
Helsinki Law Review

2010/2



Helsinki Law Review is published and edited by Finnish undergraduate law students. Its primary purpose is to provide Finnish law students with a forum for practicing their skills in academic writing and assessment as well as an opportunity to follow and participate in the work of their peers and seniors.

Helsinki Law Review is supervised by an Academic Council that consists of a number of senior academic staff members in the Faculty of Law. Each article is evaluated anonymously by a referee chosen among academic professionals. A referee evaluating an article written by an undergraduate student is advised of the author's background.

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In addition to research articles and case commentaries, *Helsinki Law Review* is also interested in publishing other types of writings, such as book reviews.

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On the Review

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The *Review* is published twice a year. The *Review* is prepared to publish articles and other contributions in Finnish, Swedish and English. English Abstracts are provided for articles not fully written in English. The *Review* is available for free subscription at <http://www.helsinki.lawreview.fi> to organizations.

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From the Editors

This is the first issue of *Helsinki Law Review* in which all articles are written in English or Swedish. That was not in itself the original goal of the *Review* but the law students chose their languages. None of the authors wrote in her or his native language. It is delightful to notice that the authors took the opportunity to improve their ability to communicate in foreign languages.

How to write an article for the *Review*? It is not difficult, just start writing. Sometimes an opportunity to write something and get it published is like standing – or wavering – on the threshold of a new era. In the end this “something” could also be a distinguished article. At first, the law student does not know what could be achieved but wants to explore. In my opinion, the student can lean high-spiritedly forward and think that now it is time for an expedition.

Helsinki Law Review is a publication which is done and supported through the fine efforts of various students and professionals. The *Review* is grateful to the referees who gave their appraisals. It is a great feeling to notice how committed the authors are to evaluating and re-writing their texts based on the feedback they receive. Hopefully the authors will retain their unique enthusiasm also in the future in the field of jurisprudence.

The *Review* is also happy to have received positive feedback from the Helsinki University's Student Union publication *Ylioppilaslehti*. In April 2010 the *Review* was ranked as an example of good academic activities of the law students' association *Pykälä*.

In the academic year 2010–2011, the Law Faculty offers also *Helsinki Law Review* practical course, which is focused on learning the basics of editing an academic publication. The board of editors welcomes applications. The deadline for applications is 31 August.

Tommi Haaja
Editor-in-Chief

Market Force Arguments as Grounds for Pay Differences – A Gender-theoretical Study

Elisa Voutilainen

English Abstract

The idea of the article is to study market forces as an acceptable reason for pay differences in the public sector. Statistics show that women still earn less than men and that women's and men's jobs are segmented. The majority of employees in the public sector are women whereas men form the majority in the private sector.

The focus is especially on studying pay discrimination cases where market forces have been used as a reason. The case law of Finnish, Swedish and English courts as well as the Court of Justice of the European Union will be examined in the article. Swedish case law is chosen because the legal culture and law is very similar to the Finnish one and there are hardly any suitable cases in Finland. English case law, on the other hand, is chosen because it has quite many examples of market force arguments in cases of pay discrimination. The European Union sets its own demands for equal pay and thus harmonizes the laws of these previously mentioned member countries. Therefore also the case law of the European Court of Justice must be examined. The main attention, though, will be given to two Swedish cases.

These cases will be studied from a gender theory viewpoint. Yvonne Hirdman's genusteori will be used as a tool for interpreting case law in order to get new perspectives. Genusteori will be compared to the classical legal interpretation method according to which courts always have to follow the law which is set by the legislator. This method can be problematic because what the legislator decides is not necessarily morally just. These two angles have been chosen exactly because they bring out the interesting contradiction between what is morally just and legally right. The idea is to provoke conversation on whether our labour market system is just and equal when it comes to market forces as a reason for pay differences.

Thus the article analyzes when market forces are discriminating people due to their gender according to genusteori as well as law and the classical legal interpretation method. Would Hirdman have come to another solution than the Swedish court and why did the Swedish court decide the two cases like it did? To find out the reasons behind these cases they will be analyzed in detail.

The conclusion is that according to genusteori the labour market is structurally discriminating women. The Finnish legal system does not have the means to interfere with this kind of discrimination at the moment. Before the legislator sees how discriminating the labour market is and is willing to take action to fix it, the situation will not change. The change must come from the legislator.

Full Article in Swedish

Marknadsargument som skäl för löneskillnader – En genusteoretisk studie

Slagorden: genusteori, marknadsargument, jämställdhet, diskriminering, lönediskriminering

1 Introduktion

Inom Europeiska unionen var löneskillnader mellan kvinnor och män 16,6 % år 2008. I Sverige var kvinnors löner i genomsnitt 84 % av mäns å 2007. I Finland däremot var kvinnors löner i genomsnitt bara 80 % år 2008.¹ Mäns och kvinnors arbete är könsfördelade, vilket innebär att det finns branscher som är antingen manligt dominerade eller kvinnodominerade. Statistiken visar således att 79 % av alla kommunanställda var kvinnor år 2008². Enligt Finlands Näringsliv EK var 72 % av alla anställda inom den offentliga sektorn kvinnor och 50 % av statens anställda kvinnor år 2008, medan bara 39 % var kvinnor på den privata sektorn³.

I denna artikel undersöks arbetsmarknadsargument som godtagbart skäl till löneskillnader inom den offentliga sektorn. Arbetsmarknadsargument betyder att löneskillnader motiveras med behov att betala högre lön för att kunna

1 Pay Developments – 2008, Eurofound.

2 Tilastoetsite marraskuu 2009, kunnalliset palkat ja henkilöstö, Kunnallinen työmarkkinalaivos.

3 Finlands Näringsliv EK, hemsida.

anställa eller behålla kunniga arbetstagare. Syftet är att undersöka hur marknadsargumentet har använts i lönediskrimineringsmål ur ett genusteoretiskt perspektiv. Analysen företas i ljuset av finsk, svensk, brittisk och Europeiska unionens domstols (EU-domstolen)⁴ rättspraxis, men tyngdpunkten ligger på den svenska arbetsdomstolens (AD) fall AD 2001:13 och AD 2001:76.

Speciellt brittisk rättspraxis är även vald som undersökningsobjektet, mot bakgrund av att Stor-Britannien har betydande erfarenhet av marknadsargumentet i rättspraxis och har utvecklat begreppet och dess tillämpning, medan EU-domstolen håll tyst i ämnet⁵. Dessutom är granskning av brittisk rättspraxis motiverad av plikten att följa samma EU-rättsliga stadganden, vilka ligger till grund för såväl brittisk som finsk lagstiftning och rättspraxis. Svensk rättspraxis har valts att redovisa med anledning av att det inte finns några rättsfall som tar upp marknadsargument i finsk rättspraxis. Eftersom finsk och svensk lagstiftning, rättslig tänkesätt och kultur samt arbetslivsstruktur är relativt likartade är det möjligt att finska domstolarna skulle följa efter i AD:s spår, om där skulle komma att tas upp mål av liknande karaktär som i Sverige.

Vid undersökningen av rättspraxis används Yvonne Hirdmans⁶ genusteori som ett tolkningsredskap, för att få ett annorlunda perspektiv än domstolarnas. Ett annat tolkningsredskap är klassisk rättsdogmatisk metod, som domstolarna måste använda i sina processer. Genusteorin kommer att jämföras med klassisk rättsdogmatisk metod för att hitta nya aspekter på målen. Idén i klassisk rättsdogmatisk metod är i korthet att det bara finns ett riktigt svar på varje given fråga, eftersom rättssystemet är ett slutet logiskt system,

4 Europeiska gemenskapernas domstol är nuförtiden Europeiska unionens domstol enligt artikel 1.4 Lissabonfördraget. Fördraget underskrevs den 13 december 2007 och trädde i kraft den 1 december 2009.

5 Fredman 1997, s. 259.

6 Yvonne Hirdman (1943–) är professor i genushistoria vid Stockholms universitet för närvarande och tidigare arbetade hon som professor i kvinnohistoria vid Göteborgs universitet. Hirdman är både författare och forskare och har publicerat många litterärt verk om jämställdhet. Hon lanserade begreppet genus på 80-talen i en artikel om något hon kallade genussystemet – teoretiska reflektioner kring kvinnors sociala underordning. Snabbt blev såväl genusbegreppet som Yvonne Hirdman själv centrala figurer i kvinnoforskning i Sverige.

där alla rättskällor har sin egen plats⁷. Metoden kan ibland vara problematisk, eftersom det som riksdagen eller något annat beslutande organ beslutar kan vara omoraliskt, men domstolarna ändå måste följa beslutet. Denna relation mellan teori och metod är fruktbar, eftersom artikelns mål är framför allt att väcka diskussion om huruvida vårt arbetsmarknadssystem faktiskt är rättvist i sådana fall.

Problemställningen är därmed i vilka fall marknadsargumentet är könsdiskriminerande enligt genusteori samt enligt lag och klassisk rättsdogmatisk metod. Om Hirdman hade fritt fått lösa de svenska fallen, skulle lösningen ha varit annorlunda än arbetsdomstolens dom. Varför bedömde AD respektive fall på just det sätt som de gjorde? För att få svar på dessa frågor undersöks AD:s domskäl och argumenteringen i domarna. I denna artikel försöker jag ta reda på om det finns förändringar i värderingarna och om AD skulle kunna meddela en likadan dom idag eller inte.

2 Hirdmans genusteori

Hirdman baserar sin teori på två grundläggande logiska konstruktioner, nämligen isärhållningen av könen samt etablerandet av det manliga som norm. Men innan denna problematik behandlas måste jag definiera själv begreppet genus. Ordet genus har utvecklats från det engelska ordet *gender*. Det finns en skillnad mellan fysiskt och psykologiskt kön i modern diskussion. *Gender* anses representera det psykologiska tanke sättet att genus är av kulturell art. Det är frågor om hur vi lär oss att uppföra oss som kvinnor och män. Då står begreppet *gender* dels för könsroll, dels för socialt kön. Hirdman menar dock att genus är mer än bara roll eller socialt kön. Hon förstår ordet genus som föränderliga tankefigurer för män och kvinnor ” – vilka ger upphov till/skapar föreställningar och sociala praktiker, vilka får till följd att också biologin kan påverkas/ändras – ”.⁸

7 I juridisk litteratur har kritiserats att alla rättskällor inte kan placeras exakt eller standardiseras utan till exempel rättsnormer som förekommer från beslut av EU-domstolen och den europeiska domstolen för de mänskliga rättigheterna inte kan placeras på standardiserade platser. Deras beslutsvärde i rättskällodoktrin och argumenteringsteori är beroende av institutionellt stöd och samhällelig godkännande. Det vill säga att deras beslutsvärde bestämmas i enskilt fall. Se Siltala 2003, s. 320–321.

8 Hirdman 1998, s. 49–51. Syftet i denna artikel är inte att kritisera genusteorin utan ge nya och alternativa perspektiv för undersökningen av marknadsargumentet. Därför redovisas kritiken för teorin inte i artikeln.

Enligt Hirdman är genusystemet en ordningsstruktur för kön, som har blivit basen för de sociala, ekonomiska och politiska ordningarna. Som redan nämntes är den ena logiken isärhållandets tabu. Enligt denna bör manligt och kvinnligt inte blandas. Den andra logiken är hierarkin; att det är mannen som utgör norm. Det som anses vara normalt och allmängiltigt är det som är manligt. Hirdman hävdar vidare att det är genom isärhållningen som den manliga normen legitimeras. Hon kritiserar teorier som tenderar att leda till legitimering av könsförtryck och anser att principen om den manliga normens legitimitet leder till ett mer fruktbart ifrågasättande av isärhållandets principer.⁹

Isärhållningen gäller överallt. Den strukturerar såväl fysiska sysslor och platser som psykiska egenskaper. Utgångspunkten är arbetsfördelningen mellan könen och föreställningar om det manliga och det kvinnliga. Enligt genus-teorin är dessa fundamentala exempel intimt ihopplänkade och förstärker legitimerandet; alltså att en man är en man, eftersom han jobbar på vissa platser och har vissa uppgifter och vice versa. Det innebär också ett maktskapande, eftersom den enes (mannens) handlande legitimeras av urskiljandet och avskiljandet från den andras (kvinnans). Denna genusformering verkar bygga på den biologiska olikheten mellan könen och på en dikotomisering mellan kvinnor och män.¹⁰

Det verkar som om det i varje samhälle och under varje tid har funnits något slags kontrakt mellan könen, som oftast är upprättat av den part som definierar den andre. Genuslogikernas teori och praktik finns i genuskontrakten, som är mycket konkreta men ändå osynliga föreställningar om hur män och kvinnor skall bete sig emot varandra. Enligt Hirdman är begreppet genuskontrakt ett slags operationalisering av begreppet genusystem. Hon menar att kontrakten kan definieras olika vid tidsperioder, i olika samhällen och i olika klasser och i sig är ömsesidiga föreställningar, medan däremot systemet utgörs av den process som via kontrakten skapar ny segregering och nya hierarkier.¹¹

9 *Ibid.*, s. 51–52.

10 *Ibid.*, s. 52–54.

11 *Ibid.*, s. 54–55.

Hirdman har också studerat olika maktstrategier hos kvinnor och män och hävdar att det finns två olika eftersträvade mål i livet. Frihetens längtan, vilken grundar sig på expansion, ovisshet och det otrygga samt symbiosens längtan, grundad på anpassning, svarande och det trygga. Enligt genuslogiker har frihetens längtan strukturerats för mannen och symbiosens längtan för kvinnan. Även om frihetens längtan även finns hos kvinnan och vice versa, så har frihetens väktare för kvinnan varit mannen, medan kvinnor har varit symbiosens bärare för män. Därmed har kvinnor och män inte samma möjligheter och inte heller samma begränsningar. Maktrelationen mellan kvinnor och män är också präglad av tanken att kvinnan är svag och mannen stark.¹²

Hirdman hävdar vidare att ”ju kraftigare som isärhållandet mellan könen verkar/fungerar, ju självklarare, ju mer legitim, ju mindre ifrågasatt blir den manliga normens primat”¹³ och tvärtom. Följaktligen blir den manliga normen mer illegitim när isärhållandets tabu bryts och kvinnor tvingas eller får lov att göra det som män gör och tvärtom. Problemet är dock att när kvinnor kommer in på tidigare manliga sfärer så försvinner männen in på nya områden. Alltså förändras isärhållandet och förtrycket. Hirdmans förslag till ett mer jämställt samhälle är att försvaga olikheterna och förstärka det som är lika. Dessutom anser hon att isärhållandet och dess hierarki skulle kunna förlora sin logik om kvinnor och män, han och hon, förs samman och definieras som ett enda.¹⁴

3 Reglering om lönediskriminering

3.1 Finsk lagstiftning

I denna artikel undersöks de viktigaste punkterna i jämställdhetsstadgandena i finsk lagstiftning. Eftersom artikels tyngdpunkt är på två svenska fall är det nödvändigt att även undersöka svensk lagstiftning. Sedan lagstiftningen i dessa båda länder har redovisats, fortsätter jag med att i korthet redovisa de viktigaste EU-regleringarna för att ge en allmän bild av relevanta rättskäl-
lor.

¹² *Ibid.*, s. 55–57.

¹³ *Ibid.*, s. 57.

¹⁴ *Ibid.*, s. 57–59.

I Finland uttrycks den allmänna principen om rättvisa i 6 § i grundlagen. Enligt detta stadgande får ingen utan godtagbara skäl särbehandlas bl.a. på grund av kön. I samma paragraf stadgas att jämställdhet mellan könen i samhällelig verksamhet och i arbetslivet främjas genom vad som närmare bestäms genom lag, särskilt vad gäller lönesättning och andra anställningsvillkor. Av den anledningen finns utförligare stadganden om jämställdhet i jämställdhetslagen (609/1986).

I 7 § jämställdhetslagen förbjuds diskriminering på grund av kön. Det finns två olika typer av diskriminering; direkt och indirekt diskriminering. Med direkt diskriminering avses i jämställdhetslagen att kvinnor och män försätts i olika ställning på grund av kön, eller att kvinnor sinsemellan försätts i olika ställning av orsaker som föranleds av graviditet och barnafödande. Direkt diskriminering föreligger vanligtvis då arbetsgivare företar medvetna aktiva åtgärder eller gör sig skyldiga till försummelser. Diskriminering kräver dock inte uppsåt eller vållande, men arbetsgivaren måste på något sett ha förstått att han eller hon har handlat i strid med vad som objektivt kan förväntas av arbetsgivaren. Indirekt diskriminering återigen betyder att personer försätts i olika ställning med stöd av skenbart neutrala bestämmelser eller skenbart neutrala kriterier och förfaringsätt, om personerna på grund av förfarandet i praktiken kan missgynnas på grund av sitt kön, eller att kvinnor och män försätts i olika ställning på grund av föräldraskap och familjeansvar. Det är dock inte fråga om diskriminering om förfarandet motiveras av ett godtagbart mål och medlen för att uppnå detta mål är befogade och nödvändiga enligt 7 § 4 momentet jämställdhetslagen.

Enligt 8 § 3 momentet i jämställdhetslagen anses diskriminering föreligga om en arbetsgivare tillämpar löne- eller andra anställningsvillkor så att en eller flera arbetstagare på grund av sitt kön försätts i en mindre fördelaktig ställning än en eller flera andra arbetstagare, som är anställda hos arbetsgivaren i samma eller likvärdigt arbete.

Enligt 9 a § jämställdhetslagen har arbetsgivaren omkastad bevisbörda i diskrimineringsfall. Det betyder att en arbetstagare, som anser sig ha blivit utsatt för diskriminering på grund av kön, måste framlägga fakta som ger anledning anta att det är fråga om diskriminering på grund av kön. Om ar-

betstagaren lyckas att visa sannolika skäl för diskriminering uppstår en diskrimineringspresumtion¹⁵. För att presumtionen skall anses föreligga krävs endast att arbetstagaren visar att han eller hon har fått sämre lön för samma eller likvärdigt arbete än någon annan arbetstagare av motsatt kön. Arbetets likvärdighet måste utredas om den inte är tydlig.¹⁶ För att bryta diskrimineringspresumtionen måste arbetsgivaren för sin del visa att jämställdheten mellan könen inte har kränkts, utan att förfarandet har haft sin grund i någon annan godtagbar omständighet än kön. Bestämmelsen tillämpas dock inte på behandlingen av brottmål enligt jämställdhetslagen.

3.2 Svensk lagstiftning

Svensk lagstiftning på detta område har ändrats nyligen. Gamla jämställdhetslagen har ersatts av en ny diskrimineringslag. I den nya diskrimineringslagen (2008:567) finns ett förbud mot diskriminering på grund av kön. Enligt 4 § diskrimineringslagen finns det två olika typer av diskriminering; direkt och indirekt diskriminering. Med direkt diskriminering avses att någon missgynnas genom att behandlas sämre än någon annan behandlats eller skulle ha behandlats i en jämförbar situation, om missgynnandet har samband med exempelvis kön. Indirekt diskriminering betyder däremot att någon missgynnas genom tillämpning av en bestämmelse, ett kriterium eller ett förfarings sätt, som framstår som neutralt, men som kan komma att särskilt missgynna personer bland annat med visst kön, såvida inte bestämmelsen, kriteriet eller förfarings sättet har ett berättigat syfte och de medel som används är lämpliga och nödvändiga för att uppnå syftet. Diskrimineringsåtgärden behöver alltså inte vara avsiktlig, men det krävs att det finns ett samband mellan diskrimineringsgrunden och missgynnandet¹⁷.

Eftersom tvisten i målen AD 2001:13 och 76 aktualiserades innan diskrimineringslagen trätt i kraft redovisas även vad som gällde enligt den tidigare jämställdhetslagen. Enligt 18 § första stycket jämställdhetslagen (1991:433) föreligger otillåten könsdiskriminering när en arbetsgivare tillämpar lägre lön eller andra sämre anställningsvillkor för en arbetstagare än dem som tillämpas gentemot arbetstagare av motsatt kön, när de utför arbetsuppgifter

15 Nummijärvi – Salonheimo 1996, s. 12.

16 *Ibid.*; Nieminen 2005, s. 117.

17 Källström – Malmberg 2009, s. 88.

som är att betrakta som lika eller i vart fall likvärdiga. Det är dock inte frågan om könsdiskriminering enligt andra stycket, om arbetsgivaren kan visa att de olika anställningsvillkoren beror på skillnader i arbetstagarnas sakliga förutsättningar för arbetet eller att de i varje fall inte, vare sig direkt eller indirekt, har samband med arbetstagarnas könstillhörighet.

I den nya diskrimineringslagen finns det ingen motsvarande regel som avser just lönefrågor. Regler har skrivits mer allmängiltigt. Avsikten med detta har varit att täcka in alla möjliga diskrimineringssituationer bättre än tidigare. Detta innebär att nya diskrimineringslagens förbud mot diskriminering trots detta även gäller rena lönefrågor.¹⁸

Bevisbördan har inte förändrats. Enligt 6 kap. 3 § diskrimineringslagen måste den som anser sig ha blivit diskriminerad påvisa omständigheter som ger anledning anta att han eller hon har blivit diskriminerad. Detta kallas för en presumtionsregel också i svensk juridisk litteratur¹⁹. I lönefrågor räcker det endast att visa att arbetstagaren har sämre lön än andra med likvärdigt arbete för att åstadkomma presumtionen. Jämförelsepersonen kan även vara från en annan yrkesgrupp.²⁰ Om käranden lyckas visa att det föreligger en diskrimineringspresumtion är det arbetsgivares skyldighet att bryta denna presumtion genom att visa att diskriminering inte har förekommit. Arbetsgivaren har två olika möjligheter att göra detta. Han eller hon kan antingen visa att skillnaden i arbetsvillkoren beror på olikheter i arbetstagarnas sakliga förutsättningar för arbetet eller att skillnaden inte har samband med arbetstagarnas kön.²¹

Vi kan följaktligen konstatera att lagstiftningen i de båda länderna är mycket likartad. Därför är AD:s två fall mycket viktiga även för Finland.

18 Prop. 2007/08:95, s. 139.

19 Källström – Malmberg 2009, s. 92.

20 *Ibid.*, s. 95.

21 Adlercreutz 2000, s. 259.

3.3 EU-rätten

Enligt art. 157²² i fördraget om Europeiska unionens funktionssätt²³ skall kvinnor och män ha lika lön för lika eller likvärdigt arbete. Denna princip är grundläggande inom EU-rätten nuförtiden, även om den är betingad av konkurrenshänsyn²⁴. Med lön förstås den gängse grund- eller minimilönen samt alla övriga förmåner i form av kontanter eller naturaförmåner som arbetstagaren, direkt eller indirekt, får av arbetsgivaren på grund av anställningen. Likalöneprincipen är vidare preciserad i likabehandlingsdirektivet 2006/54/EG, som ersatt likalönsdirektiven 75/117/EEG. Dessutom har EU-domstolen i *Defrenne II* -målet²⁵ fastställt att dåvarande artikel 119 har direkt effekt. Därmed kan enskilda arbetstagare åberopa artikeln inför nationell domstol mot såväl offentliga som privata arbetsgivare²⁶.

Det finns ytterligare internationellrättsliga regler om lika lön, till exempel ILO-konventionen, för arbete av lika värde. De viktigaste reglerna förekommer dock i EU-rätten. Därför har ytterligare endast EU-rätten redovisats i denna artikel.

4 Marknadsargument som begrepp och i rättspraxis

4.1 Marknadsargument som begrepp

Ibland kan en arbetsgivare ha externa skäl för löneskillnader. Ett sådant skäl är marknadssituationen. Ibland motiverar man löneskillnader mellan likvärdiga arbeten med att det inte är möjligt att anställa kunniga arbetstagare utan att betala dem högre lön. Marknadsargumentet har accepterats som ett objektiva och godtagbart skäl i vissa fall. Konkurrenssituationen på arbetsmarknaden med brist på yrkeskunnig arbetskraft nämns speciellt som ett möjligt godtagbart skäl för löneskillnader i regeringspropositionen. Denna

22 Artikeln är Romfördragets förra artikel 119 som förändrades till artikel 141 i Amsterdamfördraget och till artikel 157 i Lissabonfördraget.

23 Titeln av fördraget om upprättandet av Europeiska gemenskapen dvs. Romfördraget ersattes med "Fördrag om Europeiska unionens funktionssätt" i artikel 2.1 Lissabonfördraget.

24 Nyström 2002, s. 211; Schmidt 1994, s. 86.

25 Mål C-43/75.

26 Nyström 2002, s. 212; Schmidt 1994, s. 86–87.

möjlighet förutsätter dock att arbetsgivaren kan visa att löneskillnader beror på just detta och inte på något annat, könsrelaterat skäl.²⁷

Argumentet är ganska problematiskt, eftersom det kan vara svårt att uppskatta hur stor del av löneskillnaden som beror på arbetsmarknadens krafter. Om löneskillnader kan motiveras med marknadsargument kan det i sin tur föranleda ytterligare löneskillnader mellan könen inom den offentliga sektorn. Det har ofta sitt ursprung i olika lönenivåer mellan den privata och den offentliga sektorn.²⁸ Denna situation belysas i följande kapitel, först med hjälp av EU-rätten samt finsk och brittisk rättspraxis och sedan genom *barnmorskemålet II* och *nattsköterskemålet*.

4.2 Marknadsargumentet i EU-domstolen

EU-domstolen har behandlat marknadsargumentet i *Enderbyfallet*²⁹. Frågan var där om en chef för talpedagoger hade blivit lönediskriminerad i förhållande till chefer för apotekare och kliniska psykologer. Deras arbetsuppgifter var likvärdiga, men talpedagogbranschen är kvinnodominerad medan apotekare- och klinisk psykologbranscherna är manligt dominerade. Dessutom var det i målet fråga om käranden genom sin bevisning hade lyckats visa tillräckliga skäl för att diskrimineringspresumtionen skulle anses ha uppstått.

EU-domstolen konstaterade först att när signifikant statistik visar påtagliga skillnader mellan två likvärdiga yrken, av vilka den ena representerar en nästan enbart kvinnlig bransch och den andra representerar en i regel manlig bransch, förutsätter art. 119 Romfördraget att arbetsgivaren, för att detta skall kunna accepteras, bevisar att skillnaden beror på skäl som kan motiveras objektivt och som inte anknyter till könsdiskriminering. EU-domstolen fann att det inte är ett tillräckligt objektivt skäl för löneskillnader mellan respektive yrkena att löner är bestämda i kollektivavtal, även om dessa avtal i sig inte är diskriminerande. Slutligen konstaterade domstolen att det är de nationella domstolarnas skyldighet att fastställa om bristen på sökande och behovet att locka respektive sökande till anställningen med högre löner är ett ekonomiskt skäl som kan motiveras objektivt. I detta övervägande

²⁷ Prop. 57/1985, s. 19.

²⁸ Nummijärvi 2004, s. 322.

²⁹ Mål C-126/92.

måste dock proportionalitetsprincipen tillämpas. Om inte hela löneskillnaden kan förklaras med objektiva skäl måste de nationella domstolarna göra ett rimligt övervägande av hur stor del av löneskillnaden som kan förklaras därav. Enligt EU-domstolen är bara den delen av löneskillnaden som kan motiveras exakt att bedöma som ett objektiva skäl. Den delen som inte kan förklaras av marknadsargumentet måste kunna förklaras med andra sakliga skäl för att diskrimineringspresumtionen skall upphävas i sin helhet.

EU-domstolen har i sin rättspraxis utvecklat ett test för att precisera proportionalitetsprincipen, vilket benämns *Bilka-testet*³⁰. Enligt testet kan diskrimineringspresumtionen brytas om arbetsgivaren kan visa att det finns ett godtagbart skäl för hans eller hennes handling. Skälet är godtagbart och objektiva om arbetsgivaren kan visa att de givna förklaringarna till hans eller hennes praxis motsvarar verkliga behov hos arbetsgivaren och att de är adekvata och nödvändiga för att uppnå det eftersträvade resultatet.³¹

4.3 Marknadsargumentet i finsk rättspraxis

I Finland har högsta domstolen inte haft något fall där löneskillnader mellan arbetstagare som utför likvärdigt arbete samt arbetar på samma arbetsplats motiveras med behov att betala högre lön för de arbetstagarna som skulle kunna välja arbeta inom privat sektor och erhålla högre lön i samma arbete, medan någon annan arbetstagare med likvärdigt arbete inte har haft denna möjlighet. Jämställdhetsombudsmannen har däremot behandlat ett relevant fall. Det var fråga om att arbetsgivaren hade betalat olika minimilöner för lärare inom teknik- och trafikbranschen och för lärare inom social- och hälsoomsorgsbranschen. Arbetsgivaren motiverade detta med syftet att trygga konkurrenskraften inom teknik- och trafikutbildningsområdena jämfört med lönenivån inom privat sektor. Arbetsgivaren ville också säkra att kompetenta lärare sökte sig till teknik- och trafikutbildningsområdena. Faktum var att teknik- och trafikbranscherna var manligt dominerade och social- och hälsoomsorgsbranscherna var kvinnodominerade. Jämställdhetsombudsmannen ansåg att löneskillnader inom dessa branscher kunde godtas på grund av marknadsargumentet när det gäller arbete där kan visas att det finns verk-

30 Bruun – Koskinen 1997, s. 125.

31 Mål C-170/84.

liga skillnader i rekryteringen – dock bara de delarna av löneskillnader där tillgång på arbetskraft motiverade högre lön.³² Detta visar således att olika lönenivåer mellan offentliga och privata sektorer i vissa fall kan föranleda enligt kön avsevärd löneskillnader inom offentliga sektorn, vilket således har sin grund i brist på yrkeskunnig arbetskraft³³. Med anledning av att det i Finland saknas rättspraxis i sådana fall som är föremål för undersökningen i denna artikel redovisas nedan i stället brittisk och svensk rättspraxis relativt utförligt.

4.4 Marknadsargumentet i svensk rättspraxis

De två svenska målen som analyseras i detalj i kapitel 5 redovisas här kort för att ge en helhetsbild av rättspraxis i alla de länderna som är föremål för närmare undersökningen i denna artikel.

I fallet AD 2001:13 (*barnmorskemålet II*) var frågan om två barnmorskor, som var anställda hos ett landsting, var lönediskriminerade jämfört med en manlig klinikingenjör hos landstinget. Alla de tre arbetstagarnas löner var bestämda i kollektivavtal. Arbetsdomstolen ansåg att barnmorskornas arbete var likvärdigt med klinikingenjörens. Emellertid fann AD att det inte var frågan om diskriminering på grund av kön med hänvisning till åldersskillnaderna mellan klinikingenjören och de båda barnmorskorna, till arbetsmarknadssituationen, i och med att det är svårare att finna klinikingenjörer på arbetsmarknaden än barnmorskor, och till kollektivavtalsbakgrunden. Marknadsargumentet var avgörande för målets utgång.

I målet AD 2001:76 (*Nattsjuksköterskemålet*) var situationen ungefär densamma. En kvinnlig nattsjuksköterska på intensivvårdsavdelning vid Danderyds sjukhus hade lägre grundlön än en manlig medicinteknisk ingenjör vid samma sjukhus. Tvisten i målet gällde om nattsjuksköterskan hade varit utsatt för otillåten könsdiskriminering. AD fann att deras arbetsuppgifter var att betrakta som likvärdiga. På grund av marknadssituationen för respektive arbetstagare ansåg AD även i detta fall att löneskillnaderna inte hade samband med arbetstagarnas kön.

32 Jämställdhetsombudsmannens utlåtande Dnr 11/53/01, given 19.6.2003.

33 Nummijärvi 2004, s. 322.

4.5 Marknadsargumentet i brittisk rättspraxis

I Storbritannien har man mera erfarenheter av problematisering av marknadsargumentet. Man har haft mål som gäller detta redan från slutet av 1970-talet. Därför är det viktigt att här redovisa hur marknadsargumentet som skäl för löneskillnader har utvecklats i brittisk rättspraxis. Principen om rätt till samma lön för kvinnor och män fastställs i sektion 1(3) av *Equal Pay Act 1970*. Enligt denna *equal pay clause* kan löneskillnader för likvärdigt arbete vara berättigade, om arbetsgivaren kan bevisa att skillnader är genuint grundad på materiella skäl och inte på skillnaden i kön. År 1984 godtogs marknadsargumentet uttryckligt som skäl för arbetsgivares löneskillnader mot arbetstagares krav på lika lön.³⁴

I målet *Clay Cross*³⁵ hade en kvinnlig säljare lägre lön än en manlig på grund av att han hade krävt och fått samma lön som han tidigare hade haft och eftersom han var den ende lämpliga sökanden. *Court of Appeal* fann emellertid att det inte var acceptabelt att försvara löneskillnader bara med det att den ena krävde en hög lön och att den andra var villig att jobba med lägre lön.³⁶ Sådana yttre skäl var just sådant som *Equal Pay Act* var avsedd att bekämpa³⁷.

I målet *Rainey*³⁸ kom *House of Lords* till motsatt resultat. *House of Lords* fann att nyanställda medicintekniker, vilka alla var män, hade fått en onormalt hög lön när de bytte från privat sektor till kommunal sektor jämfört med en kvinnlig medicintekniker, som var redan anställd hos sjukvården. Detta var dock acceptabelt enligt *House of Lords*, eftersom det annars hade tagit för lång tid att anställa den personal som behövdes för att driva verksamheten i egen regi. Härutöver hade myndigheten inga planer att utjämna löneskillnaden.³⁹

Domen måste kritiseras. Man kan inte anse att det inte var lika värdefullt för myndigheten att behålla också kvinnor som Rainey, som att nyanställa män

34 Fredman 1997, s. 254, 256.

35 Cross v. Fletcher, (Court of Appeal) 1979 I.C.R. 1.

36 Norberg 2007, s. 170–171.

37 Fredman 1997, s. 254.

38 Rainey v. Greater Glasgow Health Board, 1987 I.C.R. 129.

39 Norberg 2007, s. 171–173.

från den privata sektorn⁴⁰. Dessutom blev resultatet just det som *House of Lords* i *Clay Cross* avsett att be kämpa.⁴¹ I Finland finns det ett liknande fall, där jämställdhetsombudsmannen ansåg att det var skäligt att betala lika lön till arbetstagare som utför lika arbete, eftersom det var lika svårt att ersätta dem⁴². Avseende kan också fästas vid det faktumet att det inte ens gjorts något försök att undersöka varför nästan hela den högre betalade gruppen var män och den lägre betalade gruppen kvinnor. Det kunde inte ha varit bara en tillfällighet, utan det var klart att kvinnors lägre status på arbetsmarknaden utnyttjades för att sänka lönekostnaderna.⁴³ Domen är viktig därför att den konstaterar att mäns löner kan vara för höga i stället att kvinnors löner alltid är för låga. Då borde arbetsgivaren antingen sänka männens löner eller höja kvinnornas eller göra båda sakerna så att lika lön uppnås.⁴⁴ Ett skäl är att arbetsmarknadsargumentet expanderades till skäl som inte var ekonomiska, såsom administrativ effektivitet. Domen tillät arbetsgivaren att fortsätta utnyttja faktumet att kvinnor accepterar arbeta med lägre lön än män.⁴⁵

Målet *Ratcliffe*⁴⁶ handlade om att arbetsgivaren sänkte lönerna lägre än kollektivavtals minimilön för att kunna tävla med konkurrenternas anbud. Majoriteten av arbetstagare var kvinnor, som hellre arbetade med låga löner än inte hade något arbete alls. *House of Lords* ansåg att detta inte var ett acceptabelt skäl för löneskillnader. Norberg anser att målet lyfter fram en viktig synpunkt, nämligen behovet att hålla isär två artschilda frågor. Först måste man undersöka om marknadskrafterna tvingade den offentliga myndigheten att handla på det viset. Sedan måste man pröva om dessa marknadskrafter snarare reflekterade könsdiskriminerande värderingar än äkta ekonomiska skäl.⁴⁷ Fredman kritiserar domen, eftersom det lämnar öppet marknadsargumentets omfattning, då *House of Lords* inte försökte göra ett allmän uttalande om marknadsargumentets roll i lönefrågor. Hon säger

40 *Ibid.*, s. 172.

41 Fredman 1997, s. 256.

42 Jämställdhetsombudsmannens uttalande Dnro 11/53/01, given 19.6.2003. Fallet är redovisat i kapitel 4.3.

43 Fredman 1997, s. 256-257.

44 Norberg 2007, s. 173.

45 Fredman 1997, s. 257.

46 *Ratcliffe and others v. North Yorkshire County Council (House of Lords)*, 1995 I.C.R. 833.

47 Norberg 2007, s. 173-175.

också att domen klart visar att brittisk lagstiftning avseende lönediskriminering är svag.⁴⁸

Fallet *Halloran*⁴⁹ däremot är signifikant, eftersom domstolen sorterade bort marknadseffekter såsom reflekterade könsdiskriminering, när den undersökte om marknadsargumentet var acceptabelt. Det förhållandet att pojkskolor hade högre elevavgifter och kunde betala högre löner till sina lärare i förhållande till flickskolors lärare var en äkta marknadseffekt enligt domstolen. Det visade dock att samhället värderade pojkars utbildning högre än flickors, varvid också marknadseffekten byggde på könsdiskriminerande preferenser och därför kunde inte användas som acceptabelt skäl.⁵⁰

I målet *Barton*⁵¹ ansåg domstolen att det var viktigt att i undersökningar om någon har blivit lönediskriminerad ta hänsyn till båda rekryteringstidpunkter och senare tidpunkter. Såsom Norberg noterar ändras utbud och efterfrågan ständigt och ett argument för löneskillnader därmed kan försvinna efter en tid.⁵²

Storbritanniens rättspraxis kan sammanfattas på följande sätt. Om arbetsgivaren vill argumentera för löneskillnader med marknadsargumentet måste han eller hon föra bevisning om ej besatta lediga tjänster och omsättning av personal när jämförelsepersonen anställs samt måste arbetsgivarens rekryteringsåtgärder från den tiden undersökas. Ytterligare är en jämförelsepersons lön i hans eller hennes tidigare anställning viktigt och arbetsgivaren bör ha vidtagit åtgärder för att skaffa information om marknadspriset när nyrekrytering sker. Arbetsgivaren måste därvid redovisa hurdan könsfördelningen är för att kunna bestämma om ersättningspraxis orimligt missgynnar kärandens grupp. Till sist måste undersökas hur stor den delen är som kan motiveras med marknadsargument, om inte hela löneskillnaden kan motiveras därmed. Det är alltså arbetsgivarens skyldighet att föra bevisningar om detta.⁵³

48 Fredman 1997, s. 258.

49 *Halloran v. Corporation of London* (Industrial Tribunal 14119/96).

50 Norberg 2007, s. 175–177.

51 *Barton v. Investec Henderson (EAT)*, 2003 I.C.R. 1205.

52 Norberg 2007, s. 177–178.

53 *Ibid.*, s. 178–179.

5 Analys

5.1 Barnmorskemålet II (AD 2001:13)

Landstinget intog den ståndpunkten att det var tvunget att betala den lön som klinikingenjören tidigare haft för att kunna möta marknadskrafterna och behålla honom i anställningen. Landstinget hävdade att lönenivån var högre på grund av att det fanns många alternativ för klinikingenjören inom den privata sektorn, medan denna situation inte förelåg för de båda barnmorskorna. AD fann att det för att bryta presumtionen inte är nödvändigt att visa att jämförelsepersonens lön har höjts som en direkt följd av att arbetsgivaren har varit rädd för att arbetstagaren annars skulle övergå i en annan, mer välbetald anställning. Bakgrunden här var att det inte hade förekommit någon konkret anledning för landstinget att befara att klinikingenjören skulle lämna sitt jobb för att arbeta inom den privata sektorn. Alltså höll AD med landstinget att det långsiktigt dock var nödvändigt att anpassa löner för alla klinikingenjörer till den privata sektorns nivå för att kunna rekrytera de personer som behövdes. Dessutom konstaterar AD att det inte var frågan om diskriminering, eftersom klinikingenjörens och barnmorskornas löner överensstämde med vad som allmänt gällde inom landstingssektorn. AD menade därmed att alla hade normala löner, men att klinikingenjörernas löner råkade vara högre än barnmorskornas löner.

Båda punkterna i domen kan kritiseras. Först kan hävdas att det fanns brister i undersökningen om att marknadssituationen hade så stor betydelse vid bestämmandet av en klinikingenjörs lön som AD och landstinget påstod. Argumenteringen var för allmän. Såsom Norberg påpekar saknades det bevisning om lediga tjänster som inte kunde fyllas och om att omsättningen av personal var ett godtagbart och objektiva skäl. Det fanns heller ingen bevisning om landstingets rekryteringsåtgärder eller åtgärder för att skaffa information om marknadspriset.⁵⁴ Även om svenska domare inte är bundna av brittisk rättspraxis skulle situationen bli mycket tydligare om de där tillämpade principerna gällde också i Sverige. På basis av den bevisning som presenterades i målet har *Bilka-testets* princip om arbetsgivarens verkliga behov inte kunnat visas.

⁵⁴ *Ibid.*, s. 191.

Den andra punkten är ännu lättare att kritisera. Det förhållandet att lönesättningen var normal var enligt AD ett tillräckligt skäl för att klinikingenjörers högre lönenivå skulle anses vara objektiv och godtagbar. Det verkar alltså som att normalitet innebär icke-diskriminering enligt svensk rätt⁵⁵. Att AD avgjorde målet på det här viset ger vid handen att Hirdmans beskrivning av samhället är ganska träffande.

Som framgår ovan hävdar Hirdman att mannen är norm och att det legitimeras med att isärhålla det kvinnliga och manliga. Om det accepteras att löner i en kvinnlig bransch kan vara lägre än på en manlig bransch även om arbetsuppgifter anses vara likvärdiga, ter det sig att vi samtidigt accepterar att mannen har makten, är starkare än kvinnan och ytterligare definierar det som är normalt. Hirdman föreslår att vi förstärker det lika för att uppnå jämställdheten. Ett sätt att göra så i detta fall vore att följa det brittiska exemplet att sortera bort marknadseffekter som reflekterar könsdiskriminering, dvs. i det här fallet det förhållandet att barnmorskornas arbete värderas lägre än klinikingenjörens. Då borde arbetsgivaren för att bryta diskrimineringspresumtionen kunna visa att könsdiskriminering inte förekommer åtminstone på den aktuella marknaden. Norberg föreslår även ett annat alternativ, nämligen skyldighet att visa att det finns exempelvis vissa typer av personalomsättningskostnader, alltså marknadskrafter, som inte baserar sig på kön, som förklarar hela löneskillnaden.⁵⁶ Sådana kostnader har inte påvisats i detta fall. Ur ett genusteoretiskt perspektiv kan vi följaktligen dra den slutsatsen att åtminstone en del av löneskillnader är könsdiskriminerande och att situationen speglar de könsdiskriminerande strukturerna i samhället.

5.2 Nattsköterskemålet (AD 2001:76)

Liksom i barnmorskemålet fann AD att nattsköterskan och medicinteknikern utförde arbete som bör betraktas som likvärdiga. Landstinget hävdade att löneskillnaden var objektivt motiverad på grund av marknadskrafterna. Landstinget grundade sin argumentering på att medicinteknikern hade en stor alternativ arbetsmarknad inom den privata sektorn och att situationen inte var densamma för nattsköterskor. Därtill påstod landstinget att

⁵⁵ *Ibid.*, s. 190.

⁵⁶ *Ibid.*, s. 194.

det hade varit nödvändigt vid ett tillfälle att betala teknikern ett lönepåslag för att han inte skulle lämna sin tjänst. Landstinget hävdade ytterligare att nattsköterskorna var mer utbytbara än teknikerna, eftersom de behärskade speciell teknik och därför var svår att ersätta. Jämställhetsombudsmannen hävdade att också nattsköterskor hade en alternativ arbetsmarknad och att landstinget inte hade tagit hänsyn till detta, vilket innebar diskriminering.

På basis av detta undersökte arbetsdomstolen i vilken utsträckning de respektive arbetstagarna hade en alternativ arbetsmarknad. Statistiken visade att 90 % av nattsköterskorna jobbade inom landstinget medan motsvarande andel för tekniker var bara 10 %. Dessutom ansåg AD att medicinteknikers arbetsuppgifter förutsatte sådana kunskaper i elektronik och allmän teknik att de hade större möjligheter att finna arbete inom den tekniskt inriktade delen av näringslivet. Följaktligen fann AD att medicintekniker hade en stor alternativ arbetsmarknad inom den privata sektorn. Sedan konstaterade AD att teknikern hade fått ett lönepåslag år 1986, vilken inte hindrade hans löneutveckling, och att teknikerns lön var på den normala nivån. Det förelåg dessutom stor personalomsättning inom medicintekniska avdelningen. På grund av allt detta fann AD att det fanns legitima behov av respektive lönenivån för att befintlig personal skulle kunna behållas och att tillräckligt kvalificerad personal skulle kunna anställas. Därför var medicinteknikerns lönenivå objektivt och sakligt motiverad.

Vad gäller nattsköterskor påvisades att de även hade en alternativ marknad, nämligen på bemanningsföretag i Norge och dessutom inom läkemedelsindustrin och den medicintekniska industrin. AD fann dock att efterfrågan på sjuksköterskor på den privata sektorn var marginell och att landstingen var de klart dominerande arbetsgivarna på den offentliga sektorn. Även om AD medgav att det åtminstone hade funnits en ”tendens till någon brist” på nattsköterskor, ansåg AD att denna bristsituation inte kunde sättas i samband med en marknadspåverkande efterfrågan utanför landstingssektorn. Dessutom var personalomsättningen vid den privata sektorn eller i Norge obetydlig enligt arbetsdomstolen med hänsyn till att sjukhusen där bara hyrde in en liten del av alla sina arbetstagare från bemanningsföretag. Till följd därav drog AD slutsatsen att den alternativa marknaden var alltför marginell för att kunna påverka nattsköterskors löner.

På grundval av vad som har presenterats verkar det som att landstinget hade godtagbara skäl för medicinteknikers lönenivå. Dessutom verkar det vara rimligt att konstatera att nattsköterskors alternativa marknad var för marginell för att det faktum att landstinget inte hade tagit hänsyn till denna kunde anses utgöra könsdiskriminering. Slutresultatet kunde dock ha blivit annorlunda om Jämställhetsombudsmannen hade väddjat och åberopat just bristen på alternativa marknader för nattsköterskor. Landstingen har en dominerande position, eftersom det finns föga konkurrens om arbetskraft inom vårdsektorn. Därför har de stor makt vad gäller att bestämma priset på vårdarbete. De har även möjlighet att pressa ner priset i viss utsträckning. Landstingens makt baserar sig på de strukturer som finns i vårt samhälle.

Vården är en av de traditionella sektorerna som anses vara kvinnliga ur ett genusteoretiskt perspektiv. Män kan inte vara en emotionell och ömsint sjuksköterska. De måste syssla med mer manliga saker såsom teknik. Traditionellt har också ansetts att de offentliga tjänsterna är tryggare än de privata, eftersom det alltid finns efterfrågan på arbetare inom den offentliga sektorn. Det kommer alltid att finnas patienter, som måste tas om hand. Den privata sektorn har däremot ansetts vara mer otrygg, men samtidigt finns där större möjligheter att uppnå högre positioner. Vi kan iakttä den maktstrategistrukturen som Hirdman framställer i sin genusteori och som beskriver hur kvinnor och män tenderar att bete sig i samhället. Kvinnor söker sig till den trygga vårdsektorn, medan män söker sig till den otrygga privata sektorn. Alltså styr osynliga och inlärda föreställningar hur vi tänker och beter oss, vilket påverkar våra yrkesval enligt genusteorin. Dessutom grundade arbetsdomstolen även i detta fall sin dom på det argumentet att både nattsköterskans och medicinteknikerns löner var i nivå med vad som allmänt gällde dvs. normala. Från detta kan vi sluta oss till att nattsköterskors arbete ändå värderas lägre än medicinteknikerns i samhället.

På basis av det ovannämnda kan hävdas att Hirdman inte hade accepterat arbetsdomstolens dom utan att undersöka om det förelåg en sänkande effekt på nattsköterskors löner som en direkt följd av landstingens dominerande ställning. Detta skulle kunna undersökas närmare till exempel genom att kontrollera lönenivåer på arbetsgivarens andra sektorer, som är manligt

dominerade och jämföra detta med nattsköterskors lönenivå⁵⁷. För att bryta diskrimineringspresumtionen är det ändå arbetsgivarens skyldighet att visa att dess dominerande position inte har påverkat lönenivån i sänkande riktning. Om arbetsgivaren inte kan göra det kan enligt genusteorin påstås att åtminstone en del av löneskillnader beror på könsdiskriminerande strukturer.

6 Slutsatsen

På basis av vad som har redovisats ovan kan man dra slutsatsen att det finns strukturer i vårt samhälle som missgynnar kvinnor. Som statistiken visar verkar det som om vårt samhälle har strukturella skillnader och osynliga beteendemönsters, vilka fortfarande har stor makt över våra beteenden. Mot den bakgrunden synes Hirdmans genusteori vara väl lämpad för analys av de ovan nämnda målen. Man kan också påstå att vår nuvarande lagstiftning inte erbjuder några verkningsfulla medel för att bekämpa dessa problem. Lagstiftningen och rättspraxis snarare förstärker dessa missgynnande strukturer genom att godta marknadsargumentet och genom att förbinda normaliteten med icke-diskriminering. Som Hirdman skulle uttrycka saken så förstärker rättspraxis legitimeringen av mannen som norm. Dessutom är domstolarnas överväganden om arbetsgivarens verkliga behov att betala högre löner till den ena men inte till den andra, som utför likvärdigt arbete, allför ytliga.

För att marknadsargumentet skall kunna accepteras som icke-diskriminerande borde lagstiftaren och domar följa den brittiska rättspraxisens exempel om de förutsättningar som krävs för att tillerkänna marknadsargumentet giltighet. Brittisk rättspraxis har börjat påverka den strukturella diskrimineringen i Storbritannien och medför krav på striktare bevisning från arbetsgivaren än vad som är fallet i den svenska arbetsdomstolen. Så länge som lagstiftaren inte förklarar och skärper dessa förutsättningar kommer den svenska arbetsdomstolen och finska domstolarna inte heller att förändra praxis även om det finförekommer alltmer diskussion om detta. Domstolarna måste dock fatta beslut i enlighet med gällande lagregler och inte utgående från doma-

57 *Ibid.*, s. 201.

res privata värderingar. Brittiska domstolarna har kanske lättare att påverka rättsläget än svenska och finska domstolar, eftersom brittisk rättskultur är annorlunda och domstolarna i Storbritannien har en starkare position som självständig rättskälla än domstolarna i Finland och Sverige.

Men eftersom det förekommer alltmer diskussion kan man hysa positiva tankar om framtiden. Det har varit svårt att finna juridisk litteratur rörande marknadsargumentet, åtminstone före barnmorskemålet II och nattsköterskemålet, men kanske är tiden nu mogen för en förändring därvidlag, eftersom folk är mer uppmärksamma på ämnet och på de diskriminerande strukturerna. Det har till och med förekommit upphetsade diskussioner om den kvinnligt dominerade vårdsektorns lägre lönenivå i förhållande till manligt dominerade industrisektorns lönenivå. Därför är det lite förargligt att den svenska lagstiftaren inte uppmärksammade problemet när den nyligen stiftade den nya diskrimineringslagen. Det skulle ha varit ett gott exempel och en uppmuntran för den finska lagstiftaren. Man kan emellertid hoppas att detta kommer att ske om problemet undersöks vidare och om lagstiftaren trycks på förändring. Först när ledamöter i riksdagen uppmärksammar hur diskriminerande marknadsargumentet är i sådana fall som har behandlats i denna artikel och är redo att vidta åtgärder för att ändra på situationen, är det möjligt att förändra de diskriminerande arbetsmarknadsstrukturer som nu råder.

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Risk Allocation Mechanisms in Merger and Acquisition Agreements

Keywords: M&A, delayed enforcement of acquisition agreement, MAC clause, termination fee, price adjustment mechanism

Ott Aava

Abstract

This article serves as an overview to provide basic knowledge for people previously unacquainted with the field of mergers and acquisitions and the risks of parties involved in M&A agreements. The article provides a thorough review of the risks the parties are exposed to in the time period between signing and closing the transaction and proposes three ways to effectively allocate these risks between the parties, namely Material Adverse Change (MAC) clauses, termination fees and price adjustment mechanisms.

Full Article

1 Introduction

Merger and acquisition (M&A) transactions are usually very complex as they involve the takeover of an entire company with its rights and obligations. The economic value of these deals is also significant – for instance, in the last decade the net worth of major top ten deals rose from more than \$50 billion to \$167.7 billion. Negotiating these kinds of deals requires a lot of specialized workforce as the M&A agreements involve complex economic, fiscal and legal matters. The amount of details that must be settled and clarified in an M&A agreement is enormous and therefore the agreement is often more than 100 pages long. Due to its complexity, the lawyer who advises or takes part in the process of concluding an M&A agreement must be familiar with all the economic and accounting related aspects, as well as other non-legal fields.

The sheer size of the transaction is a reason why these deals require considerable time to finish. Several matters must be negotiated between the parties, but even when the final agreement is established, the enforcement of the transaction can be delayed. A common reason for a delay is the need to obtain competition authorities' acceptance, but also other legal issues can lead to delayed performance of the agreement. The time period between signing and closing the agreement can amount to as much as a year. The problem with this delay is that usually the assets acquired do not have a constant value in time and are subject to change. This matter is further emphasized by the fact that usually such deals include intangible assets and/or goodwill. Therefore, the longer the time period between the signing and closing, the bigger the possibility that the value of the target will change, but the parties are exposed to other risks as well, such as general economic downturn or terrorist attacks. The important question is by whom and how is the target company's ordinary business activity maintained. In addition to that, the possibility of intent to defraud by the other party cannot be disregarded either. All these risks must be allocated between the parties in the M&A agreement.

Therefore, the object for this article is to give a general overview of the reasons for delay between the signing and closing the M&A deal, risks that the parties of the M&A deal are exposed to, and also to provide three main mechanisms to allocate these risks. The aim is to provide basic knowledge to students with no special knowledge in the M&A area, but who are keen to get familiar with the topic. The first chapter of the article concentrates on the reasons for delay between the signing and closing the agreement and takes a closer look at the risks the deferral of closing involves. The next three chapters present three principal ways to allocate risks between the parties – the material adverse change clauses, termination fees and price adjustment mechanisms. The article provides an overview of what is a MAC clause and how is it used, and also deals with the problems related to drafting the clause. Termination fee, as one of the most negotiated parts of the agreement, has several implications to look closer at as well – these aspects are explained and their general economic background is introduced. Price adjustment mechanisms are complex systems that involve a lot of accounting principles and methods. These must be well considered when concluding a

price adjustment clause in the agreement, as disputes over price adjustments may easily emerge. Whenever possible, all three methods are accompanied with tips and suggestions to consider when drafting an M&A agreement. The issues in the article are handled on a general international level, although the common law system and US court practice of have had an impact on this work.

Within the frame of this article it is not possible to go in depth with each of the topics, thus the article does not intend to discuss all the possible aspects related to the presented risk allocation mechanisms. Neither does the article cover the use of pre-contractual agreements and other contractual terms, such as closing conditions and representations and warranties, which are also often used to allocate contractual risks.

2 Need for Risk Allocation in M&A Agreements

2.1 Delay in Closing the Acquisition

The problem of deal risk in business combinations is well-known in the law of contracts.¹ The difficulty is in the interim period between signing and closing.² There can be several reasons for a delayed performance: for example, the performance of the parties simply takes more time to complete (e.g. building a house). However, a company acquisition is merely a transfer of property and a payment of consideration that, in its nature, could be effected simultaneously with entering into an agreement³ and is often used for instance in Germany.⁴ If there is no time gap between signing and closing the question of risk allocation never arises,⁵ but it is rarely the case. Usually the reasons for non-simultaneity of signing and closing are legal.⁶

Commercial and limited liability company laws play the main role in causing a delay. There are three ways to acquire a business of another: a) a stock

1 Miller 2009a, p. 2016.

2 Miller 2009b, p. 99–204, p. 107.

3 Freund 1975, p. 149–150.

4 Beinert 1997, p. 136.

5 Miller 2009a, p. 2016.

6 *Ibid.*

purchase; b) an asset purchase; and c) a merger under state law.⁷ The majority of the deals are structured as mergers under state law⁸ and usually state law requires shareholder approval for these agreements. For example, in member states of the European Union, laws concerning mergers are harmonized with the EU Council Third Directive where Article 7 states that a merger agreement must be approved by the shareholders in the general meeting.⁹

Although arranging a shareholder meeting takes time, a far longer delay may be caused because of competition issues. State law may require approval for the proposed merger or acquisition from relevant authorities. As an example: concentrations that take certain dimensions must be approved by the European Commission,¹⁰ and as the recent Sun Microsystems acquisition by Oracle Corporation has shown, getting the necessary approvals can take several months.¹¹ In the USA receiving consents from Federal Trade Commission or the Department of Justice can take more than a year.¹² Some additional approvals might be needed when a merger takes place in certain industries. It is the case for instance when banks merge.

Sometimes closing the acquisition takes time because third parties' interests have to be taken into account – a party to a business combination may need to seek consent of its own contractual party. For example, when a company has a factory on a lease, it should be examined whether an approval from the owner of that estate is needed. These kinds of contractual clauses protect the counterparty from ending up in a contractual relationship with a party that is other than the one originally contracted.¹³ In this situation there are two possibilities: seek the consent of the counterparty or closing the transaction without the consent (also known as “*close over*”). The decision is

7 Kling & Nugent 1992, § 1.02.

8 Miller 2009a, p. 2017.

9 Third Council Directive 78/855/EEC concerning mergers of public limited liability companies.

10 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

11 EU press release IP/10/40. EU Commission started its investigation on 3th September 2009 and concluded that the transaction would not significantly impede effective competition in the European Economic Area on 21th January 2010.

12 Miller 2009a, p. 2021.

13 *Ibid.*, p. 2023.

obviously made depending on the costs and benefits of the possible course of action.¹⁴

As mentioned, there are several reasons for non-simultaneous signing and closing of the agreement. The delay is not a threat *per se*, but it represents a considerable risk because the business situation at closing can differ from the situation at signing. At signing both parties voluntarily enter into the agreement and therefore, at least at the time of signing, the parties must believe themselves to be making a good deal.¹⁵ However, as the length of the interim period between signing and closing increases, the profitability for a party to close the deal may change as well.

2.2 Risks of the Parties in a Delayed Closing

The risks of the parties created by a delay in closing the deal are diverse. There is always a considerable risk to lose significantly in transaction costs that have accrued in calculating the accurate offer of the target if the acquisition finally is not closed. Moreover, a bidder can lose the opportunity to profit from another strategic merger.¹⁶ However, the buyer is not the only one exposed to risks, as the seller may also lose significantly when the deal is not closed. These different types of risks parties are exposed to can be divided into four groups as set forth by *Robert T. Miller*:

Systematic risks can be changes in broad economic or market factors affecting firms generally. Such factors include, among other things, changes in financial, credit, debt, capital, or securities markets; general changes affecting the industries or lines of business which the party operates; changes in law; changes in Generally Accepted Accounting Principles (GAAP); changes in political or social conditions; acts of war, terrorism or natural disasters.¹⁷ There is usually very little either party can do to prevent these kinds of risks or even cushion the long-term effects of these risks.¹⁸

14 *Ibid.*

15 Miller 2009b, p. 162.

16 Levy 2002, p. 1363.

17 Miller 2009a, p. 2071.

18 *Ibid.*, p. 2074.

Indicator risks are connected to the company itself and the company can take measures to avoid them. These risks are for example not meeting the internal projections or estimates by industry analysts, or change in the value of the shares in the market.¹⁹ However, changes in these matters do not certainly mean that there is a risk.²⁰

Agreement risks are such as attrition of employees or loss of customers arising from the announcement of the agreement.²¹ In that case the employees might fear that the merger has adverse consequences on them personally and seek a new job; there is also the risk that competitors will exploit such situation to increase their market share.²²

Business risks are those that arise in the ordinary course of the company's operations, such as loss of important customers or sales due to competitive pressure, cyclical downturns in business, large tort liabilities arising from the company's operations, problems rolling out new information and accounting systems, and product defects along with resulting recalls and product liability claims.²³

Another risk from the buyer's point of view is a competing bid made by another company. In a typical scenario, one company places a bid on the target and the bid is accepted. The two entities reach a final agreement on the terms of the acquisition, but prior to the closing of the transaction, a third company offers a higher bid for the target company.²⁴ *Richard S. Ruback's* study has shown that the second bidder is usually the winner.²⁵ Although the study is almost 20 years old, the risks are the same – as the second bidder does not need to make large investments to find out the target's price and has thus an advantage of making a better offer. Therefore the initial bidder has the risk of losing capital invested to make the initial offer and thus a strong incentive to avoid the materialization of such a risk.

19 *Ibid.*, p. 2007.

20 *Ibid.*, p. 2085.

21 *Ibid.*, p. 2007.

22 *Ibid.*, p. 2087.

23 Miller 2009a, p. 2089–2090.

24 Levy 2002, p. 1367.

25 Ruback 1983, p. 141, 147. The research analyzes rivalry among bidders in the acquisitions market for two different objective functions: stockholder wealth maximization and management welfare maximization.

Sometimes the success of the acquisition may depend on early efforts to facilitate integration, because the merger is motivated by the potential post-closing synergy. Thus the companies might start integrating the businesses immediately after the signing. This is important in industries that experience rapid technological change.²⁶ In the abovementioned situation the cost of non-closure of the deal can be quite significant to both parties – the seller needs some guarantees that the buyer will close the deal and not walk away with the information revealed in the integrating or due diligence process.²⁷ These risks are quite high in industries where human capital and technological know-how are critical inputs and where technological change is rapid.²⁸

During negotiations the buyer wants to have maximum protection against business changes while the seller seeks to limit its liability.²⁹ Usually this is not possible and the risk will be allocated between the parties to reach a more equal outcome. However, if the risk is not set on the acquirer, the seller wants to limit the outs for the buyer as much as possible, in order to keep the buyer committed to the transaction and protect itself from the negative exposure that a broken deal could create.³⁰ Therefore parties to the merger or acquisition use different kinds of contractual methods to allocate these risks. Some of the most important methods to allocate the risks are MAC clauses, termination fees and price adjustment mechanisms. These are discussed below in detail.

3 Material Adverse Change Clauses

MAC (material adverse change) or often named as MAE (material adverse effect) are conditions used in merger and acquisition agreements for allocating risks between the parties during the interim period between the signing and closing of the contract. MAC clauses are complex and are negotiated thoroughly, because MAC permits the buyer or the seller not to close the transaction after signing. Usually they distinguish various kinds of risks to

26 Gilson & Schwartz 2005, p. 337.

27 *Ibid*, p. 337–338.

28 *Ibid*, p. 340.

29 Grech 2003, p. 1501.

30 Hall 2003, p. 1064.

the parties' business and allocate them between the parties, with many exceptions and exceptions to exceptions.³¹ A typical term would permit the buyer not to close the transaction on the post-execution occurrence of "any change, occurrence or state of facts that is materially adverse to the business, financial condition or results of operations" of the seller (i.e., the "target").³² There are opinions that MAC should be preferable to MAE³³, but mostly MAC and MAE are used interchangeably³⁴ and there is no big difference between them.

3.1 Definition of a MAC Clause

In merger and acquisition agreements MAC clauses are used in several places: in the definitions part, in the representations and warranties sections and in the closing conditions.³⁵ A MAC definition is needed to understand the meaning of MAC, because in the other sections of the agreement only the acronym MAC is used. Therefore we usually find the meaning of MAC in the definitions part; the fairly standard description goes as follows³⁶:

"Material Adverse Change or Material Adverse Effect means any change, effect, event, occurrence, state of facts or development which individually or in the aggregate [has resulted] [[would reasonably be expected to] [could] result] in any change or effect, that is **materially** adverse to the business, condition [(financial or other)] [, prospect] or results of operations of the Company and its Subsidiaries, taken as a whole; provided, that none of the following shall be deemed, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been or will be, a Material Adverse Change or Material Adverse Effect: (A) any change, effect, event, occurrence, state of facts or development (1) in the financial or securities markets or the economy in general, (2) in the industries in which the Company or any of its Subsidiaries operates in general, to the extent that such change, effect, event, oc-

31 Miller 2009b, p. 104.

32 Gilson & Schwartz 2005, p. 331.

33 Adams 2004, p 18–19.

34 Cheng 2009, p. 568.

35 *Ibid.*

36 Quintin 2008, p. 278–279.

currence, state of facts or development does not disproportionately impact the Company or any of its Subsidiaries or (3) resulting from any Divestiture required to be effected pursuant to the terms of this Agreement or (B) any failure in and of itself by the Company to meet any internal or published projects, forecasts or revenue or earnings predictions (it being understood that the facts or occurrences giving rise or contributing to such failure may be deemed to constitute, or be taken into account in determining whether there has been or would reasonably be expected to be, a Material Adverse Effect or a Material Adverse Change”).

This definition has several elements worth looking at:

1. Has, would, could. Usually the buyer likes to use as wide a MAC definition as possible to involve any adverse effects. This could be achieved by using the modal verb “could” in MAC definition instead of “has” or “would”. Using “could” involves all possible alternative courses of events that could lead to MAC occurring. So all adverse effects are involved, no matter how remote. “Would” is middle ground and defines the MAC as something likely to happen. The purpose of “Has” can be to restrict the grounds for MAC – it simply states that when invoking to MAC, the event must have occurred.³⁷ In agreements “would” is perhaps the most commonly used.³⁸

2. Prospect. In general usage, prospect means “chances or opportunities for success”. Therefore using “prospect” in MAC definition means that the favored party can trigger MAC when there is a change in chances or opportunities for success. The counterparty is not happy to add “prospect” into the agreement, because it involves the future. For example adding “prospect” in high-tech deals can be fatal because the future is not often predictable, but on the other hand it is inevitable in deals that involve biotechnology.³⁹

37 Adams 2004, p. 16–17.

38 Quintin 2008, p. 280–281.

39 Adams 2004, p. 35–36.

3. Material. Materiality is the main issue in the MAC litigations and therefore it will be discussed in the interpretation part.

4. Target definition. The seller usually wants the adverse effect to be measured on the basis of its aggregate impact on the target, not in an isolated fashion. For example: “the Company and its Subsidiaries, taken as a whole”.⁴⁰ From the buyer’s standpoint it would be better to measure it separately to allow opt-out if the interesting subsidiary deteriorates, even though having no serious impact on the corporation.

The definition of MAC is referred to in the closing conditions and in the representation and the warranties sections of an agreement and thus the MAC definition is only as important as the operative clauses that convey its meaning. MAC can be triggered in two totally different contexts, one favors the seller, the other favors the buyer.⁴¹ Usually the closing condition has a requirement that the seller’s or the buyer’s representations and warranties set forth in previous sections shall be true and have not suffered MAC.⁴² If the defined MAC is applied in representations and warranties, the following is quite common: *since January 1, 2008, no events or circumstances have occurred that constitute, individually or in the aggregate, a MAC.*⁴³ Another example: *neither the Seller nor the Target is party to any litigation that would reasonably be expected to result in a MAC.*⁴⁴

3.2 Exceptions to MAC

Exceptions to the MAC are important as they serve to limit the scope of the MAC provision by shifting liability to the buyer or seller (depending on the structure of the deal) should one of the exceptions arise.⁴⁵ Like in the definition above, exceptions to the MAC are possible and actually quite common – 70% of all the deals contain a carve-out.⁴⁶ It is also stated that

40 Quintin 2008, p. 281.

41 *Ibid*, p. 279.

42 See e.g.: Asset purchase agreement between Sonic Solution and Roxio Inc, p. 57.

43 Elken 2009, p. 305–306.

44 *Ibid*.

45 Grech 2003, p. 1490.

46 Nixon Peabody LLP (2008), p. 7.

the current financial crisis has made exceptions more buyer-friendly.⁴⁷ Exceptions are assumed to be very important in deals that involve companies where technological know-how is a crucial input or the company is exposed to information leaks that could aid competitors, customers and suppliers, or where the declines in stand-alone value are essential in case the deal fails.⁴⁸ Usually the exceptions concern a change in the economy or business in general; change in the conditions that prevail in the target's industry, unless the change has a disproportionate impact on the target; change in securities markets; change in trading price or trading volume of the Company's stock; change in interest or exchange rates; change in the legal environment or a change in the interpretation of laws or regulations; or acts of war or terrorism.⁴⁹ The choice of course depends on the needs of the parties and their bargaining powers.

An interesting solution is available in the UK, where MAC clauses in public transactions in mergers and acquisitions agreements may not contain MAC exceptions, since the UK regulation prescribes the circumstances when a condition may or may not be invoked.⁵⁰ A transaction is considered to be public when the target company's securities are traded in a regulated market in the UK.⁵¹

3.3 Interpretation Issues

The main issue in litigations that concern the MAC has usually been whether the adverse change is of sufficient magnitude to count as a material adverse change within the meaning of the agreement.⁵² The materiality is often not defined by the parties in the agreement, and even when it is, the definition is often too vague.⁵³ Therefore the materiality is often a matter of dispute, although the case law is not favorable for triggering the MAC clause – courts have set the bar rather high before a buyer may be allowed to back out of a transaction using the MAC clause.⁵⁴ Courts in the US for example use

47 Nixon Peabody LLP (2008), p. 3.

48 Gilson & Schwartz 2005, p. 340.

49 Nixon Peabody LLP (2008).

50 McDermott Will & Emery 2007, p. 4.

51 The Takeover Code 2009, at A3-A7.

52 Miller 2009b, p. 100.

53 Cheng 2009, p. 574.

54 Quintin 2008, p. 284.

several techniques to interpret whether a MAC has occurred or not, because the text of the MAC offers usually limited help to determine it.

Firstly, the courts in the US tend to be fact intensive. Courts will delve into the facts surrounding the creation of the agreement, the parties' actions while the agreement was in effect, and the parties' actions after the agreement was terminated, and use the results to interpret the MAC. Since all the facts surrounding a merger or an asset acquisition will be included in the court's analysis, it would be reasonable for parties to act in a manner they want to have on record. This means that the parties of the agreement should treat one another with respect and act *bona fide* during the transaction.⁵⁵

Secondly, when ambiguous language is used, courts will interpret it rather from the seller's point of view. The buyer usually wants to use broad language defining the MAC to protect itself from any harm the target company could suffer. The Delaware Chancery Court in the US found in shareholders' litigation against IBP Inc that the MAC clause seemed to allocate all the risk of negative events to IBP, but the court found it difficult to conclude that the parties meant to include every negative event, no matter how great or small. Thus the court used external evidence to determine the meaning of the clause. However this solution could lead to a result that is not consistent with the intent of parties. Therefore, when the parties meant to include all the negative events, it should be expressly stated in the MAC clause.⁵⁶

Thirdly, courts tend to emphasize external facts. They often use external facts to interpret the MAC clause – i.e. the external factors that were outside the control of the parties. Therefore the target company should carefully negotiate the language of the MAC clause to exclude external factors or conditions outside its control.⁵⁷ Finally, the court takes into account the size of the adverse change in question. The size of the adverse impact is critical to the court's determination of whether a MAC has occurred or not. The event must be substantial compared to the size of the deal. Also the seasonality and the temporary declines in earnings are often taken into account deter-

55 Hall 2003, p. 1080–1082.

56 *Ibid*, p. 1082–1084.

57 *Ibid*, p. 1084–1085.

mining the materiality.⁵⁸ Courts in the US also make a difference between strategic investors and financial investors – latter ones are more favored in the cases of MAC interpretation.⁵⁹

4 Termination Fees

4.1 Economic Background for Termination Fees

Termination fee (quite often known as “break-up”, “bust-up”, “cancellation” or “good-bye” fee)⁶⁰ is a sum of money paid by the seller to the potential buyer of a business in case the agreed transaction fails to close for reasons set forth in the acquisition agreement.⁶¹ The acquisition process can be complicated⁶² and therefore lawyers, accountants, investment bankers and other highly-paid professionals may be needed to advise on the deal.⁶³ All this increases the costs of the deal and therefore, a termination fee can be used as a measure to allocate the risk of losing investments made for making the initial bid to the seller.

It must be noticed that there are slight differences in different legal systems concerning termination fees. In civil law systems the termination fee is usually in a form of contractual penalty, but in common law systems the contractual penalty is not allowed by law and the termination fee usually refers to a clause in the agreement that enables opt-out from the agreement when the termination fee is paid. Below the common law system is examined more closely, but the same principles often apply to the civil law systems as well.

Consider the following as an example of the importance of the termination fee: Bidder A makes a bid of \$100 million on a target company and an agreement is concluded but without a termination fee for the seller. Then comes bidder B and bids \$105 million. The target will terminate the agreement and bidder A loses its investments made to investigate the amount

58 *Ibid*, p. 1086–1087.

59 Quintin 2008, p. 283–284.

60 Samet 1996, p. 133.

61 *Ibid*, p. 132.

62 Some examples of the difficulties: Easterbrook & Fischel 1996, p. 164–165.

63 Samet 1996, p. 133.

of the correct bid, whereas the bidder B prevails in the bidding and has a free ride on some of the expenditures of bidder A. The difference between A's and B's offer is \$5 million. Now let us observe the situation with a \$3 million termination fee: if the target terminates the agreement with bidder A, then the seller must pay \$3 million as a compensation for A. In this case bidder B does not only outbid bidder A, but also adds the termination fee to the bid. Therefore the change between the offers of A and B is now \$2 million and contrary to the first situation, A does not stay with empty hands.⁶⁴ It can be stated that the main role of the termination fee is to compensate the expenses the failed bidder carried to make the initial bid, as without any reimbursement mechanisms potential buyers might not consider taking part in the bidding at all. It is also suggested that the fee is meant to compensate the losses incurred during the delay between making the bid and closing.⁶⁵ What should be considered when drafting a termination fee clause in the merger and acquisition agreement is specified below.

4.2 The Seller's Incentives to Draft the Termination Fee Provisions

The termination fee provisions do not only serve as the advantage of buyer, as also the other party may use these provisions to allocate their risks. The seller may have several reasons to agree to have a termination fee in the agreement. Firstly, termination fee provision can be necessary to attract a serious bidder by showing that the seller is receptive to the bidder's offer and willing to proceed with the negotiations in good faith.⁶⁶ Secondly, the target's board can preserve its fiduciary duties to its shareholders at a known cost. The termination fee also enables the target to examine other offers without losing the credibility or deterring the initial offer.⁶⁷ Therefore the termination fee can be seen as an "exit" clause for the board of the target to negotiate with another bidder in order to satisfy their fiduciary duties to the stockholders.⁶⁸

64 Sneirson 2002, p. 581–582.

65 Wachtel 1999, p. 587.

66 Swett 1999, p. 357.

67 *Ibid.*

68 Quintin 2008, p. 276.

Interestingly, the target company's directors might have motives to use the termination fee in a way that supports not the shareholders' interests, but their own. From the target's directors' point of view the acquisition probably ends with them losing their jobs and therefore they have an incentive to request for a counter-offer of a cheaper price but with them staying at their position, or instead make the acquisition impossible by requesting too high a price. Either way, it is not in the interest of the shareholders but the members of the board. Therefore the members of the board can be made liable for losses if they infringe their fiduciary duties.⁶⁹

Termination fee in an agreement can be used as a tool to support the board's intention – setting a high termination fee may force the shareholders to approve an acquisition agreement in order to avoid the payment of the termination fee.⁷⁰ However, the business judgment rule is used in the US to determine whether the board can be made liable for the losses shareholders have suffered: if the directors acted on an informed basis, in good faith, and without self-interest, the board's decision is sound.⁷¹ The board is expected to solicit the best possible offer for the shareholders and if the termination fee disables others' opportunity to make bids, it can be declared void in US courts.⁷² This board obligation is referred to as “Revlon duties” because it was determined in the case *Revlon v. MacAndrews & Forbes Holdings*.⁷³ Therefore, while drafting termination fee provisions, a lawyer must also consider the board's fiduciary duties in order to make a valid provision.

4.3 Size of the Termination Fee

Although the parties may agree a termination fee as high or small as they want, the amount of the fee is often the source of dispute after the agreement is signed and respectively, courts of the US may lower its size. Courts have taken into account considerations such as the sheer size of the termination fee as a total amount or percentage of the deal size, the amount of the

69 Wachtel 1999, p. 617.

70 *Ibid*, p. 618.

71 Swett 1999, p. 359.

72 *Ibid*, p. 364.

73 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, (Delaware Supreme Court, 1986). In that case the board of the target company used a break-up fee as a measure to make a deal with a preferred buyer in an auction process where the other buyer would have paid more for the target.

fee relative to the benefit to shareholders, as well as the size of the parties of the acquisition and the need for the protection measures for the parties, among others.⁷⁴ The court is likely to investigate whether the termination fee is inserted to the agreement in a one-on-one negotiation or in an action situation.⁷⁵ To prevent possible disputes later it would be wise to make clear that the board of the target's company understands the economic impact of the termination fee on potential competing bids.⁷⁶ As a consequence, termination fees usually amount from 1 to 5% of the transaction value,⁷⁷ as the higher ones bear the risk of non-enforcement.⁷⁸ According to Delaware courts, as small a percentage as 3% is not considered reasonable by itself, and other circumstances must be considered as well.⁷⁹

4.4 When Is the Termination Fee Triggered?

When drafting a termination fee provision not only the size of the fee must be agreed on but also the circumstances when the fee must be paid. Although the amount of the fee gets most of the attention during the negotiations,⁸⁰ defining the events that trigger the payment of the fee are more important from the author's point of view, as a higher fee should be favorable if there is only one event that triggers the payment, compared to a situation where there is a smaller fee to be paid but more circumstances that might trigger the payment. There are various events that may trigger the termination fee⁸¹, such as if the transaction is not closed by the seller because it accepted another offer; the target company's shareholders do not approve the acquisition agreement; or when the acquirer terminates the agreement because the target breaches the representations, warranties or covenants.⁸² Sometimes it might be useful to state that the termination fee must be paid in case of an automatic termination of the agreement, when the deal was not closed on a "drop dead" date.⁸³

74 See generally: Laster & Haas 2007.

75 Kramer & Slonecker 2000, p. 13.

76 *Ibid.*

77 Levy 2002, p. 1366.

78 Gilson & Schwartz 2005, p. 336.

79 It has been stated for example in the court case of *La. Mun. Police Employees' Ret. Sys. v. Crawford* 2007.

80 Glover 2002, p. 14.

81 See generally e.g. Glover 2002.

82 Glover 2002, p. 21.

83 Glover 2002, p. 14, 18.

Termination fee can be designed to have two tiers that will be triggered by two different events and if both events exist, both fees must be paid. As an example, *Bell Atlantic Corporation* and *NYNEX Corporation* had the termination fee in a merger agreement broken down into two parts: first part provided that the party would be required to pay \$200 million if there were a competing acquisition offer for that party, a failure to obtain shareholders' approval or a termination of the agreement. The second tier represented a payment in amount of an additional \$350 million when the competing transaction was consummated within eighteen months of the termination of the merger agreement.⁸⁴

4.5 Termination Fee as Liquidated Damages

In the US and the UK contractual penalty is prohibited.⁸⁵ Instead they use a similar legal construction called "liquidated damages". These contractual clauses place an obligation to the parties to pay a sum of money in case one party breaches the agreement.⁸⁶ Liquidated damages need three conditions to be fulfilled in order to be valid: a) it needs to be intended to function as a damage, not as penalty; b) the amount of the damages is difficult to calculate or unpredictable; c) the amount agreed on must be reasonable.⁸⁷ Therefore it is important to make a difference between the termination fee used as a contractual clause enabling a party to back out of the deal, and the termination fee that is intended to be used as liquidated damages in case the agreement is breached, while the latter is based on another standard. Drafting termination fees as liquidated damages can be used to bypass the application of Revlon duties and the business judgment rule, and therefore it has its own advantages.⁸⁸

4.6 Reverse Termination Fee

Recent years have introduced a new termination fee clause where the buyer pays the termination fee – a so called "reverse break-up fee".⁸⁹ It is used

84 Wachtel 1999, p. 590.

85 See e.g. Calleros 2006.

86 Law Library – American Law and Legal Information 2010.

87 *Ibid* and Swett 1999 as from the acquisition viewpoint.

88 Swett 1999, p. 343.

89 Quintin 2008, p. 276–277.

mainly by private equity funds (PEF) as an option to opt out from the deal for reasons such as when the finances are not available any more.⁹⁰ The deals where the PEFs are parties are structured differently from the deals where strategic investors are the buyers. The PEFs do not bear the risks at the same level with the strategic investors and therefore they need an option to back out of the deal when the circumstances change. One way the PEFs are using to minimize the risks is to distance themselves from the deal and use a shell company, provided with guarantees from the PEF to pay the reverse termination fee or the price of the target when the conditions precedent are satisfied.⁹¹ These agreements are also drafted in a way that enables no specific performance. Thus avoiding possible damage claims when the deal is not closed and leaving the reverse termination fee as a sole remedy to the seller.⁹²

5 Price Adjustment Mechanism

The acquisition agreements often contain purchase price adjustment clauses as a measure of risk allocation. A purchase price adjustment clause allows changing of the purchase price according to the change in value of the target during the interim period between signing and closing the acquisition agreement. Usually the value of the company changes due to business operations in their ordinary course, but the buyer might also need protection against the seller “looting” the company after the price has been determined.⁹³

The purchase price adjustment mechanisms are generally based on the working capital or net assets of the company.⁹⁴ Although the mechanism can be made using a net book value, tax liabilities, shareholders' equity, cash expenditures, net debt, net worth, cap-ex spending or number of customers as a benchmark. According to a survey that studied 43 publicly-filed purchase agreements entered into since January 1, 2003 with a transaction value in excess of \$50 million, and which contained purchase price adjustment provisions other than working capital, none of the purchase price adjustment

90 Kaye & Hinds 2009, p. 5.

91 Griffin 2009, p. 7.

92 *Ibid.*

93 Adel 2006.

94 Freeland & Burnett 2009c, p. 12.

mechanisms were used in more than 10% of the surveyed transactions.⁹⁵ However, the less used are often combined with the mechanisms that are based on working capital, outstanding debt being the most used.⁹⁶

Price adjustment mechanisms are used when there is a fundamental agreement between the parties as to the value of the target, but which is subject to change when the closing of the deal is placed in the future.⁹⁷ One intention of purchase price adjustments is to ensure that the seller is motivated to conduct the business between signing and closing in a way that is in the long-term interest of the buyer rather than the short-term interest of the seller.⁹⁸ These clauses combine both accounting and legal principles and therefore give ground for conflicts during the negotiation, drafting, interpretation and enforcement phase⁹⁹ and are often considered to be the most frequent source of post-closing disputes between parties to private company acquisitions.¹⁰⁰ It is examined below, whether purchase price adjustment clauses should be inserted in the agreement and if so, how they should be drafted.

5.1 Should Price Adjustment Clauses Be Inserted into the Acquisition Agreement?

As the price adjustment mechanism can work against both parties of the agreement, they should be carefully considered before being inserted into an agreement. According to *Mark B. Tresnowski*, at least four questions should be asked before adding price adjustment clauses into the agreement:¹⁰¹

1. Do you have a “closed system”¹⁰² in the acquisition agreement? In that case the parties usually do not need a working capital adjustment. Basically the need for a price adjustment mechanism exists when the seller can or wants to manipulate the working capital and cash before closing. When the value of the target cannot decrease,

95 Sinha & Elsea 2004, p. 18.

96 See generally Freeland & Burnett 2009c.

97 Walton & Krieb 2005, p. 8.

98 Freeland & Burnett 2009a, p. 9.

99 Tresnowski 2004, p. 14.

100 Freeland & Burnett 2009a, p. 9.

101 Tresnowski 2004, p. 17–18.

102 “Closed system” refers to the situation where the agreement does not contain elements whose value is subject to change in time.

then there is no need for purchase price adjustment clauses, because it probably raises the purchase price.

2. Can you defend a one-way adjustment provision? In that case you have nothing to lose and it will make sense to add it to the agreement, especially if you have an “open system”¹⁰³ in the acquisition agreement. But on the other hand you need to have a good negotiation position in order to insert a one-way adjustment provision, particularly considering the fact that working capital tends to increase over time.

3. If you are destined to have a two-way adjustment provision, in which way do you expect working capital to go in the ordinary course between signing and closing?

4. Is there a minimum level of working capital that the target business needs to operate efficiently? If there is and it is not present at closing then the buyer needs some more funding and that means that the actual purchase price is bigger than mentioned in the agreement.

Considering the answers, the buyer may find it desirable not to raise the issue of a purchase price adjustment provision in the agreement and rely solely on the representations, covenants and warranties of the agreement. In case the buyer wishes a price adjustment mechanism to be inserted in the deal, many aspects must be considered beforehand.

5.2 Object of the Measurement

The case law in the US has shown that it is to the seller’s disadvantage when assets subject to adjustment are mentioned broadly in price adjustment clauses.¹⁰⁴ As the price adjustment mechanism must provide a certainty to the parties of the possible outcome, general accounting principles (e.g. GAAP)¹⁰⁵ are just not precise enough for purchase price adjustments.¹⁰⁶

103 “Open system” refers to the situation where the agreement contains elements whose value is subject to change in time.

104 Freeland & Burnett 2009b, p. 13.

105 GAAP is a principle driven accounting system used in the USA. The problems concerning GAAP are similar to other principle driven accounting systems as well.

106 See generally: Freeland & Burnett 2009b

Roughly half of the agreements that had a working capital adjustment clause measured it using some variation of the standard GAAP definition of the “current assets minus current liabilities”.¹⁰⁷ Broad wording and therefore ambiguous meaning creates misunderstandings between parties and thus buyers might consider assets as part of working capital while the seller does not. For example, in *Mehiel v. Solo Cup Company*¹⁰⁸ court case in the US, the seller defined its Maryland facility as an “asset held for sale”, which is a current asset, because the seller intended to sell it. But when the buyer calculated the post-closing working capital, the \$5.6 million factory was not included because the buyer decided to hold it as a long term asset.

Therefore it is suggested to draft precise components of working capital in the price adjustment mechanism. One example is to include: 1. cash, 2. accounts receivable, 3. inventory and 4. prepaid taxes; and take off: 1. trade payables and 2. accrued expenses.¹⁰⁹ The same authors believe that the practice of enumerating the balance sheet components that will be included or excluded in working capital adjustments continues even at a higher level, because the GAAP gives no certainty of the outcome with respect to the purchase price adjustment mechanism.¹¹⁰

As all the necessary information is derived from the target’s latest financial statements and the earning trends reflected therein,¹¹¹ a problem may emerge in the assessment of whether the target’s statements are concluded in a way agreed upon. The aim of the buyer is that the pre-closing balance sheet is concluded in conformity with GAAP, but the seller would like to have the balance sheet drafted as it had been drafted before. Thus the purchase agreement will usually guarantee that pre-signing and post-closing balance sheets must be prepared consistently and in compliance with GAAP.¹¹² However, sometimes the buyer finds that the pre-closing balance sheet does not comply with GAAP and therefore, the buyer is not able to conclude a final balance sheet which is at the same time consistent with the pre-closing balance

107 Freeland & Burnett 2009b, p. 12.

108 *Mehiel v. Solo Cup Co.*, 2007.

109 Freeland & Burnett 2009b, p. 13.

110 Freeland & Burnett 2009c, p. 20.

111 Walton & Krebs 2005, p. 9.

112 Freeland & Burnett 2009a, p. 12.

sheet and in accordance with GAAP.¹¹³ In that case, the outcome of the price adjustment is uncertain and may depend on the circumstances.¹¹⁴ Therefore it is suggested to use the following wording in the price adjustment clause: “The final balance sheet is prepared in accordance with GAAP, applied consistently with the target company’s prior accounting practices to the extent such practices are in accordance with GAAP.”¹¹⁵

5.3 The Importance of Precise Language

Although purchase price adjustment provisions are seemingly quite simple, vague wording in price adjustment provisions can cause disputes not only in the measurement metrics but also in the arbitration and dispute resolution parts. Therefore precise language is very important in drafting the relation between price adjustment and indemnification.¹¹⁶ If the relation between them is not clear, it can cause uncertainty of the result as the *Westmoreland Coal v. Entech*¹¹⁷ case in the US has shown. In the case the seller had concluded a pre-signing balance sheet that was not in conformity with GAAP and therefore the buyer wanted adjustments in the purchase price. The seller advocated that it was a matter of the indemnification and the dispute should be settled in court instead of using the arbitrator as the acquisition agreement designated in case the price adjustment dispute would arise. The court’s analysis showed that it considers the acquisition agreement in its entirety and does not concentrate solely on the price adjustment clauses and therefore, the interplay between price adjustment clauses and indemnification part of the agreement must be made clear in order to grant a foreseeable result.

At the same time the methods that are used to evaluate the assets must be clearly defined. There are many methods that can be used to assemble a balance sheet and the result will be the same, although these methods may give different results when you compare certain accounts. GAAP provides many different principles and methods for accounting and thus, using general ref-

113 *Ibid.*

114 *Ibid.*, p. 12-13.

115 *Ibid.*, p. 13.

116 Freeland & Burnett 2009b, p. 13.

117 *Westmoreland Coal Co. v. Entech, Inc.*, 2003.

erence to the GAAP in price adjustment clause may lead to a dispute after closing. This uncertainty of outcome may work against both parties.¹¹⁸ As an example of difficulties, in *Twin City Monorail v. Robbins & Myers*¹¹⁹ case in the US, the parties had agreed to use the methods provided by GAAP for evaluating the inventory. However, as the GAAP enables the use of several methods, the buyer had the firm opinion that LIFO (last in, first out) was the right one to use while the seller advocated for FIFO (first in, first out), which made a difference of \$700,000. Therefore in the agreement it should be precisely drafted what method to use and sometimes it can be as easy as: “inventory will be valued at the lower of cost or market, using the LIFO method of valuation”.¹²⁰

Concluding the price adjustment clauses, a lawyer should also consider, for example, how much authority will be given to the arbitrator. Does the arbitrator solve disputes only concerning the accounting matters or all the matters with regards to the price adjustment?¹²¹ Also, it must be considered when the price adjustment should be delivered to the seller. If the agreement states that the seller should be given no more than 15 business days after the buyer has received all *necessary documents*, then these documents must be stated as well.¹²²

6 Summary

Mergers and acquisitions are complicated transactions. M&A agreements tend to be large and complex documents in which the parties allocate the risks associated with the deal. There are many contractual mechanisms that enable the parties to allocate risks as agreed.

The MAC conditions enable the allocation of the risks between the parties using the “material adverse change” as an indicator for opting out of the agreement. Exceptions to the MAC are possible and quite common. A lawyer, drafting a MAC clause in the agreement, should make clear whether

118 See generally: Freeland & Burnett 2009a and Freeland & Burnett 2009b.

119 *Twin City Monorail, Inc. v. Robbins & Myers, Inc.*, 1984.

120 Freeland & Burnett 2009a, p. 14.

121 Freeland & Burnett 2009b, p. 13.

122 *Ibid*, p. 14.

material adverse change must have taken place, would take place or could take place in order to enable the party not to close the deal. Also, it must be considered whether changes in the company's prospects can be a reason for triggering the MAC. As the main issue in litigations that concern MAC clauses has usually been whether the adverse change is of sufficient magnitude to count as a material adverse change within the meaning of the agreement, the parties must clearly stipulate when the change is material enough. Parties must also agree whether the adverse effect is to be measured on the basis of its aggregate impact on the target or in an isolated fashion, not taking its subsidiaries into account.

A termination fee is a sum of money paid by the seller to the potential buyer of a business in case the agreed transaction fails to close for reasons covered in the acquisition agreement. The termination fee clauses therefore protect the buyer's investments made during the negotiations and after signing. Recent years have introduced the usage of reverse termination fee – in that case the buyer pays the agreed amount of compensation if it decides not to close the deal. As the termination fee has a great impact on the party who is obliged to pay it, it is often under dispute in courts. Concluding a termination fee in the M&A agreement, a lawyer should consider how big the termination fee should be – if it is too high, the courts can lower it. In order to avoid disputes, it would be wise to state it clearly in the agreement when the payment of the termination fee is triggered. If the termination fee is concluded in the agreement as a liquidated damage, then in order to be a valid provision in the common law jurisdiction, some additional requirements must be considered as well.

A purchase price adjustment mechanism allows the changing of the purchase price according to the change in the value of the target during the interim period between signing and closing the acquisition agreement. As the price adjustment mechanism can work against the party who insisted to add it into the agreement, the need for the mechanism must be considered well beforehand. Although the price adjustment mechanism is a good way to ensure the seller is motivated to operate the business between signing and closing in a way that is in the long-term interest of the buyer, rather than the short-term interest of the seller, many aspects must be made clear

before agreeing to include the price adjustment clause into the agreement. It is suggested to define the object of the measurement precisely in order to avoid later disputes. Precise language is very important at drafting the relation between price adjustment and indemnification and the methods that are used to assess the assets must be clearly defined as well.

All abovementioned methods enable lawyers to draft a agreement with relevant risk allocation between the parties, although every method has its own issues to consider in order to achieve a result that is both suitable and predictable for the client. Probably the simplest way to manage at least some risks is to use a termination fee clause in the agreement which enables the buyer or the seller to get a specified amount of cash in case the other party ends or breaches the agreement. MAC clauses are suitable in agreements when economic or market factors may affect the value of the deal dramatically, and where the risks must be somehow allocated between the parties. However, in cases where the value of the company's assets varies seasonally or there are other reasons the value of the company might change, price adjustment clauses are used to define the process of pricing and thus enable an adequate result for both parties. Quite often all of these methods are used together in the agreement, and the recent financial crisis is probably a reason why these mechanisms will have a growing importance in M&A deals.

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The Marriage of Lille Case: The Intrusion of Popular Human Rights Discourse in Law

Keywords: Human Rights, Religion, Case law, Marriage, Secularity

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Abstract

In 2008 in France, a tribunal acceded to the demand of a Muslim man for the annulment of his marriage on the grounds that his wife was not virgin. This decision, although in conformity with the prescriptions of the law and the case law, was highly criticized and was therefore finally reversed. Popular reaction against the first decision relied mostly on rights-based arguments. Interestingly those arguments were used against the will of the persons involved in the case. The large-scale reaction illustrates the general fear of the acceptance of Islamic practices in the law.

Full article

1 Introduction

In 2008, a judgment was delivered that sparked a huge reaction within both the media and public opinion in France. A Muslim man succeeded in his claim for the cancellation of his marriage on the grounds that his wife was not a virgin as she had initially professed. The magnitude of the reaction of individuals against this ruling led the government to intervene and request an appeal. These claims were grounded on human rights discourse. Human rights are the product of a transnational consensus, emerging from a transnational space. This space, setting the human rights rules, can be characterized as the ‘centre’ of the human rights formation. Members of the centre share a common set of values and practices, such as secularity, universality

¹ A French Erasmus student, currently in first year of Master in Public Law.

or the use of English². At the local level, these values are not universally integrated. On the side of a part of the population which has been familiarized with the ideas of the centre, a periphery remains. The periphery's values are often based on traditions and religion. The coexistence of these two poles has given birth to translators, in charge of the introduction of the transnational discourse and values at the local level³. Traditionally this role is fulfilled by the national judges and politicians. One can consider that the media and the activists also play this part. Mastering both the languages of the centre and the periphery, these individuals operate the mediation between those entities. In the case discussed, public opinion has appropriated the language of the centre to challenge the position of the traditional translators. People argued that the annulment did not comply with a correct application of the human rights. The consensus against the annulment led to a decision that was against the will of both parties involved (the woman and her former husband). This consensus was certainly founded on the idea, that seems to be widespread in French society, of the fear represented by Islamic worship.

1.1 The “Marriage of Lille” Case: A Resounding Affair

On April 1st 2008, the Tribunal de Grande Instance de Lille (Court of First Instance) acceded to the claim of the husband to annul the marriage⁴. Article 180 of the French Civil Code allows one of the partners to ask for cancellation if he can prove there was a misunderstanding of the essential qualities of the other partner*. During the procedure, the wife acknowledged that her virginity was a fundamental element in their decision to get married, and agreed on the annulment. However, a few days after the judgment was published it created a large scandal in the media. Politicians, human rights organisations, bloggers and even people in the streets⁵ demanded the decision to be reversed. The public's dissent went to such an extent that

2 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Brill Academic Publishers, 2010, p. 257–258.

3 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 *American Anthropologists* 1. 2006, p. 39–49.

4 Tribunal de grande instance de Lille, 01/04/2008, in *Recueil Dalloz* edition 22/05/2008, n° 20, p. 1389. * (In the entire document): translation by the author.

5 Agence France Presse (AFP), 06/06/2008.

the French Minister of Justice, Rachida Dati, who primarily supported the decision, had to resort to an exceptional procedure. She requested that the public prosecutor, as her hierarchical inferior, would appeal against the decision. On November 27th the Court of Appeal of Douai reversed the judgment⁶. It stated that “Virginity is not an essential quality, it has no impact on matrimonial life”^{*}.

It is important to note the difference between annulment and divorce. For an annulment, the grounds must have existed before the marriage. Article 232 of the Civil Code offers a procedure for divorce by mutual consent. Article 242 allows one of the partners to seek a divorce on the basis of a violation of the duties and obligations of the marriage, which can include lying^{*}. In this latter alternative, the wife would have been considered to be at fault because of her lie and not because of her unchaste behaviour. Therefore, the main issue was not the outcome *per se* but the grounds on which it was based. Can the virginity of a woman be considered an “essential quality” of her person?

Strictly legally speaking, the first decision, although criticized, seems to be well-grounded. Many lawyers have admitted this in their comments⁷. So how did it arise that this ruling was so negatively received in public opinion, to such an extent that it led to reversal of the decision? This is an instance of the growing importance that the human rights discourse is taking in national debate. It is interesting to observe the influence of the different discourses that took part in this debate.

6 Court d’Appel de Douai, Première Chambre Civile, Public audience of 17/11/2008, n°0803786, in *La semaine juridique générale*, édition 2009, II, p. 10005.

7 E.g.: Maître Eolas, advocate from the Paris bar, <http://www.maitre-eolas.fr/post/2008/05/30/969-n-y-a-t-il-que-les-vierges-qui-puissent-se-mariar>. Maître Sophie Tougne, advocate from the Paris bar specialized in family law, in *Le Point*, 30/05/2008. Florence Sturbois-Meilhac, advocate specialized in personal law, *Le Figaro*, 30/05/2008. Laurence Mayer, advocate specialized in family law, <http://www.avocat-divorce-paris.com/actualite-categorie-nullite-de-mariage.html>. *La gazette des tribunaux*, <http://la-gazette-des-tribunaux.blogspot.com/2008/06/quand-la-justice-sintresse-la-virginit.html>.

1.2 The Success of the Human Rights Phenomenon and the Traditional Division of the Discourse

In the traditional view, coming from the 17th century, human rights are tools for individuals to protect themselves from the State. Since the end of the Second World War, an important number of ‘norms, institutions and processes that seek to shield the individual from arbitrary and excessive State action’ were born and have expanded to such an extent that some scholars talk about a ‘human rights phenomenon’.⁸ Miia Halme highlights three elements of the phenomenon: the discourse, the community and the artefacts⁹. The three of them have lately demonstrated a peculiar expansion. This development comes with a change in the shape of international society¹⁰. As Sally Engle Merry pointed out, a central transnational space, producing the human rights regime, nowadays coexists together with a periphery¹¹. As opposed to the former, English speaking and secular, the latter is ‘non-English speaking, religion-oriented’, and based on traditions. The relationships between these two poles gave birth to translators. These individuals (judges, politicians, legislators) are powerful because they are capable of translating claims from the local periphery to the transnational space and vice versa. The language they master is weightier than the one used by the other members of the periphery. Therefore their interventions are respected because they are grounded in the transnational phenomenon. Due to the extension and the success of the human rights phenomenon in the collective mind, more and more people have appropriated the human rights discourse. The ‘Marriage of Lille’ case presents a glaring example of this phenomenon.

8 Definition of the Human Rights phenomenon, in Mutua, Makau, *Human Rights discourse: African viewpoint*, in *Human Rights: the new consensus*, Regency press, London, 1994, p.94–98.

9 Halme, Miia, *Human Rights in action*, PhD thesis, Helsinki, University Press of Helsinki, 2008, 256p., p. 7, <https://oa.doria.fi/handle/10024/36063>.

10 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Brill Academic Publishers, 2010, p. 1–2.

11 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 *American Anthropologists* 1. 2006, p. 39–49.

2 The Popular Reaction

As soon as the media echoed the case, the first and most remarkable reaction was the popular one. People gave their opinions on their blogs, and expressed their indignation publicly on TV and radio broadcasts. Some forums of news-related websites even had to close due to the amount and the controversial character of the messages¹². Contrary to the traditional translators, the public opinion does not master the language of international human rights. It has a consequence on the content of their discourse, qualified by Duncan Kennedy as the “lay discourse of rights”¹³. These lay interventions nonetheless have an influence; echoed by the media, they led to a reverse of the decision.

2.1 The Emphasis on Secularity

Policy makers use education as a means to instil the values they want to be shared by the future generations. Miia Halme qualifies them as ‘centre values’¹⁴. In France, the secularity of the State is one of these. This very important feature of the French society is cited in the first article of its Constitution. The 1905 law of separation between Church and State is very often cited and celebrated*. This law recognizes an unconditional freedom of conscience and establishes a strict separation, economically as well as theoretically, between the French Republic and any church. It is part of the education of every pupil in France from the primary school, at least in mandatory civic education classes*. Also it is interesting to note that the reaction did not come only from people belonging to particular movements or groups (e.g.: feminists, extremist parties, etc.). The vast majority of citizens seemed to oppose this decision, which, they argued, was against this very basis of their society. Many people resented that such a shocking thing can happen in ‘our’ country, in France, the ‘country of freedom and secularity’. The integration of this civic value of secularity in education is older than the

12 E.g.: www.20minutes.fr and www.nouvelobs.fr.

13 Kennedy, Duncan, *The Critique of Rights in Left Legalism / Left Critique*, Durham & London, Eds. Brown, Wendy & Halley, Janet. Duke University Press, 2002, p. 210 et seq.

14 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Brill Academic Publishers, 2010, p. 257–258.

inception of human rights. This anchor in the French common mind may explain why this argument was the first tool of the opponents. The emphasis on secularity also shows the importance of the applicant's religion in the case. It raises the recurrent question in the public debate on the meaning of secularity¹⁵. Does it imply the refusal of all beliefs or the acceptance of all religions? In the opponent's mind, secularity is used as a shield against the drifts, which religion, and especially Islam, can lead to. For the applicants in the case, this reaction can be considered an infringement of their freedom of religion. Marriage is a matter of choice but also of beliefs. The definition of what represents an essential element in the decision to get married is subjective. One cannot only apply objective civic arguments to this very personal situation, and leave all religious considerations aside, on behalf of secularity.

2.2 Essential Quality of a Person: A Subjective Element

The phrase 'essential quality of the person' used in the Civil Code is vague. It leaves room for the judge's interpretation. It is quite certain that when the first version of Article 180 was written in 1803, the virginity of the wife was encompassed in the concept of essential qualities of a person. However, societal values evolve depending on the context. According to a well-established court practice, the error of the person can be either objective or subjective. If subjective, the plaintiff has to prove that the (missing) quality he deplores was decisive in the decision to get married. In the present case, it seems clear that the virginity of the woman was a decisive subjective element for the marriage from the perspective of the husband. In case-law, some similar instances have been accepted and are quite famous, such as the fact that a Catholic man discovered that his wife had already divorced prior to the marriage (1997 case), or the impotence of the husband¹⁶. It is to be noted that in the 1997 case, the Cour de Cassation (French Supreme Civil Court) did not require that the essential quality had any impact on matrimonial life. This criterion was new in the Douai Court ruling. It is a

15 See for example: Guaino, Henry, special adviser of Nicolas Sarkozy: "Le sept-neuf, l'invité politique », *France Inter*, 01/12/2009.

16 Divorce: Cour de Cassation, Chambre Civile 2/12/1997, 96-10.498. Impotence of the husband: Cour d'Appel de Paris, 26/03/1982 and Tribunal de Grande Instance d'Avranches, 10/07/1973.

means to express that society's conception of the woman in the marriage has changed and therefore the criterion of virginity is not acceptable anymore.

It seems clear that the fact that the plaintiff was a Muslim amplified the intensity of the debate. The aforementioned 1997 case did not have an equivalent media response, although it was also based on a religious – but Catholic – doctrine. In people's mind it is inconceivable that an Islamic precept could be the grounds for a judicial decision. On the contrary, French justice must demonstrate the 'correct' application of rights as reflecting secular values.

2.3 The Centre Showing the 'Good' Way to the Periphery

Although all religions are considered legally equal, Islam seems to suffer from a bad image in Western countries due to prejudices promoted by the media and the general climate. Moderate Islam is associated with extremist practices. This confusion explains people's reluctance to accept Islamic worship. They consider it dangerous and incompatible with a Western vision of democracy and rights. This tense situation reveals the imbalance between two extremes of society. Using Merry's vocabulary, the Islamic community can be considered a periphery, compared to the centre of French society characterized by secularity.¹⁷ Representatives of the centre, in accordance with the dominant pattern of rights, believe that they are in a superior position. This enables them to impose their translation of rights discourse on the less 'rights-developed' societies or segments of the society. They are secure in the idea that they belong to the 'good side' since their claim is in accordance with the majority's concept of human rights. Human rights are seen as unquestionably good arguments. Therefore, members of the majority feel entitled to teach and decide for the woman what is best for her. This reproduces the paternalistic attitude of the occidental countries towards others, imposing their own view upon what is and is not right. What is new is the fact that the vast majority of society now exercises this role, using rights' vocabulary. Because they do not master this language, they use it excessively, and even at the expense of the person they consider a victim.

¹⁷ Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in *108 American Anthropologists* 1. 2006, p. 39–49.

3 The Discourse of the Traditional Translators

The discourse of politicians, associations or even journalists, is more based on what Miia Halme calls ‘human rights artifacts’ that are international human rights instruments.¹⁸ As traditional translators, they use the transnational human rights language corresponding to the lay rights claims. Associations jumped at the opportunity presented by this case, which gave them a forum through which they could denounce wider problems (e.g.: forced marriages, women’s situation in fundamentalist communities), but in this particular instance they benefited from the support of human rights and a wide audience through media. Lawyers and politicians especially referred to the European Convention on Human Rights (ECHR), which has a positive image. They based their argumentation on various articles of the convention, either to criticize or to approve the annulment¹⁹. It seems to be the closest international instrument to the individuals. This popularity probably comes from the fact that it can be used by individuals against French Court rulings before the European Court of Human Rights²⁰. In practice, the resort to this instrument turns out to be much more confusing than it looks like from the perspective of the lay discourse.

3.1 The European Convention on Human Rights, an Ambivalent Instrument

3.1.1 One Provision for Two Opposing Claims

Considering only the ECHR, one notices that both the former spouses and the public prosecutor, involved in the Appeal before the Douai Court, based

18 Halme, Miia, *Human Rights in action*, PhD thesis, Helsinki, University Press of Helsinki, 2008, 256p, <https://oa.doria.fi/handle/10024/36063>.

19 Francine Summa, advocate specialized in family law, http://avocats.fr/space/francine.summa/content/_4C269124-8504-461B-A1BF-EC4B89289D16. Laurence Mayeur, advocate specialized in family law, <http://www.avocat-divorce-paris.com/actualite-categorie-nullite-de-mariage.html>. Patrick Morvan, Law professor at University Paris 2, specialized in social law, <http://patrickmorvan.over-blog.com/article-20233700-6.html>. Ligue des droits de l’Homme de Toulon, a human rights defense association, <http://www.ldh-toulon.net/spip.php?article2714>.

20 However, no further prosecution has followed. Therefore the case was not brought before the European Court of Human Rights. The threat of a French condemnation by the European Court might have encouraged the intervention of Rachida Dati in favor of the Appeal, in addition to the popular reaction.

their arguments on the same legal grounds. Article 12 provides a right to marry. In French law, provisions setting up freedoms are considered to embody a negative as well as a positive aspect. Article 12 is therefore also used in support of cancellation: the right not to marry. This involves the right to reconsider the union on legitimate grounds if the law offers this possibility. Article 8 declares the right to privacy and family life²¹. It is invoked by the woman in the appeal, claiming that the public prosecutor's intervention in her private life is a breach of this right. However, she could also, in the manner of her popular defenders, have invoked a breach of privacy regarding her previous sexual activity in order to oppose the cancellation. Article 9 sets up the principle of freedom of thought, conscience and religion. It includes the freedom of one 'to manifest his religion or belief in worship, teaching, practice and observance'. Restrictions to this right must remain exceptional²². Both parties in the discussion could invoke Article 9. The supporters of the cancellation put the emphasis on freedom of religion. The plaintiff argued in the appeal that the essential quality he deplored in his wife was her inability to tell the truth about elements of her past that were fundamental within his – and his wife's – community. In this case, out of respect for his freedom to observe his religion, this conviction should have been taken into account. On the other hand, the opponents of the cancellation invoked the need to protect the public order in a democratic society.

3.1.2 *The Need for a Balancing Between Rights*

This shows that an argument for the support of any point of view can be rights-based. Any rights-claim can have an apparently formally valid counter rights-claim. They cannot all be legally correct though, otherwise conflicts would never be settled. In order to stand on such a conflict, one must favor one value over another. Either freedom of religion or people's concept of morals prevails. This choice is not neutral. It implies subjective judgment

21 According to Clayton and Tomlinson, the right to privacy includes "respect for a person's moral and physical integrity, personal identity, personal information, personal sexuality and personal or private space." Clayton, R. & Tomlinson, H., *The Law of Human Rights*, Oxford, Oxford University Press, 2000, para. 12.85–12.94.

22 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. European Convention on Human Rights, article 9.

on what values should be protected in society. Human rights cannot apply as the sole rule; other considerations always come into the picture. Positive human rights law is the result of a choice made by Western countries. It is only the recognition of a pattern of values, which ‘allows you to be right about your value judgment, rather than just stating “preferences”’²³. As soon as one realizes that the ‘good’ balancing between rights is only a matter of choice of priorities in one society at one moment, those rules lose their absolute character. Human rights can be manipulated. From this point forward, one does not blindly believe in the human rights system anymore. One can challenge them. In theory, the choice between values belongs to the national judge. Indeed, in order to remain adaptable to different factual situations and national singularities, human rights conventions leave room for the national judge to stand on important issues.

3.2 The Role of the National Judge

Article 66 of the French Constitution gives the judicial authority the mission of guardianship of individual freedoms. Relying on this disposition, the judicial judge is, in this case, the one in charge of deciding which of the rights claims is the most receivable and which value should prevail.

Other possibilities exist. In the 1960’s, Herbert Wechsler commented on a case in the context of anti-racial discrimination claims in the United States. In the absence of a ‘neutral principle’ by which to favor one value over another, Wechsler suggested that the judge would defer to the legislature. The final decision in the balancing of values belongs to the society as a whole, represented by the legislature.²⁴ This process does not exist in French law. Nevertheless, between the first judgment and the appeal, a revision of the French Constitution occurred. New article 61-1 allows a judge to remand a law to the Constitutional Court if a party of the trial claims that this law infringes on rights and freedoms protected by the Constitution*. It would have been interesting to have the opinion of the Constitutional Court on

23 Kennedy, Duncan, *The Critique of Rights in Left Legalism / Left Critique*, Durham & London, Eds. Brown, Wendy & Halley, Janet. Duke University Press, 2002, p. 184–185.

24 Wechsler, Herbert: *Toward neutral principles of constitutional law*, 73 Harv. L. Rev. 1, 1959, p. 16, 25, and 31.

this conflict of rights. Though perhaps this case was controversial enough, and the use of this new constitutional tool would have been too audacious.

Consequently, the final decision belongs to the judge. This is confirmed by the European Court of Human Rights since the 1976 *Handyside v. United Kingdom* case. The State authorities keep a margin of interpretation regarding the 'legitimate aims in a democratic society'. They are in the best position to determine the requirement of morals, due to their 'direct and continuous contact with the vital forces of their countries'. In the appeal, the judge decided to favor morality, through the notion of public order.²⁵

3.3 The Reference to Public Order, a Reintroduction of Moral Considerations

According to the Court of Appeal, in this case the preservation of public order was more important than the protection of freedom of religion. It stated that the appreciation of the essential quality comes under public order control and therefore cannot be let at the disposition of the parties*. The judge and the public prosecutor, a representative of the State, can decide which motivations for a marriage are acceptable or not. Public order is defined in administrative law as the union of security, public health, peace and public morality²⁶.

3.3.1 The Components of Public Order

Some observers invoked public order in the sense of public health²⁷. They argued, justifiably, that accepting the annulment would be very dangerous; it could lead even more young women to visit the hospital in order to remodel their hymen. Rachida Dati also used the public order argument, but in support of the first judgment; according to her, this interpretation of the law protected the young woman and would prevent forced marriages to continue²⁸. The advocate for the husband considered the judgment of the Court of Appeal as a 'judicial forced marriage'.*²⁹

25 *Handyside v. United Kingdom* (5493/72), 4/11/1976.

26 Based on former Article 97 of the *Code of Communes*.

27 Elisabeth Badinter, philosopher, *Le nouvel observateur*, 25/06/2008.

28 *Le Figaro*, 30/05/2008.

29 AFP, 16/11/2008.

The main issue in consideration is morals. Allowing the claim is to risk opening a ‘Pandora’s Box’³⁰; any subjective opinion on the content of the concept of essential quality could be the basis for the cancellation of marriage. This is precisely the aim of Article 180 of the Civil Code and the traditional interpretation of the ‘essential quality of a person’ as a subjective element. However, the Court of Appeal considers in the present case that we cannot let individual will regulate all aspects of a civil relationship. Public authorities should intervene when the individuals go too far. The request of the plaintiff went too far. It was not acceptable.

3.3.2 Public Order, a Shield against the Excesses of the Individuals in Their Private Lives

One can wonder if the competence of a judge should include the power to define what should people think ‘essential’ or not in their private life. The definition of morals encompasses one’s conception of what is right or wrong. It is based on a subjective consideration about what all ‘rational’ persons should share. Morality is always at the frontier between social consensus and individual convictions. Rights exist precisely to avoid personal judgment and the reign of the arbitrary. The rule expresses a consensus over what ought to be. The judge has to apply it, without giving any weight to his personal opinions.

Accordingly, the judge of the first instance applied the rule, in compliance with the case law, without giving any judgment of value. The judge of the appeal had to take the almost unanimous popular reaction into account. Morality was the tool he used of to restore a social consensus, as a shield against what society considered unacceptable. The strength of the reaction against the first judgment evinced the fear existing against Islam in French society. According to the prevailing opinion, Islamic values are a threat to democracy and should remain outside French society. Granting a right to a Muslim on the ground of his religion would be the first step down a slippery slope. The need to protect society is important enough to go against an individual’s will.

30 Catherine Bacon, president of a local branch of the association «Ni putes ni soumises», women’s rights activist, *La voix du Nord*, 30/05/2008.

3.4 Liberal Rights against Individual Will

The transnational human rights system, which we can qualify as Western, is based on individual rights. Individual freedom and freedom of choice are key concepts of any human rights instrument. These rights can be exercised in any way provided they do not infringe the rights of others. Paradoxically in the ruling of the Court of Douai the use of human rights seems to go against the wills of the persons concerned. Indeed, both partners wanted the annulment. The woman acknowledged that her husband was within his right by making this request. She belonged to the same community as him. Therefore her conception of the rights and duties existing between spouses differed from Western ones.

The freedom to exercise one's religion can be exercised in any way not infringing the rights of others. In the Lille case, the woman did not consider that her rights were infringed because her values were not based on individualism, but based on her religion. From a Western point of view, she seemed 'oppressed by her own culture' and she needed protection³¹; she had to understand that under her vision of relationships, she was not free. However, she preferred to align herself with her religious precepts instead of the conception of freedom offered in a Western society, and might have accepted the situation with full knowledge of her legal rights. Nevertheless it seems that justice had to teach her what her rights are in a 'correct' system of values. This decision was to have the role of a model.

This same paternalistic attitude was adopted both by the judge and in the comments made by the objecting individuals. The judge had to impose the French version of equality. If individual free will is really at the basis of the human rights concept, Western countries should tolerate minority claims if they are freely consensual. The problem is again to determine whether the tradition is observed with well-informed consent. Laws banning headscarves worn in different contexts in France rely on the idea that it is a

31 Merry, Sally Engle, *Transnational human rights and local activism: mapping in the middle*, in 108 *American Anthropologists* 1. 2006, p. 43–44. The author recounts in those pages the case of a battered woman in Hawai'i who tells a support group that she had forced sexual relations. "She saw the act differently when it was called "rape"". The French media-relayed case seeks to have a similar educational role in the field of women's rights.

symbol of women's oppression. However, a lot of women oppose these laws, claiming that it is their choice. Some insist on the fact that they are educated and therefore do not accept the argument that they took this decision in ignorance of their rights. Some argue that a headscarf helps them feel better, in accordance with their worship. The goal is to determine the value of the consent. Therefore, a State decision should not be based on the concept that the observance of a particular religion is, *per se*, dangerous and oppressive.

4 The Appropriation of Rights by the People

4.1 The Desecration of the Translator's Discourse

The success of the human rights phenomenon has brought the human rights discourse 'from the periphery to the center' of the public debate in contemporary France³². Even the judiciary must justify its interpretation of the law, which can be challenged by human rights based arguments. The public authority must defend its ruling in front of the society; the public opinion is the 'new judge' in respect to the people's own rights. The 'spiral of expansion' reaches its maximum size regarding the actors involved³³. The judges, politicians and legislators – and, to a certain extent, the medias and the activists, – traditional translators, are replaced by citizens offering their own interpretation of human rights in particular cases. Popular discourse becomes the new voice of the centre. The former translators are no longer as powerful, their language is no longer sacred and their opinions are subject to popular judgment. As an example, Elisabeth Polle, the Lille judge who returned the first judgment, had to lay charges for receiving threatening letters a few days after it was published³⁴.

32 Halme, Miia, *From the periphery to the centre: emergence of the Human Rights phenomenon in Finland* in *Finnish Yearbook of International Law*, Leiden, Ed. Creutz, Katja, Brill Academic Publishers, 2010, p. 257 and 281.

33 Ibid., p. 186.

34 *La voix du Nord*, 10/06/2008.

4.2 The People as Guardians of their Own Rights

Many observers claimed that if French civil law can lead to such an unacceptable ruling, it urgently has to be changed³⁵. Human rights are a tool to challenge not only judgments but also the national law itself. Existing above the legal system, human rights as extra-legal embodiments of values constitute guidelines which the law should comply with. If people think that the legal system deviates from these guidelines – if it does not provide for the rights it owes them – the people can claim that these extra-legal human rights are to be applied. The public opinion can even struggle for the rights of others. If human rights are relative and can be manipulated, who is better placed to declare and interpret them than the majority of the population, to whom they belong? The majority acts as the guardian of its own rights. The meaning of human rights is still decided at the international level, but it is no longer a set of rules that comes only from above. The individual has made this tool theirs, and can even shape the content of the various rights.

In the traditional sense, as a product of the Age of Enlightenment, law is the basis of a democratic society in the sense that it expresses the general will of the people³⁶. The law can therefore be challenged by an opposite general will. In the Lille case, the rejection of the first judgment seemed to represent such a consensus that it could be considered as that of the general will. This phenomenon can be regarded as a return to the original conception of human rights: an instrument of the individuals with which to defend themselves against the public authorities. In the present case, however, the society seemed to be defending itself against the threat represented by another culture more than from the arbitrariness of the State.

35 Martin Hirsch, High Commissioner for active solidarities and Bruno Le Roux, Member of Parliament, in *Le Post*, 01/06/2008. Valérie Liétard, secretary of State for women's rights, in *Web libre*, 30/05/2008. Marie-George Buffet, national secretary of the Communist Party, in *Le Figaro*, 30/05/2008. Caroline Fourest, feminist, Prochoix, 2/06/2008. Catherine Bacon, president of the local branch of the association "Ni putes ni soumises", women's rights activist, in *La Voix du Nord*, 31/05/2008. Forum discussion, *Le figaro.fr*, <http://plus.lefigaro.fr/article/le-mariage-annule-de-lille-choque-73-des-francais-20080606-23543/commentaires>.

36 Rousseau, *Le contrat social*, 1762; *Déclaration des droits de l'Homme et du Citoyen*, 1789.

4.3 The Balance between Rights: A Choice of Society

Human rights should not be used systematically by the majority against minorities. Rights exist precisely in order to avoid ill-considered judgments based on feelings such as fear or hatred. One cannot accept that the public opinion, through media, decides case-by-case how conflicts should be settled. The public authorities must find the right balance between the protection of individuals and the respect of individual will. Clear borders need to be established. Although human rights need flexibility in order to function in practice, there have to be some fixed principles resulting from a choice of society. ‘Morals’ is too vague a concept, leaving too much room for subjectivity. There needs to be a stable statement, clear and well-considered, on what value society generally decides to favor. It should avoid subjectivity and on-the-spot judgments. It is also a question of the predictability of the judgments. In order to reach this consensus, there needs to be a national discussion. The debate must not only be raised occasionally, directly after judicial cases or new laws are echoed in the media, but must be a continuous discussion, devoid of passions, on what values society ought to embody. What considerations do ‘we’ want the judge to protect and give priority to? What sense does France decide to give to ‘secularity’? Has the society decided to accept different beliefs on the basis of freedom, or is religion – every religion – considered a threat which must remain outside all the aspects of public life and tribunals?

Observing the Lille case and the recent legislative reality, it seems that French society is heading toward a banning of religion in any act of public or civil life, at least regarding Islam³⁷. It must be confined to the very private sphere. In the context of ‘islamophobia’, people tend to think that Islamic values and worship will never be compatible with democratic ideas, they confuse moderate and extremist Islam³⁸. Consequently, Muslims have two alternatives: to occidentalize their worship or to struggle for the respect of their beliefs against the Western interpretation of human rights. This latter option can lead to a communitarian attitude. The Islamic community may be tempted to cut itself from the rest of “indivisible” French society³⁹.

37 Not exclusively French society (see the referendum on minarets in Switzerland for example).

38 See the Final report of the Commission on British Muslims and Islamophobia: *Islamophobia: A challenge for all*, Runnymede Trust, London, 1997.

39 French Constitution, Article 1.

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Can International Arbitration Remain Unaffected by EU Law? – Anti-Suit Injunctions and the Scope of the Arbitration Exception

Keywords: Arbitration, Anti-Suit Injunction, European Union Law, West Tankers, Brussels I Regulation

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Abstract

The European Court of Justice has recently ruled in the case C-185/07 West Tankers (Allianz) that under certain circumstances the validity of an arbitration agreement may be evaluated under the Brussels I Regulation by a court of an EU Member State. Moreover, the courts of the seat of arbitration may not issue so-called anti-suit injunctions to protect arbitration against court proceedings in breach of an arbitration agreement in another Member State. This article deals with the concept of anti-suit injunctions and the interface between international arbitration and EU law, with focus on the recent case law of the ECJ. The European Commission has proposed amendments to the arbitration exception. The impact of the reform is difficult to foresee; however, any measure which implies bringing arbitration within the scope of EU law must be assessed carefully. International arbitration is a universal means of dispute resolution and the EU should be cautious not to adopt an inappropriate solution based on regional needs.

Full Article

1 Introduction

It is a truth universally acknowledged that parties to a dispute sometimes commence proceedings in foreign jurisdictions with a view to gain time.¹ On such instances, a foreign court may be seised in bad faith and in disregard of, for example, an agreement to arbitrate. Although the foreign court

¹ The author is indebted to Jane Austen for the structure of the opening sentence.

is ultimately likely to find that it does not have jurisdiction over the dispute because of the existing arbitration agreement, reaching this conclusion may nevertheless take a long time and involve an examination of the validity of the agreement to arbitrate. “Time is money”², and this is particularly true in transnational litigation where prolonged court proceedings often mean substantial costs, be it in the form of litigation expenses or otherwise. In order to combat this type of dilatory manoeuvres, courts in Common Law jurisdictions may issue so-called “anti-suit injunctions”, that is, orders restraining a party from commencing or continuing vexatious court proceedings in foreign jurisdictions.

European Union law does not, in principle, deal with international arbitration. In creating an “area of freedom, security and justice”³, the EU has adopted the Brussels I Regulation⁴ (hereinafter also “the Regulation”) which deals with the recognition and enforcement of judgments in civil and commercial matters. However, the wording of the opening article of the Regulation is straightforward: “[t]he Regulation shall not apply to [...] arbitration.”⁵ Curiously enough, this “arbitration exception” was nonetheless at the heart of a controversial judgment by the Court of Justice of the European Union⁶ (“European Court of Justice”, hereinafter also “the ECJ” or “the Court”) in the recent *West Tankers* (also known by the name *Alianz*) case.⁷ In that reference for a preliminary ruling, the House of Lords

2 This adage is attributed to Benjamin Franklin (1706–1790).

3 Title V of the Treaty on the Functioning of the European Union, OJ C 115 of 9 May 2008.

4 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. For the sake of clarity, the paper only refers to the Brussels I Regulation although in many instances it may be appropriate to bear in mind that the Lugano Convention, the signatories of which include also the EFTA Member States (with the exception of Liechtenstein; Iceland, Norway and Switzerland being signatories), is highly similar in terms of its content. Also the relevant case law of the European Court of Justice is, to an extent, applicable thereto. However, it is not the purpose of this article to deal further with the Lugano Convention.

5 Article 1(2)(d). In a similar fashion, Article 1(2)(e) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16, provides that “[t]he following shall be excluded from the scope of this Regulation: [...] arbitration agreements [...]”.

6 At the time of the judgment, the Court of Justice of the European Communities; from 1 December 2009 onwards the Court of Justice of the European Union, as it was renamed with the entry into force of the Treaty of Lisbon.

7 Judgment of the Court (Grand Chamber) of 10 February 2009 in Case C-185/07 *West Tankers*.

asked the ECJ whether a United Kingdom court could issue an anti-suit injunction to protect *arbitral* proceedings in London against parallel *court* proceedings commenced in another EU Member State, namely Italy. In its judgment, the ECJ ruled this practice to be incompatible with the Brussels I Regulation.

The question is: why were these protective measures not compatible with EU law, considering that the Regulation does not apply to arbitration? The effect of the *West Tankers* judgment as to the scope of the Brussels I Regulation is worth considering: the judgment involves bringing arbitration-related anti-suit injunctions into the scope of application of the Regulation and therefore blurs the boundaries of the arbitration exception. So far, international arbitration as an autonomous system of dispute resolution has been left untouched by the Union legislator. Moreover, one may contemplate the practical consequences of the judgment: what happens when anti-suit injunctions are no longer available to protect arbitration in the EU? In this respect, the possible economic significance of the *West Tankers* judgment is not to be underestimated. Since the possibility to issue anti-suit injunctions is no longer available for situations falling under EU law, contracting parties may increasingly choose their seat of arbitration outside the European Union.

In the following, I will first present the common law concept of anti-suit injunction, with a focus on English law. Secondly, the relationship between arbitration and EU law and the relevant case law leading up to the *West Tankers* case will be outlined. Thirdly, I will analyse the judgment in *West Tankers* and discuss the effects that the judgment might produce. Finally, it is not without significance how the arbitration exception is to be construed in the future. I will therefore conclude by addressing the possible future developments of the relationship of arbitration and the Brussels I Regulation.

2 Anti-Suit Injunctions

2.1 Origin and Legal Basis in English Law

The anti-suit injunction is an order that a court may issue to restrain a party to proceedings from either commencing or continuing litigation in a certain forum, often in a foreign jurisdiction.⁸ The legal basis for anti-suit injunctions in current English law⁹ is in the Supreme Court Act 1981.¹⁰ However, the origins of this equitable¹¹ jurisdiction date back centuries, the first reports of an application for such relief being from the 15th century.¹² Its historical roots lie in a “common injunction” which the Courts of Chancery¹³ could issue to restrain a party from commencing or continuing a suit in the courts of common law where to do so would be contrary to conscience.¹⁴ As no statutory basis to grant an injunction existed before the Supreme Court of Judicature Act 1873, at the time, injunctions were granted by the Court of Chancery under its equitable jurisdiction.

8 According to another definition, “[a]n anti-suit injunction is an order of the court requiring the injunction defendant not to commence, or to cease to pursue, or not to advance particular claims within, or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country, or court proceedings elsewhere in England.” (Footnotes omitted.) See, Raphael 2008, p. 4.

9 The concept of an anti-suit injunction is known throughout the common law world. However, for the purposes of this paper, the discussion will focus on the concept of the anti-suit injunction in English law (which refers to the law of England and Wales; Scotland and Northern Ireland being separate, independent jurisdictions). This is done in order to provide an overview of the concept to support the discussion on the European law implications which the English concept is perceived to have with regard to the case law of the ECJ, in particular Case C-185/07 *West Tankers*, explained below. Nevertheless, reference is made to the United Kingdom whenever the state is referred to in its capacity as a Member State of the European Union.

10 Section 37(1) which reads: ‘The High Court may by order (whether interlocutory or final) grant an injunction [...] in all cases in which it appears to the Court to be just and convenient to do so.’ Earlier provisions include the Supreme Court of Judicature (Consolidation) Act 1925 Section 45(1) and Supreme Court of Judicature Act 1873 Section 25(8).

11 Generally speaking, “equity” in common law jurisdictions refers to a set of legal principles developed to supplement strict rules of law and to mitigate their severity. For a more detailed presentation on the concept of equity in English law, see McGhee 2005, pp. 1–12.

12 Such injunctions are known to have been commonly issued from the time of Henry VI (1422–1461). See, to that effect, Altaras 2009, p. 328.

13 Until the Supreme Judicature Acts in 1873 and 1875 the English legal system was divided into courts of law and equity, that is, the common law courts and the Courts of Chancery respectively. The two formed separate and partly competing jurisdictions until they were fused by the said Acts. See, Raphael 2008, p. 41.

14 Bell 2003, p. 172.

2.2 Anti-Suit Injunctions and Transnational Litigation

The first record of a case with a transnational dimension, that is, where a party sought an injunction to prevent litigation outside of England was the case of *Love v Baker*¹⁵ from year 1665.¹⁶ Since then, the form and conditions for the anti-suit injunction have evolved, but the jurisdiction remains wide and discretionary. In general, by issuance of anti-suit injunctions, English law acts to prevent the pursuit of foreign proceedings that are vexatious or oppressive.¹⁷ For example, courts may issue such injunctions in order to protect the integrity of the process¹⁸ or guard against the evasion of public policies of the forum.¹⁹

It is to be noted that the anti-suit injunction is a discretionary remedy which the courts may issue when it is “just and convenient to do so”²⁰. Thus, the right to obtain an injunction is not a cause of action²¹ and it must always be in the interests of justice to grant the injunction.²² Importantly, it is an elementary condition that the issuing court should have personal jurisdiction over the addressee of the order.²³ This is of paramount significance, especially in transnational litigation, since a key characteristic of the order is that it is directed at the person aiming to commence or continue the

15 *Love v Baker* [1665] 1 Ch Ca 67. See also, Raphael 2008, p. 10.

16 For the first reported case of a court granting an injunction in proceedings outside the British Isles, see *Beckford v Kemble* [1822] 1 Sim. & St. 7 (sale of plantations in Jamaica).

17 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. The case is generally cited as the leading authority for the doctrine. See, e.g. Harris 2008, p. 370; and, more generally, Bell 2003, pp. 180–190.

18 As in *Armstrong v Armstrong* [1892] P 98.

19 See, e.g. *Bank of Tokyo Ltd v Karoon* [1987] AC 45.

20 Supreme Court Act 1981 Section 37(1).

21 Altaras 2009, p. 328. However, it has also been observed that “the cause of action is for an injunction itself, and does not require the underpinning of a separate equitable right” and that “there is no doubt that an anti-suit injunction is a legitimate form of final claim which can be claimed at trial independently of the existence of any other cause of action.” See, to that effect, Raphael 2008, p. 72 as well as footnotes 42 and 43 therein.

22 Raphael 2008, p. 173.

23 According to Lord Goff in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, the person must be “amenable” to the jurisdiction.

foreign proceedings, not at the foreign court itself.²⁴ The consequences of non-compliance with an anti-suit injunction are severe: it is a contempt of court and, therefore, acting in breach of an injunction may result in serious penalties, including imprisonment or seizure of assets situated in the United Kingdom.²⁵ The party acting in breach of an anti-suit injunction also runs a risk that the judgment obtained in a foreign jurisdiction will not be recognised in the United Kingdom.

2.3 Anti-Suit Injunctions in Support of Arbitration

In the basic situation, an anti-suit injunction is granted to restrain the pursuit of court proceedings abroad in order to protect court proceedings in England. However, anti-suit injunctions may also be issued in support of an arbitration clause.²⁶ Traditionally English courts have readily granted an injunction where proceedings are commenced in a foreign jurisdiction in breach of an existing arbitration agreement.²⁷ Notwithstanding the fact that the ECJ ruled in the case *Turner*²⁸ that anti-suit injunctions to restrain foreign court proceedings in the European Community were incompatible with the Brussels Convention,²⁹ the English courts maintained that they could continue to issue anti-suit injunctions where this was done in support of *arbitration*.³⁰ Admittedly, although the ECJ's position was clear in that anti-suit injunctions were incompatible with EU law, it could arguably be

24 This is expressed already in the words of the Lord Chancellor in *Love v Baker* [1665] 1 Ch Ca 67: "It was said, The Injunction did not lie for foreign jurisdictions, nor out of the King's Dominions. But to that it was answered, The Injunction was not to the Court, but to the Party." To the same effect, see e.g. Lord Hobhouse in *Turner v Grovit* [2001] UKHL 65, para 22. See also, Bell 2003, p. 173. However, the *in personam* nature of the anti-suit injunction has not infrequently been seen as mere formalism. For instance, according to the late ECJ Advocate General Ruiz-Jarabo Colomer: "it is undeniable that, as a result of a litigant being prohibited, under threat of a penalty, from pursuing an action before a given judicial authority, the latter is being deprived of jurisdiction to deal with the case, and the result is direct interference with its unfettered jurisdictional authority." See his Opinion in Case C-159/02 *Turner*, para 34.

25 Raphael 2008, p. 1; see also, Opinion of Advocate General Kokott in Case C-185/07 *West Tankers*, para 14.

26 For an early recorded case to this effect, see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 L.T. 846.

27 To this effect, Sheppard 2005.

28 Case C-159/02 *Turner*.

29 *Ibid.*, para 31.

30 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598. It is noteworthy that the judge granting the anti-suit injunction at first instance in *West Tankers* [2005] EWHC 454 (Comm) indicated that he was bound by this judgment.

held that it was equally obvious from the ECJ's case law on arbitration³¹ and its exclusion of the Brussels I Regulation that the *Turner* jurisprudence did not apply to arbitration and, therefore, could not preclude the issuance of anti-suit injunctions in support of arbitration.

It was precisely this situation which was addressed by the ECJ in the *West Tankers* case in February 2009. The facts of the case were the following. In year 2000, a ship owned by West Tankers Inc. collided with a jetty in Syracuse, Italy. Insurance companies brought proceedings against West Tankers Inc. in the *Tribunale di Siracusa* (District Court of Syracuse) in Italy claiming damages; West Tankers Inc., on the other hand, sought a declaration in the High Court in London, United Kingdom, to the effect that the insurers, who were claiming by their statutory right of subrogation under Italian law, were bound by an existing arbitration clause in the charter-party³², and that consequently, the dispute should be resolved in arbitration. The anti-suit injunction in support of the arbitral proceedings was granted by the British judge at first instance.³³ Once the case reached the House of Lords³⁴, the lords decided to refer a question for a preliminary ruling under Article 234 EC³⁵ to the ECJ concerning the compatibility of the anti-suit injunction, when issued in support of arbitration, with European Union law. The ECJ replied: no such injunctions were to be allowed, even if they were issued in support of an arbitration agreement.³⁶

2.4 Criticism of the Anti-Suit Injunction

In order to understand the ECJ's reaction to anti-suit injunctions in the *West Tankers* case, it is in order to provide a critical assessment of the value of

31 See, in particular, Case C-391/95 *Van Uden*; and Case C-190/89 *Marc Rich*.

32 A charter-party (Lat. *charta partita*, a legal paper or instrument, "divided", i.e. written in duplicate so that each party retains half) is the contract by which the owner of a ship lets it to others for use in transporting a cargo. See, the 11th Edition of Encyclopaedia Britannica and <http://www.britannica.com>.

33 *West Tankers* [2005] EWHC 454 (Comm).

34 *West Tankers v RAS Riunione Adriatica di Sicurtà SpA and others* [2007] UKHL 4.

35 Now, in an amended form, Article 267 of the Treaty on the Functioning of the European Union. The following paragraph has been added to the Article by the Treaty of Lisbon: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

36 Judgment of the Court (Grand Chamber) 10 February 2009, Case C-185/07 *West Tankers*, para 34.

anti-suit injunction. In the following, the anti-suit injunction is considered from the points of view of international comity, human rights as well as its practicality. In particular, the practicality argument is contemplated with reference to the needs of the uniform system for the allocation of jurisdiction in the EU. To illustrate the point, the national procedural law of one EU Member State, namely that of Finland, will be considered.

2.4.1 International Comity and Human Rights

The anti-suit injunction has been criticised widely on several grounds. The most obvious reason is that it is seen to interfere with the notion of international comity of nations. In public international law, comity involves mutual and reciprocal respect which is to prevail in the relations between different nations and their courts and legal systems.³⁷ Inasmuch as anti-suit injunctions interfere with matters falling within the national sovereignty of other countries, namely the administration of justice, the principle of comity of nations is compromised. It may be mentioned that the idea of comity is also reflected in the Brussels I Regulation. In particular, the principle of mutual trust by virtue of which judgments given in other Member States are recognised and enforced all over the EU³⁸ may be seen as an expression to respect the administration of justice in other Member States.

Furthermore, the anti-suit injunction is seen as possibly violating fundamental human rights since it may be seen as obstructing a party's access to court, particularly in the sense of Article 6 of the European Convention of

37 Raphael 2008, p. 7. Another description is provided by Sir John Donaldson MR in *British Airways Board v Laker Airways Ltd* [1984] QB 142 (CA), p. 186: "Judicial comity is shorthand for good neighbourliness, common courtesy, and mutual respect between those who labour in adjoining judicial vineyards."

38 See, in particular, Recitals 16 and 17 of the Preamble to the Brussels I Regulation.

Human Rights³⁹. It has been suggested that this right to access to court may possibly come to be assessed on a transnational basis, and that therefore to impede access to a court in a different country might constitute a violation of Article 6 of the European Convention of Human Rights.⁴⁰ In addition, the possibility to obtain an anti-suit injunction may also be seen as inherently favouring litigants in those jurisdictions where the anti-suit injunction is available, as opposed to litigants in jurisdictions where such an order is unknown.⁴¹

2.4.2 *Anti-Anti-Suit Injunctions and Attaining “Practical Justice”*

The anti-suit injunction is often applauded as a practical tool to achieve practical justice.⁴² However, it should be noted that this practical nature is directly linked with the unilateral character of the instrument; practical justice may be achieved easily whenever the party agrees to be restrained from continuing the foreign proceedings and whenever the foreign court does not object to being thus affected. However, whenever this is not the case and the foreign court does not want to tolerate interference with its jurisdiction, the practicality is lost. A court in a common law jurisdiction may in such a situation issue a “counter-injunction” against the anti-suit injunction; these are known as *anti-anti-suit* injunctions. It goes without saying that subsequently an *anti-anti-anti-suit* injunction may, and is even

39 Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. The European Court of Human Rights has held that a right of access to a court is inherent in Article 6 of the Convention and that the individual has a right of effective access to a court. See, for these two conditions, *Golder v United Kingdom* (1975) judgment of 21 February 1975 §§28 and 35–36; and *Airey v Ireland* (1979) judgment of 9 October 1979 §§24 and 28, respectively. These considerations are also valid in the context of EU law, since the ECJ has held that “the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.” See e.g. Case C-432/05 *Unibet*, para 37.

40 See, to this effect, Raphael 2008, pp. 28–31.

41 To this effect, see Ambrose 2003, p. 412.

42 See, e.g. Raphael 2008, p. 12.

likely, to follow.⁴³ In such a scenario, the aim of achieving practical justice is obviously defeated.

From the viewpoint of achieving practical justice, it is interesting to contemplate the hypothetical outcome of the *West Tankers* case, had the ECJ decided otherwise. Namely, if the ECJ had expressly endorsed the use of anti-suit injunctions within the scope of the Brussels I Regulation, it is not inconceivable that similar procedural tools might have been introduced also in the other Member States' laws of procedure. In the overwhelming majority of EU Member States the concept of an anti-suit injunction is unknown. However, hypothetically speaking, it is not to be excluded that this kind of development might even have come about through new interpretations of the existing procedural laws, as demonstrated by the following example.

2.4.3 Hypothesis: an Anti-Anti-Suit Injunction Emanating from a "Civilist" Member State – the Case of Finland

I would like to further entertain this hypothesis of reciprocal injunctions emanating from courts of different Member States. In the case *Through Transport*⁴⁴, proceedings were commenced in a Finnish court, *Kotkan käräjäoikeus* (District Court of Kotka), in breach of an agreement providing for arbitration in London. The English High Court was subsequently seised with a view to obtain an anti-suit injunction to restrain the Finnish proceedings. An interesting question which may be asked is whether the Finnish court could have responded to the anti-suit injunction?

43 The problems associated with a potential never-ending chain of anti-suit injunctions were famously highlighted in the transatlantic *Laker Airways* litigation. See, e.g. case *British Airways Board v Laker Airways Ltd* [1984] UKHL 7. For an example of an *anti-anti-suit injunction*, see case *GE Francona Reinsurance Ltd v CMM Trust No.1400* [2004] EWHC 2003, para 10.

44 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598. It may be noted that on appeal against the decision to grant the injunction, the English Court of Appeal was faced with a situation similar to the one later to present itself in the case *West Tankers*. In fact, the Court of Appeal considered the possibility of making a reference for a preliminary ruling to the ECJ, but observed that Article 68 EC permitted only courts against whose decisions there are no judicial remedies under national law to make a reference concerning the interpretation of the Brussels I Regulation. Therefore only the House of Lords would have been competent to make such a reference, as was subsequently the case in *West Tankers*. It may be noted that Article 68 EC has since been repealed by the Treaty of Lisbon.

Similarly to most European jurisdictions with origins in the Romano-Germanic legal tradition, Finnish law does not contain a provision for granting anti-suit injunctions. However, Finnish courts may order precautionary measures in accordance with Finnish law. In particular, under the Finnish Code of Judicial Procedure “the court may [...] prohibit the deed or action of the opposing party, under threat of a fine [...]”.⁴⁵ The very broad wording of this provision may be seen as enabling, at least in theory, the court to order a party to restrain from acting in the court of another Member State, which is, in effect, more or less the result produced by the anti-suit injunction.⁴⁶

I do not intend to suggest that, had the ECJ decided otherwise in *West Tankers*, Finnish courts would have actually commenced to issue anti-suit injunctions. Rather, the purpose of the above hypothesis is to underline that the “practical” effectiveness of the anti-suit injunction may not be a very sound justification for upholding anti-suit injunctions in the first place as regards the Brussels I Regulation. In any event, had the ECJ deemed anti-suit injunctions compatible with the Regulation, nothing would have prevented other Member States from including similar tools in their national laws. Whilst this remains a theoretical contemplation, such developments would have potentially gravely undermined the effectiveness of the anti-suit injunction and the overall efficiency of the Brussels I regime.

3 The European Union Law Context

3.1 Arbitration and EU law

Arbitration used to enter the ambit of European Union law through Article 293 EC, whereby Member States were to negotiate the “simplification of formalities governing the reciprocal recognition and enforcement of [...]”

45 Chapter 7 Section 3 of the Code of Judicial Procedure (4/1734). An unofficial English translation of the code by the Ministry of Justice of Finland is available at <http://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf>.

46 In an article from 2004, a Finnish scholar suggested that an agreement conferring exclusive jurisdiction on the Finnish courts might be a factor which might induce the Finnish court to grant the measure. See, to that effect, Koulu 2004, pp. 235–236. At the current state of the law, this possibility is of course precluded under the Brussels I Regulation by virtue of the more recent ECJ’s case law, particularly the cases C-116/02 *Gasser*, C-159/02 *Turner*, and C-185/07 *West Tankers*.

arbitration awards.” However, this provision has now been repealed by the Treaty of Lisbon.⁴⁷ In any event, arbitration has always been expressly excluded from the scope of the Brussels I Regulation. The main reason for the exclusion is the fact that the rules governing arbitration have largely been established by international conventions.⁴⁸

Despite the seemingly clear wording of the arbitration exception, the question of what has actually been excluded from the Regulation’s scope is not unambiguous. While it has been acknowledged that the Contracting Parties of the Brussels Convention⁴⁹ “intended to exclude arbitration in its entirety”⁵⁰ from the scope of the Convention; it has been equally observed that “the literal meaning of the word ‘arbitration’ itself implies that [the exception] cannot extend to every dispute affected by an arbitration agreement.”⁵¹ The interface between the Regulation and arbitration revolves around certain determinants, such as whether arbitration is “merely a matter incidental to an examination of the competence of the court of origin to

47 Article 293 EC has been repealed because it had become outdated and was no longer seen as necessary to achieve the aims prescribed therein. It is true that various measures described in Article 293 EC could already be adopted, e.g. on the basis of Articles 65, 94 and 95 EC (now Articles 81, 115 and 114 TFEU, respectively). However, it may be contemplated whether the removal of the explicit competence of the Union in matters relating to arbitration could complicate possible future developments regarding arbitration and EU law. See, on the reasons for repealing Article 293 EC, *travaux préparatoires* concerning the ratification of the Lisbon Treaty by the Republic of Finland (in Finnish), HE 23/2008 vp, pp. 265–266.

48 In particular, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, UN Treaty Series, Vol. 330, p. 3 (hereinafter the “New York Convention”), to which in total 142 states, including all Member States of the EU, are parties. In addition, the European Convention on International Commercial Arbitration of 1961 done at Geneva, 21 April 1961, is worth mentioning; however, not all Member States are parties to this Convention. For more on the reasons for the exclusion of arbitration, see the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968, OJ C 59, 5 March 1979, (hereinafter the Jenard Report), p. 13. It may be noted that the so-called “EC Arbitration Convention”, namely Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 23 July 1990, OJ 1990 L 225, p.10, is a convention on compulsory arbitration regarding taxing conflicts and transfer prices, and is therefore not to be confused with the conventions on international commercial arbitration.

49 1968 Brussels Convention; later Council Regulation 44/2001, the “Brussels I Regulation”.

50 Case C-190/89 *Marc Rich*, para 18.

51 Report on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg, 9 October 1978, OJ 1979 C 59, p. 71 (hereinafter “the Schlosser report”), p. 93.

assume jurisdiction”⁵² or a “preliminary issue which the court must resolve in order to determine the dispute”⁵³. All in all, it is noteworthy that the existing ambiguity as to the way in which the arbitration exception is to be construed is not a totally new phenomenon.⁵⁴

The European Court of Justice has been faced with arbitration in several cases which relate to arbitration in one way or another.⁵⁵ The situations include whether an arbitral tribunal is a “court of a Member State” which is under an obligation to make a reference for a preliminary ruling,⁵⁶ whether an arbitral award may be annulled by a national court based on a provision of EU law,⁵⁷ as well as whether the appointment of arbitrators and the grant of provisional measures which relate to a dispute to be heard before an arbitral tribunal are measures within the scope of the Brussels I Regulation.⁵⁸ The ECJ has also examined arbitration agreements in respect of their compatibility with consumer protection.⁵⁹ With regard to the weak position of the consumer and the imbalance between the consumer and the seller,⁶⁰ an arbitration agreement may be considered to be void on grounds of public policy related to consumer protection.⁶¹

Furthermore, it may be pointed out that the ECJ has held, in the context of the United Nations Convention on the Law of the Sea,⁶² that EU law precludes the submission of a dispute to an arbitral tribunal set up under an international convention where this would involve the interpretation or ap-

52 *Ibid.*

53 Case C-190/89 *Marc Rich*, para 26; Opinion of Advocate General Kokott in Case C-185/07 *West Tankers*, para 54.

54 For a more detailed presentation on the evolution of the scope of the exception, see Briggs 2008, pp. 504–511. Particularly the judgment in the case C-391/95 *Van Uden* has blurred the clarity of the exception. See, to that effect, *ibid.* p. 510.

55 Indeed, it may be noted that the ECJ itself has jurisdiction, by virtue of Article 272 TFEU, “to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.”

56 Case 102/81 *Nordsee*.

57 Case C-126/97 *Eco Swiss*.

58 At the time of the judgments, the Brussels Convention of 1968. See, Case C-190/89 *Marc Rich* and Case C-391/95 *Van Uden*, respectively.

59 See Cases C-168/05 *Mostaza Claro* and C-40/08 *Asturcom*.

60 Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial*, para 27.

61 See, Case C-40/08 *Asturcom*, para 52.

62 United Nations Convention on the Law of the Sea (UNCLOS) signed at Montego Bay on 10 December 1982, UN Treaty Series, Vol. 1833, p. 3.

plication of EU law which falls under the exclusive jurisdiction of the ECJ.⁶³ Finally, it may be conjectured that the impact of EU law may also extend to international *investment* arbitration whenever this kind of arbitration is based on Bilateral Investment Treaties between two EU Member States.⁶⁴

3.2 Allocation of Jurisdiction in EU law: a Forum Shopper's Delight?

3.2.1 *The Hierarchy of Lis Pendens and Agreements on Jurisdiction*

The general rule on *lis pendens* states that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, the court first seised shall first establish whether it has jurisdiction over the dispute.⁶⁵ Should the court first seised decline jurisdiction, the court *second* seised may then proceed to examining the dispute at issue. Moreover, according to the ECJ, in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction.⁶⁶ However, this general rule of *lis pendens* becomes more complicated if the dispute at hand is characterised by the presence of an agreement conferring jurisdiction. The question then becomes should the general rule still prevail even if the court second seised is the court upon which the parties have conferred exclusive jurisdiction by virtue of a jurisdiction clause?

The basic starting point for the ECJ in evaluating jurisdiction clauses has been to view the courts of a Member State designated in the jurisdiction clause as having exclusive jurisdiction to pronounce on their competence, that is, the validity of such a clause.⁶⁷ However, the Court has also had to consider not only the respect for an agreement conferring jurisdiction but also the need to adhere to the chronological order in which courts are seised of the dispute. In other words, these conflicting interests have had to be balanced, resulting in the juxtaposition of Articles 27 (*lis pendens*) and 23 (agreement conferring jurisdiction) of the Regulation. The ECJ adopted

63 Case C-459/03 *Commission v Ireland (the MOX Plant)*, paras. 123 to 126.

64 See, to that effect, Wehland 2009, p. 319.

65 Article 27 of the Brussels I Regulation. For a comprehensive account on various questions regarding *lis pendens*, see McLachlan 2009.

66 See, to that effect, Case C-351/89 *Overseas Union*, para 23.

67 See, to that effect, Case C-269/95 *Benincasa*, para 32.

the following solution in the case *Gasser*⁶⁸: the court first seised must have priority to pronounce on its competence before the court second seised, *notwithstanding* the fact that the court second seised has been designated by the parties to the dispute as the court having exclusive jurisdiction. Thus the ECJ granted priority to the order in which the courts are seised over any agreement by which the parties may have conferred jurisdiction on a particular court. As a result, any court second seised must therefore stay proceedings until the court first seised has declared that it has no jurisdiction.⁶⁹

3.2.2 *Exclusive Forum Clauses and Anti-Suit Injunctions*

The problems of the approach in *Gasser* were soon to be highlighted by the subsequent ECJ ruling in the case *Turner*⁷⁰. Traditionally, if proceedings are commenced in breach of an exclusive forum clause designating an English court (or arbitral tribunal) as competent to resolve the disputes in the matter, the English judge is presumed to issue an injunction unless it is shown that there are strong reasons as to why the anti-suit injunction should *not* be granted.⁷¹ In the *Turner* case the ECJ held that the courts of a Member State cannot grant an anti-suit injunction in support of the proceedings in the court second seised.⁷² What is more, the ECJ stated expressly that the grant of an anti-suit injunction would not be permissible even if the court not designated by the agreement were seised in bad faith with a view to frustrating the existing proceedings.⁷³ This is because, according to the ECJ, the anti-suit injunction constitutes interference with the jurisdiction

68 Case C-116/02 *Gasser*.

69 *Ibid.*, para 54.

70 Case C-159/02 *Turner*.

71 *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (CA), For more on the so-called "Angelic Grace" principles, see Raphael 2008, p. 173–182.

72 Case C-159/02 *Turner*, para 31. It may be noted that the question of the compatibility of an anti-suit injunction with EU law had been already raised earlier. In the case *Alfred C. Toepfer International GmbH v Societe Cargill France* [1997] EWCA Civ 2811, the English Court of Appeal decided to refer the question to the ECJ; however the case settled. See, Nurmela 2005, p. 144. Another reference was made in Case C-24/02 *Marseille Fret*. In that case, however, the ECJ declared that it did not have jurisdiction to reply to the questions posed by a French court (*Tribunal de commerce de Marseille*) on grounds that the referring court was not a court of final instance in the sense of Article 68 EC. As observed in footnote 44, Article 68 EC has since been repealed by the Treaty of Lisbon.

73 Case C-159/02 *Turner*, para 31.

of the foreign court and runs counter to the principle of mutual trust which underpins the EU judgments regime.⁷⁴

The Court's reasoning in *Gasser* and *Turner* may be understood with respect to the operational needs of the Brussels I⁷⁵ regime. However, the outcome of the solution adopted by the ECJ may certainly be criticised: the possibility to seise whatever court in any Member State, in breach of an existing agreement conferring jurisdiction, is likely to encourage actions brought in bad faith. The availability of such dilatory actions provides an undue incentive for forum shopping which aims to prolong the duration of proceedings.⁷⁶ In according prevalence to the idea of the mutual trust in the interaction of the courts of the Member States⁷⁷ over respecting the trust in private agreements conferring jurisdiction⁷⁸, the ECJ has arguably legitimised the use of dilatory proceedings in the courts of other Member States.⁷⁹ Arguably, also the fact that a clause conferring jurisdiction is seen as not conferring exclusive jurisdiction, in the sense that no other court could be seised by the parties, may erode the confidence that economic operators have for the European legal system. In turn, this might result in large-scale commercial litigation being driven out of the European Union.⁸⁰

74 *Ibid.*, para 28.

75 To be precise, the judgment in question, although delivered in 2004, concerns still the 1968 Brussels Convention.

76 Such dilatory proceedings are commenced before the courts of states where the judiciary is known to act slowly. One such Member State is Italy, as was the case in *Gasser*, and such actions have commonly become known as "Italian torpedos". The risk of conflicting judgments is particularly high in the field of patent litigation. See, e.g. Betti 2008.

77 See Preamble to the Brussels I Regulation, Recital 16.

78 See *ibid.*, Recital 14.

79 The ECJ may soon pronounce again on a question of parallel proceedings, because the Irish Supreme Court has referred on 30 January 2009 a question for a preliminary ruling in the case *Goshawk Dedicated Ltd & Others v Life Receivables Irl Ltd* [2009] IESC 7. It may be estimated that at least the ECJ will not be reasoning on the basis of the principle of mutual trust, since both sets of proceedings are not within the EU, but take place namely in the United States and Ireland.

80 To this effect, Muir Watt 2007.

In general, lawyers from common law jurisdictions have criticised the ECJ judgments sharply.⁸¹ From a doctrinal viewpoint, the ECJ judgments have been seen to create unnecessary rigidity by imposing inflexible rules where the system would call for flexibility.⁸² It is true that in a whole series of recent ECJ judgments, the common denominator has been the apparent difficulty of English private international law and that of the European Union to coexist peacefully.⁸³ The English judge has traditionally been free to address questions of competence by, for example, declining jurisdiction in favour of a more suitable court by way of the doctrine of *forum non conveniens*⁸⁴ or, in a situation where proceedings are commenced in a foreign jurisdiction, an anti-suit injunction to restrain those proceedings may have been issued. Following the rulings by the ECJ, these measures are no longer available under the Brussels I Regulation.

In addition, the practical implications of the ECJ case law are feared by many to prove disastrous.⁸⁵ The dreary prospects include, in particular, diminished numbers of large-scale commercial transactions and dispute resolution in Europe as well as – following the judgment in *West Tankers* – reduced attractiveness of European arbitral seats, such as London, as compared with other major arbitration centres, such as New York or Singapore.

All in all, it is against this line of case law that the judgment in the *West Tankers* case should be assessed. The situation in that case was basically the same as in *Turner*: the question of whether an anti-suit injunction may be granted, except that in support of *arbitration*, rather than ordinary litigation. Until the *West Tankers* judgment the ECJ case law remained thus unclear as

81 According to Trevor Hartley, the decisions have caused “something of a crisis of confidence among English lawyers” towards the ECJ; while another commentator, Adrian Briggs, professor of private international law at Oxford University, has already earlier put the matter rather more pointedly by stating that “the concreting over of the common law conflict of laws is the one activity which never seems to require an environmental impact assessment.” See, respectively, Hartley 2006, p. 183; and Briggs 2002, preface, v.

82 Harris 2008, pp. 368–369.

83 Obvious examples include e.g. Case C-159/02 *Turner*; and Case C-281/02 *Owusu*.

84 This article does not purport to describe the doctrine of *forum non conveniens* in great detail. However, it is briefly noted that a stay of proceedings may be granted under the doctrine if another forum is shown to be clearly more appropriate for the proceedings at issue. See, to that effect and more generally, e.g. *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460. On the question of *forum non conveniens* in relation to European law, see Case C-281/02 *Owusu*.

85 See, to this effect, Harris 2008, pp. 368–369.

to whether anti-suit injunctions could be granted in a situation where the subject-matter of the dispute would have to do with arbitration, which, by definition, should fall outside the scope of the Brussels I Regulation.⁸⁶

4 The Effect of the *West Tankers* Case

4.1 Analysis of the Judgment

4.1.1 Principal Reasoning: *Effet Utile* of the Regulation

As already mentioned, in the *West Tankers* ruling, the ECJ considered anti-suit injunctions in support of arbitration proceedings to be incompatible with the Brussels I Regulation. In fact, the Court stated that the English proceedings, where the injunction was granted, did have arbitration as their principal subject-matter and the proceedings were, therefore, outside the scope of application of the Regulation by virtue of Article 1(2)(d). However, the Court went on to rule that

“[...] even though [such] proceedings do not come within the scope of [the] Regulation [...], they may nevertheless have consequences which undermine its *effectiveness*, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters.”⁸⁷

In particular, the ECJ stated that as the parallel Italian court proceedings, on the other hand, did come within the scope of application of the Regulation, the anti-suit injunction was therefore “obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation”⁸⁸. Thus the effect of the anti-suit injunction was unacceptable and was deemed incompatible with the effective functioning of the Regulation. The main argument for rejecting the anti-suit injunction by the ECJ was, therefore,

86 Since according to Article 1(2)(d), the Brussels I Regulation “shall not apply to arbitration”.

87 Case C-185/07 *West Tankers*, para 24. Emphasis added.

88 *Ibid.*, para 30. Furthermore, it is settled case law of the ECJ that “the application of national procedural rules may not impair the effectiveness of the [Regulation].” See, to that effect, Case C-365/88 *Hagen*, para 20.

the doctrine of *effet utile*, that is, the principle of practical effectiveness, of European Union law.

4.1.2 *The Idea of Mutual Trust*

Secondly, the ECJ also considered that the grant of the anti-suit injunction obstructed the performance of the Italian court. In particular, the Court stressed the importance of “the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under [Brussels I Regulation] is based”, echoing the reasoning in the *Turner* case.⁸⁹ This argument can be both endorsed and criticised. In creating a common system for the allocation of jurisdiction in Europe, it is clear that mutual trust as between courts of that area must be present. However, while it is true that this mutual trust is a cornerstone of the Regulation as regards mutual recognition of judgments,⁹⁰ it is, as one commentator has observed, “difficult [...] to understand why the principle of mutual trust should lead to consecrating the priority of any court seised (even in bad faith) rather than trusting the courts of the seat of arbitration.”⁹¹ Nevertheless, the ECJ refers to mutual trust only after the discussion on *effet utile* and therefore the judgment is clearly not based solely, or even primarily, on that argument.

4.1.3 *Principle of Competence-Competence and the Autonomy of Arbitration*

The New York Convention provides that a court, when seised of an action in a matter in respect of which the parties have made provision for arbitration, will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the arbitration clause is null and void, inoperative or incapable of being performed. The ECJ justified its reasoning thirdly by stating that where a party claiming the arbitration agreement to be “null and void, inoperative or incapable of being performed”⁹², the anti-suit injunction would effectively have the effect of depriving that party from the option to have the validity of the arbitration agreement examined by the, in

89 Case C-159/02, *Turner*, para 24.

90 See, Recitals 16 and 17 of the Preamble to the Regulation.

91 Horatia Muir Watt, comment on the article Kessedjian 2009, available at <http://conflictoflaws.net/2009/kessedjian-on-west-tankers/>, accessed on 1 November 2009.

92 In accordance with the wording in Art. II(3) of the New York Convention.

this case, Italian court.⁹³ Advocate General Kokott reasoned in her Opinion that this result is, in particular, against “the general principle that every court is entitled to examine its own jurisdiction (doctrine of *Kompetenz-Kompetenz*⁹⁴).”⁹⁵

So what about the arbitral tribunal then? The question is whether the arbitral tribunal should also be equally entitled to examine its own jurisdiction? It cannot be inferred from the mere absence of EU rules on arbitration that court proceedings are to be favoured over arbitration proceedings. In *West Tankers*, the ECJ treated the examination of the validity of the arbitration agreement as a “preliminary issue”⁹⁶ and an “incidental question”⁹⁷ which the national court must be able to deal with in order to pronounce on the question of whether it has jurisdiction or not.⁹⁸ It may be argued, however, that the question of the validity of the arbitration agreement cannot be dealt with as a mere preliminary issue.⁹⁹

93 Case C-185/07 *West Tankers*, para 31.

94 It may be noted that the doctrine of *Kompetenz-Kompetenz* may also be construed in a larger sense to encompass the question of state sovereignty and the authority of the state over its own competence. See, e.g. Von Bogdandy–Bast 2010, p. 63.

95 Opinion of Advocate General Kokott in *West Tankers*, para 57. Generally, the principle is recognised widely in national laws and institutional rules on arbitration. For example, in France (Nouveau Code de Procédure Civile, version consolidée au 5 septembre 2009, art. 1458), England (Arbitration Act 1996 ss. 30-32), Finland (Laki välimiesmenettelystä 967/1992, 5 §), and in institutional rules such as LCIA (art. 23), ICC (art. 6), and UNCITRAL (art. 21). However, some variation exists as between different national regimes and the principle is also recognised as “controversial and [as one that] has spawned a range of different national responses”. See, to that effect, Barceló 2003, p. 1123.

96 Judgment in Case C-185/07 *West Tankers*, para 26. Advocate General Kokott elaborated more on the theme in her Opinion, at para 54, by stating that “[t]he existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, as a *preliminary* issue it could not change the classification of the proceedings, the subject-matter of which falls within the scope of the Regulation.” (Italics added.)

97 Judgment in Case C-185/07 *West Tankers*, para 26.

98 The Court discovered support for its reasoning in the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters OJ 1986 C 298, p. 1 (hereinafter Evrigenis and Kerameus Report).

99 See, to this effect, e.g. comment by Horatia Muir Watt on the article Kessedjian 2009, available at <http://conflictoflaws.net/2009/kessedjian-on-west-tankers/>, accessed on 1 November 2009. Also, importantly, critics have pointed out that the Court failed to justify “why proceedings concerning the validity and application of an agreement to arbitrate should be beyond the [...] Regulation’s reach [in accordance with the *Marc Rich* doctrine on subject-matter], whereas a preliminary issue in relation to the very same subject matter falls within the Regulation’s mechanism dealing with allocation of jurisdiction.” See, Dutson–Howarth 2009, p. 339.

At this point, it may be observed as a side remark that it is admittedly highly recommendable that a national court examines, even of its own motion, the possible unfairness of an arbitration clause in a *consumer contract* in ascertaining its own territorial jurisdiction, as the ECJ has held.¹⁰⁰ However, one may wonder whether a check for the validity of an arbitration agreement is really necessary for every arbitration agreement that may come before a national court as a preliminary issue in determining the question of its jurisdiction? Whereas consumer protection is a public policy exception which the national court must observe *ex officio*¹⁰¹, it appears that, finally, an action brought against *any* arbitration agreement under the Brussels I regime, even in bad faith, may indeed produce similar effects with an equally extensive scrutiny of the arbitration agreement. If the validity of arbitration agreements is examined simply as a result of bringing an action in the said court, the effectiveness of arbitration will inevitably suffer. Therefore a line has to be drawn somewhere.

In fact, some commentators have suggested that the mere claim of the existence of an arbitration agreement should be sufficient to direct the proceedings to the arbitral tribunal which should then examine its competence, along with the validity and the applicability of the agreement to arbitrate.¹⁰² Furthermore, arguably the 1958 New York Convention requires allocating such, at least practical, priority to the arbitral tribunal.¹⁰³ In addition, the subsidiarity of the Brussels I Regulation to the New York Convention is apparent from Article 71(1) of the Regulation.¹⁰⁴ The ECJ's reasoning, namely that the examination of the validity of any arbitration clause falls within the

100 With respect to Article 6(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). See, to this effect Case C-243/08 *Pannon GSM*, paras. 32 and 35.

101 This is the case "where the court has available to it the legal and factual elements necessary for that task." Case C-243/08 *Pannon GSM*, para 35.

102 Dutson–Howarth 2009, p. 340.

103 According to Catherine Kessedjian, Article II(3) of the New York Convention should be understood so that "it is for the arbitral tribunal to decide on the validity of the arbitration agreement unless (*and only in that case*) it is null and void, inoperative or incapable of being performed." (Italics added). Others have pointed out to the same effect that the cases where the arbitration agreement is null and void, inoperative or incapable of being performed, are extremely rare. See, respectively, Kessedjian 2009; and Dutson–Howarth 2009, p. 339.

104 Article 71(1) reads: "[The] Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments."

scope of the Regulation as a preliminary issue, may be seen as not respecting the intention of the parties to exactly exclude that jurisdiction.¹⁰⁵ After all, the chief purpose of parties' resorting to arbitration is to keep the matter away from ordinary litigation. Arguably, an approach whereby the foreign court would decline jurisdiction – based on the arbitration exception in the Regulation – as soon as it had assured itself of the *existence*, rather than the validity, of an arbitration agreement would be more consistent with reference to the clear wording of the exclusion in Article 1(2)(d) of the Regulation.¹⁰⁶ Furthermore, it can also be suggested that such practice would better guarantee the respect of the principle of competence-competence and that of the autonomy of international arbitration.

4.2 Implications of the Judgment

The widespread interest in the *West Tankers* judgment is principally explained by the general economic significance attached to international arbitration. When it became known in 2007 that the European Court of Justice was to pronounce on a question relating to arbitration – something it does not normally do – curiosity was stirred. With regard to the ECJ's earlier decision in the case *Turner*¹⁰⁷ on the general incompatibility of anti-suit injunctions with EU law, fears were expressed as to the possible outcome of *West Tankers*. The main concern was that arbitration in the United Kingdom¹⁰⁸ would be rendered less attractive if the possibility to issue anti-suit injunctions in support of arbitration proceedings were to disappear. These feelings were enhanced by the importance attached to the issue of jurisdictional competition by the House of Lords in their reference to the ECJ. In particular, Lord Hoffman observed that

105 For a more general overview of party autonomy and EU law, see Kuipers 2009.

106 See also the judgment of the Court of Appeal of Paris in the *Fincantieri* case concerning the Brussels Convention, where it was held that “en présence d'une convention d'arbitrage [...] le juge étatique doit se déclarer incompétent à moins qu'un examen sommaire ne lui permette de constater la nullité ou l'inapplicabilité manifeste de la clause, priorité étant réservée à l'arbitre auquel il appartient de statuer sur sa propre compétence [...]” (Italics added) My translation: “When there is an existing arbitration agreement, [...] the national judge must declare that he is not competent to hear the dispute, where a cursory examination of the validity of the arbitration clause does not indicate the nullity or manifest inapplicability of the clause, since the arbitrator must have priority to pronounce on his own competence.”

107 Case C-159/02 *Turner*.

108 London, in particular, is a major seat for international arbitration.

“it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.”¹⁰⁹

Nevertheless, it has also been suggested that the importance of the *West Tankers* judgment has been exaggerated.¹¹⁰ It should also be noted that the courts of many other European arbitration centres, such as Paris, have never had the possibility of granting injunctive relief; a point which has not been seen as crucial to their success. In addition, although many of the reactions to the judgment have been rather grim,¹¹¹ the outcome of the judgment was largely predictable, considering the ECJ’s reasoning in the earlier cases.¹¹² However, following the judgment, the arbitration exception of the Brussels I Regulation may be viewed differently. Considering that the Regulation is not supposed to apply to arbitration, on the face of it, it is not an overstatement to say that the boundaries of the exception to the Regulation’s scope of application have been blurred by the *West Tankers* judgment. In any event, the judgment should also be understood as being given at a time when the

109 Opinions of the Lords of Appeal for Judgment in the cause *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpaA and others* [2007] UKHL 4, p. 8.

110 See, to that effect, Dutson–Howarth 2009, p. 337. The authors of the article place more importance on factors such as the expertise of London-based counsel and arbitrators and the commercial importance of London in international trade.

111 With reference to the case law described above, one commentator has noted that “if you’re going to produce poor decisions, [...] you might as well do it consistently.” See George 2008. An even gloomier view was expressed by Adrian Briggs who stated that “[t]he judgment just goes to show that you can expect the worst and still be disappointed.” Comment on the article Hess 2009, available at <http://conflictoflaws.net/2009/west-tankers-comment-by-professor-hess/>, accessed on 1 November 2009.

112 In particular, Case C-116/02 *Gasser*; and Case C-159/02 *Turner*.

Brussels I Regulation is in a process of revision.¹¹³ Therefore, the judgment may also be seen as a political decision to defend the system of the Brussels I Regulation as well as, more generally, the primacy of EU law.¹¹⁴

5 Alternative Solutions to Anti-Suit Injunctions in the European Union

5.1 The Situation Post-West Tankers

Firstly, lest it be forgotten, the grant of anti-suit injunctions remains available in the courts of common law jurisdictions whenever vexatious proceedings are commenced in overseas forums; that is, outside the European Union.¹¹⁵ Moreover, the anti-suit injunction remains also available in jurisdictions outside the territorial scope of the Regulation, as the Regulation does not affect the powers of courts in third countries, that is, non-EU Member States, to restrain proceedings within EU Member States.¹¹⁶ Although the grant is no longer possible by a court of a Member State in support of an arbitration agreement when proceedings are commenced in the courts of another Member State, many commentators have been quick to point out that this is not such a crucial issue, and that other kinds of weapons can be found in the arsenal of the common law.¹¹⁷ In order to illustrate this point, one such weapon, with its strengths and limitations, is presented in the following: namely, an application for declaratory relief.

5.2 Declaratory Relief

5.2.1 *Anti-Suit Injunctions vs. Declaratory Relief*

In general terms, declaratory relief, also called a declaratory judgment is a judgment of a court in a civil case which declares the rights, obligations or

113 The plans for the revision of the Regulation are dealt with in more detail in Chapter 6. Propositions to reform the Regulation include e.g. the deletion of the arbitration exception and the adoption of a provision creating a hierarchy of courts allocating priority to the court agreed on in choice of court agreements.

114 See, to this effect, Hess 2009, available at <http://conflictoflaws.net/2009/west-tankers-comment-by-professor-hess/>, accessed on 1 November 2009.

115 The principle has been relied upon in a recent English judgment in the case *Shashoua v Sharma* [2009] EWHC 957 (Comm).

116 E.g. Channel Islands have been suggested as a particularly convenient jurisdiction to secure anti-suit injunctions also post-*West Tankers*. See, Balthasar 2009.

117 See, e.g. Van Waeyenberge 2009, p. 302; and Dutson–Howarth 2009, p. 345

duties of each party in a dispute.¹¹⁸ The general EU law approach of the ECJ towards arbitration may also be applied to declaratory judgments in that they may fall outside the scope of the Regulation whenever they concern arbitration. As the ECJ pointed out in the judgment in *West Tankers*, the English proceedings which were commenced in support of the arbitration agreement did not come within the scope of the Regulation: in other words, they were covered by the arbitration exception in Article 1(2)(d). This is because the Regulation does not apply to proceedings, the *principal subject-matter* of which is arbitration.¹¹⁹ To answer the question of when the subject-matter of proceedings is arbitration, the Court has further stated that “arbitration is the subject-matter of proceedings where they serve to protect the right to determine the dispute by arbitration.”¹²⁰ The same principle, the protection of arbitration proceedings, may be applied to declaratory judgments.

The important distinction between a declaration and the grant of an anti-suit injunction is that, arguably, a declaration given by the court of the arbitral seat does not interfere with the proceedings which are under way in another Member State. Moreover, those proceedings which aim to protect arbitration fall outside the scope of Brussels I Regulation. Therefore, any judgment handed down in another Member State need not be recognised under the Brussels I Regulation¹²¹ by the court granting the application for a declaration in proceedings which do not fall within the scope of the Regulation themselves. To this effect, Gloster J. stated in a “post-*West Tankers*” case, *The Wadi Sudr* that

“[...] the judgments [given in another Member State] are not required to be recognised [...] in proceedings [...] which are not themselves

118 The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. To this effect and for more on the concept of declaratory relief, see, e.g. Dharmananda 2009, pp. 25–29.

119 Case C-190/89 *Marc Rich*, para 26; and Case C-391/95 *Van Uden*, para 48.

120 The position was taken by the ECJ in Case C-391/95 *Van Uden* and was repeated by in the *West Tankers* case, see paras. 15, 22 and 23.

121 In particular, with regard to Art. 33(1) which provides that “[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”

proceedings within the Regulation, because, in the latter proceedings, the Regulation simply does not apply.”¹²²

It must be held that the logic followed in *The Wadi Sudr* case is persuasive.¹²³ One should bear in mind that in order to determine whether a dispute falls within the scope of the Regulation, reference must be made solely to the subject-matter of the proceedings. When that subject-matter is arbitration, it follows logically that in proceedings where a piece of legislation, that is, the Brussels I Regulation, does not apply in the first place, one cannot suddenly be required to take into account that law; solely on account that court proceedings are commenced elsewhere.

As the declaratory judgment does not directly interfere with the foreign proceedings, it may be assumed that the grant of such relief does not, therefore, directly clash with the doctrines underpinning the *West Tankers* judgment either.¹²⁴ It is therefore possible to obtain a declaratory judgment as to the validity of an agreement to arbitrate. This declaration may then be used, for example, in order to gain a stay in the proceedings in the other Member State or to resist the recognition and enforcement of a foreign judgment in the home state.¹²⁵

5.2.2 Possible Non-Recognition of Declaratory Judgments under Brussels I Regulation

Nevertheless, it has also been suggested that such declaratory judgments on the validity of an arbitration agreement go too far in limiting the scope of the arbitration exception excessively and that such judgments should not benefit from simplified mechanism of circulation under the Regulation.¹²⁶ A declaratory judgment on the validity of the arbitration clause should

122 *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWHC 196 (Comm), para 94.

123 Moreover, the idea is not novel. Advocate General Darmon pointed out in his Opinion in the *Marc Rich* case, at para 88, that “in no circumstances can the existence of another action pending before another court entail the result that application of the [Brussels] Convention is extended to the dispute concerned if it was not already covered by the Convention by virtue of its subject-matter.” This passage was also relied upon by Gloster J. in her reasoning.

124 To this effect, Dutson–Howarth 2009, p. 345.

125 See, to this effect, *ibid.*

126 Mourre–Vagenheim 2009, p. 79.

therefore not be recognised under the Brussels I Regulation *exactly* for the reason that arbitration is excluded from the Regulation. This was the position taken by the *Cour d'appel de Paris* (Court of Appeal of Paris) in the case *Fincantieri*¹²⁷, in which an Italian court had given a declaratory judgment on the validity of an arbitration agreement between the parties, one of which then sought recognition and enforcement of that Italian judgment in the French court. However, the Paris court considered that the Italian judgment was given on a matter which was outside the scope of application of the Brussels I Regulation and therefore could not be recognised by virtue of the Regulation.¹²⁸

5.2.3 Doubts about the Compatibility of Declaratory Relief with EU Law

Moreover, the use of declaratory judgments in the way described above might be seen by some as a way to circumvent the *effet utile* of the Brussels I Regulation. While it is clear that a declaration would not interfere with the proceedings in another Member State in the same way as an anti-suit injunction does; considering that a declaratory judgment would nonetheless enable a litigant to go around the “first court seised” – rule, it begs the question whether the ECJ would approve of the solution. Finally, considering that the matter does not appear wholly clear beyond all doubt, this matter may yet come before the ECJ in the form of a reference for a preliminary ruling.

Finally, the purpose of this cursory presentation on the application for declaratory relief is simply to serve as an example of an alternative strategy as to the obtention of injunctive relief to combat vexatious foreign proceedings. While anti-suit injunctions may not be granted in the same way as before the *West Tankers* ruling, other means to challenge the foreign jurisdiction may remain available. Whereas this may regrettably encourage tactical manoeuvring by litigants, it may nonetheless mitigate the importance of the fact that anti-suit injunctions are contrary to the Brussels I Regulation.

127 *Fincantieri* judgment of 15 June 2006.

128 This solution is also endorsed by e.g. Hess, Pfeiffer and Schlosser 2008, p. 56.

6 The Future of the Arbitration Exception

6.1 West Tankers: Confusion and an Unsatisfactory Outcome

It is clear that so far the interest has not only been confined to examining the impact of the judgment on anti-suit injunctions. Rather, notwithstanding the immediate practical effects that the *West Tankers* judgment may have on arbitration in Europe, the judgment has brought to the fore the overall ambiguities relating to the arbitration exception of the Brussels I Regulation.

First of all, it may be asked following the judgment in *West Tankers* whether the strict *lis pendens* rule upheld in the case *Gasser* operates also in the context of the enforcement of an arbitral award. In other words, is it possible for a litigant wishing to “torpedo” the enforcement of the arbitral award to invoke the invalidity of the arbitration agreement before the court in a Member State different from the Member State where the arbitral proceedings take place? If this were true, it would indeed paralyse the enforcement of the award. Needless to stress, such a solution would be contrary to the ideology of the Regulation and, as such, both disconcerting and totally unacceptable.

Secondly, it may be noted that the approach adopted in *West Tankers* concerning the scope of the arbitration exception results in a rather bizarre situation. When the validity of an arbitration agreement is contested in one Member State as a preliminary issue, the dispute may in effect be characterised as falling *within* the scope of the Regulation in that jurisdiction. However, in another Member State the same dispute may be characterised as falling *outside* of its scope as the proceedings before arbitrators and the courts of the arbitral seat exercising ancillary jurisdiction have arbitration as their principal subject-matter. If both the judge of the court in the first Member State and the arbitrator in the other Member State persist to go on with the respective proceedings, parallel judgments will follow. In such a case the court judgment would be recognisable by virtue of the Brussels I Regulation and the arbitral award by virtue of the New York Convention. Needless to say, the result is very unsatisfactory; particularly if the decisions

of the court and the arbitral tribunal are in conflict with each other. Apparently Advocate General Kokott referred to this kind of situation in her Opinion in *West Tankers* and stated that “[i]nstead of a solution by way of [anti-suit injunctions], a solution by way of law is called for.”¹²⁹ Considering the critique of anti-suit injunctions presented earlier in this article, it is easy to agree with Advocate General that the solution to this functional deficiency in the Regulation is surely not best resolved by the use of unilateral injunctions. In this respect, the *West Tankers* case has clearly highlighted the need to amend the Regulation to remedy the situation.

6.2 EU Commission’s Solution: Deletion of the Arbitration Exception

The problems of the situation are reflected in the calls by the EU Commission to delete, at least in part, the arbitration exception from the Regulation. This proposition is endorsed by the drafters of the so-called Heidelberg Report¹³⁰ as well as the Commission’s recent Green Paper on the Brussels I Regulation¹³¹. It is emphasised that the reason for deleting the arbitration exception is not to bring proceedings in arbitral tribunals within the scope of application of the Brussels I Regulation. The Commission underlines that the possible deletion of the exception would not be “for the sake of regulating arbitration”, but rather to ensure the smooth circulation of judgments in Europe and the prevention of parallel proceedings.¹³² As a matter of fact, since the Regulation governs proceedings in, or judgments given by, a court of a Member State – not arbitral tribunals¹³³ – the Regulation would not apply to arbitration proceedings even in the absence of an explicit arbitration exception.¹³⁴

129 Opinion of Advocate General Kokott in Case C-185/07 *West Tankers*.

130 Hess, Pfeiffer and Schlosser 2008. See particularly on the abrogation of the arbitration exception, Schlosser 2009, pp. 45–48.

131 Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21.4.2009, COM(2009) 175 final, pp. 8–10.

132 *Ibid.*, p. 8.

133 The ECJ has noted that generally, an arbitral tribunal is not to be considered as a “court or tribunal of a Member State” within the meaning of Article 177 of the Treaty [now, in amended form, Article 267 TFEU]. See, to that effect, Case 102/81 *Nordsee*, para 10.

134 Schlosser 2009, p. 45.

However, since court proceedings in support of arbitration might come within the scope of the Regulation with the deletion of the arbitration exception, the Commission is also contemplating the possibility of granting exclusive jurisdiction to the courts of the Member State of the place of arbitration to determine the questions relating to such proceedings.¹³⁵ Other proposed amendments include the introduction of a rule permitting a Member State to refuse to recognise or enforce a judgment on the validity or application of an arbitration agreement, where that judgment would be irreconcilable with an arbitration agreement under the national law of the Member State or an arbitral award that is enforceable in that Member State under the New York Convention.¹³⁶

6.3 Conclusion: Development of EU Arbitration Law?

The precise effects of the possible amendments to the arbitration exception are difficult to envisage. However, it is clear that the Commission is proposing changes to the Regulation which bear an impact on arbitration – so far a field untrodden by the European legislator. It is true that the current state of affairs with regard to the problems described above is unsatisfactory. Therefore a solution is called for. However, international arbitration is transnational by definition and aspires to be universal in nature. Therefore it goes against the underlying postulate of arbitration to "regionalise arbitration laws".¹³⁷ It is thus questionable whether the problems should be resolved by extending the scope of EU law with respect to arbitration.

Finally, while the discussion on the effects of the *West Tankers* case will surely abate in the future, the discussion on the reform of the arbitration exception of the Brussels I Regulation is, on the contrary, likely to become more intense. The Commission's proposals in the Green Paper have already faced sharp criticism.¹³⁸ It remains to be seen how, or if, the arbitration exception in the Brussels I Regulation will change. All in all, the *West Tankers* judgment has highlighted the need for European coordination of legislation in relation to international arbitration.

135 Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21.4.2009, COM(2009) 175 final, p.9.

136 *Ibid.*, p. 9. See also, Pullen 2009, pp.58–59 and the articles referred to in footnotes 28 and 29.

137 Mourre–Vagenheim 2009, p. 83.

138 See, e.g. Pinsolle 2009, pp. 62–65; and Pullen 2009, pp. 58–59.

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Book Reviews

The Principle of Sustainability: Transforming Law and Governance

Klaus Bosselmann

Ashgate, Surrey, UK 2008. 242 pages.

Hermann Backer

1 Which Sustainability?

To appreciate the subject of *The Principle of Sustainability* by Klaus Bosselmann¹ one should firstly be aware of the blur surrounding the concept of *sustainable development*. This is the result of the long debate on the concept's actual legal and political substance which has taken place before and after the Rio Declaration of 1992².

Many would agree that a central component in any definition of the concept is the environment and a need to limit the impact of human activities on it. Sustainable development would thus involve some kind of controlled development, even economic growth, which does not endanger, or permanently harm, the environment.

This view, however, is far from being accepted by all. Some seem to claim that the word *sustainability* in contexts like sustainable development should instead simply be read as a synonym of words like “stability” and “continuity”³. Sustainable development should according to this viewpoint thus be simply read as *uninterrupted* development.

1 University of Auckland Professor of Law.

2 UN, “Annex I: Rio Declaration on Environment and Development” in “Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992)”, (1992). A/CONF.151/26 (Vol. I).

3 Different uses of the word can be illustrated with the previous EU treaty valid until 1st December 2009 (Treaty of Nice) in which the word “sustainable” occurs six times, mainly in phrases like “sustainable balance of payments” (Art 4.), or “sustainable development of economic activities” (Art. 2) which could be interpreted simply as non-interrupted economic development. The presently valid Treaty of Lisbon includes wordings with clearer link to environment when mentioning sustainable development.

Given this kind of divergence in the semantic space of sustainability one is hardly surprised by the content of the officially adopted phrases in international documents involving the concept sustainable development. These commonly reiterate that social, economic and environmental issues are somehow the key elements of this concept, and claim that they should be balanced – but leave commonly most details how they interrelate in mid-air.

As a contribution to these discussions *The Principle of Sustainability* outlines ecological sustainability as the core concept to underlie various secondary composites, including sustainable development. The book further attempts to link this core concept of sustainability to ethics, justice, human rights, state sovereignty and finally outline a path to some elements of an ecologically sustainable global governance and international law.

The central claim of the book is simple – the limits⁴ that ecosystems place on socioeconomic development has always been the core of sustainable development. For Bosselmann the alternative interpretation, that economic growth should be on equal footing with environment when balancing environmental exploitation and protection, is a misconception about sustainable development. The interpretation of sustainability as a requirement to maintain (or achieve) the ecological integrity of our global ecosystem, in which our social and economic systems are embedded, is according to him actually the only way to give the concept of sustainable development any meaning at all.

2 Applying Sustainability – Laws and Obligations?

In his quest for the essence and history of his interpretation of sustainability the author goes through a number of historic European examples of theory and praxis. 17th century forestry management and laws in Germany (based on *Nachhaltigkeit*), France (based on *bon usage de la nature*) and in England, as well as the English Commons and German Allmenden systems

⁴ Cf. figures like the global +2°C limit for climate change included in e.g. the Copenhagen Accord of 2009 (p. 4 in UNFCCC. "Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009-Decisions adopted by the Conference of the Parties". (2009) available from <http://unfccc.int>.)

of land ownership⁵ are among provided examples where the essence of the sustainability concept has been applied historically. In addition to other historic and more recent examples around the world Bosselmann draws also from the Gabcikovo-Nagymaros case (Hungary/Slovakia)⁶ and the separate opinion of Judge Weeramantry⁷.

As mentioned the legal nature of sustainable development and sustainability is under continuing debate. These concepts have in international legal adjudication so far been touched upon only in *obiter dicta* terms, never as a *ratio decidendi*⁸, and most states have since 17th century drifted quite far from the kinds of historic practices cited in the book.

Bosselmann points out that the disagreement on their legal nature is not surprising given the lack of substantial content in many definitions of sustainable development. In contrast, he makes the case that his concept of sustainability has full potential of a strong legal principle based on its moral foundation (respect for ecological integrity), inherent sense of direction (ensuring ecological integrity) and interpreting the statements in various international agreements and declarations, as well as national laws, related to sustainable development.

Underlying the new kind of, ecological, justice proposed by Bosselmann to actually apply his concept of sustainability are the moralities of the Brundtland report⁹, namely 1) concern for the poor (intragenerational equity) and 2) concern for the future (intergenerational equity), but supplemented by a third point 3) concern for the non-human natural world (interspecies justice).

The book further highlights the potential, and often silenced, tension between some aspects of human rights and the environment. According to

5 Allowing only community controlled, and restricted, property use.

6 ICJ, "Gabcikovo-Nagymaros project (Hungary/Slovakia). Judgement of 25 September 1997" (1997) I.C.J. Reports.

7 C. Weeramantry, "Separate opinion of Vice-President Weeramantry (in ICJ 1997 The Gabcikovo-Nagymaros Project)" (1997) I.C.J. Reports.

8 Cf. the Gabcikovo-Nagymaros judgement *supra*.

9 World Commission on Environment and Development, "Our Common Future, Report of the World Commission on Environment and Development" (1987) Published as Annex to UN General Assembly document A/42/427, Development and International Co-operation: Environment August 2, 1987.

the author the focus on the concept of rights is a reason why liberal theories are facing problems with environmental issues. Solving environmental problems requires not only limiting certain human rights (e.g. property rights), but also taking ecological responsibilities and obligations. But he argues such limits make sense also from a more anthropocentric viewpoint. In a world with limited resources human rights need to respect ecological boundaries to be able to deliver what they were conceived for.

3 Sustainable States and the International Community?

The Principle of Sustainability recognizes the potential of states as guardians of a global environment, but simultaneously points at the principle of state sovereignty as one of the major obstacles in the required shift to more sustainable practices. According to the book the global nature of recent environmental issues, like climate change, present a radically new type of challenge to state sovereignty, and to the current approaches. Looking at existing international environmental law, which admittedly appears often more geared towards protecting property rights of states vis-à-vis the environment – rather than on protecting the environment *per se*, one is inclined to accept the existence of a potential problem.

Bosselmann sees the lack of an overarching agreement on fundamental rights and obligations of states in relation to the global environment, in line with international labour, trade and human rights law a major failing of the present system of international law. He points out that even if a number of principles signaling “commonality of interests”¹⁰ exist in international environmental law none of them amount to a general duty not to harm the environment comparable to the principle of *erga omnes* in human rights.

In order to transform states to a positive force in implementing the principle of sustainability, grounded on such a hypothetical imperative to ensure the ecological integrity of the global ecosystem, Bosselmann (like, e.g., Peter Sand¹¹) envision states as Environmental Trustees of their allotted share of

10 “Interest of all mankind”, “common concern of humanity”, “common heritage of mankind” and so forth.

11 P. H. Sand, “Sovereignty Bounded: Public Trusteeship for Common Pool Resources?” (2004) *Global Environmental Politics* 4:1, 47–71.

the global environment. As the outcome of the 2009 UNFCCC meeting in Copenhagen illustrate the international community is still to reach a consensus on overarching obligations to protect the global environment, as envisioned by Bosselmann.

Professor Martti Koskenniemi recently mentioned that he does not favour policy proposals issued from the academia. For him the underlying ideas, critique and reflection, commonly forgotten after the proposal has been tabled, are often more valuable than the proposal itself¹². *The Principle of Sustainability*, nevertheless, promotes a specific policy proposal as a step towards a global governance system compatible with the outlined principle of sustainability. This is the Earth Charter¹³, initially developed as a civil society response¹⁴ to the Rio Summit in 1992 and later promoted by various international meetings, albeit never at the intergovernmental level.

4 Final Remarks

Whether one agrees with all of the arguments in *The Principle of Sustainability* likely depends on the worldviews of the reader. The main strength of the book lies in its integrative grip which should be interesting to many readers perplexed, or exhausted, by the complexities of the sustainable development debate. A plethora of concepts related to international environmental law are put in one specific perspective and consequently sustainable development is given a clear meaning. From a purely educational experience this in itself is reason enough to read the book.

12 L. Dingle and D. Bates, "Conversations with Professor Martti Koskenniemi. Second Interview: 2nd August 2009" (2009) Eminent Scholars Archive <http://www.squire.law.cam.ac.uk>.

13 <http://www.earthcharterinaction.org/content/>.

14 But it should be noted that one chief architect behind this paper was the Secretary General of the 1992 Rio Earth Summit, Maurice Strong.

