Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: **July 18, 2007**		
In re:		
		Chapter 11
ENRON CORP., et al.,		
		Case No. 01-16034 (AJG)
Reorganized Debtors.		Confirmed Case
ENRON CORP.,		
Plaintiff,		
v.		Adv. No. 03-92677 (AJG)
J.P. MORGAN SECURITIES INC., *et al.*,		
Defendants.		

Present: Hon. Arthur J. Gonzalez, Bankruptcy Judge; _____, Courtroom Deputy; _____, Court Reporter

Appearances: **As set forth on the record of the Hearing.**

Proceedings: **X** Motion, dated June 28, 2007, for Relief from the Cycle 9 Deposition Schedule (the "Motion").

Orders: **X** The Court denies the Motion as set forth on the record of the hearing. [A copy of which is attached as Exhibit "A"].

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez	7/18/07	Jacqueline De Pierola
United States Bankruptcy Judge	Date	Courtroom Deputy

Exhibit “A”

On June 28, 2007, AXA Court Terme, AXA IM Euro Liquidity, both represented by their asset management company, AXA Investment Managers, Paris, S.A. (collectively “AXA”) filed a motion for relief from the Cycle 9 Deposition Schedule, pursuant to Sections I and V of the Court’s June 15, 2006 Deposition Protocol Order. Specifically, AXA requests a further postponement of the now adjourned June 28, 2007 deposition of Corinne Gaborieau, an AXA employee, as well as further production of information related to the transactions at issue in this case including analyst reports prepared by Gaborieau in France in October 2001 and certain tape recordings. AXA wishes to continue the postponement of the deposition and the delivery of information until after letters rogatory have been served in compliance with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970 (the “Hague Convention”).

AXA argues that it is obligated to comply with the discovery procedures of the Hague Convention because it is otherwise prohibited from voluntary production of witnesses and documents pursuant to the French Penal Code, Law No. 80-538 (the “French Blocking Statute”) which carries a punishment by fine and/or imprisonment. AXA also argues that the production of Gaborieau’s analyst reports and other documents or tape recordings may violate Law No. 78-17, also known as the Data Protection Law, which, pursuant to article 68 of the statute, limits the transfer of personal data to a state outside of the European Community.

Regarding the Data Protection Law, AXA asserts that answers to personal questions asked during depositions, such as “what is your name” and “what is your

background," as well as tape recordings of somebody's voice are the kinds of information that are protected under this statute. The Court finds that such concerns are without merit. First, the personal questions that would be asked during the deposition have likely already been answered in Gaborieau's completed deponent questionnaire that AXA provided to Enron on March 20, 2007. The information provided on that questionnaire included personal data such as Gaborieau's education and employment background with AXA. (*See* Madden Decl., Ex. 2.) Second, while the Data Protection Law does not specifically refer to a person's recorded voice, the statute's broad definition of "personal data" could possibly encompass such a trait. *See* Law No. 2004-801 of Aug. 6, 2004, *modifying* Law No. 78-17, art. 2 ("Personal data means any information relating to a natural person who is or can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to him."). However, whether voice recordings are encompassed in this statute or not, AXA may still transfer Gaborieau's information pursuant to article 69(3) of the Data Protection Law which provides that

> the data controller may transfer the personal data to a State not satisfying the conditions provided for in Article 68 if *the data subject has expressly consented to their transfer* or if the transfer is necessary subject to one of the following conditions for . . . the meeting of obligations ensuring the establishment, exercise or defence of legal claims . . . .

Law No. 2004-801, art. 69(3). Given AXA's demonstrated cooperation in the discovery process thus far, it does not appear that consent will be an issue of dispute. Thus, the paramount issue before the Court is whether the threat of prosecution under the French Blocking Statute is sufficient to warrant implementation of the Hague Convention discovery procedures.

In general, courts should "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987). This does not mean, however, that the Hague Convention is the exclusive means for obtaining evidence located abroad. *See id.* at 541 (holding that the Hague Convention is not mandatory, but rather is "one method of seeking evidence that a court may elect to employ"). As held by the United States Supreme Court, a court should not resort to the Hague Convention discovery procedures "without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective." *Id.* at 544. To that effect, when determining whether to compel foreign parties to produce documents located abroad, courts in the Second Circuit apply a balancing test which is derived from both *Aérospatiale* and section 442 of the Restatement (Third) of Foreign Relations Law of the United States.

The principal factors considered in this test are four-fold, "(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, (3) the importance to the litigation of the information and documents requested, and (4) the good faith of the party resisting discovery." *Minpeco S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987). Based on the facts before the Court, these factors weigh heavily against granting AXA's motion.

Regarding the "importance to the litigation" factor, AXA effectively concedes that the information at issue is important. *See* AXA Mot. for Relief 8 (asserting that since AXA "is willing to cooperate in obtaining the letters rogatory, the Court need not even consider the importance of the information to the case . . . ."). Thus, this factor weighs in favor of denying AXA's motion.

Regarding the "competing interest" and "hardship" factors, AXA argues that it may face criminal liability under the French Blocking Statute if the Court declines to proceed under the Hague Convention discovery procedures. A plethora of Second Circuit cases, however, rejects the notion that the French Blocking Statute provides a substantial enough risk of prosecution to warrant a departure from the Federal Rules of Civil Procedure. *See Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (holding that plaintiffs' fears of criminal prosecution under the French Blocking Statute appear to have no sound basis and that "[t]here is little evidence that the statute has been or will be enforced"); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, No. 80 Civ. 1911, 1984 WL 423, at *3 (S.D.N.Y. May 30, 1984) (finding that the legislative history of the French Blocking Statute gives "strong indications that it was never expected or intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign court"); *Bodner v. Banque Paribas*, 202 F.R.D. 370, 376 (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."). Moreover, even in a case where the foreign party was threatened with

prosecution by two French agencies, as opposed to AXA's concern here that focuses on the potential threat of a criminal prosecution, a court still held that the United States experience "teaches that there is little likelihood these threats [under the French Blocking Statute] will ever be carried out . . . ," and that this "speculative possibility of prosecution [was] . . . insufficient to displace the Federal Rules of Civil Procedure." *In re Vivendi Universal, S.A. Securities Litigation*, No. 02CIV5571, 2006 WL 3378115, at *4 (S.D.N.Y. Nov. 16, 2006).

Accordingly, the Court holds that the interest of the United States to apply its procedural rules for discovery for the purpose of adjudicating fully and completely matters before its courts outweighs the interest of France's enactment of the French Blocking Statute. Further, the hardship that AXA would suffer under the French Blocking Statute if the Court denies its motion is too remote and speculative to be given any weight. Thus, the competing interests factor and the hardship factor weigh against proceeding under the Hague Convention discovery procedures.

Turning to the "good faith" factor, AXA argues that it has cooperated to date and only resisted the discovery process when it realized that the French Blocking Statute and the Data Protection Law were at issue. In that regard, AXA asserts a number of instances that it claims are indicative of good faith, such as AXA's cooperation in the discovery process, its effort to supply Enron with sample letters rogatory, and its commitment to a voluntary extension of time for fact discovery. Although previous productions of documents could contribute to good faith conduct, courts usually require much more. *See In re Vivendi*, 2006 WL 3378115, at *4 (finding that attempts to obtain permission from the French government to produce documents that are not subject to the French Blocking

Statute demonstrates good faith); *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-702, 2007 WL 1558567, at *29 (E.D.N.Y. May 25, 2007) (holding that defendant made a good faith effort by, *inter alia*, sending two letters to the French government and leaving one telephone message with the French Ministry); *see also Phillips Petroleum*, 105 F.R.D. at 31 (holding that although foreign plaintiff produced substantial volumes of documents, "sheer volume alone cannot give rise to a presumption of good faith . . . "). While the Court does not believe that the record is fully developed as to AXA's conduct, the Court finds that a finding of good faith is warranted on the record before it. This factor would then weigh in favor of AXA.

In conclusion, weighing all the factors, the Court finds that the relief sought by AXA is not warranted. Further, the Court notes that AXA has taken the position that the Court should allow the Hague Convention process to proceed and if it does not seem that that process is moving expediously enough for the needs of the case, then the Court could consider the parties' position at that time and determine then whether to proceed outside the Hague Convention discovery process. Here, since it is undisputed that the French Blocking Statute is not a new statute and given the vast amount of case law on this particular statute, it is difficult to understand why the issues before the Court were not identified by AXA sooner. Therefore, before the Court would order efforts to comply with the Hague Convention at this late date, it would be incumbent upon AXA to establish that obtaining the necessary letters rogatory under the Hague Convention could be obtained without delaying the discovery for more than a brief period of time should rest with AXA. It is clear that that burden has not been met.

Further, for the sake of completeness, the Court will briefly address the alternative balancing test recently adopted by some Second Circuit courts when determining whether to depart from domestic procedural laws. Recently courts have adopted a seven-fold balancing test comprised of the "hardship" and "good faith" factors in *Minpeco* and the five factors set forth in the Restatement which consists of the "competing interest" and "importance to the litigation" factors as well as (1) the degree of specificity of the request, (2) whether the information originated in the United States, and (3) the availability of alternative means of securing the information. *See Strauss*, 2007 WL 1558567, at *10 (considering the seven factors); *Reino De Espana v. American Bureau of Shipping*, No. 03 Civ. 3573, 2005 WL 1813017, at *3 (S.D.N.Y. Aug. 1, 2005) (same). Even if the parties' pleadings had specifically addressed the additional factors in the Restatement, the Court would still come to the same conclusion. First, AXA has not objected to the specificity of Enron's discovery request regarding Gaborieau. Second, as discussed previously, the Supreme Court has held that the Hague Convention is not the only means of securing information from abroad. Enron had the option to seek discovery through the Court's Deposition Protocol Order just as much as it had the option to seek information through the Hague Convention. Thus, under the seven-fold balancing test, the facts still fail to show that the relief sought by AXA is warranted.

For the reasons stated above, the Court denies AXA's motion for relief and directs AXA to fully and promptly comply with its discovery obligations.