The Dutch Supreme Court on how to deal with the CISG on appeal (Willemen Infra v Jura)

On 24 February 2023, the Dutch Supreme court has ruled in the case Willemen Infra v Jura, ECLI:NL:HR:2023:313. The ruling clarifies the scope of the Dutch courts' duty to apply the CISG (UN Convention on Contracts for the International Sale of Goods, 1980) ex officio on appeal. The Dutch appellate courts shall not review of their own motion whether the first instance court had to apply the CISG to the dispute, if the question of governing law was not the subject of parties' objections on appeal and thus got "beyond the parties' dispute".

Facts

The facts of this case related to a sale of gutters by a Dutch seller to a Belgian buyer. The gutters were to be used for the renovation of a runway at Zaventem airport. According to the seller's general terms and conditions, the disputes were to be resolved before a Dutch court on the basis of Dutch law.

After the start of performance, the buyer had reasons to assume that that the seller was unable to timely supply the products of the required quality. The buyer refused to take all the purchased gutters.

Proceedings

The seller disagreed and claimed damages for the loss of profit caused by the breach of contract. In the proceedings, the buyer submitted a counterclaim, invoking partial avoidance of contract and, alternatively, nullity of contract due to vitiation of consent. The buyer submitted namely that it had concluded the contract based on misrepresentation relating to the products' quality (the certificates which the products should have) and the delivery time.

The seller relied on both the CISG and Dutch law in its written submissions, including the statement that the choice for Dutch law in the general terms and conditions should be interpreted as excluding the application of the CISG. During the oral hearing, both parties referred to Dutch law only (see on this the

Conclusion of the Advocate General, at [3.4]). The first instance court ruled as follows in relation to applicable law: '*According to the [seller], the contract is governed by Dutch law. (…) 'The court contends that [the buyer] also relies on Dutch law in its arguments, and thus follows [the seller's] reasoning. The court follows the parties in this and shall apply Dutch law*." (the formulation is quoted in *Willemen Infra* v *Jura* at [4.3.1], compare to Advisory Council's Opinion nr 16). The court has then applied the Dutch civil code, not the CISG, to the dispute.

The seller appealed against the decision, but not against the applicable law. Nevertheless, the appellate court considered of its own motion, whether the contract was governed by the CISG. It ruled that the contract fell under the CISG's scope; the Convention was directly applicable on the basis of article 1(1)(a) CISG, as both Belgium and the Netherlands are Contracting States to CISG. Furthermore, the parties to the dispute have not explicitly excluded the CISG's application based on article 6. The appellate court has applied the CISG to the contractual claim, and Dutch law – to the claim relating to the vitiation of consent, as this matter falls outside the Convention's scope. The buyer has labelled the application of the CISG 'surprising', because no claim in appeal targeted applicable law.

In cassation, the Dutch Supreme has ruled that applicable law was indeed "beyond the parties' dispute" on appeal. Therefore, the appellate court was neither free to determine applicable law anew nor free to apply CISG of its own motion (*Willemen Infra* v *Jura* at [2.1.2]- [3.1.6]).

CISG and procedural ordre public?

The ruling is logical from the point of view of civil procedure. Appellate review follows up on – and is limited by – the points invoked on appeal. Issues "beyond the parties' dispute" are not reviewed, unless these issues fall under the rules of procedural ordre public, which the appellate courts must apply of their own motion. While there is no unanimously accepted definition of the Dutch procedural ordre public, the cassation claim explicitly suggested that 'the CISG is not of ordre public' (see Conclusion of the Advocate General, at [3.3.]). Whereas this element of the cassation claim has been satisfied, neither the Advocate General nor the Court have engaged with the discussion whether procedural ordre public covers direct application (or applicability) of the Convention's uniform substantive sales law, even if it would be confined to establishing

whether the parties have opted-out the CISG based on its article 6.

A New Court Open for International Business Soon: The Commercial Court in Cyprus

Written by Georgia Antonopoulou (Birmingham Law School) & Xandra Kramer (Erasmus University/Utrecht University; research funded by an NWO Vici grant, www.euciviljustice.eu).

We are grateful to Nicolas Kyriakides (University of Nicosia) for providing us with very useful information.

The Novel Commercial Court and Admiralty Court in Cyprus

New courts geared to dealing with international commercial disputes have been established in Europe, the Middle East and Asia, as has also been reported in earlier blogposts in particular on Europe (see, among others, here and here). They have various distinctive features such as the focus on cross-border commercial disputes and the use of the English language as the language of court proceedings. It seems that Cyprus will soon be joining other European countries that have established such courts in recent years, including France, the Netherlands, and Germany.

In May 2022, the House of Representatives in Cyprus passed Law 69(I)/2022 on the Establishment and Operation of the Commercial Court and Admiralty Court. The law creates two new specialised courts, namely the Commercial Court and Admiralty Court, focusing on commercial and maritime law disputes respectively. The courts were planned to open their doors on 1 January 2023. However, the Supreme Court of Cyprus, which is responsible for administrative matters, requested an extension and the courts are expected to be operational in July 2023 (see here).

According to the preamble to this Law, the establishment of these specialised courts aims at expediting the resolution of disputes and improving the efficiency of the administration of justice. In addition, the Courts' establishment is expected to enhance the competitiveness of Cyprus, attract foreign investment, and contribute to its overall economic development. Similar arguments have been put forward in other European countries, notably in the Netherlands (Kramer & Antonopoulou 2022).

The Cypriot Commercial Court shall have jurisdiction to determine at first instance any type of commercial dispute, provided that the amount in dispute or the value of the dispute exceeds 2,000,000 Euros. The law defines commercial disputes broadly and offers an indicative list of such disputes for which the court has jurisdiction. The Commercial Court shall also have jurisdiction over competition law disputes, intellectual property law disputes, and arbitration related matters irrespective of the value of the dispute. The Commercial Court shall have territorial jurisdiction over disputes that have arisen, in part or wholly in Cyprus, as well as over defendants residing in Cyprus. In cross-border disputes parties can agree on the court's jurisdiction in a choice of court agreement. Typically, the Brussels I-bis Regulation would apply to determine the validity of such clause. At the request of at least one party and in the interest of justice, the court shall accept procedural documents in English and shall conduct hearings and publish judgements in English. The Commercial Court will consist of five judges drawn from the Cypriot judiciary based on their expertise in commercial law disputes and practices and their English language skills.

A Genuine International Commercial Court for Cyprus?

While the definition of an international commercial court is open to interpretation and there are different types of international commercial courts (Bookman 2020; Dimitropoulos 2022), the Commercial Court's specialised focus on high-value commercial disputes as well as the option to litigate in English suggest that Cyprus has just added itself to the growing number of countries that have established an international commercial court in recent years (see also Kramer & Sorabji 2019). This possibility of English-language court proceedings is a key feature of these new courts. However, the degree to which this is possible differs per country. The Netherlands Commercial Court (NCC) uses English throughout the proceedings apart from cassation at the Supreme Court. Due to the lack of a relevant constitutional provision, the use of the English language in NCC court

proceedings was made possible by including a new provision in the Dutch Code of Civil Procedure. By contrast, the German Chambers for International Commercial Disputes and the Paris International Chambers limit the use of English in court to documentary evidence or oral submissions and on the basis of a lenient interpretation of existing rules. Cyprus is the first country in Europe that amended its constitution with a view to permitting the use of the English language in court proceedings. The new Article 4(3)(b) provides that the Commercial Court and the Admiralty Court as well as the higher courts ruling on appeals may allow the use of English in court including oral and written submissions, documentary evidence, witness statements and the pronouncement of judgements or orders. In addition, unlike other international commercial courts established as chambers or divisions within existing courts the Commercial Court in Cyprus is structured as a self-standing court. Its jurisdiction is not exclusively limited to cross-border disputes but extends to domestic disputes with territorial links to Cyprus. The court's focus on both cross-border and domestic disputes might be explained by the objective to accelerate trials and increase the efficiency of public court proceedings especially with regard to disputes related to the financial crisis and its aftermath.

The Reasons for Creating the Cypriot Commercial Court

The establishment of international commercial courts in Europe and in Asia has been thus far mainly driven by access to justice and economic considerations. International commercial courts aim at improving commercial dispute resolution by offering litigating parties specialised, faster, and therefore better court proceedings. It has been also underpinned by the aim of improving the business climate, attracting foreign investment, and creating litigation business.

In line with these considerations, Law 68(I)/2022 reiterates the benefits of a specialised commercial court both for the Cypriot civil justice system and the economy. Despite these similarities between the reasons driving the worldwide proliferation of international commercial courts and the establishment of a commercial court in Cyprus, the Cypriot context is slightly different. The financial crisis suggests that the Cypriot international commercial court is also part of a broader array of measures aimed at meeting the particular dispute resolution demands following the crisis (see also Mouttotos 2020). The establishment of the Commercial Court in Cyprus therefore indicates that international commercial courts might no longer be seen as a luxury available to the few countries willing

and able to participate in a global competition of courts, but also as an essential measure for countries aiming to recover from a financial crisis. Yet, whether specialised courts bring about direct economic benefits or if they only indirectly benefit national economies by signalling to foreign investors a well-functioning justice system remains open to debate (among others Farber 2002; Coyle 2012).

The DSA/DMA Package and the Conflict of Laws

A couple of weeks ago, I had the pleasure of speaking about the scope of application of the Digital Services Act (DSA) and Digital Markets Act (DMA), which together have been labelled the 'European constitution for the internet', at an event at the University of Strasbourg, organized by Etienne Farnoux and Delphine Porcheron. The preprint of my paper, forthcoming at Dalloz IP/IT, can be found on SSRN.



Disappointingly, both instruments only describe their territorial scope of application through a unilateral conflicts rule (following a strict 'marketplace' approach; see Art. 2(1) DSA and Art. 1(2) DMA), but neither of them contains any wider conflicts provision. This is despite the many problems of private international law that it raises, e.g. when referring to 'illegal' content in Art. 16 DSA, which unavoidably requires a look at the applicable law(s) in order to establish this illegality. I have tried to illustrate some of these problems in the paper linked above and Marion Ho-Dac & Matthias Lehmann have also mentioned some more over at the EAPIL Blog.

Unfortunately, though, this reliance on unilateral conflicts rules that merely define the scope of application of a given instrument but otherwise defer to the

general instruments of private international law seems to have become the norm for instruments regulating digital technology. It can be found, most famously, in Art. 3 of the GDPR, but also in Art. 1(2) of the P2B Regulation, Art. 3(1) of the proposed ePrivacy Regulation, and in Art. 1(2) of the proposed Data Act. Instruments that have taken the form of directive (such as the DSM Copyright Directive) even rely entirely on the general instruments of private international law to coordinate the different national implementations.

These general instruments, however, are notoriously ill-equipped to deal with the many cross-border problems raised by digital technology, usually resulting in large overlaps between national laws. These overlaps risk to undermine the regulatory aims of the instrument in question, as the example of the DSM Copyright Directive aptly demonstrates: With some of the most controversial questions having ultimately been delegated to national law, there is a palpable risk of many of the compromises that have been found at the national level to be undermined by the concurrent application of other national laws pursuant to Art. 8 I Rome II.

The over-reliance on general instruments of PIL despite their well-established limitations also feels like a step back from the e-Commerce Directive, which at least made a valiant attempt to reduce the number of national laws, although arguably not at the level of the conflict of laws (see CJEU, *eDate*, paras. 64–67). The balance struck by, and underlying rationale of, the e-Commerce Directive can certainly be discussed – indeed, given its importance for the EU's ambition of creating a 'Digital Single Market', it should be. The drafting of the DSA/DMA package would arguably have provided the perfect opportunity for this discussion.

The long tentacles of the Helms-Burton Act in Europe (III)

Written by Nicolás Zambrana-Tévar LLM(LSE) PhD(Navarra), Associate Professor KIMEP University (Kazakhstan), n.zambrana@kimep.kz

There has recently been a new and disappointing development in the saga of the Sánchez-Hill, a Spanish-Cuban-US family who filed a lawsuit before Spanish courts against a Spanish Hotel company (Meliá Hotels) for unjust enrichment. Meliá is exploiting several hotels located on land owned by Gaviota S.A., a Cuban company owned by the Republic of Cuba. That land was expropriated by Cuba without compensation, following the revolution of 1959.

In 2019, the First Instance Court of Mallorca (Spain) held that the lawsuit was a means to circumvent the sovereign immunity of Cuba, given the fact that, in order to decide on the right to compensation of the claimants for the unjust enrichment of the defendant, the court would allegedly have to decide on the lawfulness of a sovereign act – i.e. expropriation –, because only if the expropriation had been unlawful could the defendant be exploiting land which did not belong to Gaviota but to the claimants. The court held that the claimants were also arguing that they had a right *in rem* – such as property or possession – over assets of a sovereign state and that such assets were also protected by the rules of sovereign immunity. This alone would have been enough to dismiss the lawsuit but, unnecessarily, the court added that it did not have jurisdiction to decide about property rights concerning real estate assets located outside Spain.

The Court of Appeal of Mallorca disagreed with the lower court. It held that sovereign immunity was not an issue because Cuba had not been named a defendant in the claim. Besides, Spanish courts had jurisdiction because Spain was the place of the domicile of the defendant and the claim was one of unjust enrichment – i.e. a claim in tort –, not one whose subject matter was the existence or scope of a right *in rem* over a real estate asset. In brief, the claimants were not asking Cuba to give back their land and were not asking monetary compensation neither from Cuba nor from Gaviota.

Meliá then filed a motion arguing that the claim was an attempt to eschew the EU Blocking Statute meant to prevent the effectiveness of US court rulings against EU companies, under the Helms-Burton Act of 1996. The defendants further requested that the matter be taken to the European Court of Justice for a preliminary ruling on the scope and correct interpretation of the Blocking Statute. The CJEU may have taken years to issue such a ruling but the Spanish First Instance Court denied the motion.

Later on, Meliá filed another motion requesting that Gaviota and the Republic of

Cuba be joined to the lawsuit (*exceptio plurium litisconsortium*) and the First Instance Court granted the motion on the basis, once again, that any ruling on unjust enrichment would previously and necessarily require a decision about the property rights of Gaviota and Cuba, which should therefore be heard in the Spanish proceedings. Probably making a very serious strategic mistake, the claimants did not appeal this decision of the First Instance Court and agreed to join Gaviota and Cuba to their claim with the result that, last January 2023, the First Instance Court once again dismissed the lawsuit on grounds of sovereign immunity, given the fact that, now, a sovereign entity is in fact a defendant in the proceedings.

In the meantime, the Cuban Government had been correctly notified and had claimed that it enjoyed sovereign immunity before foreign courts. Beyond that, Cuba never made an appearance in the proceedings but Gaviota did, requesting that the proceedings be stayed on the basis that it also enjoyed sovereign immunity. Besides, the Spanish Government had also issued a report requested by Spanish law, indicating that the Cuban acts of expropriation must indeed be considered acts *iure imperii*.

The potential implications of a claimants' improbable victory for the Spanish tourism industry in Cuba are worrisome but, above all, this muddled and already long-lasting lawsuit has given rise to much interest among Spanish scholars, especially conflict of laws specialists. The 2019 decision of the First Instance Court was criticised for applying the doctrine of sovereign immunity in the absence of a sovereign defendant – e.g. something much more similar to the Act of State doctrine, which has no place in Spanish law – and for confusing an action in rem with an action *in personam*. That initial ruling of the First Instance Court may have also inappropriately mentioned and relied on immunity from execution against property of a sovereign state, which is mostly relevant in enforcement proceedings.

Now, however, the Spanish First Instance Court apparently feels vindicated because its recent an relatively short ruling reiterates verbatim practically everything it said in its 2019 decision. The judge also warns the claimants that they had the chance to appeal the ruling granting the motion to join Gaviota and Cuba but did not do so, which means that such decision is now *res judicata*. The logic of the argument is somewhat baffling. The judge initially dismissed the claim on grounds of sovereign immunity, despite the fact that no sovereign was a party.

Then, the judge requested that the sovereign be joined as a party and, when the claimant yielded and did so, the judge once again dismissed the claim on grounds of sovereign immunity.

The key to this stage of the proceedings may have been the joinder of Gaviota and Cuba to the claim. Arguably, it was not necessary to do so. In Spanish law, the *exceptio plurium litisconsortium* can be raised in certain cases provided by statute as well as in certain cases provided by case law. Whenever there is a plurality of parties to the same legal relationship, which is the subject-matter of the proceedings, a joinder is obligatory as a condition for a decision on the merits, based on the inseparable nature of that legal relationship. Its justification lies in the right to be heard of all those who might be affected by the ruling on the merits. A joinder is not necessary when the ruling only affects certain individuals or entities in an indirect manner. In the case at hand, the parties to the unjust enrichment are Meliá, i.e. the party who has allegedly enriched itself at the expense of the other party, i.e. the claimants. Cuba is therefore not a party to the alleged unjust enrichment. Moreover, any findings of Spanish courts concerning the unlawfulness of the expropriation would have no bearing on the property rights of Cuba over that land.

In fact, Spanish courts are no strangers to litigation related to the Cuban nationalisation program and, on several occasions, the Supreme Court has taken into consideration the unlawfulness of that nationalisation process with respect to, for instance, ownership rights over trademarks registered in Spain, emphasising that it is not for Spanish courts to decide on such lawfulness but that they can accept or reject some of the extraterritorial effects of the sovereign acts of the foreign state in the territory of the forum. In those cases, the Supreme Court said that the Cuban nationalization was against the public policy of Spain because of the absence of due process and compensation. However, the Supreme Court added that the applicable law to property rights over trademarks registered in Spain was Spanish law, not Cuban law.

The Sánchez-Hill family has just a few more days left to appeal this new decision of the First Instance Court, in proceedings which may potentially have opened a new venue for victims of the Cuban revolution, given the EU Blocking Statute and given the fact that, since the end of the suspension of Title III of the Helms-Burton Act, claims before US Federal Courts based on that piece of legislation have not been very being successful.

Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey

The 36th Annual Survey of Choice of Law in the American Courts (2022) has been posted to SSRN.

The cases discussed in this year's survey cover such topics as: (1) choice of law, (2) party autonomy, (3) extraterritoriality, (4) international human rights, (5) foreign sovereign immunity, (6) foreign official immunity, (7) adjudicative jurisdiction, and (8) the recognition and enforcement of foreign judgments. Happy reading!

John Coyle (University of North Carolina School of Law)
William Dodge (University of California, Davis School of Law)
Aaron Simowitz (Willamette University College of Law)

Book: Intolerant Justice: Conflict and Cooperation on Transnational Litigation by Asif Efrat

Summary provided by the author, Asif Efrat

In a globalized world, legal cases that come before domestic courts are often transnational, that is, they involve foreign elements. For example, the case before the court may revolve around events, activities, or situations that occurred in a foreign country, or the case may involve foreign parties or the application of

foreign law. Such cases typically present an overlap between the legal authorities of two countries. To handle a transnational case cooperatively, one legal system must cede its authority over the case, in full or in part, to a foreign legal system. This effectively means that a local citizen would be subjected to the laws or jurisdiction of a foreign legal authority, and that raises a host of questions and concerns: Does the foreign legal system abide by the rule of law? Does it guarantee human rights? Will the foreign court grant our citizen the due process and fair treatment they would have enjoyed at home?

The newly published book *Intolerant Justice: Conflict and Cooperation on Transnational Litigation* (Oxford University Press) argues that the human disposition of *ethnocentrism* – the tendency to divide the world into superior in-groups and inferior out-groups – would often lead policymakers to answer these questions negatively. The ethnocentric, who fears anything foreign, will often view the foreign legal system as falling below the home country's standards and, therefore, as unfair or even dangerous. Understandably, such a view would make cooperation more difficult to establish. It would be harder to relinquish the jurisdiction over legal cases to a foreign system if the latter is seen as unfair; extraditing an alleged offender to stand trial abroad would seem unjust; and the local enforcement of foreign judgements could be perceived as an affront to legal sovereignty that contravenes fundamental norms.

This book examines who expresses such ethnocentric views and how they frame them; and, on the other hand, who seeks to dispel these concerns and establish cooperation between legal systems. In other words, the domestic political debate over transnational litigation stands at the center of this book.

In this debate, the book shows, some domestic actors are particularly likely to oppose cooperation on ethnocentric grounds: the government's political opponents may portray the government's willingness to cooperate as a dangerous surrender to a foreign legal system, which undermines local values and threatens the home country's citizens; NGOs concerned for human rights might fear the human-rights consequences of cooperation with a foreign legal system; and lawyers, steeped in local rules and procedures, may take pride in their legal system and reject foreign rules and procedures as wrong or inferior.

By contrast, actors within the state apparatus typically view cooperation on litigation more favorably. Jurists who belong to the state – such as judges,

prosecutors, and the justice-ministry bureaucracy – may support cooperation out of a concern for reciprocity or based on the principled belief that offenders should not escape responsibility by crossing national borders. The ministry of foreign affairs and the ministry of defense may similarly support cooperation on litigation that could yield diplomatic or security benefits. These proponents of cooperation typically argue that legal differences among countries should be respected or that adequate safeguards can guarantee fair treatment by foreign legal authorities. In some cases, these arguments prevail and cooperation on litigation is established; in other cases, the ethnocentric sentiments end up weakening or scuttling the cooperative efforts.

These political controversies are examined through a set of rich case studies, including the Congressional debate over the criminal prosecution of U.S. troops in NATO countries, the British concerns over extradition to the United States and EU members, the dilemma of extradition to China, the wariness toward U.S. civil judgments in European courts, the U.S.-British divide over libel cases, and the concern about returning abducted children to countries with a questionable human rights record.

Overall, this book offers a useful analytical framework for thinking about the tensions arising from transnational litigation and conflict of laws. This book draws our attention to the political arena, where litigation-related statutes and treaties are crafted, oftentimes against fierce resistance. Yet the insights offered here may also be used for analyzing judicial attitudes and decisions in transnational cases. This book will be of interest to anyone seeking to understand the challenges of establishing cooperation among legal systems.

Comparative Analysis of Doctrine

of Separability between China and the UK

Written by Jidong Lin, Wuhan University Institute of International Law

1. **Background**

Separability is a world-recognized doctrine in commercial arbitration. It means that an arbitration clause is presumed to be a separate and autonomous agreement, reflecting contractual commitments that are independent and distinct from its underlying contract.[1] Such a doctrine is embraced and acknowledged by numerous jurisdictions and arbitral institutions in the world.[2]

However, there are different views on the consequences of separability. One of the most critical divergences is the application of separability in the contract formation issue. Some national courts and arbitral tribunals held that in relatively limited cases, the circumstances giving rise to the non-existence of the underlying contract have also resulted in the non-existence of the associated arbitration agreement, which is criticized as an inadequacy of the doctrine of separability.[3] On the contrary, other courts hold the doctrine of separability applicable in such a situation, where the non-existence of the underlying contract would not affect the existence and validity of the arbitration agreement. This divergence would directly affect the interest of commercial parties since it is decisive for the existence of the arbitration agreement, which is the basis of arbitration.

Two contrary judgements were recently issued by two jurisdictions. The Chinese Supreme People's Court (hereinafter "**SPC**") issued the Thirty-Sixth Set of Guiding Cases, consisting of six guiding cases concerning arbitration. In Guiding Case No. 196 *Yun Yu v. Zhong Yun Cheng*, the SPC explains the Chinese version of separability should apply when the formation of the underlying contract is in dispute.[4] Although the SPC's Guiding Cases are not binding, they have an important persuasive effect and Chinese courts of the lower hierarchy are responsible for quoting or referring to the Guiding Cases when they hear similar cases. On the other hand, the English Court of Appeal also issued a judgement relating to separability, holding this doctrine not applicable in the contractual formation issue.[5]

2. **Chinese judgment**

The Chinese case concerns a share transfer transaction between Yun Yu Limited. (hereinafter "**YY**") and Shenzhen Zhong Yuan Cheng Commercial Investment Holding Co. Limited. (hereinafter "**ZYC**"). On 9th May 2017, YY sent the Property Transaction Agreement (hereinafter "**PTA**") and the Settlement of Debts Agreement (hereinafter "**SDA**") to ZYC. The PTA was based on the Beijing Stock Exchange (hereinafter "**BSE**") model agreement. PTA and SDA included a dispute resolution clause in which the parties agreed that the governing law should be Chinese law and the dispute should be submitted to Beijing Arbitration Commission. On 10th May 2017, ZYC returned the PTA and SDA to YY with some revisions, including a modification on the dispute resolution clause, which changed the arbitration institution to the Shenzhen Court of International Arbitration. On 11st May 2017, YY commented on the revised version of the PTA and SDA but kept the dispute resolution clause untouched. In the accompanying email, YY stated, "Contracts confirmed by both parties would be submitted to Beijing Stock Exchange and our internal approval process. We would sign contracts only if we got approval from BSE and our parent company." On the same day, ZYC returned the PTA and SDA with its stamp to YY. On 27th October 2017, YY announced to ZYC that the negotiation was terminated. On 4th April 2018, ZYC commenced arbitration based on the dispute resolution clause in PTA and SDA.

The SPC held that separability means the arbitration agreement could be separate and independent from the main contract in its existence, validity and governing law. To support its opinion, the SPC refers to Article 19 of the People's Republic of China's Arbitration Law (hereinafter "**Arbitration Law**"), which stipulates that: "An arbitration agreement shall exist independently, the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement." SPC submits that the expression "(t)he arbitration agreement shall exist independently" is general and thus should cover the issue of the existence of the arbitration agreement. This position is also supported by the SPC's Interpretation of Several Issues concerning the Application of Arbitration Law (hereinafter "**Interpretation of Arbitration**

Law"), [6]Article 10 of which stipulates: "Insofar as the parties reach an arbitration agreement during the negotiation, the non-existence of the contract would not affect the validity of the arbitration agreement." Thus, the SPC concluded that the existence of an arbitration clause should be examined separately, independent from the main contract. Courts should apply the general rules of contractual formation, to examine whether there is consent to arbitrate. If the court found the arbitration clause formed and valid, the very existence of the main contract should be determined by arbitration, unless it is "necessary" for the court to determine this matter. The SPC concludes that the PTA and SDA sent by YY on 11st May 2017 constituted an offer to arbitrate. The stamped PTA and SDA sent by ZYC on the same day constituted an acceptance and came into effect when the acceptance reached YY. Thus, there exists an arbitration agreement between the parties. It is the arbitral tribunal that should determine whether the main contract was concluded.

3. **English judgment**

The English case concerns a proposed voyage charter between DHL Project & Chartering Limited (hereinafter "**DHL**") and Gemini Ocean Shipping Co. Limited (hereinafter "**Gemini**"). The negotiations were carried on through a broker. On 25th August 2020, the broker circulated what was described as the Main Terms Recap. It is common ground that the recap accurately reflected the state of the negotiations thus far. Within the Recap, both parties agreed that the vessel would be inspected by Rightship. This widely used vetting system aims to identify vessels suitable for the carriage of iron ore and coal cargoes. Also, both parties agreed that the dispute should be submitted to arbitration. There was an attached proforma, including a provision that the vessel to be nominated should be acceptable to the charterer. Still, that acceptance in accordance with detailed requirements set out in clause 20.1.4 "shall not be unreasonably withheld". By 3rd September, however, Rightship approval had not been obtained. DHL advised that "(p)lease arrange for a substitute vessel" and finally, "(w)e hereby release the vessel due to Rightship and not holding her any longer." In this situation, the attached proforma was not approved by DHL, and there is no "clean" fixture, [7]which means the parties did not reach an agreement. After that, Gemini submitted that there is a binding charter party containing an arbitration clause and commenced arbitration accordingly.

The Court of Appeal made a detailed analysis of separability. Combining analysis of numerous cases, including Harbour v. Kansa, [8]Fiona Trust, [9]BCY v. BCZ[10] and Enka v. Chubb, [11]and analysis of International Commercial Arbitration written by Prof. Gary Born, the Courts of Appeal concluded that separability should not be applied if the formation of the underlying contract is in dispute. Separability applies only when the parties have reached an agreement to refer a dispute to arbitration, which they intend (applying an objective test of intention) to be legally binding. In other words, disputes as to the validity of the underlying contract in which the arbitration agreement is contained do not affect the arbitration agreement unless the ground of invalidity impeaches the arbitration agreement itself. But separability is not applicable when the issue is whether an agreement to a legally binding arbitration agreement has been reached in the first place. In this case, the parties agreed in their negotiations that if a binding contract were concluded as a result of the subject being lifted, that contract would contain an arbitration clause. However, based on the analysis of the negotiation and the commercial practice in the industry, the Court of Appeal concludes that either party was free to walk away from the proposed fixture until the subject was lifted, which it never was. Thus, there was neither a binding arbitration agreement between the parties.

4. Comments

Before discussing the scope of the application of separability, one thing needed to be clarified in advance: Separability does not decide the validity or existence of the arbitration agreement in itself. Separability is a legal presumption based on the practical desirability to get away from a theoretical dilemma. However, separability does not mean the arbitration agreement necessarily exists or is valid. It only means the arbitration agreement is separable from the underlying contract, and it cannot escape the need for consent to arbitrate.[12] Therefore, the existence of the arbitration agreement should not be considered when discussing the scope of application of the arbitration agreement.

The justification of the doctrine of separability should be considered when discussing its scope of application. The justification for the doctrine of separability can be divided into three factors: (a) The commercial parties' expectations. Parties to arbitration agreements generally "intended to require

arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty. (b) Justice and efficiency in commerce. Without the separability doctrine, “it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitration obligation by the simple expedient of declaring the agreement void.” and (c) Nature of the arbitration agreement.[13] The arbitration agreement is a procedural contract, different from the substantive underlying contract in function. If these justifications still exist in the contract formation issue, the doctrine of separability should be applied.

It is necessary to distinguish the contract formation issue and contract validity issue, especially the substantive validity issue, when discussing the applicability of those justifications. The contract formation issue concerns whether parties have agreed on a contract. The ground to challenge the formation of a contract would be that the parties never agree on something, or the legal condition for the formation is not satisfied. The contract substantive validity issue is where the parties have agreed on a contract, but one party argue that the agreement is invalidated because the true intent is tainted. The grounds to challenge the substantive validity would be that even if the parties have reached an agreement, the agreement is not valid because of duress, fraud, lack of capacity or illegality. The formation and validity issues are two different stages of examining whether the parties have concluded a valid contract. The validity issue would only occur after the formation of the contract. In other words, an agreement can be valid or invalid only if the agreement exists.

It is argued that separability should be applicable to the formation of contract. Firstly, separability satisfies the parties expectation where most commercial parties expect a one-stop solution to their dispute, irrespective of whether it is for breach of contract, invalidity or formation. Furthermore, the application of separability would achieve justice and efficiency in commerce. Separability is necessary to prevent the party from vitiating the arbitration obligation by simply declaring a contract not concluded. In short, since the justifications still stand in the issue of contract formation, separability should also apply in such an issue.

The English Court of Appeal rejected the application of separability in the formation of contract holding the parties’ challenge to the existence of the main contract would generally constitute a challenge to the arbitration clause. However, the same argument may apply for invalidity of the underlying contract. Since the arbitration agreement is indeed concluded in the same circumstances

as the underlying contract the challenging to the validity of the contract may also challenge the validity of the arbitration clause, while separability still applies. On the contrary, the Chinese approach probably is more realistic. The SPC ruled that separability applies where the formation of the underlying contract is disputed. But before referring the dispute to arbitration, the SPC separately considered the formation of the arbitration clause. Only after being satisfied the arbitration clause is prima facie concluded, the court declined jurisdiction and referred the parties to arbitration.

[1] Ronan Feehily, *Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine*, 34 Arbitration International 355 (2018), p. 356.

[2] See Blackaby Niegel, Constantine Partasides et al., *Redfern and Hunter on International Arbitration*, Kluwer Law International; Oxford University Press 2015, pp. 104–107.

[3] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, pp. 492-493.

[4] The Guiding Case No. 196: Dispute in Validity of Arbitration Agreement between YunYu Limited and Shenzhen ZhongYuanCheng Commercial Investment Holding Co. Limited.

[5] DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555 (24 November 2022)

[6] SPC's Interpretation of Several Issues concerning the Application of Arbitration Law, Fa Shi?2006?No. 7.

[7] Clean Fixture is a concept in the maritime area. It means the Parties' confirmation that the contract has been concluded and that there are no further Subjects and/or restrictions to the execution of the agreed Contract. The Fixture is not clean until both parties have waived their subjects/restrictions.

[8] Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701.

[9] Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] 4 All ER 951.

[10] BCY v BCZ [2016] SGHC 249, [2016] 2 Lloyd's Rep 583.

[11] Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, [2020] 1 WLR 4117

[12] See McNeill M. S. & Juratowitch B., *Agora: Thoughts on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate*, 3 Arbitration International 475 (2008).

[13] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, p. 428.

The standard of human rights review for recognition and enforcement of foreign judgments: 'due satisfaction' or 'flagrant denial of justice'?

Note on *Dolenc v. Slovenia* (ECtHR no. 20256/20, 20 October 2022)

by Denise Wiedemann, Hamburg

1. Facts and Holding

On 20 October 2022, the ECtHR issued a decision that provides guidance regarding the human rights review of recognition and enforcement decisions. The decision concerns the recognition of Israeli civil judgments by Slovenian courts. The Israeli judgments obliged Vincenc Vinko Dolenc, an internationally renowned

neurosurgeon, to compensate a former patient for pecuniary and non-pecuniary damage in an amount equivalent to approximately 2.3 million euros (para. 22). Dolenc had performed surgery on the claimant, who was left severely disabled. After Slovenian courts recognized the Israeli judgments, Dolenc applied to the ECtHR. He contended that Slovenia had violated Art. 6(1) ECHR because it had recognized Israeli judgments that resulted from an unfair proceeding. Specifically, he argued that he had been unable to participate effectively in the trial in Israel because the Israeli court had refused to examine him and his witnesses by way of the procedure provided under the Hague Evidence Convention (para. 61).

The ECtHR found that the Slovenian courts had not examined the Israeli proceedings duly and had not given enough weight to the consequences that the non-examination of the witnesses had for the applicant's right to a fair trial (para. 75). Therefore, the ECtHR unanimously held that Slovenia had violated Art. 6(1) ECHR.

2. Standard of Review

In its reasoning, the Court confirmed the standard of review that it had laid down in *Pellegrini v. Italy* (no. 30882/96, ECtHR 20 July 2001). In *Pellegrini*, the ECtHR found that Contracting States to the ECHR have an obligation to refuse recognition or enforcement of a foreign judgment if the defendant's rights were violated during the adjudication of the dispute in the state of the judgment's origin (para. 40). As in *Dolenc v. Slovenia*, the ECtHR in *Pellegrini* did not examine whether the proceedings before the court of origin complied with Art. 6(1) of the Convention. Instead, the Court scrutinized whether the Italian courts, i.e. courts in the state of enforcement, applied a standard of review in reviewing the foreign judgment which was in conformity with Art. 6(1) ECHR. As regards the standard of review, the ECtHR required the Italian courts to 'duly satisfy' themselves that the proceedings in the state of the judgment's origin fulfilled the guarantees of Art. 6(1) ECHR (para. 40). Thus, when recognizing or enforcing a civil judgment from a non-Contracting State, Contracting States have to verify that the foreign proceedings complied with Art. 6(1) ECHR.

Yet, in respect of other issues, the ECtHR has limited the standard of review from due satisfaction to that of a 'flagrant denial of justice'. In the criminal law context, the ECtHR held in *Drozd and Janousek v. France and Spain* that Contracting

States are obliged to refuse the enforcement of a foreign sentence only if 'it emerges that the conviction is the result of flagrant denial of justice' (para. 110). The same limited review has been applied to extradition cases (*Othman (Abu Qatada) v. the United Kingdom*) and to child return cases (*Eskinazi and Chelouche v. Turkey)*. A flagrant denial of justice is a breach that 'goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.' (*Othman*, para. 260).

It has been argued that in cases regarding the recognition or enforcement of a foreign civil judgement, the review should likewise be limited because the fundamental rights violation in the state of recognition or enforcement would be only of an indirect nature (e.g. *Matscher*, 'Der Begriff des fairen Verfahrens nach Art. 6 EMRK' in Nakamura et al. (eds), Festschrift Beys, Sakkoulas, Athens 2003, pp. 989–1007, 1005). Contrary to this view, the ECtHR confirmed in *Dolenc v. Slovenia* the requirement of an unlimited review of the proceeding in the state of origin; the Court saw 'no reason to depart from the approach set out in *Pellegrini*' (§ 60).

The approach taken in *Pellegrini* and *Dolenc* is convincing with regard to Art. 1 ECHR, which obliges the Contracting States to fully secure all individuals' rights and freedoms. A deviation from the requirement set out in Art. 1 ECHR is not justified by the fact that recognition or enforcement of a decision issued in violation of Art. 6(1) ECHR would only be of an indirect nature; rather, such a recognition or enforcement would exacerbate the violation and would, therefore, be in direct breach of the Convention. The ECtHR explained the restricted level of review in extradition and child return cases with the fact that, unlike in a recognition or enforcement situation, 'no proceedings concerning the applicants' interests [had] yet been disposed of' (see *Eskinazi and Chelouche v. Turkey*).

However, it is not obvious why the ECtHR applies different standards for the enforcement of foreign criminal judgments ('flagrant denial of justice') and the recognition or enforcement of foreign civil judgment ('due satisfaction'). Whereas Contracting States are not required to verify whether a foreign criminal proceeding was compatible with all the requirements of Art. 6(1) ECHR, they are obliged to do so when a foreign civil proceeding is at issue. In justifying the

reduced effect of Art. 6(1) ECHR in criminal cases, the Court explained that a review of all the requirements of Art. 6(1) ECHR would 'thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned.' (*Drozd and Janousek v. France and Spain*, para. 110). Thus, the ECtHR seems to place greater importance on cooperation in criminal matters than on cooperation in civil matters. A reason is not apparent.

3. Situations Allowing for a More Limited Review

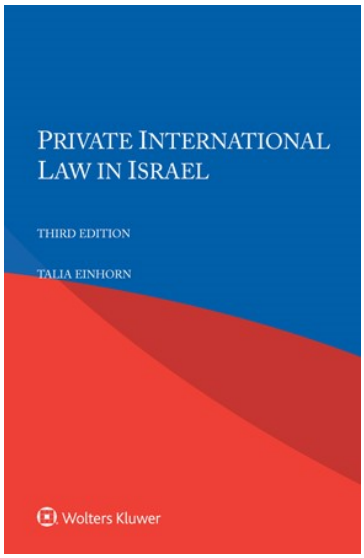
Despite the confirmation of *Pellegrini v. Italy* in *Dolenc v. Slovenia*, the ECtHR left open the possibility of a more limited review in certain civil recognition and enforcement cases. First, the *Pellegrini* case and the *Dolenc* case concerned judgments emanating from non-Contracting States. If, in contrast, the recognition or enforcement of a judgment from a Contracting State was at issue, debtors would be obliged to challenge violations of Article 6(1) ECHR in the state of the judgment's origin. If debtors fail to do so – e.g. if they miss the time limit for lodging a complaint at the ECtHR (Art. 35(1) ECHR) –, a further review in the state of enforcement would not be successful. Otherwise, procedural limits for human rights challenges would lose their preclusive effect.

Second, the ECtHR qualified *Pellegrini* as a case having 'capital importance' (para. 40) and *Dolenc* as a case of 'paramount importance to the defendant' (para. 60). While *Pellegrini* concerned a decision annulling a marriage, i.e. determining personal status, the foreign judgment in *Dolenc* caused serious financial and reputational damage to the applicant. However, it is questionable why a judgment for payment of a small amount of money should allow for a more limited review as Art. 1 ECHR does not differentiate between important and less important matters.

Finally, different standards would in any event apply to recognition and enforcement within the EU: In the case of recognition and enforcement under strict EU procedures (without the possibility of refusal), Member States benefit from the 'presumption of compliance' (*Sofia Povse and Doris Povse v. Austria*; *Avoti?š v. Latvia*). With this presumption, the ECtHR seeks to establish a balance between its own review powers vis-à-vis states and its respect for the activities of the EU. In cases with a margin of manoeuvre, in particular through the public

policy clause, the ECtHR will not require the Member State of recognition or enforcement to 'duly satisfy' itself that the adjudication proceeding in the Member State of origin complied with Art. 6(1) ECHR. Rather, the ECtHR will assess only whether the application of the public policy clause has been 'clearly arbitrary' (*Royer v. Hungary*, para. 60).

Out now: Talia Einhorn, Private International Law in Israel, 3rd edition



It is my pleasure to recommend to the global CoL community a real treat: Talia Einhorn's "Private International Law in Israel", an analysis of the country's private international law of no less than almost 900 pages, now in its third edition. This monograph, significantly enlarged and extended, grounds on the respective country report for the International Encyclopedia of Laws/Private International Law amongst a large series of country reports on which the "General Section" by Bea Verschraegen, the editor of the entire series, builds.

According to the Encyclopedia's structure for country reports, the text covers all conceivable aspects of a national private international law, from "General Principles (Choice of Law Techniques)" in Part I, including the sources of PIL, the technical and conceptual elements of choice of law rules ("determination of the applicable law") as well as "basic terms". Part II unfolds a fascinating tour d'horizon through the "Rules of Choice of Law" on persons, obligations, property law, intangible property rights, company law, corporate insolvency and personal bankruptcy, family law and succession law. Part III covers all matters of

international civil procedure, including jurisdictional immunities, international jurisdiction, procedure in international litigation, recognition and enforcement and finally international arbitration.

The analyses offered seem to be extremely thorough and precise, including in-depth evaluations of key judgments, which enables readers to grasp quickly core concepts and issues beyond basic information and the mere black letter of the rules. For example, Chapter 4 of Part III on the recognition and enforcement of foreign judgments explains that Israel is a State Party to only one rather specific convention, the UN Convention on the Recovery Abroad of Maintenance 1956 (apparently operated without any implementing legislation, see para. 2434). Further, Israel entertains four bilateral treaties (with Austria, Germany, Spain and the UK) that provide generally for recognition and enforcement of judgments in civil and commercial matters. These four treaties, however, seem to differ substantially from each other and from the domestic statutory regime under the Israeli Foreign Judgments Enforcement Law ("FJEL"), see para. 2436. These differences are spelled out down to the level of decisions of first instance courts of the respective foreign State Party, see e.g. footnote 1927 with reference to recent jurisprudence (of the German Federal Court of Justice and) of the local court of Wiesbaden on Article 8(2) of the bilateral treaty with Germany stipulating, according to these courts' interpretation, a far-reaching binding effect to the findings of the first court. This is contrasted with case law of the Israeli Supreme Court rejecting recognition and enforcement of a German judgment, due to the lack of a proper implementation of the Treaty in Israeli domestic law, see paras. 2437 et seq. – a state of things criticized by the author who also offers an alternative interpretation of the legal constellation that would have well allowed recognition and enforcement under the Treaty, see para. 2440. Additionally, interpretation of the domestic statutory regime in light of treaty obligations of the State of Israel, irrespective of a necessity of any specific implementation measures, is suggested, para. 2447. On the level of the domestic regime, the FJEL, in § 3 (1), prescribes as one out of a number of cumulative conditions for enforcement that "the judgment was given in a state, the courts of which were, according to its laws, competent to give it", see para. 2520. Indeed, "the first condition is puzzling", para. 2526, but by no means unique and does even appear in at least one international convention (see e.g. Matthias Weller, RdC 423 [2022], at para. 251, on Art. 14(1) of the CEMAC 2004 Agreement and on comparable national rules). At the same time, and indeed, controlling the jurisdiction of the

first court according to its own law appears hardly justifiable, all the more, as there is no control under § 3 FJEL of the international jurisdiction according to the law of the requested court / State, except perhaps in extreme cases under the general public policy control in § 3 (3) FJEL. Additionally, on the level of domestic law, English common law seems to play a role, see paras. 2603, but the relation to the statutory regime seems to pose a question of normative hierarchy, see para. 2513, where Einhorn proposes that the avenue via common law should only be available as a residual means. In light of this admirably clear and precise assessment, one might wonder whether Israel should considering participating in the HCCH 2019 Judgments Convention and the reader would certainly be interested in hearing the author's learned view on this. The instrument is not listed in the table of international treaties dealt with in the text, see pp. 821 et seq., nor is the HCCH 2005 Choice of Court Agreements Convention. Of course, these instruments do not (yet?) form part of the Israeli legal system, but again, the author's position whether they should would be of interest.

As this very brief look into one small bit of Einhorn's monograph shows, this is the very best you can expect from the outsider's and a PIL comparative perspective, probably as well from the insider's perspective if there is an interest in connecting the own with the other. Admirable!

Return of the anti-suit injunction: parallel European proceedings and English forum selection clauses

Written by Kiara van Hout. Kiara graduated from the Law Tripos at the University of Cambridge in 2021 (St John's College). She is currently an Associate to a Judge at the Supreme Court of Victoria.

In two recent English cases, the High Court has granted injunctive relief to

restrain European proceedings in breach of English forum selection clauses. This article compares the position on anti-suit injunctive relief under the Brussels I Regulation Recast and the English common law rules, and the operation of the latter in a post-Brexit landscape. It considers whether anti-suit injunctions to protect forum selection clauses will become the new norm, and suggests that there is Supreme Court authority militating against the grant of such injunctive relief as a matter of course. Finally, it speculates as to the European response to this new English practice. In particular, it questions whether the nascent European caselaw on anti anti-suit injunctions foreshadows novel forms of order designed to protect European proceedings.

Anti-suit injunctions under the Brussels I Regulation Recast

In proceedings commenced in the English courts before 1 January 2021, it is not possible to obtain an anti-suit injunction to restrain proceedings in other EU Member States.

In Case 159/02 Turner v Grovit [2004] ECR I-3565, the Full Court of the European Court of Justice found that it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country. That is so even where that party is acting in bad faith in order to frustrate existing proceedings. The Court stated that the Brussels I Regulation enacted a compulsory system of jurisdiction based on mutual trust of Contracting States in one another's legal systems and judicial institutions:

> It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them… Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

In the subsequent Case 185/07 Allianz v West Tankers [2009] ECR I-00663, the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country on the basis that such proceedings would be contrary to an English

arbitration agreement. In its decision, the Grand Chamber of the European Court of Justice found that notwithstanding that Article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction may have consequences which undermine the effectiveness of that regime. An anti-suit injunction operates to prevent the court of another Contracting State from exercising the jurisdiction conferred on it by the Brussels I Regulation, including its exclusive jurisdiction to determine the very applicability of that regime to the dispute. The decision in Allianz v West Tankers represents an extension of Turner v Grovit insofar as it prohibits the issue of anti-suit injunctions in support of English arbitration as well as jurisdiction agreements.

Anti-suit injunctions under the common law rules

The Brussels I Regulation Recast rules govern proceedings commenced in the English courts before 1 January 2021. The regime governing jurisdiction in proceedings commenced after 1 January 2021 comprises the Hague Choice of Court Convention and, more pertinently for present purposes, the common law rules.

At common law, a more flexible approach to parallel proceedings is taken. Anti-suit injunctions may be deployed to ensure the dispute is heard in only one venue. Section 37 of the Senior Courts Act 1981 empowers courts to grant an anti-suit injunction where it appears just and convenient to do so. The ordinary justification for injunctive relief is protection of the private rights of the applicant by preventing a breach of contract. Where parties have agreed to a forum selection clause, either in the form of a jurisdiction or arbitration agreement, anti-suit injunctions may be available to prevent a breach of contract.

In two recent cases, the English courts have granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. These cases demonstrate clearly the change of position as compared with Allianz v West Tankers and Turner v Grovit, respectively.

Proceedings in violation of English arbitration agreement

In QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm), a yacht allegedly caused damage to an underwater power cable

which resulted in hydrocarbon pollution. The claimant had issued a liability insurance policy to the owners in respect of the yacht. That policy contained a multi-faceted dispute resolution and choice of law clause, which provided *inter alia* that any dispute arising between the insurer and the assured was to be referred to arbitration in London.

The defendant had issued a property damage and civil liability insurance policy with the owners of the underwater power cable. The defendant brought a direct claim against the claimant in the Spanish courts under a Spanish statute. The claimant responded by issuing proceedings in England, and applied for an anti-suit injunction in respect of the Spanish proceedings brought by the defendant.

The court found that the claims advanced by the defendant in the Spanish proceedings were contractual in nature, as the Spanish statute provided the defendant with a right to directly enforce the contractual promise of indemnity created by the insurance contract. The matter therefore concerned a so-called 'quasi-contractual' anti-suit injunction application, as the defendant was not a party to the contractual choice of jurisdiction in issue. Nevertheless, the right which the defendant purported to assert before the Spanish court arose from an obligation under a contract (the claimant's liability insurance policy) to which the arbitration agreement is ancillary, such that the obligation sued upon is said to be 'conditioned' by the arbitration agreement.

That the defendant was seeking to advance contractual claims without respecting the arbitration agreement ancillary to that contract provided grounds for granting an anti-suit injunction. As such, the position under English conflict of laws rules is that the court will ordinarily exercise its discretion to restrain proceedings brought in breach of an arbitration agreement unless the defendant can show strong reasons to refuse the relief (see Donohue v Armco Inc [2001] UKHL 64). The defendant advanced several arguments, which were dismissed as failing to amount to strong reasons against the grant of relief. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining Spanish proceedings brought by the defendants.

Proceedings in violation of exclusive English jurisdiction agreement

In Ebury Partners Belgium SA/NV v Technical Touch BV [2022] EWHC 2927

(Comm), the defendants were interested in receiving foreign exchange currency services from the claimant company. The claimant submitted that the parties had entered into two agreements in early 2021.

The first agreement was a relationship agreement entered into by the second defendant Mr Berthels as director of the first defendant Technical Touch BV. Mr Berthels completed an online application form for currency services, agreeing to the claimant's terms and conditions. These terms and conditions were available for download and accessible via hyperlink to a PDF document, though in the event Mr Berthels did not access the terms and conditions by either method. The terms and conditions included an exclusive jurisdiction agreement in favour of the English courts.

The second agreement was a personal guarantee and indemnity given by Mr Berthels in respect of the defendant company's obligations to the claimant. This guarantee also included an exclusive English jurisdiction agreement.

When a dispute arose in April 2021 as to the first defendant's failure to pay a margin call made by the claimant under the terms of the relationship agreement, the defendants initiated proceedings in Belgium seeking negative declaratory relief and challenging the validity of the two agreements under Belgian law. The claimant responded by issuing proceedings in England, and applied for an interim anti-suit injunction in respect of Belgian proceedings brought by the defendants. The claimant submitted that the Belgian proceedings were in breach of exclusive jurisdiction agreements in favour of the English court.

An issue arose as to whether there was a high degree of probability that the English jurisdiction agreement was incorporated into the relationship agreement, and which law governed the issue of incorporation. It is not within the scope of this article to consider this choice of law issue in depth. For present purposes, it is sufficient to note that the court decided that it was not unreasonable to apply English law to the issue of incorporation, and that on this basis, there was a high degree of probability that the clause was incorporated into the relationship agreement.

As in QBE Europe, the court approached the discretion to award injunctive relief on the basis that the court will ordinarily restrain proceedings brought in breach of a jurisdiction agreement unless the defendant can show strong reasons to

refuse the relief. No sufficiently strong reasons were shown. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining the Belgian proceedings.

Anti-suit injunctions to protect forum selection clauses: the new norm?

It is plainly important to the status of London as a litigation hub in Europe that English forum selection clauses maintain their security and enforceability. The Brussels I Regulation Recast provided one means of managing parallel proceedings contrived to circumvent such clauses. Absent the framework provided by the Brussels I Regulation Recast; the English courts appear to be employing anti-suit injunctions as an alternative means of protecting English forum selection clauses. This ensures that litigants are still equipped to resist parallel proceedings brought to 'torpedo' English proceedings.

Proceedings in which there is an exclusive English forum selection clause represent among the most compelling circumstances in which the court might grant an anti-suit injunction. In those circumstances, the court is likely to grant injunctive relief to protect the substantive contractual rights of the applicant. The presence of an exclusive forum selection clause is a powerful ground for relief which tends to overcome arguments as to comity and respect for foreign courts. As noted in the joint judgment of Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38, citing Millett LJ in Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, a foreign court is unlikely to be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

Nevertheless, it is not to be assumed that injunctive relief will always be granted to enforce English forum selection clauses. As Lord Mance (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agreed) stated in Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35, at paragraph [61]:

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the

> parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

It is too early to say whether anti-suit injunctions will be granted as a matter of course in circumstances such as those in QBE Europe and Ebury Partners. The judgment of Lord Mance indicates that there is a residual role for comity and respect for foreign courts even in cases of breach of a forum selection clause. The English court should not necessarily assume that its own view as to the validity, scope and interpretation of a forum selection clause is the only one. In some instances, it will be appropriate to allow a foreign court to come to its own conclusion, and consequently to refuse injunctive relief. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 117-124] It is clear, at least, that anti-suit injunctions have returned to the toolbox.

The European response: anti anti-suit injunctions?

It seems likely that English anti-suit injunctions will be met with resistance by European courts who find their proceedings obstructed by such orders. As a matter of theory, it is now possible for European courts to issue anti-suit injunctions to restrain English proceedings: the inapplicability of Allianz v West Tankers and Turner v Grovit vis-à-vis England cuts both ways. However continental European legal systems have traditionally regarded anti-suit injunctions as being contrary to international law on the basis that they operate extraterritorially and impinge on the sovereignty of the State whose legal proceedings are restrained.

It is more plausible that European courts would deploy anti anti-suit injunctions to unwind offending English orders. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 50] Assuming that the grant of anti-suit injunctions becomes a regular practice of the English courts in these circumstances, this could provide the impetus for legal developments in this direction across the Channel. In recent years both French and German courts

have issued orders of this kind in the context of patent violation. In a December 2019 judgment, the Higher Regional Court of Munich issued an anti anti-suit injunction to prevent a German company from making an application in US proceedings for an anti-suit injunction (see Continental v Nokia, No. 6 U 5042/19). In a March 2020 judgment, the Court of Appeal of Paris issued an anti anti-suit injunction ordering various companies of the Lenovo and Motorola groups to withdraw an application for an anti-suit injunction in US proceedings (see IPCom v Lenovo, No. RG 19/21426).

However, neither decision endorses the general availability of anti anti-suit injunctions outside of the specific circumstances in which relief was sought in those cases. It remains to be seen whether European courts will be willing to utilise anti anti-suit injunctions in circumstances wherein parties have agreed to English forum selection clauses. At this stage, it can only be said that there is a possibility of an undesirable tussle of anti-suit injunctions and anti anti-suit injunctions. This would expose litigants to increased litigation costs, wasted time and trouble, uncertainty as to which court will ultimately hear their case, and the spectre of coercive consequences in the event of non-compliance. Furthermore, a move towards relief of this kind would have a profound impact on the security of English jurisdiction and arbitration agreements. Developments in this area should be watched with interest.