

## Anti-Suit Injunction Within Chancery's Jurisdiction



*Aric H. Wu*  
*Delaware Business Court Insider*

In *National Industries Group (Holding) v. Carlyle Investment Management LLC*, \_\_ A.3d \_\_, 2013 Del. LEXIS 253 (Del. May 29, 2013), the Delaware Supreme Court addressed arguably inconsistent precedents and clarified that the Chancery Court has subject-matter jurisdiction to enter an anti-suit injunction based on a valid forum selection clause.

### **NIG Files Suit in Kuwaiti Court**

In December 2006, Kuwait-based National Industries Group (Holding) entered into a subscription agreement with Carlyle Capital Corporation Ltd. (CCC), a Guernsey investment fund organized by Carlyle Investment Management LLC. CCC subsequently entered liquidation, and in September 2009, CCC's liquidator informed investors that their investments had likely been lost.

In November 2009, NIG filed suit. Although the subscription agreement provided that any dispute "with respect to" NIG's investment would be subject to the "exclusive jurisdiction" of the "courts of the state of Delaware," NIG filed suit in a Kuwaiti court. In May 2010, Carlyle filed suit in the Chancery Court seeking an injunction against "the filing or prosecution of any action subject to the forum selection clause in the NIG subscription agreement in any forum other than the courts of the state of Delaware." NIG did not respond to Carlyle's complaint.

On July 13, 2011, the Chancery Court entered default judgment and an anti-suit injunction prohibiting NIG from pursuing any claims outside of the Delaware courts. The Chancery Court denied NIG's motion to vacate the default judgment, and NIG appealed.

### **Purported Invalidity of Contract and Personal Jurisdiction**

On appeal, NIG argued that the Chancery Court had no personal jurisdiction because the subscription agreement was void ab initio under Kuwaiti law as Carlyle and CCC did not have a license to market and sell securities in Kuwait. According to NIG, Kuwaiti law applied because Carlyle representatives had met with NIG in Kuwait in order to market CCC shares, and the subscription agreement stated that Delaware law would not apply "insofar as affected by the state securities or 'blue sky' laws of the jurisdiction in which the offering described herein has been made to the investor."

The Delaware Supreme Court flatly rejected NIG's personal jurisdiction argument because a "valid forum selection clause must be enforced" and "a party cannot make

an end-run around an otherwise enforceable forum selection provision through an argument about the enforceability of other terms in the contract, i.e., the ‘state securities’ clause.” Consistent with the U.S. Supreme Court’s admonition in *M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1, 15 (1972), that a forum selection clause will be enforced absent a clear showing that “the clause was invalid for such reasons as fraud or overreaching,” the Delaware Supreme Court held that “where the parties to the forum selection clause have consented freely and knowingly to the court’s exercise of jurisdiction, the clause is sufficient to confer jurisdiction on a court.”

### Chancery Court Has Subject-Matter Jurisdiction

NIG also argued that the Chancery Court lacked subject-matter jurisdiction to enter an anti-suit injunction under *El Paso Natural Gas v. TransAmerican Natural Gas*, 669 A.2d 36 (Del. 1995).

In *El Paso*, the parties had entered into a settlement agreement that provided that “all actions ... for the alleged breach of this agreement or the operative agreements shall be brought in the Chancery Court of the state of Delaware.” After TransAmerican filed suit in Texas, El Paso filed suit in Chancery Court seeking “an injunction restraining TransAmerican from litigating its claims in any forum other than the Delaware Court of Chancery.” The Chancery Court dismissed the action for lack of subject-matter jurisdiction. On ap-

peal, the Delaware Supreme Court observed that parties cannot contract for all their disputes to be heard in Chancery Court because its jurisdiction is limited to controversies where the plaintiff has no adequate remedy at law, and affirmed dismissal because El Paso could not show that it lacked an adequate remedy at law: “The Court of Chancery correctly determined, inter alia, that El Paso could raise the forum selection clause in the settlement agreement as a defense in the first filed Texas action and, if successful, recover the costs of that litigation. It further held that the ability to raise the forum selection claim as a defense in the Texas action was an adequate remedy at law. We agree.”

NIG argued that Carlyle similarly had an adequate remedy at law because it could raise the parties’ forum selection clause as a defense in the Kuwaiti action. Accordingly, NIG argued that the Chancery Court lacked subject-matter jurisdiction. In response, Carlyle pointed out that, in *Ingres v. CA*, 8 A.3d 1143 (Del. 2010), the Delaware Supreme Court affirmed (without discussion of *El Paso*) the Chancery Court’s entry of an anti-suit injunction based on the parties’ forum selection clauses.

The Delaware Supreme Court addressed its arguably inconsistent rulings in *El Paso* and *Ingres* and clarified that the Chancery Court has subject-matter jurisdiction to enter an anti-suit injunction based on a valid forum selection clause: “Requiring Carlyle to enforce the forum selection clause in

Kuwait, when Carlyle bargained for a subscription agreement provision that precluded such litigation, would deprive Carlyle of the benefit of its bargain. Therefore, that is not an adequate remedy at law. To the extent that our decision in *El Paso* is inconsistent with our holding in this case or *Ingres*, *El Paso* is overruled. ... Carlyle has no adequate remedy other than an anti-suit injunction.”

### Delaware Courts Will Enforce Forum Selection

The NIG decision makes clear that, where parties have agreed upon Delaware courts as their forum for dispute resolution and there has been no fraud or overreaching specific to the forum selection clause, Delaware courts will strictly enforce the forum selection and have the power to enjoin a party resisting litigation in Delaware courts from pursuing litigation in any other forum.

*Aric H. Wu* is a litigation partner in the New York office of Gibson, Dunn & Crutcher.