

The French Blocking Statute – Avoiding a judicial crossfire

The French Blocking Statute (Law No. 80-538 of 16 July 1980) can create utter bafflement for parties to a litigation outside of France, but who need information held on French territory or by persons located in France. In application of its provisions, they can be caught in a judicial cross-fire where they risk a fine before the US courts (for example) if they do not produce the requested information and criminal penalties in France if they even seek out this information.

Three of the major French cases applying the Blocking Statute concern companies who invoked its provisions against injunctions from US courts to produce documents in the context of discovery proceedings.^[1] In all three cases, French judges found that for these companies to communicate documents to foreign jurisdictions in the context of ongoing or future proceedings would be contrary to Article 1 *bis* of the Blocking Statute. A more recent decision rendered by the Criminal Chamber of the *Cour de cassation* of 12 December 2007 (the « MAAF Decision »), fined a French lawyer for having sought information on the circumstances in which the board of directors of the insurance company MAAF had bought shares of an insurance company called “Executive Life”.^[2] The Court found the attorney guilty for having merely seeking information covered by Article 1 *bis* of the Blocking Statute (information of an economic, financial or commercial nature and aimed towards building evidence in the context of a foreign judicial procedure).

This decision demonstrates the general nature of the content covered by the Blocking Statute, whose main objective is not only to protect French interests from American style discovery^[3], but to promote the use of international judicial assistance established through international treaties and agreements, such as the Hague Convention of 18 March 1970. In order to promote this international cooperation, Article 1 and Article 1 *bis* of the Blocking Statute list different incriminations concerning the exportation of information out of France.

Article 1 of the Blocking Statute prohibits communicating (in writing, orally or in any other form) to foreign public officials:

- “documents or information of an economic, commercial, industrial, financial or technical nature and the communication of which is against the sovereignty, security, or essential economic interest of France or its public policy.”
- The scope of Article 1 *bis* of the Blocking Statute is different than that of Article 1 as it prohibits requesting, seeking, or communicating (in writing, orally, or in any other form), to obtain proof in the context of ongoing or future foreign judicial or administrative proceedings:
- “documents or information of an economic, commercial, industrial, financial or technical nature.”

Consequently, when the information requested or provided is meant to be used in the context of foreign judicial or administrative proceedings, the scope of the Blocking Statute is significantly wider than when the information is to be simply communicated to foreign public officials. Article 1 *bis* does not necessitate the information requested or communicated to be against the sovereignty, security, or essential economic interest of France or its public policy, which widens even further its scope.

Moreover, Article 1 *bis* does not state that the information obtained must be adduced as proof in foreign proceedings, but that it is simply obtained in the context of said foreign proceedings.

In the facts leading to the MAAF decision, no actual information was received. The MAAF executive contacted by the attorney had allegedly responded vaguely and then contacted French prosecutors. In light of this decision, the only criterion needed to prosecute is for the accused to have sought information. In addition, the *Cour de cassation* in the MAAF Decision specifically criticized the attorney for not having received a special power in accordance with the provisions of the Hague Convention of 18 March 1970.^[4]

Article 3 of the Statute penalizes such infractions by a maximum prison sentence of 6 months and a fine of up to 18,000 euros.

However, the Blocking Statute is not meant to hinder relations between attorneys and their clients.^[5] The French Minister of Justice confirmed that the Blocking Statute should not apply in the absence of foreign judiciary or administrative proceedings, especially as regards business relations with foreign countries, nor limit or control relations between international attorneys and their clients.

The *Cour de cassation* in the MAAF decision also specified that the Blocking Statute should not be seen as a disproportionate obstacle to a defendant's rights to a proper defense, as this is guaranteed by the procedures set out under the Hague Convention of 18 March 1970.^[6]

Given the lack of regard many US courts have for the Blocking Statute and its enforcement by the French courts as demonstrated by the MAAF decision, great care must be taken in trying to obtain proof in France. Coordination between the US proceedings and any measures that could be taken in France to obtain proof is not only necessary for the proper execution of such measures, but also to avoid fines or penalties whether it be in the US or France.

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[1] Court of first instance of Nanterre, 22 December 1993, JurisData No. 1993-050136; *Cour de cassation*, 2nd civil chamber, 20 November 2003, No. 01-15.633; Commercial Court of Paris, 20 July 2005, JurisData No. 2005-288978.

[2] *Cour de cassation*, Criminal Chamber, 12 December 2007, No. 07-83.228, JurisData No. 2007-042157.

[3] The discovery proceedings took place accordingly in France according to the rules set out by the Hague Convention (Chapter 1) and under the control of the French judge ; in reality the attorney designated by the insurance commissioner undertook and investigation to find witnesses to whom he offered monetary compensation.

[4] It is necessary to specify that the US courts in the MAAF Decision had already formulated a request for judicial assistance, which may have possibly exacerbated the decision rendered against the attorney.

[5] Response from the Minister of Justice to the French Parliament, JOAN Q,26 January 1981, No. 373.

[6] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: The use of this Convention would allow the US courts to initiate a procedure of judicial assistance under which the desired information could be obtained, if it is sufficiently enumerated.