RECOGNITION AND ENFORCEMENT OF JUDGMENTS AWARDING DAMAGES FOR BREACH OF A CHOICE-OF-COURT AGREEMENT: A QUASI ANTI-SUIT INJUNCTION? – The Supreme Court of Greece refers question to the CJEU for a preliminary ruling.

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On the 25th of June the Supreme Court of Greece has rendered a provisional judgment to request preliminary ruling of the CJEU on the question of compatibility of the right to damages for breach of a choice-of-court agreement with the European ordre public. The judgment forms part of the group of decisions related to the Alexandros T case [Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG ([2014] EWCA Civ 1010)]. The case has also been reported by Apostolos Anthimos, who had already stressed out the importance of an EU level solution, see his blog posts concerning *Decisions Nr. 371/2019 and Nr. 89/2020 of the Piraeus Court of Appeal* respectively. Also, the procedural history of the case in England is meticulously exposed in the post of Dr. Martin Ilmer.

The facts of the case

The dispute arose out of a marine insurance contract, which contained a choice-of-court agreement designating the courts of London as competent. After the shipwreck of the ship, the ship owners brought proceedings against the insurers before the High Court of Justice, which were finally ended with the parties reaching an out-of-court settlement. The settlement agreement itself contained also a prorogation clause in favor of the English courts.

At a later stage, the ship owners brought action before the courts of Piraeus, alleging damages suffered due to the conduct of the other party in the English proceedings. This conduct consisted of the systematic discrediting of the seaworthiness of the ship by using false evidence.

As a response, the insurers contested the jurisdiction of the Greek courts, by invoking the prorogation clauses contained in both the insurance contract and the settlement agreement. Furthermore and while proceedings before the court of Piraeus were still pending, the insurers filed a damages claim before the High Court of Justice for breach of the choice-of-court agreements, seeking recovery for the legal costs and expenses incurred in the Greek proceedings.

Their action was fully accepted by virtue of *the [2014] EWHC 3028 (Comm)* decision of the High Court of Justice, as the latter acknowledged the existence of a valid, exclusive choice-of-court agreement in favor of the English jurisdiction. Subsequently, the courts of Piraeus declined jurisdiction and dismissed the claim of the ship owners on the grounds of the res judicata effect of the English judgment, while refusing the existence of grounds for non recognition of the English judgment in Greece *(Dec. Nr. 899/2016, 28.3.2016, Piraeus Court of First Instance).*

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The decision of the Court of Appeal

The ship owners formed an appeal against the decision of the Court of First Instance, alleging that the latter was wrong to recognize a decision granting compensation for breach of a choice-of-court agreement, on the grounds of violation of the principle of mutual trust and of the European ordre public. Therefore, the decision of the Court of Appeal *(Dec. Nr. 465/2020, 07.03.2019, Piraeus Court of Appeal)* was focused on two points:

1. The affinity of a decision recognizing the right to damages for breach of a choice-of-court agreement with the anti-suit injunctions.
2. The violation of the procedural ordre public as ground for non recognition and enforcement of such decisions, under the Articles 34 (1) and 45 (1) of the EU Regulation 44/2001 (Brussels I Regulation).

As far as it concerns the first point, the Court of Appeal refused to draw a parallel between the right to damages for breach of a choice-of-court agreement and the anti-suit injunctions, which have been explicitly banned from the system of the Brussels I Regulation by virtue of the CJEU's *Turner v. Grovit and West Tankers v. Allianz* decisions (although *West Tankers* concerned an arbitration agreement, dealing primarily with the question of the Regulation's scope of application). According to the Greek courts, such decisions do not aim at the international jurisdiction of a foreign court but they refer exclusively to the non-execution of the prorogation agreement-as it would be with the failure to comply with any other contractual obligations- and consequently to the existence or non-existence of contractual liability lying with the violating party. (For a different view on the question of compatibility with the principle of mutual trust, see the analysis included in the doctoral thesis of Dr. Mukarrum Ahmed).

Proceeding with the second point, the court stresses that each decision admitting violation of a choice-of-court agreement and consequently international jurisdiction of the forum prorogatum cannot but correlatively refuse international jurisdiction of the forum yet seized. Hence, that is perfectly tolerated by the European ordre public, since it doesn't constitute an illegitimate interference in the adjudicatory jurisdiction of a foreign court but results from the mere application of the rules of the Brussels I Regulation. And the Court went on, to point out that even a false application of the rules of the Regulation could not justify the non recognition of the decision of a Member State, since a violation of the rules on international jurisdiction does not establish a violation of the procedural public order. It is clear-the court continues- that the misinterpretation or false application of the rules on international jurisdiction is overridden by the objective of the free circulation of judgments within the European judicial area.

Based on these assertions, the Court of Appeal declared lack of jurisdiction of the Greek courts to rule on the merits of the case, confirming the decision of the Court of First Instance.

The exequatur procedure and the preliminary reference to the CJEU

In the meantime, a parallel exequatur procedure has been initiated at the insurers' initiative, who sought to execute the English judgment in Greece. The relevant exequatur request was fully accepted, while the application for refusal of enforcement filed by the ship owners, was rejected. Finally, the ship owners seized the Supreme Court pursuant to Article 44 and Annex IV of the Regulation, so that the question shall be resolved by means of a final and irrevocable decision. The Supreme Court, requesting a preliminary ruling, addressed to the CJEU - almost verbatim- the following questions *(Dec. Nr. 820/2021, 25.6.2021, Supreme Court of Greece):*

1. In addition to the conventional anti-suit injunctions, are there any other decisions or orders which, even implicitly, impede the applicant's right to judicial protection by the courts of a Member State and therefore fall under the scope of the Articles 34 (1) and 45 (1) of the Brussels I Regulation? And more specifically, can a decision granting compensation for breach of a choice-of-court agreement, be considered as being against the European public order?

1. In case of a negative answer to the first question, do such decisions still fall under the scope of the Articles 34 (1) and 45 (1) of the EU Regulation 44/2001, once they are considered as being against the national public policy of Greece, so that the objective of the free movement of civil judgments within the European Union c?uld be overridden in that case?

It needs to be noted that the English, Spanish courts and recently the German BGH have already acknowledged the right to damages for breach of a jurisdiction clause. Yet the CJEU had not the chance to take position on such question, since the forum derogatum was in the previous cases a non EU member-state, where the principle of mutual trust does not apply. It remains to be seen whether the solution adopted by the national courts, will be expanded to the European judicial area. A highly anticipated decision with secondary implications also on the key issue of the nature of a choice-of-court agreement.