



# Protection of US legally privileged documents in French civil discovery procedure



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Litigation, France

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## Introduction

As with many other national laws, French law recognises parties' right to gather evidence at the pre-trial stage by way of a discovery procedure (ie, judges will require opponents to disclose files and documents under certain circumstances). However, the confidentiality of targeted files and documents can be a major obstacle to the success of such claims. In *Metabyte v Thomson*(1) the Supreme Court held that confidentiality provided by US legal privilege is unlikely to frustrate a discovery action undertaken in France.

## Facts

Claiming to be the victim of unfair commercial practices in relation to the strategic use of an IP licence, US-registered company Metabyte planned to sue one of its US competitors, the Thomson group, for allegedly committing the purported misconduct. Before filing the claim before the competent judge, Metabyte requested permission to seize any relevant evidence of such misconduct from Thomson's premises in France.

Within a specific non-adversarial procedure, the Paris Commercial Court president granted Megabyte authorisation to enter Thomson's premises and garnish any relevant evidence with the assistance of a bailiff. Such claim was founded on Section 145 of the Code of Civil Procedure.

Thomson challenged the seizure order before the Paris Court of Appeals, arguing that it was illegal and gave Metabyte access to several documents covered by confidentiality. The court rejected Thomson's claim and confirmed the seizure order.

Thomson then appealed before the Supreme Court and raised two main arguments in order to challenge the seizure.

On the one hand, Thomson considered that the seized documents were mostly letters and emails exchanged between lawyers and in-house counsel working in the United States under the legal professional privilege granted by Section 119 of the Restatement (Third) of the Law Governing Lawyers. Thus, Thomson argued that the order violated US public order and the US law, which would apply to the upcoming litigation between Thomson and Metabyte.

On the other hand, insofar as the French judge had no jurisdiction to issue a judgment on the merits in relation to the upcoming litigation, Thomson requested that the judge prevent the bailiff from giving the seized documents back to Metabyte. According to Thomson, this would have preserved US law.

### **Decision**

The Supreme Court rejected Thomson's claim and considered that the seizure complied with Section 145 of the Code of Civil Procedure. According to the Supreme Court, the measure was legally admissible under French law, insofar as the French judge was not required to verify whether the seizure violated foreign law, should the latter apply on the merits of the dispute. Confidentiality resulting from US statutory legal privilege is not a fundamental freedom. Further, it could not be applied, since French law contemplates only the confidentiality between attorneys at law as a fundamental right, not confidentiality between in-house counsel.

### **Comment**

As with US law, French law authorises the implementation of discovery procedures. Section 145 of the Code of Civil Procedure allows a party to request authorisation to carry out a legally admissible measure:

- in order to reasonably gather or preserve evidence or facts; or
- before any procedure is brought in court.

Since civil discovery can greatly constrain a defendant, French judges authorise such measures under strict conditions, by checking that the seizure is balanced. Thus, for example, a seizure cannot be compelled on documents and letters exchanged between attorneys at law, since they are covered by legal professional privilege. This is a fundamental principle governing attorneys at law and is a fundamental freedom in France.

In the case at hand, the Supreme Court was asked to consider the legality of a seizure of documents covered by confidentiality under a foreign regulation (ie, US statutory law).

It could have been argued that the French discovery procedure had to comply with US law, given the fact that the litigation could have been settled on the merits under US law – law which French courts are, of course, entitled to apply. **(2)**

Despite the above, the Supreme Court's decision not to annul the seizure on the grounds of a violation of US legal privilege complies with its own jurisprudence, which considers that a discovery compelled in France must be carried out under French law, **(3)** not foreign law.

Since France distinguishes attorneys at law, whose documents are legally protected, from in-house counsel, who are not protected by any kind of sworn-in legal privilege, no guarantees can be attached to the latter, even if they have stronger protections in another country.

The Supreme Court's stance is understandable, since discovery under Section 145 is a pre-trial measure, governed only in accordance with French procedural law requirements, regardless of the elected law applicable to the disputed matter. The judgment results in an undeniable power for French judges to grant discovery on French soil, which foreign investors can use to avoid constraints in their own jurisdictions by way of forum shopping.

*For further information on this topic please contact Nicolas Contis or Leonardo Pinto at Kalliopé by telephone (+33 1 44 70 64 70) or email (ncontis@kalliopé-law.com or lpinto@kalliopé-law.com). The Kalliopé website can be accessed at [www.kalliopé-law.com](http://www.kalliopé-law.com).*

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**Endnotes**

- (1) Supreme Court, 1st Civil Section, November 3 2016, 15-20495.
- (2) Supreme Court, 1st Civil Section, November 24 1998.
- (3) Supreme Court, 1st Civil Section, July 4 2007, 04-15.367.

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Nicolas Contis



Leonardo Pinto

