GIDE

GIDE LOYRETTE NOUEL

client alert

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CROSS-BORDER DISCLOSURE OBLIGATIONS: English Court of Appeal rules that 'French Blocking Statute' does not prevent disclosure by French defendants in English proceedings

If you are involved in Court proceedings in England, but hold relevant documents in France (whether or not you are French) or anywhere else (if you are French), there is a real risk that you will be faced with the dilemma of complying with an English order for disclosure (or face contempt proceedings[1]) or committing a criminal offence under a French statute which appears to prohibit compliance with that order. What should you do? Regrettably, the recent decision of the English Court of Appeal in *Servier*[2] confirms the problem, but offers no real solution.

BACKGROUND

Much of the tension surrounding cross-border discovery arises from the fundamental differences between common law and civil law jurisdictions.

Common law jurisdictions generally require the discovery of documents that both help and hinder a party's case, and extend to all forms of document, including those stored electronically such as e-mails. The scope of the discovery exercise can be expansive. In the US, the obligation is to disclose not only relevant information but information that will lead to further discovery of relevant information. It also extends to information stored outside the US. Disclosure can also be very onerous in England, as demonstrated in *Digicel v Cable & Wireless LLC*, in which an initial trawl uncovering over a million documents was deemed inadequate (reported at [2008] EWHC 2522).

In contrast, civil code jurisdictions tend to take a much more restrictive approach to the discovery process. Under French law, for example, each party is required to prove the facts on which its arguments depend and there is no duty of disclosure whatsoever. Each party therefore decides freely which documents it wants to disclose or not. A court may order a party or a third-party to disclose a document under restrictive conditions only (typically requiring proof that an identified document, actually held by the addressee of the order, is necessary to solve the dispute).

'Much of the tension surrounding cross-border discovery arises from the fundamental differences between common law and civil law jurisdictions'

[1] A company in contempt of court can be subject to an unlimited fine and its directors can be imprisoned for a maximum of two years

[2] Conjoined appeals of *Secretary of State for Health and Ors v Servier Laboratory Ltd and Ors; National Grid Electricity Transmission Plc v ABB Ltd and Ors* [2013] EWCA Civ 1234

DECISIONS IN THE *SERVIER* CASE

The appeals related to interlocutory orders made in two separate actions in England for damages against members of cartels who were accused of breaching EU competition law. In one case, French defendants were ordered to provide further information that would assist the claimant in making its case. In the other, French defendants were ordered to give disclosure of documents.

In both cases, the defendants had submitted that the orders should not be made because compliance would put them in breach of the French Statute No 68-678 of 26 July 1968, as modified by the French Statute No 80-538 of 16 July 1980 (the **"Blocking Statute"**).

Article 1 *bis* of the Blocking Statute 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."

Article 3 imposes criminal sanctions for breach, being a maximum of 6 months' imprisonment and/or a fine of up to €18,000 or €90,000 for legal entities, such as companies.

Expert evidence[3] explained that French criminal law applies not only to acts committed in France but also to any crime committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offence. In this particular case, therefore the French defendants would commit the offence by disclosing documents, whether held in or outside of France.

In both cases, the English Court (Henderson J and Roth J respectively) assumed that the provision of information and giving of disclosure would engage the criminal offence under article 1 *bis* of the Blocking Statute, but said there was no automatic prohibition on the orders being made in such circumstances. It held that it had discretion to make the orders and since the risk of actual prosecution for the offence was deemed to be low, if not entirely theoretical, the orders should be made.

Appeals failed in both cases. The English Court of Appeal held that whether or not compliance with the orders of the English court was illegal under the French Blocking Statute, the English Court had jurisdiction to make them as part of the ordinary process of disclosure in civil proceedings, because such matters are governed by English law as the *lex fori*.

In the exercise of that jurisdiction, the Court took account of the real risk of prosecution. It determined that, on the information available to the first instance judges when they made their orders, it could not be said that their exercise of discretion was flawed. First, there had only been one prosecution[4] under the Blocking Statute since it had been enacted in 1968, and in very different circumstances to the present cases. Furthermore, as France is a signatory to the European Treaties under which the claims had been brought, French law must generally give way to the principle of the supremacy of EU law. This made any attempt to use the French Blocking Statute to trump the requirements of EU law extremely unlikely.

[3] From Justice Jean-Paul Béraudo, former justice of the Cour de Cassation

[4] In *Christopher X,* Cass. Crim. 12 December 2007

COMMENT

'Whilst the English Court has an obvious legitimate interest in setting and policing its own litigation process (including disclosure), where this conflicts with comity then the latter should prevail[5]'

The decision of the Court of Appeal is not surprising. It follows and confirms a line of English authority at first instance beginning with *The Heidberg*[6] in 1993, surviving the introduction of the Civil Procedure Rules in *Morris*[7] and, most recently, repeated in *Elmo-Tech Limited*[8]. The general trend is reflected in cases in other common law jurisdictions, where the existence of foreign blocking statutes has also failed to prevent disclosure or discovery orders being made in most cases[9]. The practical reason for these Courts holding that their procedural law should trump the provisions of the foreign statute is plain: if the foreign law prevailed, it may render the disclosure exercise, which is a cornerstone of common law litigation, nugatory. Taken to its extreme conclusion, any litigant could evade a disclosure obligation by just moving its relevant documents to (say) France.

Indeed, as courts in both England and the United States have concluded, the risk of prosecution in France for breach of the Blocking Statute *is* low. A recent article[10] highlights 25 US cases in which the Blocking Statute has been unsuccessfully invoked and discovery orders made, the effect of which presumably engaged criminal liability under French law, and not one of those cases has led to a prosecution. The single prosecution to date did not involve acts pursuant to a discovery request or order emanating from a foreign court, and is not necessarily indicative of whether French authorities would prosecute a litigant responding in good faith to, say, an English order.

However, this approach – at least as far as comity is concerned – is suspect. Quaere whether an English Court should order a French litigant to do something which it knows constitutes a criminal offence in France simply on the basis that it considers it to be unlikely, practically, that repercussions will follow. It is the litigant which runs the risk, not the English Court. Whilst the English Court has an obvious legitimate interest in setting and policing its own litigation process (including disclosure), where this conflicts with comity then the latter should prevail[11]. Even in the US, the American Bar Association has recognised that greater respect should be accorded to long-standing laws of foreign-friendly states, not least because failure to do so can *"ultimately impede global commerce, harm the interests of U.S. parties in foreign courts and provoke retaliatory measures"*[12].

Could or should the Court of Appeal have reached a different conclusion? *Servier* leaves open several arguments. First, article 1 *bis* of the Blocking Statute appears to create an offence committed *in England* by any claimant who applies for (requests) disclosure against a French

5 See similar comments by Arden LJ in *Joujou & Ors v Masri* [2011] EWCA Civ 746 at [78]. It is interesting to note that Rimer LJ, who gave the lead judgment in *Servier*, was also a member of the panel in the *Joujou* appeal.

6 *Partenreederei M/S "Heidberg" v. Grosvenor Grain & Feed Co Ltd* [1993] I.L.Pr. 718

7 *Christopher Morris v. Banque Arable et Internationale d'Investissement SA* [2001] I.L.Pr. 37

8 *Elmo-Tech Limited v. Guidance Limited* [2011] EWHC 98 (Pat)

9 In Australia, for example, see *Michael Wilson & Partners Ltd v. Nicholls* [2008] NSWSC 1230 (Kazakhstan); in Canada, see *Comaplex Resources International Ltd v. Schaffhauser Kantonalbank* (1991) 84 DLR (4th) 343 (Switzerland); in the United States, see *Societe Internationale pour Participations Industrielles et Commerciales SA v. Rogers* 357 US 197 (1958) (France) and many similar examples

10 *The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery by Pierre Grosdidier, Haynes Boone LLP* (2011)

11 See [5]

12 ABA Resolution 6 February 2012

defendant or by a defendant which communicates the existence of documents (by its disclosure list) or permits inspection of them in France. In *Morris*, Neuberger J said that if an act involves the commission of an offence in England and Wales, an English Court could not order it. Likewise perhaps where an English order is consequential upon or must necessarily lead to such offence being committed. Second, if documents are held in France and disclosure is ordered, then a search (*rechercher*) of those documents must necessarily occur in France; but this is prohibited by the Blocking Statute. The making of an order requiring a litigant to commit an act abroad which would be a criminal offence there is not something which the Privy Council has been prepared to condone. In *Brannigan*[13], the Privy Council allowed an order requiring a person in New Zealand to give evidence in New Zealand, although it related to information which under the law of the Cook Islands should not be disclosed. Yet Lord Nicholls recognised [31]:

"...that the contradictory commands of different states can give rise to acute problems for individuals. The resolution, or alleviation, of these problems is one object of the principles of foreign state compulsion ... ***The Commission has recognised that KPMG Peat Marwick cannot reasonably be expected to produce documents currently in the Cook Islands."*** (emphasis supplied)

In *Morris*, Neuberger avoided this problem by suggesting that under his order the French defendant was only required to do something *in England*, yet if disclosure does require a search for documents in France, it is difficult to reconcile *Servier* with the earlier approach of Lord Nicholls.

WHAT TO DO?

'Fortunately, the stalemate can be avoided.'

Under French law, the **Hague Evidence Convention**[14] was the exclusive means through which foreign judicial authorities can secure evidence in France[15]. It has since been supplemented (at least in so far as the judicial authorities of other EU Member States are concerned) by Council Regulation (EC) No 1206/2001. Under the Convention and Regulation, a foreign court can issue a letter of request to the French Court to take evidence on its behalf, or take evidence in France directly. Both the Convention and the Regulation apply as between the UK and France[16]. In *Morris*, Neuberger J recognised that seeking disclosure through the Convention route was "attractive" in terms of international comity and in terms of enabling the defendant to avoid even the hypothetical risk of prosecution, and he was right to recommend this course[17].

Uncertainty has, unfortunately, been introduced by the French Ministry of Justice. Roth J had in fact sanctioned the issue of a letter of request, but this was rebuffed by the French Ministry of Justice stating[18]:

"... in order to have one party produce documents considered necessary for the outcome of the lawsuit it has to settle, a court does not need to make an international application to obtain

[13] *Brannigan and ors v. Ronald Davidson* [1996] UKPC 35

[14] The Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 18 March 1970

[15] Confirmed in *Journal Officiel de l'Assemblee Nationale – Questions et Reponses*, 26 janvier 1981, p 373

[16] The Regulation prevails over the Convention (Article 21(1) Regulation). The UK does not maintain any bilateral arrangements with France, but the Convention is – of course – multilateral.

[17] Ultimately, he ordered disclosure directly, not through the Convention route, because the defendant had already delayed and taken no steps (despite having the opportunity to do so) to apply to the French Court under the Convention procedure.

[18] Letter from Mme Clementine Blanc, 21 January 2013

evidence: it suffices for it to order the party concerned to produce the said evidence. Certainly, recourse to a rogatory commission based on international instruments allows the parties to avoid the risk of being prosecuted in France on the basis of the law ... known as the "blocking statute", but this is an abuse of procedure, as no taking of evidence is in reality necessary to achieve the result sought by the judge."

That view is clearly wrong. Article 23 of the Convention expressly permits signatories to declare that they will not execute letters of request issued for the purpose of obtaining pre-trial discovery. If the Convention did not extend to such requests, no such declaration would be required. France has made a limited declaration. It must therefore recognise, in doing so, that responding to pre-trial discovery constitutes an act of "taking of evidence" within the meaning of the Convention. Indeed, this had been the position France had taken as amicus curiae in a case involving document requests before the US Supreme Court[19], in which it had stated: *"The Republic of France strongly believes that the language and negotiating history of the Convention demonstrate that it sets forth* ***mandatory procedures by which evidence located abroad may alone be sought****, unless the sovereign power permits otherwise."* (emphasis supplied)

There is no reason - in principle - to take a different approach to the Regulation.

If an English Judge is unlikely to be persuaded to issue a letter of request[20], then an alternative option might be to seek a determination that disclosure, if ordered, will *not* involve any breach of French criminal law. This suggestion might seem surprising, but the English Courts have been prepared to decide what is (or is not) French law[21]. In *Servier*, the English Court proceeded on the assumption that a criminal offence would be committed if the orders were complied with. This is by no means clear. Beatson LJ referred to France's obligations under, and the primacy over any Blocking Statute, of EU law[22]. The Blocking Statute takes effect subject to other laws in force. One such law is the EU Judgments Regulation. Although Beatson LJ does not say so, if the English Court has jurisdiction under the EU Judgments Regulation, then it would be understood that it will accordingly apply English law as the *lex fori* in respect of the procedural orders which it makes. When it does so, it is acting under and in accordance with the EU Judgments Regulation. If the Blocking Statute takes effect subject to that Regulation, then the lawful order of the Court with jurisdiction under the Regulation should prevail[23]. Arguably, such a determination *should* be recognised in France itself (again, under the Judgments Regulation). The French Courts have raised the Blocking Statute to public policy status[24] and may accordingly refuse to enforce, in France, foreign orders appearing to breach it, but none of these emanated from the courts of a Member State of the EU, even less a court upon which jurisdiction is conferred by the Judgments Regulation.

In the meantime, practical steps can and should be taken:

- Raise the Blocking Statute at the outset; a claimant appears to commit a criminal offence under French law (which operates extra-territorially) simply by requesting disclosure. Highlighting this early may make cooperation regarding issue of a letter of request more likely.

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19 *Societe Nationale Industrielle Aerospatiale v US Dist. Ct. For the S. Dist. Of Iowa* 482 US 522 (1987)

20 The time it might take to complete the process and cost involved will, inevitably, be key considerations. Practically, in future cases, a Judge might be reluctant to issue a letter of request unless and until the views expressed by the French Ministry of Justice are corrected.

21 See the decision of the Supreme Court in *Dallah Real Estate and Tourism Holding Company v. The Republic of Pakistan* [2010] UKSC 46

22 See [19]

23 Roth J comes close to this at [47] of his judgment

24 See [14]

- To the extent possible, request issuance of a letter of request under the Hague Convention or the EU Regulation on taking of evidence to avoid any risk of prosecution in France.

- Case management directions will often be agreed by the parties, but do not consent to an order for disclosure or inspection. To do so may evidence a deliberate intent to breach the Blocking Statute, and encourage prosecution. Adverse costs consequences may be avoided by simply not opposing the making of an order in appropriate circumstances.

- The *Jackson* reforms mean that standard disclosure by list is no longer the norm. France allows pre-trial discovery under the Convention where it is specific and there is a *"direct and precise link"* with the subject-matter of the proceedings. Accordingly, when choosing from the "menu" of disclosure options, an order which historically might have been used for specific (as opposed to standard) disclosure is likely to be preferable.

CONTACTS

ADAM ROONEY
adam.rooney@gide.com

MICHEL PITRON
pitron@gide.com