Comment

Christopher X and CNIL: A Clarion Call To Revitalize the Hague Conventions

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I. INTRODUCTION

ETSI found itself in a bind. A leading French nonprofit organization focused on standardizing transmission frequencies across telecommunications networks worldwide,1 the European Telecommunications Standards Institute (ETSI) had played a major role in promoting global interoperability of telecommunications equipment using cutting-edge technology.2

Yet, the selection of one set of technological standards for a network invariably means the exclusion of another, which often invites accusations of anticompetitive conduct.3 As a result, it was unsurprising when, in 2012, TruePosition, a developer of cellular telecommunications products whose network architecture was denied inclusion in ETSI’s list of standard network formats, sued ETSI and several other firms alleging a conspiracy to deny TruePosition access to the global communications market.4 As discovery proceeded, however, ETSI argued that it could not produce much of the evidence sought by TruePosition because cooperating with American-style discovery requests in France is criminalized under the country’s so-called “blocking statute.”5 Indeed, the French Court of Cassation had just enforced the blocking statute for the first time inIn reAdvocat “Christopher X”6—and had levied heavy penalties against the offending lawyer.7

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5. Id. at *3.
Nevertheless, the TruePosition court—like virtually every court before it—proceeded to demand the production of documents from ETSI directly using the Federal Rules of Civil Procedure (FRCP). The court did so in spite of the existence of the Hague Conventions, a pair of treaties designed to bridge the gap between common-law jurisdictions like the United States and civil-law jurisdictions like France with respect to discovery procedures. Indeed, France’s blocking statutes explicitly seek to channel the production of evidence to American courts through the Hague Conventions by criminalizing the production of evidence for foreign courts through any other process. French entities like ETSI that are subjected to American litigation thus find themselves in the whipsaw of competing requirements engendered by discovery demands to foreign litigants in U.S. courts, or those with non-U.S. data, [which] subject them to the Hobson’s Choice that may lead them to ask the following question, when faced with a U.S. court order requiring production in litigation: “Do you prefer I go to jail here, or there?”

American courts have wrongly disregarded Christopher X, placing French companies that operate in the United States uniquely in peril when faced with litigation. In particular, American courts have failed to recognize the rising tide of data protectionism in France heralded by the French Court of Cassation’s opinion and by the increasingly hostile policy posture towards American-style discovery of the Commission Nationale de l’Informatique et des Libertés (CNIL), the French agency charged with protecting data privacy. Without showing the appropriate degree of solicitousness when deciding whether to enforce a subpoena, American courts are raising the likelihood that French companies will face criminal punishment at home. As a result, the Supreme Court should abandon the approach of applying the comity analysis articulated in its most recent jurisprudence determining how to elicit evidence located in France and instead designate the Hague Conventions as the first-resort set of procedures for procuring such evidence.

Part II of this Comment examines the Hague Conventions, which provide the procedures guiding the execution of international requests for discovery material, and the French blocking statutes, which effectively designate the Hague Conventions as the only mechanism legal under French law by which an American court can obtain evidence located in France. Part III reviews the line of precedent that authorizes American courts to disregard the Hague Conventions and to compel discovery from French entities, even if doing so would implicate the French blocking statues. It also examines the French Court of Cassation’s decision in Christopher X, which, despite heralding a tectonic shift in the enforcement of the French blocking statutes, has been explicitly

Discovery Procedure, 25 GEO. J. LEGAL ETHICS 623, 624 (2012) (noting that the French Supreme Court had upheld a fine of 10,000 euros against the defendant).

discounted by American courts. Part IV argues that American courts have underestimated the impact of Christopher X and the recent policy shifts announced by CNIL, and that the principles of fair competition undergirding the cases establishing jurisdiction over foreign entities necessitate a new look at how courts should compel production of evidence residing abroad.

II. THE HAGUE CONVENTIONS AND THE FRENCH BLOCKING STATUTES

The Hague Conventions, which consist of the Hague Service Convention and the Hague Evidence Convention, provide the framework under which judicial bodies may obtain discovery of evidence located in foreign countries. Each signatory nation to the Hague Conventions, including the United States and France, must designate a “central authority” that receives subpoenas from foreign courts, which, if deemed by the central authority to comply with the relevant Convention, are then transmitted to an appropriate judicial body for a response. Under the terms of the Hague Conventions, a nation’s central authority must comply with the foreign court’s subpoena if doing so would comport with the host nation’s laws; if not, the central authority must accomplish service to whatever extent is allowed by the host nation’s laws. When seeking to obtain information through the Hague Conventions, American courts may impose sanctions on parties that do not provide the desired information. At the same time, foreign nations may choose to employ different methods of obtaining evidence outside those provided for in the Hague Conventions. In addition, the Hague Conventions and the French Blocking Statutes...

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11. Id. art. 2; Hague Service Convention, supra note 9, art. 2. The Department of Justice serves as the central authority for the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. c (1987).

12. See Hague Evidence Convention, supra note 10, art. 12; Hague Service Convention, supra note 9, art. 13; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471(2)(c) (1987); see also G. Brian Raley, A Comparative Analysis: Notice Requirements in Germany, Japan, Spain, the United Kingdom and the United States, 10 ARIZ. J. INT’L & COMP. L. 301, 308 (1993) (describing Article 13 of the Hague Service Convention as important for “limiting the scope of a state’s power to refuse requests for service to cases involving national sovereignty”); T. Bradbrooke Smith, Cross-Border Litigation Involving Canadian and U.S. Litigants, 17 CAN.-U.S. L.J. 261, 271 (1991) (“Article 12 of the Hague Evidence Convention . . . authorizes a refusal to execute letters rogatory where the state addressed considers that such a request would prejudice its sovereignty or security.”).


14. Id. § 442 cmt. h; see also Keith Y. Cohan, Note, The Need for a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law, 87 TEX. L. REV. 1009, 1019-20 (2009) (discussing the typical methodologies used by courts when determining whether to impose sanctions).

15. See Joseph F. Weis, Jr., The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. PIT. L. REV. 903, 914-15 (1989) (“As is true in the Service Convention, . . . signatories [to the Hague Conventions may] arrange for more liberal procedures by separate arrangements between themselves. The two Conventions are similar also in that they apply only...
Conventions allow signatory nations to declare preemptively that they will not enforce certain pretrial discovery orders if doing so would conflict with domestic law.\(^{16}\) France is one such country, having passed a law limiting pretrial discovery of documents.\(^{17}\)

In addition to passing its law limiting pretrial discovery, France has sought to funnel all foreign requests for discovery through the Hague Conventions by passing “blocking statutes.” Relevantly, French Penal Code Law No. 80-538 provides as follows:

Article 1A. Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

Article 2. The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosures.\(^{18}\)

In theory, the French blocking statute criminalizes the production of evidence in any proceedings conducted outside of the Hague Conventions.\(^{19}\) Criminal penalties would apply irrespective of whether a French party provided evidence in response to a request by an American court or if it delivered to an American entity any information of the sort encompassed by the blocking statute.\(^{20}\) However, for years after passing the law in 1980, France showed little interest in enforcing the blocking statute.\(^{21}\) This absence of enforcement appears to have emerged largely from the law’s symbolic original intent, as the
blocking statute was passed to prevent the U.S. Department of Justice from enforcing American antitrust laws against France-based shipping cartels. When those cartels subsequently dissolved, French authorities did not begin using their authority to rebuff the increasingly aggressive jurisdictional reach of American courts into French entities. On this basis, American courts repeatedly compelled the production of evidence from French parties without concern that such parties would face criminal prosecution in France, a critical building block of the cases that undermined the Hague Conventions.

III. AMERICAN COURTS AND THE ASSERTION OF EXTRATERRITORIAL JURISDICTION

Despite the United States being a signatory to the Hague Conventions, American courts have routinely asserted the power to demand evidence held by foreign entities through the FRCP. In the seminal case on this issue, Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, the Supreme Court announced that a district court could “order a party subject to its jurisdiction to produce evidence even though the act of production may violate [a blocking] statute.” Though it granted that a foreign party could secure a reprieve from a subpoena after making a good-faith attempt to comply, the Court provided trial judges wide latitude to decide whether to impose sanctions on recalcitrant foreign parties.

With the principle established that courts can enforce subpoenas by using their power to sanction foreign parties, subsequent courts have focused on identifying the circumstances in which this power should be asserted. Thirty years after Rogers, a bare majority of the Supreme Court, led by Justice Stevens in Société Nationale Industrielle Aérospatiale v. U.S. District Court for

22. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 n.4 (1987); see also SPENCER WEBER WALLER ET AL., ABA ANTITRUST SECTION, SPECIAL DEFENSES IN INTERNATIONAL ANTITRUST LITIGATION 97-98 (1995) (describing the rationales for the development of various European blocking statutes).

23. See Toms III, supra note 19.


27. See Rogers, 357 U.S. at 212.
the Southern District of Iowa, declined to mandate that the Hague Conventions be the first resort for eliciting evidence held abroad; rather, Aérospatiale directed trial courts to conduct a multifactor “particularized analysis” guided by the “concept of international comity” when considering whether to request evidence through the Hague Conventions or through a direct subpoena enforced by sanctions under the FRCP. The Court defined “comity” for purposes of this analysis as “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” Relevant factors for performing this test include the “particular facts, sovereign interests, and likelihood that resort to those [non-Hague Convention] procedures will prove effective.”

Justice Blackmun argued in dissent that courts should apply a “general presumption” to “resort first to the [Hague] Convention procedures,” in no small part because civil-law jurisdictions impose restrictions on evidence-gathering procedures due to differing views on how to protect the “underlying substantive rights” of the parties. Ignoring the only means of obtaining discovery to which other countries have consented, Justice Blackmun warned, would come “to the detriment of the United States’ national and international interests” by demonstrating “insensitivity to the interests safeguarded by foreign legal regimes.” In short, the “price tag” for ignoring the Conventions would include “the predictable long-term political cost that cooperation will be withheld” when American courts seek to conduct discovery abroad.

Nevertheless, Justice Stevens’ perspective has clearly carried the day in the lower courts. Subsequent courts have applied several iterations of the international comity test that emphasize different factors, such as whether the “competing interests of the nations whose laws are in conflict,” whether a foreign court will adequately protect the parties’ rights, and whether the foreign entity made a good-faith attempt to obtain the desired evidence.

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28. Aérospatiale, 482 U.S. at 543-44.
29. Id. at 543 n.27 (citing Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 n.9 (1797)). The Court also cited with approval the definition of “comity” provided in Hilton v. Guyot, 159 U.S. 113, 163-64 (1895), in which the Court described “comity” as the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” Aérospatiale, 482 U.S. at 543 n.27.
30. Aérospatiale, 482 U.S. at 544.
31. Id. at 548-49 (Blackmun, J., concurring in part and dissenting in part).
32. Id. at 558.
33. Id. at 548.
34. Id. at 567-68.
35. Id. at 568.
37. Cf. Voda v. Cordis Corp., 476 F.3d 887, 901 (Fed. Cir. 2007) (describing the consideration of whether a foreign court will protect the parties’ rights as falling under the umbrella of "considerations of comity" in the context of deciding whether an American court should exercise supplemental jurisdiction over foreign patent infringement claims).
Despite this proliferation of tests, courts have rarely ruled in favor of foreign entities asserting their domiciles’ blocking statutes as a defense against complying with a subpoena. As one appellate court put it in true understatement, “Societe Internationale did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law.” 39 A district court judge captured the attitude of most courts in reasoning that foreign corporations that, “as a means of advancing their profit-making businesses in the United States, incorporated under the laws of the United States and then placed their [products] in this country’s stream of commerce, have little to complain about when served with enforceable discovery requests under the Federal Rules of Civil Procedure.” 40 Critical to this assessment has been the assumption—historically correct—that a French party would incur no real penalties from complying with the American court’s subpoena, since French blocking statutes do “not appear to have been strictly enforced.” 41 Most recently, some American judges have reasoned that, since a French corporation would experience no “hardship” from complying with the subpoena and French authorities have apparently chosen not to react to intrusions by American courts, steep fines should be imposed on intransigent foreign parties. Such fines—as high as twenty thousand dollars per day of noncompliance—have been upheld by appellate courts. 42

The French Court of Cassation’s decision in Christopher X could have changed that calculus. 43 In Christopher X, the California Insurance Department (CID) sued French insurer Mutuelle d’Assurance Artisanale de France (MAAF) in federal court in connection with allegations of fraud. During the litigation, the court issued various requests for evidence under the Hague Evidence Convention from MAAF located in France. A French lawyer, acting as an agent of the lawyers representing the CID, took the initiative to call a former director of MAAF to speak about various events germane to the fraud allegation. Thereafter, MAAF filed a criminal complaint against the French lawyer complaining of violations of the blocking statute. 44 The Paris Court of Appeal, and the French Court of Cassation affirmed, that the lawyer had independently “bypassed the Hague Convention procedures and approached an

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42. See, e.g., First City, Tex.-Hous., N.A. v. Rafidain Bank, 281 F.3d 48, 51, 55 (2d Cir. 2002); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1480-82 (9th Cir. 2002).
43. See Christopher X, supra note 6.
ex-director for the defendant, without his consent, for a statement.\textsuperscript{45} Exercising their powers under the blocking statute for the first time,\textsuperscript{46} French authorities fined the lawyer ten thousand euros, though many “observers believe that if the lawyer involved in the incident had not been a French national, he might have been sentenced to jail.”\textsuperscript{47} A subsequent decision from the Criminal Chamber of the French Court of Cassation extended the scope of \textit{Christopher X} to the production by French citizens of “contractual documents held on the U.S. territory by American attorneys.”\textsuperscript{48}

Some commentators believed that these decisions would alter American courts’ treatment of foreign defendants in matters relating to discovery.\textsuperscript{49} Indeed, although France has not launched any subsequent criminal prosecutions under the blocking statute, anecdotal evidence suggests that some multinational firms are avoiding locating facilities in the United States due to fear of being opened up “to intrusive, and often extravagantly expensive investigative discovery”\textsuperscript{50} and due to a widely held perception that related criminal penalties “will likely increase in the future, exacerbating cross-border discovery conflicts.”\textsuperscript{51}

Nevertheless, American courts have not accepted that, after \textit{Christopher X}, French parties are truly at risk of liability for acceding to requests for discovery outside the Hague Conventions. Although \textit{Christopher X} was decided in 2007, only four American courts have explicitly referenced the case. In the first such reference, the court noted that the lawyer who solicited evidence outside the Hague Conventions had done so on his own initiative, rather than in response to an order by an American court.\textsuperscript{52} Even though the French Court of Cassation did not identify this difference as relevant in determining whether to apply the blocking statute,\textsuperscript{53} the court nevertheless

\begin{thebibliography}{10}
\bibitem{48} Taber-Kewene & Di Meglio, \textit{supra} note 44, at 61 (citing Cour de cassation [Cass.], [supreme court for judicial matters] crim., Jan. 30, 2008, JurisData No. 06-84.098 (Fr.)).
\bibitem{51} SEDONA CONFERENCE, \textit{supra} note 49, at 5.
\bibitem{52} \textit{In re Global Power Equip. Grp., Inc.}, 418 B.R. 833, 849 n.7 (Bankr. D. Del. 2009).
\end{thebibliography}
concluded on this basis that the defendant in the case at hand had “presented no evidence to suggest that [it] . . . faces a significant risk of prosecution if it complies with the discovery requests pursuant to an order of [the] Court.” 54 This same reasoning was applied in the contexts of a private suit alleging anticompetitive conduct (the TruePosition case), 55 an antitrust enforcement action, 56 and a patent infringement suit. 57 In each of these cases, irrespective of whether the French party had exhibited good faith in attempting to comply with a discovery request, the court ordered the production of evidence over the objection that complying with the order would violate the French blocking statute. 58 In short, Christopher X appears not to have affected the Rogers and Aerospatiale line of cases. As Part IV demonstrates, American courts should reevaluate Christopher X and the substantial impact it portends for French companies engaged in American litigation.

IV. REEVALUATING CHRISTOPHER X AND THE ENFORCEMENT OF SUBPOENAS ABROAD

American courts have analyzed Christopher X in isolation from the broader trend towards data protectionism in France. Unchecked, the continued enforcement of subpoenas outside the Hague Conventions framework threatens to accelerate this trend by increasing the pressure on French companies to comply with discovery requests, which, in turn, will increase the likelihood that those companies will face sanctions at home. Given these developments, the Supreme Court should revisit Aérospatiale and return the Hague Conventions to their proper place as a first resort for eliciting the production of evidence from abroad.

American courts have disregarded the French trend toward restricting the dissemination of data in connection with legal proceedings outside France. Writing in April 2008, one prominent French litigator noted the interesting coincidence in timing of the Christopher X ruling and the announcement of the newest policies of CNIL, the French administrative agency charged with regulating data privacy issues. 59 Shortly before the publication of Christopher X, CNIL announced its intention to identify policy responses to complaints from French companies “stemming from their legal obligations under U.S. law to . . . collect data for pretrial discovery.” 60 While CNIL did not offer any

54. 418 B.R. at 850.
58. See supra cases cited in notes 52-57; see also Grosdidier, supra note 53, at 20-22 (describing the minimal degree of deference post-Aérospatiale courts have shown to the French blocking statutes).
59. See Marie Danis, Sanction de la communication illicite de renseignements à une autorité judiciaire étrangère, LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES, Aug. 28, 2008, at 21, 26 (Fr.).
60. Beryl A. Howell & Laura S. Wertheimer, Data Detours in Internal Investigations in EU
specific policy recommendations at the time, it did suggest that it would begin working with the European Union to develop procedures for resisting further intrusion by American courts.

Subsequent CNIL policy pronouncements show that this resistance is growing. In July 2009, CNIL issued guidelines affirming that any “transmission of information in the context of a ‘Discovery’ procedure must be conducted in accordance with the Hague Convention.” American court orders to obtain evidence outside the Conventions are said to be “without force” in France, and any party that complied with such orders risks fines and imprisonment under the French blocking statute. Nevertheless, American courts have disregarded this growing assertiveness, leading two scholars to conclude that, decades after the first international discovery cases “and the first of the Blocking Statutes, the U.S. and foreign countries are actually moving further apart, rather than finding solutions to this intractable problem.”

This trend underscores the prescience of Justice Blackmun’s dissent in *Aérospatiale* and demonstrates that the time has come for *Aérospatiale* to be “reexamined to ensure that lower courts are . . . demonstrating respect ‘for any sovereign interest expressed by the foreign state.’” The political blowback that Justice Blackmun predicted twenty-five years ago should now prompt the Court to restore the Hague Conventions as the first resort for conducting international discovery and abandon the case-by-case comity analysis. The fundamental problem with taking a case-by-case comity approach in this instance is that it duplicates and misinterprets the comity analysis that the participants in the Conventions already took into account when drafting the treaties. The Hague Conventions represent a compromise that sought to bridge the gap between civil law and common law jurisdictions that take fundamentally different approaches to obtaining and reviewing evidence. When negotiating and drafting the Conventions, the signatory nations “considered the factors that are relevant to a comity analysis” and, in doing so, “represented the

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62. *Id.* at 2.
63. *Id.* at 3.
64. See supra notes 52-57 and accompanying text.
67. See supra note 35 and accompanying text.
sovereign interests of the signatory states better than individual litigants possibly could.” 68 The signatory nations compromised significantly in agreeing to the Conventions, and the United States thereafter “agreed to honor the commitments which the [Conventions] contain[].” 69 Applying a comity analysis at best duplicates the efforts of the Hague Conventions negotiators and, at worst, undermines them.

Moreover, the Supreme Court should recognize the French backlash against the American circumvention of the Hague Conventions—embodied in both the Christopher X decision and the CNIL policy announcements—as an expression of the perception of the comity analysis as fundamentally unfair and illegitimate. In many respects, the courts’ tendency to disregard potential blocking statute liability after performing comity analyses 70 confirms the thesis that comity analysis typically leads courts to engage in “discriminatory classification of litigants with equal claims to forum governance,” resulting in courts favoring one particular group of litigants. 71 In other words, comity analysis results in courts treating American and French litigants differently based upon their countries of origin and the courts’ interpretation of those countries’ interests in having their laws enforced, even though the parties themselves have equal claims to having their rights vindicated in the court forum. Indeed, scholarly views of Aérospatiale-era decisions applying comity analysis to the question of whether to apply the Hague Conventions suggest a consistent judicial bias in favor of circumventing the Conventions entirely, 72 which uniquely and unfairly subjects French litigants to liability. This result represents a significant erosion to the rule of law. 73 It also ignores the fact that the Hague Conventions were crafted specifically to “avoid offending notions of judicial sovereignty prevailing in many civil law nations.” 74 Aérospatiale allows American courts to ignore the balance of sovereign interests incorporated in the Conventions themselves.

This current state of affairs is fairly ironic in light of the fact that the historical purpose of comity analysis was to “mediate conflicts between


69. Weis, supra note 15, at 931.

70. See supra notes 52-57.


73. Weinberg, supra note 71, at 87.

74. Born & Hoing, supra note 72, at 396.
sovereigns” with the goal of “‘assur[ing] judicial efficiency and [reflecting] abiding respect for other courts.’” The idea that comity analysis should be used to promote harmony among nations has been repeated by a number of scholars elsewhere, including both then-Judge Breyer and Justice Scalia. By applying a comity analysis instead of looking first to the Hague Conventions—which are the most concrete and direct expression of how the United States and France wish to reconcile differences in their methods of taking discovery—American courts have only worsened the conflict that the Conventions were initially implemented to solve. The rise of data protectionism in France and the response by CNIL and the French courts to invasive American discovery methods proves that the purpose for which the Aérospatiale Court crafted its three-part comity test to determine how best to take discovery has not served the interest for which it was created.

Therefore, the Supreme Court should reconsider its ruling in Aérospatiale and create a presumption in favor of first using the Hague Conventions to conduct international discovery. Concerns about the relative efficiency of the Hague Conventions would be best addressed through reforms institutionalized through negotiations of the party nations, rather than piecemeal through the courts. Adopting the position of Justice Blackmun’s dissent is the best way to ensure the ongoing cooperation of French institutions in effectuating American discovery requests while eliminating the whipsaw that has bedeviled French defendants for over three decades.

V. CONCLUSION

This Comment has argued that the current practice of applying a case-by-case comity analysis to determine whether to opt for the Hague Conventions or the FRCP in taking discovery from French entities has proven woefully inadequate to the task. As the tide of data protectionism in France continues to rise, ongoing efforts to extract discovery from French entities in contravention of French blocking statutes will continue to generate cross-border tension. As a result, the U.S. Supreme Court should reverse itself and restore the Hague Conventions to their proper place as the prime avenue for securing cross-border discovery.