not impinge on the basic nature of discovery in the United States.[35] American discovery remains vast and oriented to allowing parties to conduct their own search for information without specific knowledge of the nature of an adversary's information and with a concomitant obligation to produce the same to the adversary—the very aspects that cannot be adapted to continental European systems of law.

An eminent French lawyer and former cabinet minister has suggested that discovery in transnational litigation as it has developed in the United States since *Aérospatiale* may constitute a violation of the European Convention on Human Rights.[36] She argues that such discovery denies a foreign party a fair trial (*procès équitable*) inasmuch as failure to comply with discovery may deprive a foreign corporation of its own right to present evidence under the Federal Rules,[37] a violation of one of the most fundamental rights of every French—and other continental European and

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31. *See* Adler, *supra* note 6, at 365.

32. *Id.*

33. *Id.* at 364.

34. Press Release, Dist. of N.D., U.S. Dist. Court, on Amendments to the Federal Rules of Civil Procedure effective Dec. 1, 2015, http://www.ndd.uscourts.gov/announce/FRCP_Update_2015.pdf [https://perma.cc/AX4F-P3K9] (last visited Jan. 25, 2016).

35. The principal goal is to ensure that the scope of discovery becomes "proportional to the needs of the case." FED. R. CIV. P. 26(b)(1).

36. Lenoir, *supra* note 4, at 499.

37. *See* Fed. R. Civ. P. 37, 45; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(2)(c) (1986) (providing that a United States court or agency may make findings of fact adverse to a party even if that party has made a good faith effort to comply with the foreign jurisdiction's blocking statute).

every E.U. Member State—litigant's rights.[38] This right is known to the French as the right to present opposing evidence or, literally, as the principle or benefit of the contradictory (evidence): *le principe ou le bénéfice du contradictoire*.[39]

Clearly, the Hague Convention on Evidence has not solved the problem of foreign evidence gathering. No doubt one can describe the problem as the insistence of United States courts to elude the treaty. The deeper problem is that discovery is an entrenched, fundamental right of the American litigant.[40] Further, from the start, the Hague Convention has included an opt-out provision, allowing foreign states to refuse such discovery.[41] Civil law nations and their courts have a duty to protect their citizens from the reach of American discovery as much as their United States counterparts have a duty to exert discovery. In 1994, Gary Born suggested as a reform model that, in exchange for a binding commitment that United States courts apply the Hague Convention, foreign states would abandon Article 23 opt-outs under the Convention and execute American letters of request for discovery delivered pursuant to the Convention where the information sought was "materially relevant" to the litigation.[42]

Noëlle Lenoir suggests that, for France, the solution is to persuade both American judges and French litigants that the French blocking statute must be taken seriously.[43] She would like to see the statute applied much more frequently so that United States judges understand that the statute imposes a legal obligation to abide by the statute under pain of criminal sanction to French nationals, and thus is far from the sham threat to French citizens that United States judges often perceive it to be.[44] She also would like the fines attached to the blocking statute to be dramatically higher for French litigants who violate the law by complying with American discovery requests.[45] She reasons that the current fines do not represent a deterrent for multinational corporate defendants even if judges were to

38. *See* Lenoir, *supra* note 4, at 487, 499.

39. *See Principe de le contradiction et droits de la défense*, COUR DE CASSATION, https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2012_4571/livre_3_etude_preuve_4578/partie_4_administration_preuve_4589/principes_gouvernant_4591/principe_contradiction_26240.html [https://perma.cc/KZ43-KHCX] (last visited Feb. 12, 2016).

40. *See supra* note 2 and accompanying text.

41. *See supra* note 10.

42. Born, *supra* note 11, at 77–78.

43. Lenoir, *supra* note 4, at 493, 497.

44. *Id.* at 496.

45. *Id.* at 500.

apply the blocking statute against French nationals with more zeal than they do today.[46]

As law transnationalizes in the sense of ever-increased encounters across the globe's judicial fora, some harmonization will need to be developed so that values from civil law and common law legal orders can coexist. One option that has flourished is the non-state solution of international arbitration, which has taken precedence over national courts for the resolution of international disputes in private law. This institution has so far proven flexible. International arbitration tribunals, often composed of arbitrators from both common law and civil law states, may allow a limited amount of discovery, enough maybe to permit a common law American litigant adequate discovery for comfort. One might perhaps phrase the situation more aptly in the converse: the application of rules of general international arbitration may put litigants from common law and civil law states in a condition of mutual *discomfort*, but a discomfort each side seems able to accept.

All major international arbitration institutions permit discovery. Arbitrators vary in how much they will permit, and the International Bar Association rules refer only to selected aspects of American-style discovery.[47] For careful lawyers, however, the matter of discovery in any future arbitration between contracting parties from different legal systems can be regulated completely through the contract's arbitration clause if the lawyers on both sides can reach a mutually satisfactory agreement about the amount and nature of the discovery they will be able to conduct in case of a future dispute.

For the moment, the United States and other civil law nations lumber forward in their task of better "translating" each other's legal systems and cultures to increase understanding and to enhance international harmonization; perhaps that is the most for which one can ask.

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46. *Id.*

47. 1999 INT'L BAR ASS'N WORKING PARTY & 2010 INT'L BAR ASS'N RULES OF EVIDENCE REVIEW SUBCOMM., COMMENTARY ON THE REVISED TEXT OF THE 2010 IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 7 (2010), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0 [https://perma.cc/TS3L-EFLB].