

Case watch

June 2013

**Choice of law, English law, Article 23 Brussels Regulation, Offshore companies, Corporate veil**

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***Antonio Gramsci Shipping Corporation and others v Aviars Lembergs***

[2013] EWCA Civ 730

Background

Antonio Gramsci Shipping Corporation (“the owner”) entered into charter-parties allowing five offshore companies (“the Corporate Defendants”) to use their vessels. The owner alleged that the Corporate Defendants were actually chartering the vessels at less than the market rate and then making a profit through sub-chartering them at the higher price. The contracts that the two parties had entered into contained a jurisdiction clause stating that any disputes were to be held in the English Courts, and the owner obtained judgement against the Corporate Defendants in this way. However, the owner then sought to make two individuals, “S” and “L”, who were allegedly in control of the Corporate Defendants at the time, and domiciled in Latvia, liable for the diverted profits.

Original Judgement

The case against S took place first, where the owner claimed that the individuals established the Corporate Defendants as a device for the purpose of dividing profits, and this justifies lifting the corporate veil to make the controllers of the corporation accountable. The owner claimed that S should be liable under the jurisdiction of the English courts, largely relying on Article 23 of the Brussels Regulation, which provides that where parties have agreed that a particular jurisdiction is to apply, that choice is final. In this case it was argued that by virtue of the jurisdictional clauses in the contract with the corporate entity, the controller of the corporate entity could be held to those terms. The court approved of this direct contractual route to deciding liability, and held that piercing the corporate veil was justifiable, and even though the contracts were entered into with the corporations, the owner could proceed against the individual who controlled the corporation as a façade to conceal wrongdoing under the jurisdiction of the English courts.

However, by the time the case against L was heard another judgement on an unrelated but very similar case altered the decision process.

The judge in *VTB Capital v Nutritek International Corp.* disagreed with result of S’s case and rejected this direct contractual route to jurisdiction. The Supreme Court then confirmed that there is no tenable ground to establish jurisdiction through contractual clauses when the implicated individual

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was not a party to the contract. In light of these developments the court was bound to reject the claim against L. The judgement concluded that assuming it were possible to demonstrate consensus without a formal contract, that consensus must be established in fact, and without any evidence that L ever expressed or indicated agreement to jurisdiction it is not permissible to raise the corporate veil to reveal L as a party to the contracts.

### Appeal

As an appeal was allowed in the VTB case, it was also allowed here. The owner claimed that insufficient weight had been given to the European jurisprudence on this point (the VTB case focusing on English law) and that Article 23 can cover 'deemed consent' rather than actual consent to a jurisdiction in particular circumstances.

The court had to consider whether the director or controller of a corporate body who has used that corporation as a façade to conceal wrongdoing by entering into a contract with another, can be regarded as having consented to the obligations of that contract – in this case the jurisdictional clauses. Did the judge err in holding that L cannot have been said to 'agree' to the terms of the contract, nor can he be held jointly liable along with the Corporate Defendants?

The court held that the examples given of 'deemed consent' were not relevant to this particular case – there is no identifiable principle upon which the nature of a contract could justify a deemed consent in the absence of actual consent. It may be that with the transfer of a contract, or of all the rights and obligations it provides, a third party will incur liability but this is not the case here. While there is some flexibility over oral and written agreement, there is still a need for a consensus to be clear and precise. Despite praise for the eloquence of the claims, the appeal was dismissed.

### Remarks

*This case, alongside VTB Capital, further clarifies the position on piercing the corporate veil. We are reminded that this is not an automatic process, even when someone has controlled a company as a device to conceal wrongdoing. Merely establishing the purpose of the corporation and that an individual was indeed in charge at the time is not enough to justify making that individual liable for a transaction or action of the corporation. This would undermine the principle of law that a contract is an autonomous undertaking between the parties involved, and throw the recognition of the independent will of the parties – the fundamental basis of contracts – into doubt. Indeed, the judgement makes clear that the purpose of Article 23 under the Brussels Regulation is to ensure that the choice of jurisdiction is freely chosen by the parties to the agreement.*

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