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Client Alert

The English Court's Solution to the French Blocking Statute Problem

April 1, 2014

In late December 2013, it was reported that the Supreme Court had refused permission to appeal against the decision of the Court of Appeal in *Secretary of State for Health and others v Servier Laboratories Ltd and others; National Grid Electricity Transmission plc v ABB Ltd and others* [2013] EWCA Civ 1234. In so doing, Britain's highest court brought to an end a recent line of litigation concerning a problem which had caused headaches for investigators, litigators, and the English court itself for some years. Surprisingly, perhaps, this problem was a result of a piece of French domestic legislation, the so-called Blocking Statute.

The Blocking Statute was enacted in 1968 and, following amendment in 1980, includes a wide-ranging prohibition in Article 1 *bis*, restricting how documents located in France can be used in relation to foreign judicial or administrative proceedings. It provides:

"Subject to international treaties or agreements and applicable laws and regulations, any individual is prohibited from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, with a view to establishing evidence in foreign judicial or administrative proceedings or in relation thereto."

For the scale of this prohibition to make sense, one has to consider the mischief the French government sought to remedy when enacting the Blocking Statute. Primarily, it wanted to provide a degree of cover for French parties who were increasingly facing requests, emanating from U.S. courts, for the production of documents as part of discovery. These requests were often viewed as excessive, and it was envisaged that French parties could seek to resist them by claiming that compliance would cause them undue prejudice, as it could result in the imposition of criminal sanctions under French law.

Since its enactment, commercial disputes have become ever-more international in scope. This has meant that foreign courts have had to grapple with a rise in issues relating to the Blocking Statute, as French parties have, with greater frequency, invoked its protection. However, such attempts have met with mixed success. For example, in the U.S. case *Aerospatiale v U.S. District Court*, 482 U.S. 522 (1987) the Supreme Court dismissed the French party's objections to discovery, stating: "[i]t is well settled that such [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence, even though the production may violate that statute."

Facts

The present line of litigation emerges from two unrelated cases, both concerning alleged international cartel activity involving French parties: in the case of *Secretary of State for Health and others v Servier Laboratories Ltd and others* [2012] EWHC 2761 (Ch), [2012] EWHC 3663 (Ch) (*Servier*), in the supply of pharmaceuticals to the

NHS, and in *ABB Ltd and others v National Grid Electricity Transmission Plc* [2013] EWHC 822 (Ch); (*Alstom*), in the market for gas-insulated switchgear, a component in power substations. The French defendants sought to resist an order for further information and disclosure respectively, in each case by relying on the Blocking Statute.

Servier

In *Servier*, Mr Justice Henderson stayed the claim until after the oral hearing in related European Commission proceedings which, all parties accepted, overlapped to some extent with the current claim. The judge did, however, order Servier to respond to elements of the Claimant's request for further information. He was not persuaded by Servier's objections that to comply with the order would place the company at risk of prosecution under the Blocking Statute. Servier appealed against the order.

Alstom

In *Alstom*, the claimants were seeking disclosure of documents held in France. The parties had initially agreed to a compromise, such that the claimants could get access to the relevant documents, without a risk to the French-domiciled defendants that the Blocking Statute would be engaged. To achieve this, a request was made to the French authorities under the EU Evidence Regulation (No 1206/2001) (the "EU Evidence Regulation"). Alstom claimed it had previously successfully followed the "direct route" provided for in the Regulation in similar circumstances. However, a few months after the order for obtaining the documents in this way was granted, the French Ministry of Justice refused to cooperate, going so far as to describe the request as "an abuse of procedure." The claimants made a renewed application for disclosure from the defendants, which the French-domiciled defendants again resisted. The Court was, therefore, required to consider whether it was appropriate to order disclosure, with the result that the Blocking Statute might be engaged, or attempt an alternative court-to-court route under the EU Evidence Regulation. This, the French-domiciled defendants argued, was "the appropriate route…as it would avoid the risk of their being prosecuted under the blocking statute."

In his judgment in *Alstom*, Mr Justice Roth considered in some detail the risk the defendants faced of prosecution under the Blocking Statute. Ultimately, he considered this risk negligible, on what he described as the "striking" basis that the French authorities appear to have pursued only a single prosecution in the almost fifty years since the Blocking Statute entered into force. In the 2007 case *Re Avocat Christopher X*, a French lawyer was fined €10,000 under the legislation. However, as Mr Justice Roth emphasised in his judgment, the facts in that case can be readily distinguished: there, the document request was fraudulent and did not arise from a court order.

In addition, Mr Justice Roth felt that the European Commission's stated goal of encouraging private actions for breach of competition law further undermined the defendants' protestations. He considered it "virtually inconceivable" that the authorities of one Member State would launch a prosecution on the basis of compliance with a court order of another Member State. He concluded therefore that the criminal sanctions potentially imposed by the Blocking Statute were not a legitimate concern of the English court.

In view of this, Mr Justice Roth ordered disclosure by the French defendants, finding that: "[g]iven my conclusion regarding the risk of prosecution under the French blocking statute, I see no sound basis for taking a course that involves further delay and uncertainty. I consider the French Defendants should be subject to an order for disclosure in the same way as all the other defendants." In so doing, he recalled the aphorism of Mr Justice Hoffmann (as he then was) from an earlier case that "[i]f you join the game you must play according to the local rules."

Appeals

Both sets of French defendants appealed the respective orders, arguing that the EU Evidence Regulation was the only option open to the Court, and that the Court had failed to afford sufficient weight to the prospect of the prosecution under the Blocking Statute.

Due to listing commitments, the Court of Appeal was not able to hear the appeals together, but on 22 October 2013, it handed down a detailed and very clear judgment upholding the orders of the High Court. Its conclusions were:

> (i) It was not, as the French Defendants claimed, mandatory for the Court to make use of the EU Evidence Regulation to obtain the required documents. Lord Justice Rimer reached this conclusion rejecting arguments to the contrary "unhesitatingly." Lord Justice Beatson stressed that the purpose of the procedures set out in the Regulation was to improve and accelerate the taking of evidence in another Member State and that "[i]t was aimed at increasing and not reducing options in such a context and does not, on its face, remove or restrict existing forms of proceeding." Only in situations where an order to obtain evidence in a foreign Member State would require the involvement of a judicial or public official of that Member State, would the process under the EU Evidence Regulation be mandatory.
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> (ii) The orders were procedural in nature, and were therefore governed by the *lex fori, i.e*. the laws of England and Wales. A risk of prosecution in a foreign jurisdiction provides "no defence to their making".
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> (iii) The judges at first instance correctly recognised that they had discretion to make the orders for further information and disclosure. The exercise of this discretion was "unimpeachable".
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> (iv) Lord Justice Beatson added that the supremacy of European law over domestic French law must be recognized. "This makes any attempt to use the French Blocking Statute to trump the requirements of EU law extremely unlikely."

Proposed Amendments to the Blocking Statute

This is a timely confirmation of the position of the English court. France is currently reviewing the effectiveness of the Blocking Statute as part of a wider reform on sanctioning violations of business secrets. A bill is making its way through the French parliament, aimed at enhancing the effect of the statute, by reducing the scope of the

information it protects to certain classes of non-public documents, the unauthorized disclosure of which "may seriously endanger the interests of the company." While the categories of documents covered will be reduced, the penalties for breach of the law are to be increased: from the current sanction of six months' imprisonment and/or a fine of up to €18,000 (or €90,000 for legal entities) to three years' imprisonment and/or a fine of €375,000.

It remains to be seen whether these changes will constitute a curate's egg. While the reduced scope of covered documents is surely a positive step, the increase in already severe sanctions will be greeted with more muted optimism. In the meantime, litigators will be keeping a close eye on whether, in light of these new sanctions, the French authorities will be any more likely to bring prosecutions based on the Blocking Statute. Whether this would mean that foreign courts pay more attention to the amended legislation is uncertain, but if prosecutions remain only ever a theoretical risk, the Blocking Statute will presumably continue to be viewed as an essentially toothless piece of legislation, making it likely to fall into greater insignificance.

In the meantime, the Court of Appeal's judgment provides helpful insight to French parties to proceedings in the English court. According to Jon Turner QC, lead counsel for the claimant National Grid in *Alstom*: "the Supreme Court's refusal of permission to appeal now has definitively clarified that French parties to English litigation must comply with the rules of the English court. There is no arguable case that the special procedures under the EU Evidence Regulation have to be invoked instead – these can be cumbersome and risky when compared with the normal English toolkit of disclosure, the provision of information, and witness testimony in the English courtroom."

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