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Bank Mellat v HM Treasury: disclosure in English civil proceedings overrides Iranian Sharia law on privacy

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A slew of recent cases has illustrated the English court's approach to evidence sought in the context of multi-jurisdictional proceedings and investigations – and especially at the intersection of the civil and criminal law.

See, for instance, our articles on cases where:

- the need for confidentiality in English civil proceedings overrode an FBI subpoena
- the English court assisted its US counterpart despite arguments this would expose an individual to risk of criminal liability
- the English court ordered a third party corporate to produce privileged material in an investigation into that corporate's auditor, with concomitant concerns that this material could become public or be passed to a regulator in another jurisdiction

These cases are now accompanied by a recent Court of Appeal decision in Bank Mellat v HM Treasury. This long-running claim by one of Iran's largest private banks is for substantial damages following HM Treasury's imposition of the Financial Restrictions (Iran) Order 2009, which prohibited UK financial institutions from having any business relations with the Bank – an Order which the UK Supreme Court quashed in 2013.

This was an interlocutory hearing to determine whether the Bank was obliged to disclose documents to HM Treasury in unredacted form. The Bank argued that it would be exposed to a real risk of prosecution in Iran if it did so. The redactions protected the confidential banking information of identifiable individuals, and the Bank argued that removing the redactions was a violation of Iranian privacy law. This was a serious matter, because privacy is a Sharia principle and hence enshrined in the Iranian constitution. Notwithstanding the Bank's argument, the Court of Appeal decided that the documents had to be disclosed on an unredacted basis.

In reaching its decision, the Court had regard to the following:

1. The Court of Appeal followed the first instance decision of Cockerill J (author of The Law and Practice of Compelled Evidence in Civil Proceedings, and an established expert in this field) in ordering disclosure of the documents without redactions. The court's starting point was that confidentiality obligations in a foreign jurisdiction do not give a party any automatic entitlement to withhold documents from production in English proceedings.
2. Therefore, the question was discretionary and determined in the following way. The court considers the value of the evidence to determining the English proceedings. The court also has regard to the actual risk of prosecution to the party required to make disclosure. The decision is then a balancing exercise for the judge.
3. Cockerill J took at face value the Bank's expert evidence that producing the redacted information would expose the Bank to the risk of prosecution.
4. However, the Court of Appeal decided that was not the real question. The court needed to consider the actual circumstances of this case. The Bank would not be giving up confidential information simply of its own volition, but rather because an English court order required it. The English court order would contain additional provisions to protect the confidentiality of the material (ciphering and a 'confidentiality club'). It was the Iranian government which would bring any prosecution, but the Iranian government was a major shareholder in the Bank. The Bank was bringing a claim for c.US$1.7bn. Producing the non-redacted material was vital (the court considered) to pursuing that claim. The risk that the Iranian government would effectively shoot itself in the foot (to the tune of hundreds of millions of dollars) was, in the court's view, minimal.
5. The first instance judge was entitled to consider critically the evidence of the Bank's expert on Iranian law (as she did, in evaluating the 'real risk' of prosecution). This seems to have been especially the case as HM Treasury was unable to field an Iranian legal expert of its own. This was not through oversight – the Iranian government had a vested interest in the case, and the experts which HM Treasury approached were reluctant to give evidence. It could be inferred that they did so out of fear of the repercussions.
6. The English court should, for reasons of comity, respect Iranian law wherever possible. But comity cuts both ways. An Iranian court should be understanding of the Bank's need to make disclosure under English law, and refrain from sanctioning the Bank.
7. That said, the English court would not order the Bank to produce material of no value in the proceedings. However,

that was simply not the case here. The redacted material was potentially probative. Indeed, the Court of Appeal's 'initial reaction' was that "the fair disposal of this trial cries out for production of the Iranian documents unredacted."

There is no doubt that this decision put the Bank into an invidious position. The Bank went so far as to say that it would not comply with an order for disclosure that meant breaching Iranian law. The religious and constitutional nature of the relevant law made it a weighty concern for the Bank.

Ultimately however, in a conflict of law situation one law must trump the other, and the Court of Appeal quoted the obiter comment of Hoffmann J in Mackinnon v Donaldson & Ors: "If you join the game you must play according to the local rules." For all that the English court gives weight to foreign legal concerns, comity can only stretch so far. The power that the English Court has to protect documents from wider dissemination and keep them out of public view will in most cases lead to the same outcome.

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