Genocide by Expropriation – New Tendencies in US State Immunity Law for Art-Related Holocaust Litigations

On 10 July 2018, the United States Court of Appeals for the District of Columbia Circuit rendered its judgment in the matter of Alan Philipps et al. v. the Federal Republic of Germany and the Stiftung Preussischer Kulturbesitz.

This case involves a claim by heirs of Holocaust victims for restitution of the „*Welfenschatz*" (Guelph Treasure), a collection of medieval relics and devotional art housed for generations in the Cathedral of *Braunschweig* (Brunswick), Germany. This treasure is now on display at the *Kunstgewerbemuseum Berlin* (Museum of Decorative Arts) which is run by the Stiftung Preussischer Kulturbesitz. The value of the treasure is estimated to amount to USD 250 million (according to the claim for damages raised in the proceedings).

The appeal judgment deals with, inter alia, the question whether there is state immunity for Germany and the Stiftung respectively. Under the US Federal Sovereign Immunities Act, foreign sovereigns and their agencies enjoy immunity from suit in US courts unless an expressly specified exception applies, 28 U.S.C. § 1604.

One particularly relevant exception in Holocaust litigations relating to works of art is the „expropriation exception", § 1605(a)(3). This exception has two requirements. Firstly, rights in property taken in violation of international law must be in issue. Secondly, there must be an adequate commercial nexus between the United States and the defendant:

> „A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or

> operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

According to the Court's recent judgment in Holocaust litigation against Hungary (Simon v. Republic of Hungary, 812 F.3d 127, D.C. Cir. 2016), intrastate expropriations in principle do not affect international law but are internal affairs of the acting state vis-à-vis its citizens. However, if the intrastate taking amounts to the commission of genocide, such a taking subjects a foreign sovereign and its instrumentalities to jurisdiction of US courts (Simon v Hungary, op.cit.).

This leads to the question of what exactly is „genocide" in this sense. The Court in Simon adopted the definition of genocide set forth in Article II lit. c of the Convention on the Prevention of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277, (signed by the USA on 11 December 1948, ratified on 25 November 1988), i.e. „[d]eliberately inflicting" on "a national, ethnical, racial or religious group … conditions of life calculated to bring about its physical destruction in whole or in part". Thus, the Court in Philipps, as it observed, was „asked for the first time whether seizures of art may constitute 'takings of property that are themselves genocide' ". "The answer is yes" (Philipps v. Germany, op.cit.).

The Court prepared this step in Simon v. Hungary:

> „The Holocaust proceeded in a series of steps. The Nazis achieved [the "Final Solution"] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies".

Therefore, actions taken on the level of first steps towards genocide are themselves genocide if later steps result in genocide even if these first measures as such, without later steps, would not amount to genocide. To put it differently, this definition of genocide includes expropriations that later were escalated into genocide if already these expropriations were „deliberately inflicted" „to bring about … physical destruction in whole or in part" (see again Art. II lit. c Prevention of Genocide Convention).

It will be a crucial question what the measures and means of proof for such an intent should be. In this stage of the current proceedings, namely on the level of appeal against the decision of first instance not to grant immunity, the Philipps Court explained, in its very first sentence of the judgment, that the claimants'

submissions of facts have to be laid down as the basis for review:

> „Because this appeal comes to us from the district court's ruling on a motion to dismiss, we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor."

However, the position of the US Congress on the point is clear: As the Philipps Court explains,

> "[i]n the Holocaust Expropriated Art Recovery Act (HEAR Act 2016), which extended statutes of limitation for Nazi art-looting claims, Congress 'f[ound]' that 'the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups', see Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524."

It will be another crucial question, what „expropriation" exactly means in the context of the Holocaust. It is common ground that the unlawful taking of property from persecuted persons not only took place by direct taking but also and structurally through all sorts of transactions under duress. However, the exact understanding of what constitutes such "forced sales" – and thereby "expropriation" – seems to differ substantially. Some argue that even a sale of art works at an auction in a safe third state after emigrating to that state constitutes a forced sale due to the causal link between persecution, emigration and sale for making money in the exile. Under Art. 3 of the US Military Law No. 59 of 10 November 1947 on the Restitution of Identifiable Property in Germany, there was a „presumption of confiscation" for all transfers of property by a person individually persecuted or by a person that belonged to class of persecuted persons such as in particular all Jews. This presumption could be rebutted by submission of evidence that the transferor received a fair purchase price and that the transferor could freely dispose of the price. It is not clear whether this standard or a comparable standard or another standard applies in the case at hand. Irrespective of this legal issue, the claimants submit on the level of facts that the purchase price was only 35% of the fair market value in 1935. This submission was made in the following context:

Three Jewish art dealers from Frankfurt am Main, ancestors to the claimants,

acquired the Guelph Treasure in October 1929 from the dynasty of Brunswick-Lüneburg shortly before the economic crisis of that year. The agreed price was 7.5 million Reichsmark (the German currency of the time). The estimations of the value prior to the acquisition seem to have ranged between 6 and 42 million Reichsmark. The sales contract was signed by the art dealers „J.S. Goldschmidt“, „I. Rosenbaum“ und „Z.M. Hackenbroch“. These dealers and others formed a “consortium“ with further dealers to be able to raise the money (the whereabouts of the contract for this consortium and thus the precise structure of this joint-venture is unknown up to now).

According to the sales contract, the buyers were obliged to resell the Treasure and share profits with the seller if these profits go beyond a certain limit. The contract expressly excluded the possibility for the buyers to keep the Treasure or parts of it. Rather, the buyers were to take „every effort” to achieve a resale.

In the following years, the consortium undertook many steps to sell the Treasure in Germany and in the USA. However, according to the German Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (i.e. the alternative dispute resolution body established by the German government in order to implement the non-binding Washington Principles on Nazi Confiscated Art of 3 December 1998, on which 44 states, including Germany and the USA agreed), it was common ground that the economic crisis reduced means and willingness of potential buyers significantly. In 1930/1931, the dealers managed to sell 40 pieces for around 2.7 million *Reichsmark* in total. After displaying for sale in the USA, the remaining 42 items were stored in Amsterdam. In 1934, the Dresdner Bank showed interest as a buyer, acting on behalf of the State of Prussia. The bank apparently did not disclose this fact. In April of 1935, the consortium made a binding offer for 5 million Reichsmark, the bank offered 3.7 million, the parties ultimately agreed upon 4.25 million, to be paid partly in cash (3.37 million), partly by swap with other works of art to be sold abroad in order to react to foreign currency exchange restrictions. The sales contract was signed on 14 June 1935 by the dealers and the bank, acting on behalf of the State of Prussia whose Prime Minister was Hermann Göring at the time. In July 1935, (almost) the full price was paid (100.000 Reichsmark were kept as commission). The 42 objects were transferred to Berlin. The consortium seemed to have been able to freely dispose of the money that they received at that time and pay it out to the members of the

consortium. Later, all but one of the dealers had to emigrate, the one remaining in Germany came to death later (apparently under dubious circumstances, as is submitted by the claimants).

On the merits, the courts will have to take a decision on the central point of this case whether these facts, as amended/modified in the further proceedings, amount to "expropriation" and, if so, whether this expropriation was intended to „deliberately inflict … conditions of life calculated to bring about … physical destruction in whole or in part" (see once more Article II lit. c of the Convention on the Prevention of the Crime of Genocide).

On a principal level, the Federal Republic of Germany argued that allowing this suit to go forward will "dramatically enlarge U.S. courts' jurisdiction over foreign countries' domestic affairs" by stripping sovereigns of their immunity for any litigation involving a "transaction from 1933–45 between" a Nazi-allied government and "an individual from a group that suffered Nazi persecution." In addition to that, the principal line of argument would certainly apply to other cases of genocide and preparatory takings of property. The Court was not impressed:

> "Our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs' specific—and unchallenged—allegations that the Nazis took the art in this case from these Jewish collectors as part of their effort to drive [Jewish people] out of their ability to make a living."

Even then, the enlargement of jurisdiction over foreign states by widening the exceptions to state immunity under the concept of genocide by expropriation appears to be in contrast to the recent efforts by US courts to narrow down jurisdiction in foreign-cubed human rights litigations under the ATS and in general.

However, the Federal Republic of Germany does no longer need to worry: The Court held that the second requirement of the expropriation exception is not fulfilled because the Guelph Treasure is not present in the United States in connection with a commercial activity carried on by the foreign state in the United States. In fact, it is not present in the USA at all but still in Berlin.

Yet, in respect to the Stiftung Preussischer Kulturbesitz, the suit will continue:

For a state agency it seems sufficient that the property in question is owned or operated by that agency or instrumentality of the foreign state if that agency or instrumentality is engaged in a commercial activity (not necessarily in connection with the property in question) in the United States. The ratio of this rule is difficult to understand for outsiders and appears not to be in line with the overall developments of (personal) jurisdictional law in the USA, and if at the end of the day there is a judgment against the Stiftung to return the Treasure there will of course be the issue of recognition and enforcement of that judgment in Germany – including all political implications and considerations of public policy.

The parties may want to think about arbitration at some point. That was the way out from lengthy court proceedings and delicate questions on all sorts of conflicts of laws in the famous case of Maria Altmann v. Republic of Austria that likewise turned, inter alia, on issues of state immunity for foreign states and their agencies or instrumentalities. In general, it seems that arbitration could play a larger role in art-related disputes (see e.g. the German Institution for Arbitration's Autumn Conference on 26 September 2018 in Berlin).

Party Autonomy in Private International Law

Alex Mills, University College London, has written a book on party autonomy in private international law which has just been published by Cambridge University Press. The author has kindly provided us with the following summary:

> *This book provides an unprecedented analysis and appraisal of party autonomy in private international law – the power of private parties to enter into agreements as to the forum in which their disputes will be resolved or the law which governs their legal relationships. Such agreements have become an increasingly important part of cross-border legal relations, but many aspects of party autonomy remain controversial and contested. This book includes a detailed exploration of the historical origins of party autonomy as well as its*

various theoretical justifications. It also provides an in-depth comparative study of the rules governing party autonomy in the European Union, the United States, common law systems, and in international codifications, with particular consideration of some other important jurisdictions including China and Brazil. It examines party autonomy in both choice of forum and choice of law, including arbitration agreements and choice of non-state law. It also examines the effectiveness of party choice of forum and law not only for contractual disputes, but also for a variety of non-contractual legal relations.

The book focuses its analysis around five questions of consistency in party autonomy – consistency between party autonomy in choice of forum and choice of law, consistency in the treatment of party autonomy in contractual and non-contractual relations, consistency between the choice of state and non-state forums or law, consistency between party autonomy in theory and practice, and consistency between different legal systems in relation to the effects of (and limits on) exercises of party autonomy. This analysis demonstrates that while an apparent consensus around the core principle of party autonomy has emerged, its coherence as a doctrine is open to question as there remains significant variation in practice across its various facets and between legal systems.

More information is available here.

Towards a European Commercial Court?

The prospect of Brexit has led a number of countries on the European continent to take measures designed to make their civil justice systems more attractive for international litigants: In Germany, the so-called “Justice Initiative Frankfurt”, consisting of lawyers, judges, politicians and academics, has resulted in the creation of a special chamber for commercial matters at the District Court in Frankfurt which will, if both parties agree, conduct the proceedings largely in English (see here). In France, an English-language chamber for international

commercial matters was established at the Cour d'appel in Paris, adding a second instance to the English-speaking chamber of commerce at the Tribunal de commerce in Paris (see here). In the Netherlands, the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal will soon begin their work as special chambers of the Rechtbank and the Gerechtshof Amsterdam (see here). And in Belgium, the government plans to establish a Brussels International Business Court (see here). Clearly: the prospect of Brexit has stirred up the European market for international litigation.

The interesting question, however, is whether the above-mentioned measures will yield much success? Will Germany, France, the Netherlands or Belgium manage to convince internationally active companies to settle their disputes on the European continent rather than in London? Doubts are in order. To begin with, the many national initiatives vary considerably in detail and, thus, send rather diffuse signals to the business community. Moreover, most of the measures that have been taken or are being planned so far, notably those in Germany and France do not go far enough. They focus too much on English as the court language and neglect other factors that contribute to the outstanding success of London as a place for settling international disputes. This includes, for example, a pronounced service mentality that goes hand in hand with a strict orientation towards the special litigation needs of international companies. In any case, it is doubtful whether the withdrawal of London from the European judicial area can be compensated through national initiatives.

So, what can the remaining Member States do to offer European and other companies an attractive post-Brexit forum to settle their disputes? In a soon to be published study for the European Parliament I suggest a package of measures, one of which envisions the establishment of a European Commercial Court. This Court would complement the courts of the Member States and offer commercial litigants one more forum for the settlement of international commercial disputes. It would come with a number of advantages that national courts are not able to offer.

Advantages

To begin with, a European Commercial Court would be a truly international forum. As such it could better respond to the needs of international commercial parties than national courts which are embedded in existing national judicial

structures. In particular, it could better position itself as a highly experienced and neutral forum for the settlement of international disputes: just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from different states. These judges would ensure that the Court has the necessary legal expertise and experience to settle international disputes. And they would credibly signal that the Court offers neutral dispute settlement that is unlikely to favour one of the parties. A European Commercial Court could, therefore, offer commercial parties much of what they get from international commercial arbitration – without sacrificing the advantages associated with a state court.

A European Commercial Court, however, would not only enrich the European dispute settlement landscape and offer international commercial litigants an additional, an international forum for the settlement of their disputes. It could also participate more convincingly in the global competition for international disputes that has gained momentum during the past years and triggered the establishment of international commercial courts around the world: Singapore, for example, opened the Singapore International Commercial Court in 2015 to offer a special court for cases that are "of an international and commercial nature". Qatar has been running the Qatar International Court and Dispute Resolution Centre (QICDRC) for a number of years by now. Abu Dhabi is hosting the Abu Dhabi Global Markets Courts (ADGMC) and Dubai is home to the International Financial Centre Courts (DIFC). And in 2018 China joined the bandwagon and created the China International Commercial Court (CICC) for countries along the "New Silk Road" as part of the OBOR (One Belt, One Road) initiative. The establishment of a European Commercial Court would be a good and promising response to these developments. The more difficult question, however, is whether the EU would actually be allowed to establish a new European court?

Competence

Under the principle of conferral embodied in Article 5 TEU, the EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. With regard to the establishment of a European Commercial Court the EU could rely on Article 81 TFEU. This provision allows the EU to adopt measures to improve judicial cooperation in civil matters having cross-border implications. In particular, it

allows the EU to adopt measures that improve access to justice (Article 81(2) lit. e) TFEU) and eliminate obstacles to the proper functioning of civil proceedings (Article 81(2) lit. f) TFEU). A European Commercial Court could be understood to do both: improving access to justice and eliminating obstacles to the proper functioning of civil proceedings. However, would it also fit into the overall European judicial architecture? Above all: would the CJEU accept and tolerate another European court?

Doubts are in order for at least two reasons: first, according to TEU and TFEU it is the CJEU that is entrusted with the final interpretation of EU law. And, second, the CJEU has recently – and repeatedly – emphasized that it does not want to leave the interpretation of EU law to other courts. However, both considerations should not challenge the establishment of a European Commercial Court because that Court would not be responsible for interpreting European law, but for settling international disputes between commercial parties. It would – like any national court and any arbitral tribunal – primarily apply national law. And, as far as it is concerned with European law, the Court should be entitled and required to refer the matter to the CJEU. A European Commercial Court would, therefore, recognize and, in fact, defer to the jurisdiction the CJEU.

Challenges

The establishment of a European Commercial Court would be a good response to the many challenges international commercial litigation is currently facing. In order to succeed, however, the Court would have to be accepted by the business community. To this end the Court would require staff, equipment and procedures that meet the highest standards of professional dispute resolution. In addition, the Court would have to be fully integrated into the European judicial area and benefit from all measures of judicial cooperation, in particular direct enforcement of its judgments. Ensuring all this would certainly not be easy. However, if properly established a European Commercial Court would enrich and strengthen the European dispute resolution landscape. And it would contribute to the development of a strong and globally visible European judicial sector.

What do you think?

Call for papers: ‘Contractual Issues in Private International Law’

Dear all,

We would like to inform you that an international conference on ‘Contractual Issues in Private International Law’ is going to be held in Istanbul, Turkey on 11 October 2018 by Marmara University Faculty of Law.

The main goal of the conference is to study and discuss contractual matters in international legal practice within the context of private international law discipline. In this regard, it is possible to submit papers regarding various issues such as applicable law to international commercial contracts, jurisdiction agreements, international commercial arbitration, contract-related matters in international family law, contracts of carriage in private international law and party autonomy in private international law.

We invite our colleagues wishing to present a paper in this conference to send their abstracts to our email address pilcontracts2018@yahoo.com. We kindly request that the abstracts include the name of the study as well as the name, title, workplace and contact information of the author and consist of 300 to 500 words.

Please note that the deadline for the submission of abstracts is 20 August 2018.

For further information, please see the conference website: http://etkinlik.marmara.edu.tr/en/contractsinpil

We are looking forward to hosting you in Istanbul.

CIArb Accelerated Route to Fellowship: September 14-16, 2018 in Washington, D.C.

The Accelerated Route to Fellowship Program is a designed for senior practitioners in the field of dispute resolution procedures. Fellowship is the highest grade of Institute membership and allows the use of the designation FCIArb.The program focuses on applicable laws and procedures for the conduct of efficient arbitration hearings in complex international cases. Satisfactory assessment of performance in role play exercises will permit the candidate to take the award writing examination for qualification as a Fellow of the Chartered Institute of Arbitrators, which will be administered as part of the program.

Registration and other details are available here.

Out now: Festschrift in honour of Jolanta Kren Kostkiewicz

Although it is hard to believe in light of her vitality and prolific academic output, Professor Dr. *Jolanta Kren Kostkiewicz* (University of Berne, Switzerland) will actually retire at the end of the spring term 2018. On this occasion, many colleagues and friends both from Switzerland and abroad have contributed to a voluminous Festschrift in her honour which is published under the general heading “Civil procedure and execution in the national and international sphere – intersections and comparisons” (Alexander R. Markus/Stephanie Hrubesch-Millauer/Rodrigo Rodriguez [eds.], Zivilprozess und Vollstreckung national und international – Schnittstellen und Vergleiche, Stämpfli Verlag AG, Bern 2018, 858 pp., ISBN: 978-3-7272-2289-4, CHF 158).

The Festschrift contains numerous articles (all in German) on Swiss and EU private international law, international civil litigation (in particular the Lugano Convention), arbitration, the CISG, Swiss procedural law and comparative law. For further details and a full table of contents, please click here.

Vacancy: Senior Research Assistant sought for global project on choice of law

Professor Daniel Girsberger of the University of Lucerne is seeking to employ a Senior Research Assistant to work on a global project on Choice of Law in International Commercial Contracts. The part-time position is funded by the Swiss National Research Fund (SNF), initially for a period of three years. It is envisaged that the successful candidate would work from the University of Lucerne (and/or Geneva).

The successful candidate will:

– be a lawyer
– have very good credentials
– have completed a doctoral dissertation or be an advanced doctoral candidate
– be multilingual: ideally a native (or otherwise an excellent) English speaker with excellent English writing skills, and with very good writing (and good speaking) skills in German and at least two other languages, such as French and Spanish
– have specific research and practical skills, experience and an interest in:
o private international law on a domestic as well as regional or global level
o (ideally) international arbitration
o international instruments in the area of commercial law (such as the CISG, UNIDROIT Principles, New York Convention 1958 and Hague Conference instruments)
– have very good practical skills in using legal databases (search and management

of such databases) and electronic data processing
– be very well organized and have very good communication skills to communicate with legal academics from all over the world.

Enquiries and applications (CV and covering letter) should be directed to Daniel Girsberger: Daniel.Girsberger@unilu.ch.

Applications close on 31 August 2018.

A link to the advertisement on SSRN is available here.

Mareva injunctions under Singapore law

Whether the Singapore court has the jurisdiction or power to grant a Mareva injunction in aid of foreign court proceedings was recently considered by the Singapore High Court in *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64. Both plaintiff and defendant were Indonesian and the claim related to alleged breaches of duties which the defendant owed to the plaintiff. The plaintiff had obtained leave to serve the writ in Indonesia on the defendant. The defendant thereupon applied, inter alia, to set aside service of the writ and for a declaration that the court has no jurisdiction over him. In response, the plaintiff applied for a Mareva injunction against the defendant in respect of the defendant's assets in Singapore. The plaintiff had, after the Singapore action was filed, commenced actions in Malaysia and Indonesia covering much the same allegations against the defendant.

Under Singapore law (excluding actions commenced in the Singapore International Commercial Court where different rules apply), leave to serve the writ on the defendant abroad may be granted at the court's discretion if the plaintiff is able to show: (i) a good arguable case that the claim falls within one of the heads of Order 11 of the Rules of court; (ii) a serious issue to be tried on the merits; and (iii) Singapore is *forum conveniens*. On the facts, the parties were

Indonesian and the alleged misconduct occurred in Indonesia. As the plaintiff was unable to satisfy the third requirement, the court discharged the order for service out the writ out of the jurisdiction. Other orders made in pursuant of the order for service out were also set aside.

On the Mareva injunction, the Singapore High Court adopted the majority approach in the Privy Council decision of *Mercedes Benz v Leiduck* [1996] 1 AC 284. Lord Mustill had distinguished between two questions, to be approached sequentially: first, the question of whether the court has *in personam* jurisdiction over the defendant; secondly, the question of whether the court has a power to grant a Mareva injunction to restrain the defendant from disposing of his local assets pending the conclusion of foreign court proceedings. Valid service is required to found *in personam* jurisdiction under Singapore law. In *PT Gunung Madu Plantations*, as in *Mercedes Benz* itself, as the answer to the first question was in the negative, the second question did not arise.

Justice Woo was cognisant of the difficulties caused by hewing to the traditional approach of viewing Mareva relief as strictly ancillary to local proceedings but stated 'that is a matter that has to be left to a higher court or to the legislature' (para 54). His Honour referenced developments in the UK and Australia, where freestanding asset freezing orders in aid of foreign proceedings are permitted. Further, the Singapore International Arbitration Act was amended in 2010 to give the court the power to grant an interim injunction in aid of a foreign arbitration. It is likely that legislative intervention will be required to develop Singapore law on this issue.

The judgment may be found here: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/23135-pt-gunung-madu-plantations-v-muhammad-jimmy-goh-mashun

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26 June 2018: Colloquium on CJEU

Achmea Judgment at the University of Amsterdam

On 26 June 2018 the International Council for Commercial Arbitration (ICCA) together with the Amsterdam Center for International Law (ACIL) will host a colloquium on the CJEU's recent Achmea judgment. The event will take place from 10.30 am through 5 pm at the University of Amsterdam, Faculty of Law, Room A.3.15, Nieuwe Achtergracht 166, 1018 WV Amsterdam.

Confirmed speakers:

Prof. George Bermann (Columbia Law School)
Prof. Catherine Kessedjian (University Panthéon-Assas Paris II)
Prof. Jan Kleinheisterkamp (London School of Economics)
Prof. Stefan Talmon (20 Essex Street, University of Bonn)
Dr. Angelos Dimopoulos (Queen Mary University of London)

Moderator:

Prof. Stephan Schill, University of Amsterdam, Amsterdam Center for International Law

More information (including registration details) is available here.

Nori Holdings: England & Wales High Court confirms 'continuing validity of the decision in West

Tankers' under Brussels I Recast

Earlier this month, the English High Court rendered an interesting decision on the (un-)availability of anti-suit injunctions in protection of arbitration agreements under the Brussels I Recast Regulation (No 1215/2012). In *Nori Holdings v Bank Otkritie* [2018] EWHC 1343 (Comm), Males J critically discussed (and openly disagreed with) AG Wathelet's Opinion on Case C-536/13 *Gazprom* and confirmed that such injunctions continue to not be available where they would restrain proceedings in another EU Member State.

The application for an anti-suit injunction was made by three companies that had all entered into a number of transactions with the defendant bank involving shares of companies incorporated in Cyprus. These arrangements were restructured in August 2017. In October 2017, the defendant alleged that the agreements entered into in the course of this restructuring were fraudulent and started proceedings in Russia – based, *inter alia*, on Russian bankruptcy law – to set them aside. In January 2018, the claimants reacted by commencing LCIA arbitrations against the bank – based on an arbitration clause in the original agreements, to which the restructuring agreements referred – seeking a declaration that the restructuring agreements are valid and an arbitral anti-suit injunction against the Russian proceedings. Meanwhile, each of the parties also commenced proceedings in Cyprus.

The defendant bank advanced several reasons for why the High Court should not grant the injunction, including the availability of injunctive relief from the arbitrators and the non-arbitrability of the insolvency claim. While none of these defences succeeded with regard to the proceedings in Russia, the largest individual part of the decision ([69]–[102]) is dedicated to the question whether the High Court had the power to also grant an anti-suit injunction with regard to the proceedings in Cyprus, an EU member state.

The European Court of Justice famously held in *West Tankers* (Case C-185/07) that 'even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness' (at [24]) and that

> *[30] […] in obstructing the court of another Member State in the exercise of the powers conferred on it by [the Regulation], namely to decide, on the basis of*

> *the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under [the Regulation] is based […].*

Accordingly, it would be 'incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement' (at [34]).

Shortly thereafter, the European legislator tried to clarify the relationship between the Brussels-I framework and arbitration in Recital (12) of the recast Regulation. This Recital included, among other things, a clarification that a decision on the validity of an arbitration agreement is not subject to the Regulation's rules on recognition and enforcement. Rather surprisingly, this was understood by Advocate General Wathelet, in his Opinion on Case C-536/13 *Gazprom*, as an attempt to 'correct the boundary which the Court had traced between the application of the Brussels I Regulation and arbitration' (at [132]); consequently, he argued that 'if the case which gave rise to the judgment in [*West Tankers*] had been brought under the regime of the Brussels I Regulation (recast) […] the anti-suit injunction forming the subject-matter of [this judgment] would not have been held to be incompatible with the Brussels I Regulation' (at [133]). AG Wathelet went even further when he opined that Recital (12) constituted a 'retroactive interpretative law', which explained how the exclusion of arbitration from the Regulation 'must be and always should have been interpreted' (at [91]), very much implying that *West Tankers* had been wrongly decided.

The Court of Justice, of course, did not follow the Advocate General and, instead, reaffirmed its decision in *West Tankers* in Case C-536/13 *Gazprom*. As Males J rightly points out (at [91]), the Court did not only ignore the Advocate General's Opinion, it also very clearly regarded *West Tankers* a correct statement of the law under the old Regulation. While Males J considered this observation alone to be 'sufficient to demonstrate that the opinion of the Advocate General on this issue on [sic] was fundamentally flawed' (at [91]), he went on to point out six (!) further problems with the Advocate General's argument. In particular, he argued (at [93]) that if the Advocate General were right, any proceedings in which the validity of

an arbitration were contested would be excluded from the Regulation, which, indeed, would go much further than what the Recital seems to try to achieve.

Consequently, Males J concluded that

> *[99] […] there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision [in West Tankers] which remains an authoritative statement of EU law. […] Accordingly there can be no injunction to restrain the further pursuit of the Bank's proceedings in Cyprus.*

Of course, this does not mean that claimants will receive no redress from the English courts in a case where an arbitration agreement has been breached through proceedings brought in the courts of another EU member state. As Males J explained (at [101]), the claimants may be entitled to an indemnity 'against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings.' While one might consider such an award to be 'an antisuit injunction in all but name' (Hartley (2014) 63 ICLQ 843, 863), the continued availability of this remedy in the English courts despite *West Tankers* has been confirmed in *The Alexandros T* [2014] EWCA Civ 1010. In the present case, Males J nonetheless deferred a decision on this point as the Cypriot court could still stay the proceedings and because the claimants might still be able to obtain an anti-suit injunction from the arbitral tribunal.