English Disclosure and the French Blocking Statute

The Court of Appeal says French litigants cannot use French laws to avoid English disclosure obligations and information requests

The Court of Appeal recently handed down a judgment relating to three separate appeals concerning the interaction between a French law known as the "*French Blocking Statute*" or "*FBS*" and French companies' disclosure obligations when involved in English litigation in the English Courts.

The first case involved (amongst others) the Secretary of State for Health and Les Laboratories Servier SAS ("*Servier*") and the other cases involved National Grid Electricity Transmission Plc and Alstom Group ("*Alstom*") (amongst others).

The French Blocking Statute

The FBS is the common name for French Statute No. 68-678 of 26 July 1968 (as modified in 1980) and is aimed at restricting documents and information leaving French territory.

Article 1 of the FBS is broad and prohibits French documents or information of an economic, commercial, industrial, financial or technical nature from being used as evidence in foreign judicial or administrative proceedings, subject to international treaties or agreements. Breach of the FBS is a criminal offence in France which could, in theory, result in prosecution (potential fines and imprisonment).

The risk of prosecution is theoretical because in France there has only ever been one reported prosecution in the last 30 years, that of *re Avocat Christopher X* in 2007, a case which the Court noted was unique and exceptional because it involved deception by a French lawyer and not routine orders for disclosure given by a foreign Court.

Nevertheless, as a result of the apparent risk of prosecution in France under the FBS, the appellants (*Servier* and *Alstom*) in the Court of Appeal cases argued that disclosure orders and Requests for Further Information made against them in the English proceedings should be set aside as they might be prosecuted in France. The Appellants argued that they should only be required to respond to requests made pursuant to EC Regulation 1206/2001 (known as 'the Evidence Regulation').

The Evidence Regulation

The aim of the Evidence Regulation is to make it easier, quicker and simpler to obtain evidence from other Member States and contains two routes for taking evidence:

- a request from the Court in which proceedings are commenced directly to the Court of another Member State to take the evidence, a "*Court to Court Request*"; and
- the taking of evidence by the Court of the requesting Member State directly in the other Member State, a "*Direct Request*".

The First Instance decisions

At first instance (in both cases), the Court rejected attempts to rely on the FBS to effectively limit English disclosure and information orders.

In the *Alstom* proceedings, Roth J concluded that it was "virtually inconceivable" that criminal proceedings would ever be brought as a result of a company complying with the procedural rules of a Court of another Member State.

Roth J did not see the Evidence Regulation as the appropriate means of obtaining evidence for disclosure in these circumstances; a previous attempt to obtain evidence under a Direct Request had earlier been rejected by French Courts, arguably on the basis that it was not the appropriate route to obtain such disclosure. Roth J decided another request under the Evidence Regulation was inappropriate.

Both Appellants sought reassurance from the French Ministry of Justice that they would not be prosecuted in France under the FBS if they complied with their respective disclosure obligations in England. This assurance was not given because in reality

it could not be given. The FBS was still French law and so a theoretical risk of prosecution existed until it was repealed or amended. Both Defendants appealed.

The Court of Appeal Decision

The Court of Appeal concluded that the main issue was whether it was mandatory for the first instance Judges to use the Evidence Regulation in order to obtain the requested information and achieve the required disclosure and information.

In a unanimous verdict, the Court concluded that using the Evidence Regulation was not mandatory. These were procedural requests that were governed by the law of England and Wales. The Judges had discretion to make such orders and the decision was not affected by a theoretical risk of prosecution in France under the FBS.

In short, the Court of Appeal robustly dismissed the appeals.

Comment

This judgment clarifies the English position on whether French parties can use the FBS potentially to limit English disclosure and information orders.

The judgment does not of course deal with the position in the French jurisdiction for French parties who comply with English Court Orders, leaving uncertainty for French litigants. Given the broad and potentially wide reach of the FBS (the FBS potentially also applies to non- French individuals or entities who hold French data), it will be interesting to see if there is any move in France to amend or repeal the FBS.

Contacts

The author Richard Binns is a member of the Disputes Resolution team and deals with disclosure issues on a regular basis. He and Chris Jackson have advised international clients on the FBS and its implications for English Proceedings.

Chris Jackson
Partner
+44 (0)117 939 2238
chris.jackson@burges-salmon.com

Richard Binns
Associate
+44 (0)117 902 7249
richard.binns@burges-salmon.com