Scherer on Effects of Award Judgments

Maxi Scherer (Queen Mary, University of London) has posted Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road? on SSRN.

> *This article examines and critically assesses the 'judgment route' in international arbitration. The 'judgment' route refers to a growing trend in many jurisdictions to grant effects to foreign judgments relating to international arbitral awards, such as judgments setting aside, confirming, recognizing or enforcing an arbitral award (called 'award judgments' for the purposes of the article). Although there is abundant commentary on the effects of set aside judgments, very little attention has been paid to the other equally important situations where courts confirm, refuse to set aside or simply recognize or enforce an award. This article aims to fill this gap. It is submitted that national courts often err when they grant effects to foreign award judgments. On a theoretical level, the judgment route ignores the distinctive, ancillary nature of award judgments: award judgments differ from other judgments insofar as they relate to a prior adjudication — the award — and thus need to be treated differently. Moreover, on a practical level, the judgment route risks encouraging forum shopping and the multiplication of parallel proceedings, and it increases the likelihood of conflicting decisions. On the basis of these findings, the article concludes that the judgment route taken by courts in many jurisdictions is often the wrong road.*

The article was published in the *Journal of International Dispute Settlement*, Vol. 4, No. 3 (2013), p. 587.

ECtHR Rules on Return of a Child to Her Country of Origin under the Hague Abduction Convention

On 26 November 2013, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case of X v. Latvia (application no. 27853/09).

The case concerned the procedure for the return of a child to Australia, her country of origin, which she had left with her mother at the age of three years and five months, in application of the Hague Convention on the Civil Aspects of International Child Abduction, and the mother's complaint that the Latvian courts' decision ordering that return had breached her right to respect for her family life within the meaning of Article 8 of the European Convention on Human Rights (ECHR).

The Court considered that the ECHR and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. In the present case, it considered that the Latvian courts had not complied with the procedural requirements of Article 8, in that they had refused to take into consideration an arguable allegation of a "serious risk" to the child in the event of her return to Australia.

It may be worth noting that since the case concerned the relationship between Australia (as requesting State) and Latvia (as requested State), the special regime applying between member States of the EU bound by the Brussels IIbis Regulation was inapplicable. This explains that the obligations that Article 8 of the ECHR implies for the requesting State applied in this case, contrary to what was the case in Povse v Austria, where the incidence of the Brussels IIbis Regulation was at stake.

H/T: Patrick Kinsch

Sanga on “Choice of Law: An Empirical Analysis”

Sarath Sanga, Yale Law School, has recently published an empirical study on the use of choice of law clauses in the US (in the area of contract law). The paper can be downloaded free of charge via SSRN. The abstract reads as follows:

> *I propose a new measure to study the law and economics of choice of law: ”relative use of law.” Relative use of law measures the extent to which a state’s laws are disproportionally over- or under-utilized in contract. It is constructed by normalizing the distribution of choice of law clauses by the extent of contracting activity within each jurisdiction.*
>
> *Using this measure, I study choice of law by analyzing the nearly 1,000,000 contracts that have been disclosed to the Securities and Exchange Commission between 1996-2012. These are all contracts that companies registered with the SEC deem ”material.” I find that from 1996 to 2012, (1) only two states are relatively over-utilized: Delaware (an extreme outlier) and New York, and (2) there has been significant and robust convergence both in firms’ choice of law and relative use of law toward Delaware, New York, and Nevada.*
>
> *I offer hypotheses for this convergence that are based on (1) lock-in effects of the choice of state of incorporation and (2) positive network effects of using the same law. I present suggestive evidence that lock-in effects explain convergence toward Delaware and Nevada, while network effects explain convergence toward New York.*

Cartel Damage Claims, Non-Exclusive Jurisdiction Clauses and the "One-Stop Shop" Presumption: What Do Rational and Reasonable Businessmen Really Want?

Many thanks to Polina Pavlova, Research Fellow at the MPI Luxembourg.

On November 19th the England and Wales Court of Appeal (Civil Division) ruled on the scope of a contractual non-exclusive jurisdiction clause in the context of a damage claim for breach of EU competition law (*Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450). The Court opted for a narrow interpretation of the clause and decided against the inclusion of a purely tortious cartel damage claim in its scope.

The dispute at issue arose between the Irish airline Ryanair and the Italian jet fuel supplier Esso Italiana. The parties had concluded a fuel supplying contract containing the following clause:

> *For the purposes of the resolution of disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England.*

After a decision of the Italian Competition Authority finding that Esso Italiana participated in a jet fuel cartel, Ryanair initiated proceedings in London seeking damage recovery from it. The claims were based on breach of contract and of statutory duty.

The Commercial Court held that it had jurisdiction under the agreement. Justice Eder based his reasoning on the presumption that reasonable and rational businessmen would generally intend one-stop adjudication and that in the given case there was "an almost complete overlap" between the contractual and the tortious claim. He relied on the so called *Fiona Trust* doctrine (see *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40) and *The Angelic Grace* case-law (*The*

Angelic Grace [1995] 1 Lloyd's Rep 87), both dealing with the parallel issue of interpretation of arbitration clauses.

The Court of Appeal, however, reversed this decision, stating that any "one-stop shop" presumption requires a parallel contractual claim. Where such a claim has no prospects of success, as was the case with Ryanair's contractual claim, Lord Justice Rix saw no reason to presume that the parties would have wanted a dispute purely based on breach of competition law to be covered by the contractual jurisdiction agreement. Despite the evident relevance of Article 23 of the Brussels I Regulation, at no point did he refer to European procedural law.

This interpretation might come as a surprise. Against the background of the *Provimi* judgment (*Provimi Ltd v. Aventis Animal Nutrition SA* [2003] WHC 961), the decision not to extend the presumption in favour of one-stop adjudication to tortious cartel damage claims was not an inescapable outcome. In *Provimi*, the High Court ruled on the scope of a contractual jurisdiction clause and decided that an interpretation under Swiss, German and French law excluded claims based on breach of competition law. The reasoning of the High Court in *Provimi* was, however, generally interpreted as implicitly suggesting that English law would favor a different, broader interpretation of jurisdiction clauses. In the aftermath of the *Ryanair* judgment, such an assumption seems rather questionable.

At first sight, the *Ryanair* decision focuses primarily on the lack of a founded contractual claim. The contract between Ryanair and Esso Italiana contained a clause imposing a price adjustment obligation in case of non-conformity with relevant "applicable laws, regulations or orders". The Court correctly observed that the parties could not have envisaged a breach of competition law to fall under this provision. An implied contractual obligation that the prices would not be inflated due to breach of competition law was also regarded as an unnecessary construction. Since in the Court of Appeal's view the justification of the one-stop adjudication presumption lies in the close connection between the tortious claim and the analogous contractual one, in the absence of a founded contractual claim the presumption was decided to be inapplicable. This conclusion was reinforced by the fact that the parties explicitly excluded claims "for indirect or consequential damages" from their agreement on jurisdiction and choice of law.

Furthermore, it is necessary to bear in mind that the case before the Court of

Appeal was different from the typical situation insofar as the jurisdiction clause was non-exclusive. Such contractual terms promote forum shopping to a great extent and should, therefore, be interpreted with extreme caution. Where the parties have opted for this kind of a wider choice of jurisdiction, an intention in favor of one-stop adjudication is by no means evident. Against this background, it seems questionable whether the "*Ryanair* presumption" could be extended to exclusive jurisdictional agreements.

The specific circumstances of the case, the prospects of success of the particular contractual claim and the non-exclusive character of the particular jurisdiction clause should not, however, lead to an undervaluation of the general significance of the ruling. For the *Ryanair* judgment might set a new trend in English case-law: It remains to be seen whether it will mark the emergence of a new presumption on the intention of rational and reasonable parties – one that does not assume they would have wanted to adjudicate cartel disputes before the court designated to rule on their contractual disputes. This might be a first step towards a turnabout of the concept of the will of the reasonable contracting parties. The underlying policy decision is revealed in the last paragraph of the judgment: The fact that the buyer wants to limit the tortious claim to one cartelist should not enable the cartel member to rely on a contractual jurisdiction clause. In other words, private enforcement of competition law should be encouraged regardless of individual jurisdiction agreements.

The narrow interpretation of the jurisdiction clause is in line with the recent developments in Europe: On July 4th, 2013, an interlocutory judgment of the Helsinki District Court in the *Hydrogen Peroxide Cartel* case also decided that cartel damage claims are not covered by jurisdiction clauses contained supply agreements.

If this approach is further pursued and a default narrow interpretation of jurisdiction (and arbitration) clauses in the context of breach of competition law is established, prorogation arguments would practically be excluded in the majority of cartel damage disputes. Unless the jurisdiction clause is clearly drafted in favour of a broad interpretation, a claimant seeking to obtain damages for breach of competition law would be able to proceed against all EU domiciled cartel members by making use of Article 6 (1) of the Brussels I Regulation. This trend is to be welcomed – it would remove significant hurdles on the way to private

enforcement of competition law.

ERA-Conference on Cross-Border Debt Recovery in Legal Practice

The Academy of European Law (ERA) will host a conference on "Cross-Border Debt Recovery in Legal Practice" in Trier, Germany, on February 6 and 7, 2014. The conference is directed at lawyers dealing with civil litigation and dispute resolutions. Detailed information is available on the ERA newsletter and ERA's website.

The conference programme reads as follows:

Thursday, 6 February 2014

- 08:45 Arrival and registration
- 09:10 Welcome
  Angelika Fuchs

Chair: *Pavel Simon*

I. "BRUSSELS I" AND BEYOND

- 09:15 Jurisdiction and enforcement under Brussels I: recent CJEU case law
  Gilles Cuniberti
- 10:00 Discussion
- 10:15 The recast of the Brussels I Regulation: forthcoming changes and open issues
  Janeen Carruthers
- 11:00 Discussion
- 11:15 Coffee break

Chair: *Jens Haubold*

- 11:45 Cross-border service of documents & taking of evidence: recent CJEU case law and proposals for reform
  Pavel Simon
- 12:30 Discussion
- 12:45 Lunch

Chair: *Janeen Carruthers*

II. FACILITATING DEBT RECOVERY ACROSS BORDERS

- 14:00 The European Enforcement Order: recent CJEU and major national case law
  Jens Haubold
- 14:40 Discussion
- 14:50 European Order for Payment: a powerful tool in international debt collection
  David Einhaus
- 15:45 Coffee break
- 16:00 WORKSHOP
  Hands-on experience with the European Payment Order
  David Einhaus
- 17:00 Results of the workshop and discussion
- 17:30 End of the first conference day
- 18:15 Guided city tour
- 19:30 Conference dinner

Friday, 7 February 2014

Chair: *Remo Caponi*

III. IMPROVING ACCESS TO JUSTICE

- 09:00 Collective redress: latest developments after the Commission recommendation
  Ianika Tzankova
  09:40 Discussion
  09:50 Recovery of small claims: new ADR options, conciliation bodies and the European Small Claims Procedure, including its reform
  Xandra Kramer

- 10:30 Discussion
- 10:45 Coffee break

Chair: *Gilles Cuniberti*

IV. FREEZING OF BANK ACCOUNTS

- 11:15 The European Account Preservation Order (EAPO): upcoming changes
  Richard de Haan
- 11:45 Round table on the EAPO: Keeping the surprise effect…and protecting the debtor, plus: who carries the costs?
  - Remo Caponi
  - Richard de Haan
  - Xandra Kramer
  - Pavel Simon
- 13:00 Lunch and end of the conference

Symeonides on Issue by Issue Analysis and Depeçage

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect on SSRN.

> *This Article discusses two interrelated features of modern American choice-of-law approaches: (1) issue-by-issue analysis, and (2) dépeçage.*
>
> *Issue-by-issue analysis stands for the proposition that, in choosing the law to be applied to a multistate case, a court should focus on the particular issue(s) for which the laws of the involved states would produce a different outcome, rather than on the case as a whole. Logic suggests and experience confirms that this mode of analysis is more likely to produce individualized, nuanced, and thus rational resolutions of conflicts problems than the traditional mode of wholesale*

choices.

Dépeçage is the potential and occasional result of issue-by-issue analysis. It occurs when the court applies the laws of different states to different issues in the same cause of action. Although this phenomenon appears anomalous to the uninitiated, in reality it is not as problematic as it appears. For example, although the majority of American courts routinely use issue-by-issue analysis, this use produces surprisingly few instances of actual dépeçage, and, in most of those cases, dépeçage is innocuous. In the remaining few cases, dépeçage can be problematic, but courts employing modern approaches have all the flexibility to avoid it — and they do.

The Article concludes that the low — and easily avoidable — risk of an occasionally problematic dépeçage is not a good reason to eschew issue-by-issue analysis in light of the clear and considerable advantages of this analysis in producing apt choice-of-law solutions.

The article in forthcoming in the *University of Toledo Law Review*.

Draft Commentary of the Draft Hague Principles on Contracts

The Hague Conference on Private International Law has released a Draft Commentary of the Draft Hague Principles on Choice of Law in International Contracts.

The Commentary is written article by article. Various members of the Working Group have had primary drafting responsibility for certain Articles. They are as follows:

Preamble	Jan Neels

Article 1	Yuko Nishitani and Paco Garcimartín
Article 2	Lauro Gama and Geneviève Saumier
Article 3	Lauro Gama and Geneviève Saumier
Article 4	Dieter Martiny and Jan Neels
Article 5	Jan Neels and Dieter Martiny
Article 6	Marielle Koppenol-Laforce and Thomas Kadner Graziano
Article 7	Bénédicte Fauvarque-Cosson and Ivan Zykin
Article 8	Yuko Nishitani and Dieter Martiny
Article 9	Paco Garcimartín and Richard Frimpong Oppong
Article 10	Neil Cohen and Daniel Girsberger
Article 11	Andrew Dickinson and Geneviève Saumier
Article 12	Yuko Nishitani and Paco Garcimartín

H/T: Brooke Marshall

ECJ Rules on Freedom of Member

States to Consider Statutes Implementing EU Directives Mandatory Rules

On 17 October 2013, the Court of Justice European Union delivered its judgment in United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare (Case C-184/12).

The issue before the Court was again whether national laws implementing the EU Commercial Agency Directive could be found to be mandatory rules in the meaning of the 1980 Rome Convention (and indeed the Rome I Regulation).

The difference with the *Ingmar* case was that the parties had not chosen the law of a third state to govern their transaction, but rather the law of a Member state. However, the forum had chosen to go beyond the protection required by the Directive. The issue was therefore whether the choice of a national law which afforded the minimum protection required by the Directive could be overriden by a national statute which had gone farther than what the Directive required.

The Court held that it was possible.

> *49 Thus, to give full effect to the principle of the freedom of contract of the parties to a contract, which is the cornerstone of the Rome Convention, reiterated in the Rome I Regulation, it must be ensured that the choice freely made by the parties as regards the law applicable to their contractual relationship is respected in accordance with Article 3(1) of the Rome Convention, so that the plea relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned, as referred to in Article 7(2) of that convention, must be interpreted strictly.*
>
> *50 It is thus for the national court, in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a 'mandatory rule', to take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in*

order to protect an interest judged to be essential by the Member State concerned. As the Commission pointed out, such a case might be one where the transposition in the Member State of the forum, by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive, offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals.

51 However, in the course of that assessment and in order not to compromise either the harmonising effect intended by Directive 86/653 or the uniform application of the Rome Convention at European Union level, account must be taken of the fact that, unlike the contract at issue in the case giving rise to the judgment in Ingmar, in which the law which was rejected was the law of a third country, in the case in the main proceedings, the law which was to be rejected in favour of the law of the forum was that of another Member State which, according to all those intervening and in the opinion of the referring court, had correctly transposed Directive 86/653.

Ruling:

Articles 3 and 7(2) of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 must be interpreted as meaning that the law of a Member State of the European Union which meets the minimum protection requirements laid down by Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another Member State before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents, only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by that directive, taking account in that regard of the nature and of the objective of such mandatory provisions.

Hague Conference Publishes Proceedings of 20th Session

The Permanent Bureau of the Hague Conference on Private International Law has announced that the volume of the *Proceedings of the Twentieth Session*, Tome II, *Judgments* has recently been published.

This book can be ordered online through Intersentia Publishing.

Forum Shopping and Post-Award Judgments

Such is the title of a recent article co-authored by L. Silberman (Martin Lipton Professor of Law, New York University School of Law) and M. Scherer (School of International Arbitration, Queen Mary, University of London; Wilmer Cutler Pickering Hale and Dorr LLP, m.scherer@qmul.ac.uk), published in *Forum Shopping in the International Commercial Arbitration Context*, ed. F. Ferrari, Sellier, 2013, pp.313-345. The abstract reads as follows:

> *Forum shopping has become increasingly common in the context of post-award judgments. Post-award judgments can take several forms, depending on whether the award is set aside, confirmed, recognized or enforced. Creative parties may forum shop for a set-aside, confirmation, recognition or enforcement judgment and seek to rely on its effects in subsequent proceedings relating to the same award in another country. The courts in that other country will have to assess the effects they give to the foreign post-*

award judgment, including under existing doctrines of res judicata, issue/claim estoppel. The paper examines how courts should respond to such forum shopping attempts. It assesses whether a decision to set aside, confirm, recognize or enforce an arbitral award might affect subsequent attempts to recognize or enforce that award elsewhere.

The paper is also available on SSRN (click here).