competitive advantage of having an exclusive right to sell and the assistance provided by the supplier in communicating knowhow, training etc.

In a contract for the supply of services, the next question, under Article 7 (1)(b), is where, under the contract, the services were provided. Where there are several places of performance, the court must identify the place of the main provision of services, or if that place cannot be determined, the place where the agent is domiciled (*Wood Floor Solutions*, Case C-19/09 (EU: C:2010:137)). That determination was for the national court. Lusavouga argued that the obligations were to be performed in Portugal, where the goods were delivered. However, given the emphasis on the importance of the marketing services provided, there must be a strong argument that the place of the main provision of services was Spain where the marketing took place and the goods were eventually sold.

Exclusive distribution agreements, which are often performed in a number of different countries, can be difficult to fit into the BIR recast rules on jurisdiction, and this decision provides welcome guidance on how they might. However, parties will need to have in mind that the restrictive approach taken to orally agreed jurisdiction agreements may require more explicit drafting and/or written reference to standard terms and conditions.

Louise Merrett

Address for Correspondence: Trinity College, Cambridge, CB2 1TQ, UK. Email: lm324@cam.ac.uk

FOREIGN LAW ILLEGALITY: WHERE ARE WE NOW?

HOW should an English court react when an English law contract produces a result which is illegal under foreign law?

There is a well-established rule of English public policy that the courts will not enforce a contract if the object and intention of the parties is an endeavour "to perform in a foreign and friendly country some act which is illegal by the law of such country" (*Foster* v *Driscoll* [1929] 1 K.B. 470, 521, per Sankey L.J.) It has been held to be "an essential and necessary element" that the arrangement should involve the carrying out of prohibited acts *within the territory* of a foreign state (*Ispahani v Bank Melli Iran* [1998] Lloyds L.R. (Banking) 133, 140).

One might say there is good reason for limiting the rule in that way: it should be an exceptional case in which a contract which is legal under its governing law is refused enforcement on the basis of illegality under some other law. Ideally, the circumstances in which the exception is engaged should be predictable.

Similar considerations arise in cases involving illegality under *domestic* law, but the majority in *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467,

rejected the idea of a rule-based approach in favour of a flexible analysis, which requires the balancing of policy factors to determine whether "it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system" (per Lord Toulson, at [120]). Should issues of *foreign law* illegality be subject to a similarly open-textured approach?

The practical context is illustrated by two recent decisions by Leggatt J. in *Dana Gas PJSC* v *Dana Gas Sukuk Limited & Ors*: [2017] EWHC 2928 (Comm) and [2018] EWHC 278 (Comm) (in the first decision, Leggatt J. gave judgment against the claimant in its absence; the second judgment was his ruling on the claimant's application to set the first judgment aside). The case concerned an Islamic financing arrangement, under which "Certificateholders" provided finance to a UAE company, Dana Gas. Because *Shari'a* law (and therefore UAE law) prohibits the payment of interest, funds were paid to a trustee, who invested in a UAE law joint venture or *mudarabah*, under which Dana Gas agreed to generate profits (not interest) for distribution to the Certificateholders.

An English law agreement, the "Purchase Undertaking", provided that, in certain events, the trustee could serve notice requiring payment by Dana Gas of an "Exercise Price" (the amount invested by the Certificateholders plus unpaid distributions). In substance, the Purchase Undertaking was a back-up, designed to give the Certificateholders a claim for the full amount of their investment, whatever the position as regards the *mudarabah*.

Dana Gas argued that the *mudarabah* structure was not *Shari'a* compliant. It said that the Purchase Undertaking was therefore also unenforceable, because it had the effect of guaranteeing to the Certificateholders the return from their investment by removing the risk of a loss of capital, in a manner inconsistent with (and illegal under) *Shari'a* law. Dana Gas relied initially on Rome I, Article 9(3) (illegality under the law of the place of performance), but that point was abandoned, and the argument was instead that enforcement of the Undertaking would infringe the public policy of the forum (Rome I, Art. 21).

The Judge held that the *Foster v Driscoll* rule was not engaged, because it was impossible to say that the object and intention of the parties in entering into the Purchase Undertaking was to carry out prohibited acts *within the territory* of the UAE ([2017] EWHC 2928 (Comm), at [80]–[83]). Neither did it make a difference to characterise the Purchase Undertaking as ancillary to the *mudarabah* and infected by the same illegality, because ([2018] EWHC 278 (Comm), at [30]–[37]) the Undertaking was separate, and the illegality in question was not one proscribed by English public policy.

What does this tell us about the adequacy of the current approach? The Purchase Undertaking did not involve performance of prohibited acts within the UAE, but it did affect the position of a UAE company, and

did produce (and was designed to produce) a result which was unlawful under UAE law.

The traditional rigid approach supports the policy that parties should be held to their contracts. This was key in persuading the Court in *Ispahani* to tie the rule to the carrying out of acts within the territory of the foreign state. A wider rule, it was thought, could lead to "preposterous results", as in the example given by MacKinnon L.J. in *Kleinwort, Sons & Co. v Ungarische Baumwolle Industrie AG* [1939] 2 K.B. 678, 694–95, of the Ruritanian who runs up hotel bill in England and then relies in his defence on a later Ruritanian law which says that no Ruritanian should pay a hotel bill which he has incurred in England.

But to say that the risk of preposterous results requires an inflexible rule may be going further than is necessary. The countervailing factor is international comity. That is what led the court in *Foster v Driscoll* to refuse to uphold a partnership for the importation of whisky into the US during the Prohibition Era. In *Regazzoni v KC Sethia (1944) Ltd.* [1958] A.C. 301, 319, Viscount Simonds said: "Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity."

Comity is a notoriously elusive concept, but it seems implausible that it would require the English court to give effect to Ruritanian law, in MacKinnon L.J.'s hypothetical. If anything, it would require the opposite, because in the example the Ruritanian legislation seems designed to evade liability for a validly incurred English debt. But comity might be relevant to the enforceability of a contract which has been designed to circumvent possible illegality under a foreign law, even if it does not require acts in the territory of the foreign State.

There is some support for a more flexible approach. In *Euro-Diam Ltd. v Bathurst* [1990] 1 Q.B. 1, diamond dealers made a consignment of diamonds available on a sale or return basis to a German company, but misrepresented the value of the diamonds in order to reduce the amount of tax payable by the consignee (a criminal offence in Germany). The diamonds were stolen, and the dealers made a claim on an English contract of insurance. Kerr L.J. in the Court of Appeal (at 35C) applied a discretionary "public conscience" test to determine the relevance of the dealers' unlawful acts to the enforceability of the insurance contract, holding that it was enforceable because the illegality was incidental only, had involved no deception of the insurers, and the offending invoice was not relied upon as part of the claim.

More recently in a Hong Kong case, *Ryder Industries Ltd. v Chan Shui Woo* [2015] HKCFA 85, [2016] 1 H.K.C. 323, Lord Collins of Mapesbury N.P.J. rejected the idea of a wide rule that a contract might be refused enforcement if it has been performed in such a way as to involve one (or

both) of the parties in commission of a legal wrong under foreign law (at [56]). But he went on to say (at [57]) that "[t]here may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state . . . may be such that it would be contrary to public policy to enforce a contract".

In the US the Second Restatement §187(2)(b) provides that a choice of law clause will not be enforced if the chosen law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state". In *Lehman Bros. v Minmetals Int'l*, 179 F. Supp. 2d 118 (S.D.N.Y 2000), that provision led to the conclusion that a guarantee of liabilities under certain FX trades was unenforceable, because it sought to avoid the effect of Chinese exchange control regulations.

In his second judgment upholding the Purchase Undertaking, Leggatt J. (at [32]) justified his conclusion on the basis that there was "no English public policy which the Purchase Undertaking contravenes". By this he meant in particular that English law contains no policy equivalent to that in UAE law which makes the payment of interest illegal. That is true, but it is really the cause of the problem rather than the answer. The issue in such cases arises because the foreign law prohibits something which English law does not, and that requires a determination of whether the policy in favour of upholding contracts on the one hand should give way to the demands of comity on the other. In almost all cases, one would expect the former to win out; but it would seem better to arrive at that conclusion by conducting an appropriately calibrated balancing exercise, rather than by applying rigid rules which may not always reflect what comity requires.

Adam Johnson

Address for Correspondence: c/o Herbert Smith Freehills LLP, Exchange House, Primrose Street, London, EC2A 2EG, UK. Email: adam.johnson@hsf.com