Arbitration Agreements, Anti-Suit Injunctions and the Brussels Regulation

Martin Illmer (*Hamburg*) and Ingrid Naumann (*Berlin, currently New York*) have published a very interesting analysis of the compatibility of anti-suit injunctions in aid of arbitration agreements with the Brussels Regulation in *International Arbitration Law Review* (Int. A.L.R. 2007, 10(5), 147-159): **Yet another blow – anti-suit injunctions in support of arbitration agreements within the European Union**.

An abstract has been kindly provided by the authors:

Following the ECJ's judgment in *Turner* the issue of the compatibility of anti-suit injunctions with the regime of the Brussels Regulation has again attracted much attention due to the reference by the House of Lords to the ECJ in the *West Tankers* case. By virtue of the eagerly awaited judgment of the ECJ anti-suit injunctions in support of arbitration agreements are at risk to fall within the European Union. Illmer and Naumann provide a thorough and detailed analysis of whether anti-suit injunctions in support of arbitration agreements are compatible with the Brussels Regulation (Regulation 44/2001) and general principles of EU law. Weighing and assessing the arguments put forward in both directions they reach the compelling conclusion that anti-suit injunctions in support of arbitration agreements are incompatible not only with the Brussels Regulation but with general principles of European law. This conclusion based on legal reasoning cannot be overcome by reference to an alleged practical reality of arbitration which the authors unveil as disguised protectionism for the arbitral seat London.

In the first part of their article, Illmer and Naumann provide a detailed analysis of the scope of the arbitration exception of Art. 1(2)(d) of Regulation 44/2001 with regard to anti-suit injunctions. This comprises of an analysis of the ECJ's former judgments in *Marc Rich* and *van Uden*, the English courts' understanding and interpretation of Art. 1(2)(d) which the authors criticise as a cherry picking exercise and finally a thorough construction of the arbitration exception based on the canon of interpretation tools generally applied by the ECJ. They conclude that

the arbitration exception does not cover anti-suit injunctions in support of arbitration agreements. Caught by the the regime of the Brussels Regulation they are incompatible with it as follows inevitably from the ECJ's judgment in *Turner*.

In the second part of the article, the authors continue their analysis under the presumption that the anti-suit proceedings are covered by the arbitration exception and thus do not fall under the Brussels Regulation. Whereas one may take the view that principles underlying the Regulation, in particular the notion of mutual trust, cannot be applied to anti-suit proceedings falling outside the scope of the Regulation, one cannot bypass the general principle of *effet utile*: Even proceedings in national state courts that do not fall under the Brussels Regulation by virtue of the arbitration exception must not impair proceedings that come within the scope of the Brussels Regulation (i.e. the proceedings which are intended to be restrained by the anti-suit injunction) and thus distort the effective functioning of European law.

In a third, complementary part the authors rebut the arguments put forward by the House of Lords in the *West Tankers* reference concerning the so-called practical reality of arbitration. They show that the truth behind this argument is a protection of London as an arbitral seat vis-à-vis its European competitors in the fierce competition for arbitration amongst arbitral seats. Furthermore, the authors hint at alternatives to anti-suit injunctions in protecting the undeniable interest of the parties to an arbitration agreement in avoiding a breach or circumvention of it.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts"

The latest issue of the German legal journal ***Praxis des Internationalen Privat- und Verfahrensrecht*** (IPRax) has been published.

Here is the contents:

- ***Erik Jayme*** and ***Christian Kohler***: European Private International Law 2007 (*Europäisches Kollisionsrecht 2007: Windstille im Erntefeld der Integration)*
- ***Peter Arnt Nielsen***: Brussels I and Denmark
- ***Robert Freitag***: Remedies of the debtor against the European order for payment according to the Regulation creating a European order for payment procedure (*Rechtsschutz des Schuldners gegen den Europäischen Zahlungsbefehl nach der EuMahnVO)*
- ***Christoph Althammer***: PIL issues in case of the application of foreign law by local courts according to § 119 (1) No. 1c Judicature Act (*Kollisionsrechtliche Fragestellungen bei der Anwendung ausländischen Rechts durch die Amtsgerichte gemäß § 119 Abs. 1 Nr. 1c GVG*)
- ***Christoph Thole***: International jurisdiction of German courts regarding claims against foreign shell companies (*Die internationale Zuständigkeit deutscher Gerichte bei Klagen gegen Scheinauslandsgesellschaften*)
- ***Timo Rosenkranz***: Limits of the copyright infringement liability of the foreign operator of an online marketplace (*Grenzen der urheberrechtlichen Störerhaftung des ausländischen Betreibers einer Online-Handelsplattform*)
- ***Nina Adelmann***: The exclusion of liability regarding cross-border employment relationships between the poles of choice of law rules in labour law and the rules concerning the posting of workers (*Das Haftungsprivileg bei grenzüberschreitenden Arbeitsverhältnissen im Spannungsfeld zwischen Arbeitskollisions- und Arbeitnehmerentsenderecht – Ein Problemaufriss dargestellt am Beispiel des niederländischen Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid*)
- ***Hilmar Krüger***: Recognition and enforcement of German judgments in the Sultanate of Oman (*Zur Anerkennung und Vollstreckung deutscher Urteile im Sultanat Oman*)
- ***Dietrich Nelle***: New choice of law rules in Algeria (*Neues Kollisionsrecht in Algerien*)
- ***Yuko Nishitani*:** PIL reform in Japan (*Die Reform des internationalen Privatrechts in Japan*)

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- Dr **Hendrik Verhagen**, Professor of private international law, comparative law and civil law at Radboud University, Nijmegen, is an Advocate at the firm's Amsterdam office.

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October 2007 Round-Up:

International Tort Claims, "Forum Non" Dismissals and Punitive Damages

This installment of significant developments will focus on salient issues that have been the subject of frequent, past posts on this website.

First, the United States Court of Appeals for the Second Circuit decided a compendium of Alien Tort Claim cases that raise an interesting question at the intersection of domestic and international law: that is, when determining whether a corporate defendant has "aided and abetted" a violation of international law, what law defines the test for "aiding and abetting." *Khulumani v. Barclay National Bank* and *Ntsebeza v. DaimlerChrysler* (available here) concern the tort claims of a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. The defendants are 50 multinational corporations, and the claimed damages total over $400 billion. The basic theory of the case is that defendants' indirectly caused plaintiffs' injuries by perpetuating the apartheid system (e.g. by providing loans to a "desperate South African government"), and that they indirectly profited from those acts which violated recognized human rights standards, but not necessarily the law of the place where those acts took place. The District Court dismissed the case as a non-justiciable political question, but also because "aiding and abetting" human rights violations – the gravamen of the indirect causation and indirect harm claims – provided no basis for ATCA liability. A split panel of the Second circuit reversed. Amongst the other decisions intertwined in the 146 page opinion, the court determined that the appropriate test for aiding and abetting liability under the ATCA is set out in the Rome Statute of the International Criminal Court – that is, one is guilty if one renders aid "for the purpose of facilitating the commissions of a . . . crime." This is a far more stringent test than the one argued by Plaintiffs, founded on the Restatement (Second) of Torts § 876(b), which pins liability if one "gives substantial assistance or encouragement" to another's actions which he "knows" to "constitute a breach of duty." While the case was kept alive and remanded for further consideration, commentators have begun to wonder whether Plaintiffs have won a pyrrhic victory: "[i]f the Rome Statute test for aiding and abetting is broadly adopted, few ATCA cases against corporations may clear summary judgment and go on trial."

In a second notable case, the United States Court of Appeals for the Eleventh Circuit considered does a forum non conveniens dismissal of foreign plaintiffs in favor of Italian courts put the remaining American plaintiffs "effectively out of court" so as to justify appellate review of the dismissal? The panel held that it does. In *King v. Cessna Aircraft Co.*, the personal estates of 70 deceased individuals sued defendant for a tragic air accident in Milan, Italy. Sixty-nine of those plaintiffs were European, with one being American. The district court dismissed the claims of the European plaintiffs on forum non conveniens grounds, and stayed the action of the American plaintiff pending resolution by the Italian courts (because, it is view, the American plaintiff was entitled to "a presumption in favor of its chosen forum"). All plaintiffs appealed. Because one may not generally appeal a decision to stay proceedings, appellate jurisdiction turned on whether the American plaintiff was "effectively out of court" by the imposition of the stay. The Court held that that plaintiff:

> *"has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing [the American plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review the order that did put him out. We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate jurisdiction exists to review the stay order . . . : "The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity)." . . . Those important differences do not, however, affect the extent to which a plaintiff is placed "effectively out of court," which is the measure that defines our appellate jurisdiction over stay orders."*

On the merits, the court vacated the stay as improvident because "there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether [the American plaintiff] will have a meaningful opportunity to

participate in those proceedings." The court did not consider the merits of the European plaintiff's appeal of the forum non conveniens decision, preferring instead to remand the entire case for reconsideration in the event that the vacation of the stay, and the continuation of the lone American case here in the U.S., affects that decision.

Finally, in the latest salvo into the propriety and extent of punitive damage awards, the Supreme Court just granted certiorari in *Exxon Shipping Co., et al., v. Baker, et al*. (07-219). This case concerns a $2.5 billion punitive damages award against Exxon Mobil Corp. and its shipping subsidiary for the massive oil spill in Alaska's Prince William Sound in 1989. In agreeing to hear Exxon's appeal, the Court will decide whether the company should be subject to punitive damages solely upon judge-made maritime law, which is in apparent contradiction of decades of legal history and subject to considerable discordance in the federal courts. The case also raises the question of whether, if maritime law does govern, this specific award is too high because it is said to be "larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history." The appeal also included the question of whether a verdict of that size was unconstitutional; separating this case from recent ones (see here), the Court did not agree to hear that last question. Nevertheless, this decision will have significant ramifications for international maritime concerns. Early reactions can be found here, here, and here. SCOTUSblog has a brief discussion and links to the briefs as well here.

Volume 3, Issue 2, Journal of Private International Law

The October 2007 issue (Vol. 3, Issue 2) of the **Journal of Private International Law** has just been published. The contents are (click on the links to view the abstracts on the Hart Publishing website):

Articles

Enforcement of Foreign Non-Monetary Judgments in Canada (and Beyond) by Stephen G.A. Pitel

Habitual Residence and Brussells IIbis: Developing Concepts for European Private International Family Law by Ruth Lamont

China's Codification of the Conflict of Laws: Publication of a Draft Text by Weidong Zhu

Exclusionary Principles and the Judgments Regulation by Andrew Scott

Mere Presence and International Competence in Private International Law by Richard Frimpong Oppong

Review Articles

Chasing the Dream: the Quest for Solutions to International Insolvencies: Insolvency in Private International Law by IF Fletcher by Donna McKenzie Skene

Order, Illumination and Influence: Dicey, Morris & Collins on the Conflict of Laws, Fourteenth Edition General Editor: L Collins by Mary Keyes

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Jurisdiction and Class Actions

To what extent should a country's traditional rules for taking jurisdiction be modified to address some of the unique elements of class actions? This issue was recently considered by the Manitoba Court of Appeal in *Ward v. Canada (Attorney General)* (available here).

In *Ward* the plaintiff lived in Manitoba but in the 1970s he had been stationed in New Brunswick, where, he alleged, his employer had exposed him to Agent Orange. In one sense his claim was very much tied to Manitoba: he was there as the plaintiff, suffering damages there, and seeking to sue the Federal Crown which, by being present in every Canadian province, was present there. But he proposed, in due course, to move to have his claim certified as a class action, with a class that could cover both residents and non-residents of Manitoba.

The Crown opposed Manitoba's jurisdiction. It argued that the traditional approach to jurisdiction had to be modified in class actions, and that notwithstanding its presence as a defendant in Manitoba the plaintiff should still have to show a real and substantial connection between the action and Manitoba.

The Court of Appeal did not accept this argument. It held that the Crown's presence was sufficient for jurisdiction. The fact that a subsequent certification motion could lead to the action becoming a class action did not change, at this stage, the jurisdictional analysis.

This decision is particularly important for the guidance it provides on where, as a matter of jurisdiction, a class action can be started and the attempt made for certification. In this case, the plaintiff faced significant downside costs exposure in New Brunswick if a motion for certification was unsuccessful there, whereas in Manitoba costs are only awarded against the party moving unsuccessfully for certification in limited circumstances. This created an advantage for the plaintiff to commence putative class proceedings in Manitoba rather than in New Brunswick.

Proof of Foreign Law in Australia

In Australia, as in England, foreign law is treated as a matter of fact, not law, and its content must therefore be pleaded and proved if a party wishes to rely on it. On the other hand, the principle traditionally known as the "presumption of similarity" (or "presumption identity") means that foreign law will be assumed to be the same as local law unless the contrary is demonstrated. For this reason,

local law is generally applied by default even in cases otherwise governed by foreign law, as it is usually in neither party's interests to go to the trouble of researching and proving foreign law. However, in rare cases Australian judges have declined to apply Australian law by default, the leading example being *Damberg v Damberg* (2001) 52 NSWLR 492.

Now, in *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd* [2007] FCA 1625 (26 October 2007), Graham J of the Federal Court of Australia doubted the applicability of the New South Wales law of defamation to a case otherwise governed by Hong Kong and mainland Chinese law, and denied the applicants relief because they failed to prove the relevant foreign law. The case concerned (among other things) an allegedly defamatory email read by recipients in Hong Kong and mainland China. His Honour observed that:

> *"In making these findings [about the allegedly defamatory] email I have assumed that the defamation law in the Special Administrative Region of Hong Kong and in the remainder of the People's Republic of China is the same as it is New South Wales. However, as I said [earlier in the judgment, after discussing Damberg v Damberg and other cases on the presumption of identity]:*
>
> *'… the general presumption that, in the absence of evidence to the contrary, foreign law is the same as Australian law is not inflexible. Where the law of the forum is governed by a statute and the law within Australia is itself lacking in uniformity, I doubt whether it could be presumed that the defamation law in China, including the Special Administrative Region of Hong Kong, is the same as it is in New South Wales.'*
>
> *In the absence of evidence as to the relevant defamation law in the Special Administrative Region of Hong Kong and in the remainder of the People's Republic of China or at least that part where [the recipient] was located at the time when he received the … email, I do not consider that any award of damages should be made referable to the transmission of the … email to [the recipients in Hong Kong and China]. The relevant defamation law (if any) has not been proven."*

While the default application of Australian law is usually just and convenient, there are certain areas of law in which this default application should be overridden because it would be unfair or anomalous, especially so when local law is idiosyncratic. Although some judges have applied Australian defamation law by default in other cases governed by foreign law, defamation is an area of law which differs markedly around the world, and until the recent uniform Defamation Acts, the law of NSW was particularly idiosyncratic even in comparison with the other Australian States. Thus, it could hardly be said that the "presumption of similarity" was a realistic or fair approximation of the actual content of foreign law in this case.

Note: Although the common law "place of publication" choice of law rule continues to apply in Australia regarding defamatory material published overseas (see *Dow Jones v Gutnick*), the uniform Defamation Acts altered the rule applicable to material published within Australia so as to apply the law of the "Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection".

Paying Here, Seeking Restitution There.

A negative consequence of the availability of multiple fora in international litigation is the risk of conflicting decisions. Several adjudicators can retain jurisdiction and then reach conflicting, if not opposite, results on the merits. Is it a problem? It could be argued that it is for two different reasons. The first is that the legitimacy of the legal process is undermined when inconsistencies are produced. This is certainly true when this happens in one given legal order. However, when it happens in different legal orders, it seems to be the sad consequence of the autonomy of the legal orders involved. Arguably, there is no real inconsistency when autonomous legal orders adopt different solutions. The second reason why conflicting decisions can be a problem is because the parties may be ordered to take inconsistent actions. If a party is enjoined to do something

by one court and ordered to refrain from doing it by another court, the position of that party becomes unbearable.

An interesting example of this last hypothesis is the case of a party being ordered to pay a sum of money in one jurisdiction, but being also able to successfuly seek restitution of that sum of money in another jurisdiction. I am not aware of many cases where this actually happened. Here is an interesting one involving a court and an arbitral tribunal.

The debtor was the State of Congo, which had borrowed money from a Libanese construction company, Groupe Tabet. Congo did not make the instalments repayment itself but ask Elf Congo, the Congolese subsidiary of the French oil company Elf, to do so, and to commit to do so to the lender. There were thus two different sets of contracts, the borrowing contracts between Congo and Tabet, and the repayment contract between Elf Congo and Tabet. There was certainly a third contractual relationship between Congo and Elf Congo, which explains why Elf Congo agreed to commit to the lender, but I do not have information on it, and it is not directly relevant.

Five years later, the State of Congo argued that the lender had received too much money and Elf Congo stopped paying back, probably after being instructed to do so by the State. The lender then decided to sue Elf Congo under the repayment contract before Swiss courts (I do not know whether this venue was chosen because the contract contained a clause providing for the jurisdiction of Swiss courts). A Geneva court ordered Elf Congo to pay 64 million Swiss francs (EUR 38 million) in 2001. The Swiss Federal Tribunal eventually confirmed the judgement in 2003. The Swiss decisions were declared enforceable in France in 2003 or in 2004. The State of Congo counter attacked by initiating arbitral proceedings under the borrowing contracts against the lender, as those contracts contained a clause providing for ICC arbitration in Paris, France. The arbitral tribunal did not rule completely in the State of Congo's favour, as it found in a first award that the State still owned EUR 16 million. But the tribunal found that the remaining EUR 22 million were not owned. In a second award made in 2003, it thus ordered the lender to enter into an escrow account agreement with Elf Congo, and to put on this account any monies that it would have to pay as a consequence of the Swiss judgment beyond EUR 16 million.

A dispute concerning the enforcement of the second award was then brought

before French courts. On the one hand, the lender decided to challenge the second award and sought to have it set aside. On the other hand, the State of Congo was applying for a court order to comply with the same second award *sous astreinte*, i.e. for a judgement ordering the performance of the award and providing that the lender would have to pay a certain sum for each day of non-compliance. French courts refused to issue such order, as the proceedings challenging the award suspended its enforceability. A debate arose as to whether an exception existed in the case in hand, making the award immediately enforceable. The French supreme court for private and criminal matters (*Cour de cassation*) eventually ruled in a judgement of July 4th, 2007 that the enforcement of the award was suspended and that its performance could not be ordered judicially.

The case raises many issues of international arbitration. As far as the conflict of laws is concerned, the issue is whether there is a way to prevent the two adjudicators involved (i.e. Swiss courts and the ICC arbitral tribunal) from further ruling the contrary of each other.

German Article on Abusive Choice of Court Clauses in European Law

Stefan Leible and Erik Roeder (both Bayreuth) have published an article on abusive choice of court clauses in European law in the German legal journal *Recht der Internationalen Wirtschaft* (RIW 2007, 481-487):
Missbrauchskontrolle von Gerichtsstandsvereinbarungen im Europäischen Zivilprozessrecht

An abstract has been kindly provided by the authors:

> *In their article, Leible and Roeder analyze whether and to what extent the European Procedural Law allows to review unfair forum selection agreements. In particular, the authors try to answer the question whether an agreement under Art. 23 of the Brussels I Regulation (Council Regulation 44/2001) may be*

declared void by a national court because in concluding the agreement one party has abused its dominant economic position.

In the first part of the article, Leible and Roeder refute the arguments put forward to reject any review of jurisdiction agreements. As the authors show, the competence of the ECJ to interpret the Brussels Regulation does not foreclose such a review because the ECJ has not decided on the issue so far. A review of choice of forum-clauses would neither put legal certainty at risk, nor would it discriminate against courts of other Member States.

In the second part of the article, Leible and Roeder argue for a review of forum selection clauses within the scope of Art. 23 of the Brussels I Regulation. An agreement on jurisdiction that was obtained by abuse of economic predominance does not truly reflect the autonomous will of the parties. The possibility of a review by the courts of the Member States allows to settle individual cases in accordance with equity. In order to ensure legal certainty, the notion of "abuse of economic predominance" must be defined autonomously by the ECJ.

Conflict of Law Symposium

The Tulane Law Review and the Duke Center for International and Comparative Law organise a symposium entitled***:***

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- *Stephanie Francq* (Louvain-la-Neuve), *Mathias Reimann* (Michigan), and *Larry Ribstein* (Illinois) discussing federal unification and the dichotomy of internal and external conflicts

- *Horatia Muir-Watt* (Paris I) and *Jurgen Basedow* (Max Planck) discussing interstate market regulation
- *Jens Dammann* (Texas) and *Onnig Dombalagian* (Tulane) discussing conflicts in corporate law
- *Jan von Hein* (Max Planck) and *Symeon Symeonides* (Willamette) discussing conflicts in tort law
- *Dennis Solomon* (Tubingen), *Bill Richman* (Toledo), and *Patrick Borchers* (Creighton) discussing conflicts in contract law

The symposium will take place on **9 February 2008** in Durham, NC

More information can be found at the website of the Tulane Law Review.

(Thanks to Prof. Jan von Hein (Trier) for the tip-off.)