Dispute Resolution

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# DISPUTE RESOLUTION BULLETIN

## The English Courts' approach to ordering disclosure from French companies

A disruptive and time-consuming facet of modern litigation in common law jurisdictions is the disclosure, or discovery, process. In complicated cases, it can give rise to numerous interlocutory applications. *National Grid Electricity Transmission Plc v ABB & Others* (11 April 2013) is a recent example from the English Court, which raised an interesting issue upon whether French companies should be ordered to give disclosure in English proceedings which was alleged to be illegal under French law.

A European Commission decision established that 20 companies had violated Article 101 of the Treaty on the Functioning of the European Union (TFEU) by being involved in illegal cartel activity. The cartel's scheme involved the sharing of markets and the allocation of quotas for the supply of a bespoke product.

National Grid Electricity Transmission Plc (NGET) commenced a claim for damages against some of those companies and their subsidiaries before the English Courts, with a trial fixed for June 2014. The calculation of damages will be complex, requiring expert evidence, which itself will be heavily dependent on the disclosure of documents.

In November 2012, NGET applied for specific disclosure against four French defendant companies.

The application was resisted on the grounds that disclosure would infringe French statute 67-678 of 26 July 1968 (modified in 1980). This provides for criminal penalties for the disclosure in foreign proceedings of documents or information "of an economic, commercial, industrial, financial or technical nature".

At the French defendants' suggestion, the Court ordered that they make requests to the

French authorities for the disclosure to be conducted in France pursuant to the EU Evidence Regulation (EC Regulation 1206/2001). Those requests were ultimately refused by the French authorities.

NGET consequently renewed its application for disclosure by the French defendants, contending that there was in reality no real risk of prosecution.

It was not in dispute between the parties that the English Courts have a discretion to order disclosure, even where compliance by the disclosing party may result in a breach of an applicable foreign law. The Court found that the "critical question", assuming that the disclosure sought would infringe the French statute, was *"the likelihood of any prosecution being brought against the French Defendants at all".*

Following evidence from French legal experts, the Court found that there had only been one instance of a successful prosecution under the French statute - a Cour de Cassation decision in December 2007 concerning a French banker who had unilaterally attempted to obtain information by deception; that the 1980 amendment was a reaction to *"the perceived heavy-handed approach of the US law and procedures"* to disclosure and depositions; and that no prosecutions had been brought against major French companies complying with US disclosure orders.

As the substantive law breached by the defendants is a fundamental provision of EU law, and the English Courts had jurisdiction to determine the claims against the French defendants pursuant to the Brussels Regulation, the Court considered it "virtually inconceivable" that the French authorities would prosecute a company for complying with the procedural rules of the courts of the Member State where the proceedings are brought.

The existence of the EU Evidence Regulation did not change the position: using that Regulation to obtain disclosure *"would be an extraordinary route"* causing further delay and uncertainty, as there was a real risk that any further application under that Regulation would be rejected on the basis that disclosure does not involve the taking of evidence and so does not fall within its ambit.

This decision emphasises the importance of disclosure in English proceedings and assists in clarifying the approach likely to be taken by the English Courts in determining disclosure applications against French litigants. It is however understood that an appeal has very recently been lodged.

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## Enforcement of commercial pledges under UAE Law

Over the last 12 to 18 months, HFW's Dubai office has seen an increase in enquiries regarding securing trade finance facilities and the enforcement of securities where the borrower is located in the UAE.

Sometimes, securities can be documented without sufficient consideration as to the application of relevant local law and procedure. This article considers one form of security – a commercial pledge – and the various issues to be taken into account when looking at enforcement in the UAE.

A pledge is a form of security by which a creditor or lender takes possession of a debtor's asset until the debt is paid off. Under UAE law, the asset must be moveable property, for example goods such as commodities, ships or aircraft; or documents of title to goods, such as bills of lading. If the debt is not repaid, the creditor can sell the asset and has a priority right to collect his debt from the proceeds.

The UAE Courts will usually accept jurisdiction over assets located within their jurisdiction. In practice, they will apply local law rather than any foreign law stipulated in the underlying agreement. It is therefore important to understand how local law will affect the enforcement of pledges.

UAE law has specific rules governing commercial pledges. A commercial pledge is defined in Article 164 of the Commercial Transactions (Federal Law No. 18 of 1993) (Commercial Code) as *"one contracted on a moveable property in security of a commercial debt."* A debt will only be considered as "commercial" if it arises in a commercial context. However, commercial activities are very widely defined within the Commercial Code and include, for example, the purchase of commodities to be sold on for profit (Article 5) and bank loans, irrespective of the purpose for which the loan is allocated (Article 410).

In order for a commercial pledge to be effective:

- The party making the pledge (the "pledgor") must at the time of making the pledge be: (a) the owner of the pledged moveable property (the "asset"); and (b) able to deal with the asset pursuant to Article 1458 of the UAE Civil Transactions Law (Federal Law No. 5 of 1985) (the Civil Code) (for example, able to sell the goods).

- Possession of the asset must pass to the person taking the pledge (the "pledgee") or to another person appointed by the pledgor and the pledge (the "receiving party").
- The asset must remain in the possession of either the pledgee or the receiving party until the pledge lapses, in such a way as to prevent the pledgor disposing of the asset without the knowledge of the pledgee.

The pledgee or the receiving party shall be deemed to have possession of the asset if: (a) it is placed at his disposal in such a way that other people believe the asset has come into his custody; or (b) he holds a deed giving him sole right to take delivery of the asset. Where goods are stored in a warehouse and there is a document of title stating that they cannot be released without the permission of the pledgee, it is likely that the UAE Courts would interpret this as deemed possession and recognise the commercial pledge.

The procedure of enforcing a pledge through the UAE Courts can be swift. When a trigger event such as non-payment of a debt occurs, the pledgee must serve notice on the pledgor to pay the outstanding amount. Under Article 172 of the Commercial Code, the pledgor will have 7 days in which to pay, after which the pledgee can file an application to the competent court (usually the Court of First Instance) requesting authorisation to sell the asset.

Significantly, the application will be heard without notice to the pledgor. The Court will usually issue an order on the same day, without providing reasons. It will have discretion to determine the method of sale, for example by auction or directly by the pledgee to any purchaser of their choice.

The pledgor can file a petition before the Court of First Instance and appeal to the Court of Appeal or the Court of Cassation. However, this will not stay enforcement of the order unless the pledgor can show that there is a risk that substantial harm will arise from the enforcement. This is a high evidential threshold to meet.

This expedited procedure – potentially less than 10 days between giving notice and commencing enforcement procedures – means that the threat of acting upon a commercial pledge when the asset is situated in the UAE can be a useful mechanism for creditors seeking to enforce their security. By the same token, debtors should be aware of the speed of the process in the UAE before giving pledges over assets located there, whatever the law stipulated in the pledge agreement.

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## Leading construction team joins HFW

HFW is delighted to welcome a team of three Partners and seven Associates, formerly making up the specialist construction team at Maxwell Winward. The team joins HFW effective 29 April and will be based in London.

The team, headed by Max Wieliczko, with Partners Michael Sergeant and Robert Blundell, is considered one of the largest specialist practices of its kind in the UK and has extensive experience of both major domestic and international projects, and offers an end-to-end service covering procurement, project advice and dispute management and resolution in all its forms.

They join an already successful construction team headed by Partner Nick Longley in Asia-Pacific and Partner Paul Suckling in the Middle East. Their arrival enables the combined team to build on HFW's leading reputation in the energy, transport, trade, and ports and terminals sectors.

This important development allows HFW to continue to take advantage of growing opportunities in major infrastructure projects in Asia, the Middle East, and Europe, and also in developing markets such as South America, Africa and India, where HFW has already been working for many years.

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