Talaq v Greek public policy: Operation successful, patient dead…

A talaq divorce is rarely knocking at the door of Greek courts. A court in Thessaloniki dismissed an application for the recognition of an Egyptian talaq, invoking the public policy clause, despite the fact that the application was filed by the wife. You can find more information about the case, and check my brief comment here.

What puzzles me though is whether there are more jurisdictions sharing the same view. Personally I don't feel at ease with this ruling for a number of reasons. But prior to that, a couple of clarifications:

1. This case bears no resemblance to the *Sahyouni* saga. The spouses have no double nationality: The husband is an Egyptian, the wife a Greek national.
2. There was no back and forth in their lives: they got married in Cairo, and lived there until the talaq was notarized. Following that, the spouse moved to Greece, and filed the application at the place of her new residence.
3. Unlike Egypt, Greece is not a signatory of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations.
4. There is no bilateral agreement between the two countries in the field.

I'm coming now to the reasons of my disagreement with the judgment's outcome.

1. The result is not in line with the prevalent view in a number of European jurisdictions: From the research I was able to conduct, it is my understanding that Austria, Germany, France, Italy, Spain, the Netherlands, Norway, and Switzerland, do not see any public policy violation, when the wife takes the initiative to apply for recognition of the talaq.
2. The reasoning of the court is a verbatim reiteration of an Athens Court of Appeal judgement from the '90s. It reads as follows: *Solely the recognition of such an act would cause profound disturbance to the Greek*

legal order, if its effects are to be extended and applied in Greece on the basis of the Egyptian applicable rules. What is actually missing is the reason why recognition will lead to *profound disturbance*, and to whom. Surely not to the spouse, otherwise she wouldn't file an application to recognize the talaq.

3. It should be remembered that the public policy clause is not targeting at the foreign legislation applied in the country of origin or the judgment per se; moreover, it focuses on the repercussions caused by the extension of its effects in the country of destination. Given the consent of the spouse, I do not see who is going to feel disturbed.
4. Recognition would not grant carte blanche for talaq divorces in Greece. As in other jurisdictions, Greece remains devoted to fundamental rights. What makes a difference here is the initiative of the spouse. In other words, the rule remains the same, i.e. no recognition, unless there's consent by the wife. Consent need not be present at the time the talaq was uttered or notarized; it may be demonstrated at a later stage, either expressly or tacitly. I guess nobody would seriously argue that consent is missing in the case at hand.
5. Talking about consent, one shouldn't exclude an ex ante tacit agreement of the spouses for financial reasons. It has been already reported that all remaining options for a spouse in countries where Sharia is predominant are much more complicated, time-consuming, cumbersome, and detrimental to the wife. Take *khul* for example: It is indeed a solution, but at what cost for the spouse…
6. Last but not least, what are the actual consequences of refusal for the spouse? She will remain in limbo for a while, until she manages to get a divorce decree in Greece. But it won't be an easy task to accomplish, and it will come at a heavy price: New claim, translations in Arabic, service in Egypt (which means all the 1965 Hague Service Convention conditions need to be met; Egypt is very strict on the matter: no alternative methods allowed!); and a very careful preparation of the pleadings, so as to avoid a possible stay of proceedings, if the court requires additional information on Egyptian law (a legal information will most probably double the cost of litigation…).

For all the reasons aforementioned, I consider that the judgment is going to the wrong direction, and a shift in Greek case law is imperative, especially in light of

the thousands of refugees from Arab countries who are now living in the country.

As I mentioned in the beginning, any information on the treatment of similar cases in your jurisdictions is most welcome.

From the editors' desk: Relaunch of conflictoflaws.net!

Dear readers,

Conflictoflaws.net has been around for 12 years by now. It has developed into one of the most relevant platforms for the exchange of information and the discussion of topics relating to conflict of laws in a broad sense. And while the world has changed a lot during the past 12 years the look of conflictoflaws.net has basically remained the same. Today this is going to change:

We are happy to announce that www.conflictoflaws.net has received a (slightly) new design!

As you will see, we have tried to keep the overall simple appearance of the blog while giving it a slightly more modern touch. As regards the structure, however, there is one major change. As of today, posts will come in two different categories: "views" and "news". Under "views" posts with independent content (case notes, comments, etc.) will be displayed". Posts under "news" will convey all sorts of information (relating to, for example, conference announcements, book releases, job vacancies, call for papers, etc.).

We hope that you will like the new design and find the new structure useful. Should you have any comments or experience problems please get in touch. Needless to say that the same holds true, if you wish to share "views" and "news"!

Best wishes and happy reading!

The editors

Islamic Marriage and English Divorce – a new Decision from the English High Court

In England, almost all married Muslim women have had a nikah, a religious celebration. By contrast, more than half of them have not also gone through a separate civil ceremony, as required under UK law. The often unwelcome consequence is that, under UK law, they are not validly married and therefore insufficiently protected under UK law: they cannot claim maintenance, and they cannot get a divorce as long as the marriage is viewed, in the eyes of the law, as a nullity.

The government has tried for some time to remedy this, under suspicious gazes from conservative Muslims on the one hand, secularists on the other. A 2014 report (the 'Aurat report'), which demonstrated, by example of 50 cases, the hardships that could follow from the fact that nikahs are not recognized, found attention in the government party. An independent review into the application of sharia law in England and law, instigated by Theresa May (then the Home Secretary) in 2016 and published earlier this year, recommended to ensure that all Islamic marriages would also be registered; it also recommended campaigns for increased awareness.

Such steps do not help where the wedding already took place and has not been registered. A new decision by the High Court brings partial relief. Nasreen Akhter (who is a solicitor and thus certainly not an uneducated woman ignorant of the law) asked to be divorced from her husband of twenty years, Mohammed Shabaz Khan. Khan's defense was that the marriage, which had been celebrated as a nikah in west London, existed only under Islamic, not under UK law, and

therefore divorce under UK law was not possible. Indeed, up until now, the nikah had been considered a non-marriage which the law could ignore, because it did not even purport to comply with the requirements of English law. The High Court was unwilling to presume the lived marriage as valid. However, drawing at length on Human Rights Law, it declared the marriage void under sec 11 of the Matrimonial Causes Act 1973 and granted the wife a decree of nullity. This has important consequences: Unlike a non-marriage, a void marriage allows a petitioner to obtain financial remedies.

The decision represents a huge step towards the protection of women whose Islamic marriages are not registered. It makes it harder for men to escape their obligations under civil law. At the same time, the decision is not unproblematic: it refuses recognition of an Islamic marriage as such, while at the same time, under certain conditions, treating it like a recognized marriage. In all likelihood, only registration will create the needed certainty.

The decision is here.

Much-awaited US Supreme Court decision has been rendered: Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.

The decision is available here and further documentation is available here. I would also like to refer to previous posts by fellow editors here and here. The US Supreme Court held that: "A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements."

In a nutshell, the US Supreme Court said that the weight to be given to foreign government statements depends on the circumstances of the case. In particular, it notes that "[t]he appropriate weight [a federal court determining foreign law should give to the views presented by a foreign government] in each case, however, will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. No single formula or rule will fit all cases, but relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."

One thing of note is that the US Supreme Court refers to *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, which is a very important case in the context of the Hague Evidence Convention.

The concept of ‘right of access’ under Brussels II bis encompasses grandparents

In the judgment C-335/17 of 31 May 2018, the CJEU confirms that the autonomous concept of ‘right of access’ under Brussels II bis Regulation encompasses the rights of access of grandparents to their grandchildren.

Facts

Ms Valcheva is the grandmother of a child born from the marriage between Ms Valcheva’s daughter and the father of the child. That marriage was dissolved. Ms Valcheva lives in Bulgaria. The child lives in Greece with his father, holding full custody of the child. Ms Valcheva found that she could not maintain quality contact with her grandson. She seised a court in Bulgaria with a request to establish arrangements so that she could see her grandson more frequently.

The Bulgarian court of first instance held that Bulgarian courts had no jurisdiction. According to the court, the scope of Brussels II bis covers a wide family circle including the child’s grandparents and, therefore, applied to Ms Valcheva’s claim. Based on Article 8 Brussels II bis it is, in principle, the court of the Member State where the child’s habitual residence at the time the court is seised that has jurisdiction in matters of parental responsibility (in this case, Greek courts). The decision was upheld on appeal. Ms Valcheva has subsequently seised the Supreme Court of Cassation, Bulgaria, which referred the following question to the CJEU.

Question referred for preliminary ruling

Is the concept of “rights of access” used in Article 1(2)(a) and Article 2.10 of Regulation No 2201/2003 to be interpreted as encompassing not only access between the parents and the child but also the child’s access to relatives other than the parents, that is to say the grandparents?

Consideration by the CJEU

The CJEU answers the question in the positive. The Court notes that the concept

‘right of access’ must ‘be interpreted autonomously taking account of the wording, scheme and objectives of Regulation No 2201/2003, in the light, in particular, of the *travaux préparatoires* for that regulation, as well as of other acts of EU and international law’ (at [19]). The CJEU elaborates on these references in three main considerations.

First, the wording of the Regulation imposes no limitation in regard to the person who may benefit from the right of access (at [21]).

Second, the Regulation aims to create ‘a judicial area based on the principle of mutual recognition of judicial decisions through the establishment of rules governing jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility’ (at [28]). Not only does the objective cover all decisions on parental responsibility, according to recital 5 (at [29]), but the ‘decisions on visiting rights are also identified as a priority’, according to recital 2. The CJEU bases the interpretation of the recitals on the Commission working document on mutual recognition of decisions on parental responsibility COM(2001) 166 final of 27 March 2001. There, the EU legislature made an explicit choice not to impose restrictions on the persons who may exercise parental responsibility (at [31]).

Third, the CJEU notes the risk of irreconcilable decisions (or conflicting measures relating to parental responsibility) from various Member States, pointed out by the Advocate General. If the right of access of grandparents falls outside the scope of Brussel II bis, the questions relating to those rights could be determined not only by the court designated in accordance with Brussel II bis, but also by other courts which might consider themselves competent on the basis of their own national rules of private international law (at [35]). ‘As observed by the Advocate General in point 56 of his Opinion, the granting of rights of access to a person other than the parents could interfere with the rights and duties of those parents, namely, in the present case, the father’s rights of custody and the mother’s rights of access. Consequently, it is important, in order to avoid the adoption of conflicting measures and in the best interests of the child, that the same court — that is to say, as a rule, the court of the child’s habitual residence — should rule on rights of access’ (at [57]).

The “Coman” Case (C-673/16): Some reflections from the point of view of private international law

Written by Dr. iur. Baiba Rudevska (Latvia)

On 5 June 2018, the ECJ rendered a judgment in the *Coman* case (C-673/16). For the first time the ECJ had the opportunity to rule, on the concept of ‘*spouse*’ within the meaning of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38) in the context of a same-sex marriage. Even if the Directive only covers questions related to the entry and residence in the European Union (EU), this judgment could be of interest for Private International lawyers as well.

Main Facts:

Mr Coman (a Romanian and American citizen), and Mr Hamilton (an American citizen) met in the United States and lived there together. Mr Coman later took up residence in Belgium while Mr Hamilton continued to live in the US. In 2010 they got married in Belgium. In 2012 they contacted the competent Romanian authority to request information on the conditions under which Mr Hamilton, a non-EU citizen, could obtain the right to reside in Romania for more than three months. The Romanian authority replied that Mr Hamilton had only a right of residence for three months because, according to the Romanian Civil Code, marriage between two persons of same sex was not recognised. The case went up to the Constitutional Court, which decided to make the request for a preliminary ruling. One of the questions referred to the ECJ was as follows:

Does the term “spouse” in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European

Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

Only this question is of interest for private international law (hereinafter referred to as "PIL"). Let us take a look at the decision and at the reasoning of the ECJ.

Decision of the ECJ:

The ECJ decided that:

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38 in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

As we can see from the operative part, the ECJ does *not* impose the recognition of same-sex marriages in all the Member States.

Main Reasoning of the ECJ:

The first important thing to be noted is that the ECJ only uses the term "recognition of marriage" (paras. 36, 40, 42, 45, 46 of the judgment) whereas the Advocate General only referred to the term "autonomous interpretation" (paras.

33-58 of the opinion). And *vice versa*– the ECJ does not directly mention the term "autonomous interpretation" and the Advocate General does not analyse the "recognition of marriage". This raises an interesting question: what exactly was the method used by the ECJ in this case? Autonomous interpretation and recognition are two different methods; the former is widely used both in EU law (in general) and in international human rights law, whereas the latter is typical of PIL. Only in the second case (if we recognise that the ECJ has applied the recognition method) will this judgment be important and have a considerable impact in the field of PIL.

Here is my opinion on how this judgment should be construed:

1. The ECJ starts its reasoning by *de facto* using the method of autonomous interpretation:

(a) The term 'spouse' refers to a person joined to another person by the bonds of marriage (para. 34 of the judgment).

(b) The term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned (para. 35 of the judgment).

(c) Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any reference with regard to the concept of 'spouse' within the meaning of the Directive. It follows that a Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment).

However, after that, the ECJ switches to the term 'recognition of marriage' (paras. 35 et seq.). Does the ECJ switch to recognition or is it still using autonomous interpretation with different words?

2. It seems that the ECJ continues to applyautonomous interpretation of the term 'spouse', as the Advocate General did in his observations. In fact, the use of the words 'recognition of marriage' must be understood within the context of Romanian domestic law (Civil Code) according to which marriages between

persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners are not recognised in Romania (paras. 8, 36 of the judgment). From the point of view of PIL, it is important to point out that this Romanian legal provision already contains the Romanian public policy clause; in other words, the public policy exception is already integrated in this legal norm.

Why Autonomous Interpretation?

Both the Advocate General and the ECJ stressed that Article 2(2)(b) of the Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, but Article 2(2)(a) of that Directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of 'spouse' within the meaning of the Directive. Consequently, the Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment; paras. 33, 34 of the opinion).

The Advocate General points out that the terms of a provision of EU law without express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU (para. 34 of the opinion). The method of autonomous interpretation (qualification *lege communae*) is the only alternative to a reference to domestic law (qualification *lege fori*or *lege causae*). There are no other alternatives, even if in practice the ECJ does not clearly emphasise the application of this method [Audit M. L'interpretation autonome du droit international privé communautaire // *Journal du droit international*, 2004, n° 3, p. 799].

The use of the Advocate General's opinion in the reasoning of the ECJ leads to the conclusion that the ECJ has applied the method of autonomous interpretation (rather than recognition) of a precise term to construe, namely 'spouse' (Article 2(2)(a) of the Directive).

Why Not Recognition?

The method of recognition is one of the methods used within the framework of

PIL. However, as Professor Lagarde has shown, this method can be applied in primary EU law and not in secondary law (like directives or regulations) [Lagarde P. La reconnaisance. Methode d'emploi. In: Vers de nouveaux équilibres entre ordres juridiques. *Mélanges en l'honneur de H.Gaudemet-Tallon*. Paris: Dalloz, 2008, p. 483].

Therefore, in cases like *Grunkin Paul*(C-353/06) and *Bogendorff von Wolffersdorff*(C-438/14) we see the application of this method to names, according to provisions of TFEU (see operative parts of both judgments). The application of recognition also implies some changes in the civil registers of the Member States. On the other hand, what had been requested in the *Coman*case was the interpretation of Article 2(2)(a) of the Directive and not a ruling on the recognition of same-sex marriages within the EU. The sole context of the word 'recognition' can be found in the relevant provision of Romanian law, excluding the recognition of foreign same-sex marriages. One can only guess, but it seems that the confusion of two methods – "autonomous interpretation" and "recognition" – has been ultimately inspired by the wording of the Romanian legal provision.

Conclusions:

The interpretation and application of the judgment in the *Coman* case is narrower than it seems at the first glance. In reality, the ECJ has applied the method of autonomous interpretation of the term 'spouse' used in Article 2(2)(a) of the Directive 2004/38. According to the ECJ, this term is gender-neutral and must be understood as encompassing same-sex spouses – but only in the context of the Directive.

Therefore, this judgment does not impose the recognition of foreign same-sex marriages within the EU. It only means that Romania must grant entry and residence permits to same-sex spouses too. In such situations Romania must apply the autonomous interpretation of the term 'spouse' instead of a domestic legal norm prohibiting the recognition of foreign same-sex marriages in Romania. In other words, Article 21(1) TFEU must be seen as precluding a Member State from applying its domestic law on this particular point, and the domestic public policy exception cannot be applied either. However, this interpretation relates only to the Directive. The qualification *lege communae* of the term 'spouse' shall prevail over its qualification *lege fori*. No more and no less.

An additional remark: see the new Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [OJ L 200, 26.7.2016, pp. 1-136]. Article 2(4) of this Regulation states that it does not apply to the recognition, in a Member State, of legal effects relating to the content of public documents (including public documents establishing the fact of marriage, capacity to marry, and marital status; Article 2(1)(e)), issued by the authorities of another Member State.

Petronas Lubricants: ECJ confirms that Art 20(2) Brussels I can be used by employer for assigned counter-claim

Last Thursday, the ECJ rendered a short (and rather unsurprising) decision on the interpretation of Art 20(2) Brussels I (= 22(2) of the Recast Regulation). In *Petronas Lubricants* (Case C 1/17), the Court held that an employer can rely on the provision to bring a counter-claim in the courts chosen by the employee even where said claim has been assigned to the employer after the employee had initiated proceedings.

The question had been referred to the ECJ in the context of a dispute between an employee, Mr Guida, and his two former employers, Petronas Lubricants Italy and Petronas Lubricants Poland. Mr Guida's parallel employment contracts with these two companies had been terminated among allegations of wrongly claimed reimbursements. Mr Guida, who is domiciled in Poland, had sued his Italian employer in Italy for wrongful dismissal and his employer had brought a counter-claim for repayment of the sums Mr Guida had allegedly wrongfully received, which had been assigned by the Polish employer.

Art 20(2) Brussels I contains an exception to the rule in Art 20(1), according to which an employee can only be sued in the courts of their country of domicile, to allow the employer to bring a counter-claim in the courts chosen by the employee. Similar exceptions can be found in Art 12(2) Brussels I (= Art 14(2) of the Recast; for insurance contracts) and Art 16(3) Brussels I (= Art 18(3) of the Recast; for consumer contracts), all of which incorporate the ground for special jurisdiction provided in Art 6 No 3 Brussels I (= Art 8(3) of the Recast). In the present case, the ECJ had to decide whether this exception would also be available for counter-claims that had been assigned to the employer after the employee had initiated proceedings.

The Court answered this question in the affirmative, pointing out that

> *[28] … provided that the choice by the employee of the court having jurisdiction to examine his application is respected, the objective of favouring that employee is achieved and there is no reason to limit the possibility of examining that claim together with a counter-claim within the meaning of Article 20(2) [Brussels I].*

At the same time, the Court emphasised that a counter-claim can only be brought in the court chosen by the employee if it fulfils the more specific requirements of Art 6 No 3 Brussels I, according to which the counter-claim must have arisen 'from the same contract or facts on which the original claim was based'. This has recently been interpreted by the ECJ (in Case C-185/15 *Kostanjevec*) as requiring that both claims have 'a common origin' (see [29]–[30] of the decision). Where this is the case – as it was here (see [31]–[32]) –, it does not matter that the relevant claims have only been assigned to the employer after the employee had initiated proceedings (see [33]).

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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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.

Double Counting the Place of the Tort?

In common law Canada there is a clear separation between the question of a court having jurisdiction (jurisdiction *simpliciter*) and the question of a court choosing whether to exercise or stay its jurisdiction. One issue discussed in the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) is the extent of that separation. Does this separation mean that a particular fact cannot be used in both the analysis of jurisdiction and of *forum non conveniens*? On its face that seems wrong. A fact could play a role in two separate analyses, being relevant to each in different ways.

Justice Cote, with whom Justices Brown and Rowe agreed, held that "applicable law, as determined by the *lex loci delicti* principle, should be accorded little weight in the *forum non conveniens* analysis in cases where jurisdiction is established on the basis of the *situs* of the tort" (para 90). She indicated that this conclusion was mandated by the separation of jurisdiction and staying proceedings, which extends to each being "based on different factors". So if the place of the tort has been used as the basis for assuming jurisdiction, the same factor (the place of the tort) should not play a role in analyzing the most appropriate forum when considering a stay. And since the applicable law is one of the factors considered in that analysis, if the applicable law is to be identified based on the connecting factor of the place of the tort, which is the rule in

common law Canada, then the applicable law as a factor "should be accorded little weight".

In separate concurring reasons, Justice Karakatsanis agreed that the applicable law "holds little weight here, where jurisdiction and applicable law are both established on the basis of where the tort was committed" (para 100). In contrast, the three dissenting judges rejected this reason for reducing the weight of the applicable law (para 208). The two other judges did not address this issue, so the tally was 4-3 for Justice Cote's view.

As Vaughan Black has pointed out in discussions about the decision, the majority approach, taken to its logical conclusion, would mean that if jurisdiction is based on the defendant's residence in the forum then the defendant's residence is not a relevant factor in assessing which forum is more appropriate. That contradicts a great many decisions on *forum non conveniens*. Indeed, the court did not offer any supporting authorities in which the "double counting" of a fact was said to be inappropriate.

The majority approach has taken analytical separation too far. There is no good reason for excluding or under-weighing a fact relevant to the *forum non conveniens* analysis simply because that same fact was relevant at the jurisdiction stage. Admittedly the court in *Club Resorts* narrowed the range of facts that are relevant to jurisdiction in part to reduce overlap between the two questions. But that narrowing was of jurisdiction. *Forum non conveniens* remains a broad doctrine that should be based on a wide, open-end range of factors. The applicable law, however identified, has to be one of them.