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.

Email Updates

Readers of this blog will know that our email updates (which allows you to subscribe to receive our new content directly into your inbox) had been broken for a while. The service we used, Feedburner, is no longer operational. We're happy to say that we've now created a new email update subscription service for Conflict of Laws .net. You can **subscribe here** (the link is also permanently in the menu to the right.)

The blog has been updated to the latest software available, and we hope everything is working as it should be. If you spot a problem or bug, just let us know.

The Protection of Privacy in the

Aftermath of the CJEU's Judgments – Conference at the Max Planck Institute Luxembourg

On September 29, 2014 the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law will host a conference on 'The Protection of Privacy in the Aftermath of the CJEU's Judgments in *eDate Advertising*, *Digital Rights Ireland* and *Google Spain*'.

Ensuring the effective right to privacy regarding the gathering and processing of personal data has become a key issue both in the internal market and in the international arena. The extent of people's right to control their data, the implications of the "right to be forgotten", the actual impact on national systems of the CJEU's decisions on jurisdiction on the infringement of personality rights, and recent legislation addressing libel tourism are all shaping a new understanding of data protection and the right to privacy, and also have an impact on other fundamental rights such as freedom of speech.

This Conference will explore these issues to assess the status quo and possible developments in this area of the law which is undergoing significant changes and reforms that are not always easy to reconcile.

Program

14:15 *The CJEU's Decision in Google Spain: An Assessment*

> Professor Christopher Kuner, Honorary Fellow of the Centre for European Legal Studies, University of Cambridge, and Honorary Professor at the University of Copenhagen
>
> Dr Cristian Oro Martinez, Max Planck Institute Luxembourg – discussant

15:00 *The CJEU's Decision on the Data Retention Directive*

> Professor Martin Nettesheim, University of Tübingen

Dr Georgios Dimitropoulos, Max Planck Institute Luxembourg – discussant

16:30 *The CJEU's Decision in eDate Advertising and Its Implementation by National Courts*

Professor Burkhard Hess, Director, Max Planck Institute Luxembourg

Professor Patrick Kinsch, University of Luxembourg – discussant

17:15 *The 2010 U.S. SPEECH Act and the U.K. Reaction of 2013*

Dr Cristina M. Mariottini, Max Planck Institute Luxembourg

Professor David P. Stewart, Georgetown University – discussant

18:00 *Discussion*

For further information and to register, please click here.

Note: The following day, the Institute will host the first meeting of the ILA Committee on the Protection of Privacy in Private International and Procedural Law (this latter event is by invitation only).

Kupelyants on Sovereign Debt Restructuring

Hayk Kupelyants from the University of Cambridge as posted a paper on "Police Powers of States in Sovereign Debt Restructurings" on SSRN. The abstract reads as follows:

> *The paper looks at the powers of the States to unilaterally modify their debt obligations in the context of sovereign debt restructurings. Drawing on the*

national case law on the unilateral modifications of domestic debt, the paper argues that the States entering into sovereign bonds act in private capacity and cannot modify the private obligations in a unilateral manner. To support the argument, paper relies on the case law from the US, the Russian Federation and England. The paper also considers the powers of the State to modify private-to-private debt obligations and the debt entered into by quasi-public entities.

The full paper is available here.

Latest on Spanish Journals (II)

The last issue of *La Ley. Unión Europea* (July 2014) has also been released this month. Prof. P. de Miguel Asensio (Universidad Complutense of Madrid) is the author of the first contribution, entitled "El tratamiento de datos personales por buscadores de Internet tras la sentencia *Google Spain* del Tribunal de Justicia".

> Summary: In the light of the most recent case law of the ECJ, the territorial scope of application of the EU data protection law is discussed, with a special focus on the applicability of EU legislation to Google Inc., as search engine provider. Additionally, the position of the undertaking managing a search engine as data controller, the obligations of the search engine in this respect as well the relationship with the position of the pusblishers of websites are addressed. Finally, the scope of the right of erasure and its consequences on the activities of search engines are also discussed.

Directly related to Prof. de Miguel's paper is Dr. M. López García's "Derecho a la información y derecho al olvido al internet", published a little bit later (under *Tribuna*) in the same issue.

> Summary: Internet is major change in society. Everything we do is published in the network. If you're not on the Internet doesn't exist. But it has important legal consequences especially regarding the right to privacy and protection of

personal data, specifically the right to control the privacy of each person and decide that we want you to know or want you to forget about us. This problem has a different solution in each country. Common response is required for legal certainty.

The second main article, written by Prof. J. García López (also from the Universidad Complutense, Madrid) and entitled “El acuerdo de asociación transatlántico sobre comercio e inversiones: aproximación desde el Derecho del comercio internacional”, focuses on the TTIP:

Summary: The USA and the EU started one year ago their negotiations for the conclusion of the Transatlantic Trade and Investment Partnership (TTIP). In this paper we propose an approach from the point of view of International Trade Law. The TTIP will have to satisfy the conditions of both art XXIV GATT and art V Gats. This will produce the abolition of tariff and non-tariff barriers for the transatlantic trade, inducing a well-known effect of trade creation. On the other side, third countries like Mexico and Turkey will suffer as a consequence of the trade diversion caused by the rules of origin of the TTIP. To conclude, we will make reference to the new areas of negotiation beyond goods and services.

A comment on the ECJ decision to the aff. C-478/2012, Maletic, is provided by J.I. Paredes Pérez (Centro Europeo del Consumidor en España; University of Alcalá)

Summary: The subject of the controversy of the judgment places us within the territorial scope of protection forums included in Regulation No. 44/2001 for contracts held by consumers in order to assess the assumptions of internationality that justify their application. In this context, the judgment is of great significance, since in the appreciation of the international element of the litigious situation, the Court of Justice of the European Union does not use so much criteria of spatial type, characteristic of private international law as substantive criteria that arise from material logic. In particular, it appreciates the international nature of a consumption contract apparently domestic, taking into account intrinsic aspects of the contractual relationship, as it turns out the root cause of the matter related to connected contracts.

A selection of European case law and some news of juridical -but also of general-interest are delivered in the final part of the journal.

Latest on Spanish Journals (I)

Vol. VII (2014, 2) of the Spanish journal *Arbitraje. Revista de Arbitraje Comercial y de Inversiones* has just been released. The following contributions are to be found therein:

Under the heading *Estudios*

> Franco FERRARI: Forum shopping: la necesidad de una definición amplia y neutra
>
> Ana FERNÁNDEZ PÉREZ: Los contenciosos arbitrales contra España al amparo del Tratado sobre la Carta de la Energía y la necesaria defensa del Estado.

As *Varia*

> Miguel GÓMEZ JENE: Hacia un estándar internacional de responsabilidad del árbitro
>
> Marco DE BENITO LLOPIS–LLOMBART: El arbitraje y la acción
>
> Simon P. CAMILLERI: Anti–suit injuctions en el régimen de Bruselas I: ¿una cuestión de principios?
>
> Álvaro SORIANO HINOJOSA: El Estado y demás personas jurídicas de Derecho público ante el arbitraje internacional
>
> José Pablo SALA MERCADO: La actualidad de la inversión extranjera en Argentina. Una realidad que despierta inseguridad.

As usual, the issue provides as well with the notice of relevant recently adopted legal texts, case law (sometimes commented) of several jurisdictions, reviews of books and other journals, and of events.

Save the Date: Next Conference of the German Academic Association for International Procedural Law

The next biannual conference of the German Academic Association for International Procedural Law (Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e.V.) will take place from 25 to 28 March 2015 in Luxemburg. It will be hosted by the Max Planck Institute for International, European and Regulatory Procedural Law and will be dedicated to three topics:

- The European Court System
- International Dimensions of European Procedural Law
- International Commercial Arbitration

The conference language will (for the most part) be German. More information is available here.

Colloquium on Collective Redress in Zurich in October 2014

On 3 and 4 October 2014, Tanja Domej from the University of Zurich will host a colloquium on collective redress in Zurich. Speakers from various European jurisdictions and the US will discuss their experiences with existing instruments and possible future developments. The draft programme is available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/ccr.html. The working language will be English.

Attendance is free of charge but registration is required as the number of places

is limited. You can register online at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/registration.html or via e-mail (lst.domej@rwi.uzh.ch).

New SSRN eJournal on Private International Law

We are pleased to announce a new Legal Scholarship Network (LSN) Subject Matter eJournal – **Transnational Litigation/Arbitration, Private International Law, & Conflict of Laws eJournal**.

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Editors: Donald Earl Childress III, Associate Professor of Law, Pepperdine University School of Law, and Linda Silberman, Martin Lipton Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law

Description: This eJournal includes working and accepted paper abstracts dealing with private international law, transnational litigation, and arbitration. The topics include private international law (conflict of laws), extraterritoriality, jurisdictional issues, enforcement of foreign judgments and arbitral awards, international commercial arbitration, and investor-state arbitration.

We hope our readers will find this eJournal useful.

Another Alien Tort Statute Case Moving Forward

A few weeks back, the Unite States Court of Appeals for the Fourth Circuit revived an Alien Tort Statute case that was at first dismissed in Kiobel's wake. The four plaintiffs in *Al Shimari v. CACI Premier Technology Inc*. are foreign nationals who allege that they were tortured and otherwise mistreated by American civilian and military personnel while detained at Abu Ghraib prison on Iraq. The plaintiffs allege that employees of CACI—a private, U.S.-based defense contractor— "instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States." Based on the decision in Kiobel, the district court dismissed all four plaintiffs' ATS claims, concluding that the court "lack[ed] ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign."

The Fourth Circuit reversed, adopting a narrow read of the *Kiobel* decision. As noted before on this site, the Supreme Court in *Kiobel* said that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Reading this directive, the Fourth Circuit:

"observe[d] that the Supreme Court used the phrase 'relevant conduct' to frame its 'touch and concern' inquiry, . . . [and] broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force. [This] suggest][s] that [lower] courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action, [when assessing whether the presumption is overcome]."

"The Court's choice of such broad terminology," according to the Circuit, "was not happenstance." The "clear implication" is that "courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory. Under the 'touch and concern' language, a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims."

In this case, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation which has corporate headquarters located in Virginia. These employees were hired in the United States; the contract was concluded in the United States; and CACI invoiced the U.S. government in the United States. Finally, the plaintiffs allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

These facts dictated a different result that *Kiobel*, even if the tortious acts occurred abroad, so the case was remanded to the District Court for further proceedings on the merits. Like *Doe v. Nestle* in the Ninth Circuit, and other cases discussed on this site, the ATS is far from dead.