English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement

By Martin Illmer

In a recent decision, the English Court of Appeal confirmed a damages award for breach of a jurisdiction agreement ([2014] EWCA Civ 1010); another judgment in the Alexandros T saga, which has been unfolding before the English courts. The judgment was delivered after the Supreme Court had, in November 2013 ([2013] UKSC 70), on appeal from an earlier Court of Appeal judgment in the Alexandros T saga, held that arts 27 and 28 of Brussels I did not apply in relation to the 2006 proceedings, vis-à-vis the 2011 proceedings (see the facts below) because the claims in those proceedings did not concern the same cause of action, but merely arose out of the same factual setting and might raise common issues.

Facts

In May 2006, the vessel Alexandros T, owned by Starlight Shipping Company, sank. Starlight filed a claim with their insurers, who initially denied liability, primarily on the basis that, to Starlight's knowledge, the vessel was unseaworthy. Starlight disputed this argument and in turn alleged that the insurers had improperly influenced witnesses, had spread false and malicious rumors and, in failing to comply with their obligations to pay Starlight under the insurance policies, had caused them consequential financial loss. Accordingly, in 2006, Starlight brought an action against the insurers before the English High Court under the exclusive jurisdiction clauses in the insurance policies. Shortly before the trial, the parties settled the claim on the basis of Tomlin Orders which provided for a stay of the action save for the purposes of carrying into effect the agreed terms of the settlement. The settlement agreements were expressed to be in full and final settlement of all and any claims under the insurance policies, and contained English choice of law and exclusive English jurisdiction clauses. In addition, Starlight agreed to indemnify the insurers in respect of any claims which might be made against them in relation to the loss of the vessel or under the

policies. In 2011, however, Starlight brought proceedings in Greece against the insurers, alleging breaches of the Greek Civil and Criminal Code, relying on the factual allegations concerning witness evidence and loss made in the 2006 proceedings. In response to that claim, the insurers sought to lift the stay of the 2006 proceedings under the Tomlin Orders, and commenced proceedings before the English High Court seeking (1) a declaration that the Greek claims are covered by the releases of the settlement agreements, (2)a declaration that bringing the Greek claims was a breach of the releases in the settlement agreements as well as a breach of the jurisdiction clauses in both the policies and settlement agreements, and, (3) payments based on the indemnity clauses and damages for breach of the release and jurisdiction clauses. At first instance the High Court granted summary judgment on the insurers' claims. Starlight appealed to the Court of Appeal.

Judgment

The relevant passages of the judgment of the Court of Appeal read as follows:

> ***'Do the claims for damages infringe EU law?***

[15] The owners assert that these claims for damages interfere with the jurisdiction of the Greek court to determine its own jurisdiction and, if appropriate, the merits of the owners' claims. For this purpose they rely on Turner v Grovit [2004] 2 Lloyds Rep. 169. This reliance is, however, misplaced because Turner v Grovit related to anti-suit injunctions and no such injunction is claimed in the present case. The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court.

[16] The Greek court is free to consider the Greek claims; it will, of course, have

to decide whether to recognise any judgment of the English court that the Greek claims fall within the terms of the Settlement Agreement and have therefore been released. It will also have to decide whether to recognise any judgment awarding damages for breach of the Settlement Agreements and the jurisdiction clauses in both the settlement agreements and the insurance policies. But that is not an interference with the jurisdiction of the Greek court but rather an acknowledgment of the Greek court's jurisdiction. In these circumstances there is no infringement of EU law, nor is there any need for a reference to the Court of Justice of the European Union despite the owners' repetition of their request for such a reference in their new solicitors' letter of 26th June 2014.

[17] In fact the owners appear almost to recognise that this is the position since they expressly accept that the claim for an indemnity pursuant to the Settlement Agreements is not contrary to EU law (see their supplemental skeleton, para 48). That is plainly right (see also the observations of Lord Neuberger at para 132 of his judgment in the Supreme Court). But if the claims to an indemnity do not infringe EU law, it is very hard to see why claims to damages should infringe that law.'

Short Note

The judgment of the Court of Appeal raises a number of interesting questions, which cannot all be addressed here. From a European perspective, the crucial aspect is the compatibility of such a damages award with the ECJ's judgment in *Turner v Grovit,* and potentially also West Tankers (although the latter concerned an arbitration agreement, raising the additional problem that arbitration is excluded from the Regulation's substantive scope). Although the Court of Appeal's judgment builds partially upon the prior decision of the Supreme Court on the issue of arts 27 and 28 of Brussels I – in particular, the finding of the Supreme Court that the claims in the two proceedings did not concern the same cause of action – it is likely that the Court of Appeal would have reached the same decision irrespective of the Supreme Court's prior decision. What is most striking about the Court of Appeal's judgment is the fact that Longmore LJ, in the first sentence of para 15, refers to the Greek court's right to determine its own jurisdiction whereas subsequently, after having explained the Supreme Court's decision on jurisdiction, the court simply refers to an

interference with the Greek court's jurisdiction, which is of course not the same. Even though the Supreme Court held that arts 27 and 28 of Brussels I do not apply, a damages claim may still interfere with the right of the Greek court to determine its jurisdiction, or, more generally speaking, the threat of such a damages claim may deter parties from even bringing a claim in a foreign forum which would have the same effect as an anti-suit injunction. One may well argue that if an anti-suit injunction that amounts to specific performance of the jurisdiction agreement should no longer be granted, damages may equally not be awarded.

In light of the principle of effectiveness, the ECJ might well find an incompatibility of a damages award with the Brussels I Regime, and it is therefore somewhat surprising that the Court of Appeal did not refer the matter to the ECJ for a preliminary ruling. The Court of Appeal simply held, by way of its own interpretation, that there is no infringement of EU law, even though the matter has not yet been decided by the ECJ nor resolved by EU legislation. It is mentioned, in passing, that the English courts, in the litigation that followed the ECJ's West Tankers ruling, appear to be very reluctant to refer matters to the ECJ for a preliminary ruling (see also the issue of enforcement of an arbitral award by entering judgment in terms of the award under section 66(2) Arbitration Act 1996 in West Tankers v Allianz [2011] EWHC 829, confirmed by [2012] EWCA Civ 27). It seems that certain of the ECJ's decisions, such as West Tankers, Turner, and Gasser were so shocking to English courts that they want to avoid a repetition by all means. Moreover, the English courtsequally do not want to see the alternatives to anti-suit injunctions that are provided by English law (some even exclusively by English law) to be destroyed by the ECJ for an incompatibility with the Brussels I Regime.

The matter is somewhat different with regard to arbitration agreements, since arbitration is excluded from the Regulation's scope and there is consequentially no lis pendens mechanism that applies to it. While a state court appears to be barred from granting damages for breach of an arbitration agreement for incompatibility with the ECJ's West Tankers judgment, an arbitral tribunal may well award such damages. While arbitral tribunals are bound by substantive EU law (see ECJ Case C-126/97 Eco Swiss v Benetton [1999] ECR I-3055), they are not bound by procedural EU law that is specifically intended and designed to apply only to the Member States' courts. Consequently, the procedural principles

underlying the Brussels I regime do not bind arbitral tribunals even if seated in a Member State, so as to foster mutual trust in other Member States' courts, by allowing them to rule independently on their jurisdiction. The matter was recently heard before the English High Court, which held that the Brussels I Regulation does not apply to an arbitral tribunal, and accordingly that it may award damages for breach of an arbitration agreement free from any restraints due to the principles of the Brussels I Regime (West Tankers v Allianz [2012] EWHC 854). Interestingly, the Swiss Supreme Court reached the same result, (although it was of course not restrained by EU law) when it dealt with an arbitral award rendered by a tribunal whose members included Lord Hoffmann.