that it embraced all claims related to the agreement. Again, there was nothing to suggest that the parties intended a narrower construction, or that, contrary to normal practice, they intended that jurisdiction in any dispute should be fragmented, or that they intended the Geneva arbitration clause to be incorporated in a document which already contained a clear, comprehensive jurisdiction agreement.

The decisions in *BNP* and *Airbus* are unsurprising given the principles articulated in earlier cases. But they are important for three particular reasons. First, they highlight clearly the commercial approach of the English courts in seeking to give effect to the apparent and intended purpose of industry-standard documentation. Second, they reaffirm the courts' commitment to avoiding the fragmentation of disputes. Third, they underscore a practical lesson for those who draft complex cross-border agreements. It may be possible to ensure that previous jurisdiction agreements will not be superseded, or that an arbitration agreement should be incorporated where none exists, or that disputes should be fragmented. But nothing less than the clearest wording will do.

A final question remains, however. If a claim is subject to an exclusive English jurisdiction agreement the English court has jurisdiction, but what if a party has breached the agreement by suing elsewhere? Against a contracting party an action for damages may lie, or the foreign proceedings may be restrained by injunction (cases under Brussels 1bis aside). Non-parties who encourage breach of an agreement, such as a party's lawyers, may also be liable in tort for inducing breach of contract (though such claims face jurisdictional obstacles). But what of non-party claimants who sue in breach of an agreement, such as the subrogated insurers in *Airbus*? In an important restatement of the position (restoring to prominence Colman J.'s analysis in *West Tankers Inc v Ras Riunione Adriatica SpA* [2005] EWHC 454 Comm), Males L.J. concluded that such proceedings infringe the equitable right of a contracting party to enforcement of the clause. A declaration is therefore available and (at least in relation to infringing proceedings outside Brussels 1bis) an anti-suit injunction. As this suggests, English courts are ready to complement their commercial approach to jurisdiction agreements with effective remedies to enforce them.

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THE PLACE OF COMITY IN THE DISCLOSURE OF DOCUMENTS

IN the *Bank Mellat v H.M. Treasury* litigation, the claimant Bank brought an action in the English High Court against HM Treasury claiming $1.7

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billion plus interest for unlawful interference with the Bank's possessions. The Treasury had restricted the Bank's access to UK financial markets under the Financial Restrictions (Iran) Order 2009, SI 2009/2725. In 2013, the Supreme Court held that order to be unlawful ([2013] UKSC 38). Proof of the cause of Bank Mellat's losses was the main issue in dispute for this part of the litigation (reported at [2019] EWCA Civ 419). The proof was to be found in the some 33,000 documents whose existence had been disclosed by the Bank. HM Treasury wanted to inspect the content of the documents in full. The Bank sought to justify redaction of some of them to conceal confidential banking data.

The manner of proceedings in the English High Court is governed by the Civil Procedure Rules (CPR). Each party to proceedings must make disclosure of documents on which that party relies, as well as those which adversely affect that party's case, or support another party's case (CPR, r. 31.6). At this early pre-trial stage, "disclosure" means compiling a list of documents. "Document" means anything in which information of any description is recorded. Documents may then be inspected by either party to see if it contains evidence in support of the party's case. Documents that have not been disclosed cannot be relied upon at trial of the substance of the action. A party may apply to withhold inspection of a document by the other side on the ground that the party has a right or duty to do so (CPR, r. 31.19(3)). One of the purposes of disclosure and inspection is to avoid an ambush at trial. Parties are on a level playing field as to the documentary information available. Often actions are settled after disclosure as the disclosed documents, once inspected, render a trial of the evidence unnecessary.

The Bank made an application claiming that it had a right or duty to withhold inspection of those parts of the documents which would expose the Bank to a risk of criminal prosecution under Iranian, South Korean and Turkish laws. HM Treasury argued that the documents needed to be evaluated in their entirety, including the identity of the customers, in order for the court to be able to establish whether, when and why business had been lost as a result of the order.

At first instance Cockerill J. held that the court had a discretion whether to order disclosure and inspection. She considered the evidence of the actual risk of criminal sanction following expert evidence of each relevant country's law to hold that there was no risk in relation to South Korea or Iran but there was risk in relation to Turkey. The Bank dropped their claim in relation to Turkish and South Korean customers, but continued with the claim for losses from Iranian customers. The Bank appealed her decision, arguing that production of the Iranian documents would be a breach of Iranian law.

The Court of Appeal stated that disclosure and inspection of documents is part of the procedure of the court which is determined by the *lex fori*,

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namely English law. Therefore, both parties had to make full disclosure and inspection without redaction. However, English law will balance the need for inspection of the documents with foreign law provisions which put a party to English proceedings at risk of criminal prosecution abroad. Gross L.J. concluded that that is a matter of discretion. The order to permit inspection in these cases "will not lightly be made ... with considerations of comity in mind". One might therefore conclude that a party likely to be subject to criminal sanctions by making documents open for inspection would be excused.

Comity is known as having "elastic content" (*Dicey, Morris & Collins on the Conflict of Laws*, 15th ed. [1-008]). Its accepted use in private international law is as a tool for shaping the rules, often as a herald for caution in applying English law too widely, for example to constrain the (quasi) extra-territorial effect of anti-suit injunctions or worldwide freezing orders. Also comity is the explanation for the rule in English domestic law that the performance of a contract will not be enforced if it necessarily involves the doing of an act in a friendly foreign state (*Regazzoni v Sethia* [1958] A.C. 301). Comity has alternatively been used as a justification for the application of the appropriate foreign law. However, that historical view is no longer considered a sufficient basis for the conflict of laws.

It would be fair to say that the English court generally only pays lip service to comity as a constraint on the application of English law. And so it was in this case. Gross L.J. found insufficient evidence in the expert opinion of Iranian law of a real risk of prosecution of the Bank in Iran if the documents were unredacted. That conclusion is surprising. There was only one expert here and his advice was clear on its face. Despite the usual reminder that the evidence was uncontradicted and that the court should be reluctant to reject it, both the first instance and appeal judges did so. English law prevailed. The Bank, if it wants to proceed with its claim, must permit full inspection of the documents.

The sweeping characterisation of this issue as procedural bears closer inspection. There is a danger of the unwarranted application of English law whenever the *lex fori* is applied without justification. A procedural characterisation should be used only in the narrowest of circumstances. Disclosure is rather too easily categorised as procedural. What was at stake in this case was essentially substantive. The breach of Iranian law by disclosure would have been better characterised as a breach of confidentiality owed to the Bank's customers in the transactions being disclosed. The decision of the English court to order inspection breaches those rights as a matter of contract. The contracts have an applicable law, most probably Iranian law. The English decision had the effect of sanctioning breach of contract. That was not merely procedural. The effect is rather similar to third-party debt orders where the contractual applicable law is not English. In those cases the English court accepts that it does not have

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jurisdiction to make a third-party debt order interfering with the rights in contract where that order would not be recognised according to the law which governs the debt (*Société Eram Shipping Co. Ltd. v Compagnie Internationale de Navigation* [2003] UKHL 30, [2004] 1 A.C. 260).

The contractual characterisation is more consistent with a practical, modern view of comity. Acting in accordance with the applicable law is internationally accepted. The applicable law has the advantage of being generally clear and predictable, unlike a decision based upon comity. It is consistent with a narrow view of the *lex fori*. A party such as Bank Mellat would request non-inspection of documentary evidence of contracts on the ground that the foreign law governing those contracts requires confidentiality. Expert evidence of the content of the applicable law would still have to be evaluated. In this case the expert himself confused breaches of contractual and criminal law in Iran, possibly as a result of the parties not being clear in the questions raised. That confusion facilitated the English court denying the effect of Iranian law. A clearer focus on what an expert is to opine would lead to better results.

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PARENT COMPANY DUTY OF CARE TO THIRD PARTIES HARMED BY OVERSEAS SUBSIDIARIES

IN *Vedanta Resources plc. v Lungowe* [2019] UKSC 20, the Supreme Court affirmed the decision of the Court of Appeal that a UK parent company may owe a duty of care in English law to third parties affected by the activities of an overseas subsidiary. The case arose from allegations that the Nchanga Copper Mine in the Republic of Zambia repeatedly discharged toxic chemicals into local watercourses, polluting the only source of water for drinking and crop irrigation. The Mine is operated by Konkola Copper Mines (KCM), a Zambian company whose ultimate parent is the UK-domiciled Vedanta Resources (Vedanta). A group of 1,826 Zambian citizens brought claims in English courts against both companies, claiming negligence and breach of statutory duty under Zambian law. For Vedanta, they relied on Article 4 of the Brussels 1 Recast Regulation and argued that the company exercised a high level of control over both the mining operations and KCM's compliance with health, safety and environmental standards. For KCM, they invoked the "necessary or proper party" gateway in paragraph 3.1(3) of Practice Direction 6B of the CPR to serve the claim form outside the jurisdiction. Among other things, the gateway requires (1) there to be a "real issue" between the claimant and the

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