International commercial courts: should the EU be next? – EP study building competence in commercial law

By Erlis Themeli, Xandra Kramer, and *Georgia Antonopoulou, Erasmus University Rotterdam (postdoc researcher, PI, and PhD candidate ERC project Building EU Civil Justice)*

Previous posts on this blog have described the emerging international commercial and business courts in various Member States. While the primary aim is and should be improving the dispute resolution system for businesses, the establishment of these courts also points to the increase of competitive activities by certain Member States that try to attract international commercial litigation. Triggered by the need to facilitate business, prospects of financial gain, and more recently also by the supposed vacuum that Brexit will create, France, Germany, the Netherlands, and Belgium in particular have been busy establishing outlets for international commercial litigants. One of the previous posts by the present authors dedicated to these developments asked who will be next to enter the competition game started by these countries. In another post, Giesela Rühl suggested that the EU could be the next.

A recently published study of the European Parliament's Committee on Legal Affairs (JURI Committee) on Building Competence in Commercial Law in the Member States, authored by Giesela Rühl, focuses on the setting up of commercial courts in the Member States and at the EU level with the purpose of enhancing the enforcement of commercial contracts and keeping up with the judicial competition in and outside Europe. This interesting study draws the complex environment in which cross-border commercial contracts operate in Europe. From existing surveys it is clear that the laws and the courts of England and Switzerland are selected more often than those of other (Member) States. While the popularity of these jurisdictions is not problematic as such, there may be a mismatch between the parties' preferences and their best available option. In other words, while parties have clear ideas on what court they should choose, in

reality they are not able to make this choice due to practical difficulties, including a lack of information or the costs involved. The study recommends reforming the Rome I and Rome II Regulations to improve parties' freedom to choose the applicable law. In addition, a European expedited procedure for cross-border commercial cases can be introduced, which would simplify and unify the settlement of international commercial disputes. The next step, would be to introduce specialised courts or chambers for cross-border commercial cases in each Member State. In addition to these, the study recommends the setting up of a European Commercial Court equipped with experienced judges from different Member States, offering neutrality and expertise in cross-border commercial cases.

This study takes on a difficult and complicated issue with important legal, economic, and political implications. From a pure legal perspective, expanding – the already very broad – party autonomy to choose the law and forum (*e.g.* including choosing a non-state law and the possibility to choose foreign law in purely domestic disputes) seems viable but will likely not contribute significantly to business needs. The economic and political implications are challenging, as the example of the Netherlands and Germany show. In the Netherlands, the proposal for the Netherlands Commercial Court (NCC) is still pending in the Senate, despite our optimistic expectations (see our previous post) after the adoption by the House of Representatives in March of this year. The most important issue is the relatively high court fee and the fear for a two-tiered justice system. The expected impact of Brexit and the gains this may bring for the other EU Member States should perhaps also be tempered, considering the findings in empirical research mentioned in the present study, on why the English court is often chosen. A recently published book, *Civil Justice System Competition in the EU*, authored by Erlis Themeli, concludes on the basis of a theoretical analysis and a survey conducted for that research that indeed lawyers base their choice of court not always on the quality of the court as such, but also on habits and trade usage. England's dominant position derives not so much from its presence in the EU, but from other sources.

The idea of a European Commercial Court that has been put forward in recent years and is promoted by the present study, is interesting and could contribute to bundling expertise on commercial law and commercial dispute resolution. However, it is questionable whether there is a political interest from the Member

States considering other pressing issues in the EU, the investments made by some Member States in setting up their own international commercial courts, and the interest in maintaining local expertise and keeping interesting cases within the local court system. Considering the dominance of arbitration, the existing well-functioning courts in business centres in Europe and elsewhere and the establishment of the new international commercial courts, one may also wonder whether a further multiplicity of courts and the concentration of disputes at the EU level is what businesses want.

That this topic has a lot of attention from practitioners, businesses, and academics was evident at a very well attended seminar (Rotterdam, 10 July 2018) dedicated to the emerging international commercial courts in Europe, organized by Erasmus University Rotterdam, the MPI Luxembourg, and Utrecht University. For those interested, in 2019, the papers presented at this seminar and additional selected papers will be published in an issue of the *Erasmus Law Review*, while also a book that takes a European and global approach to the emerging international business courts in being prepared (more info here). At the European Law Institute's Annual Conference (Riga, 5-7 September 2018) an interesting meeting with vivid discussions of the Special Interest Group on Dispute Resolution, led by Thomas Pfeiffer, was dedicated to this topic. An upcoming conference "Exploring Pathways to Civil Justice in Europe" (Rotterdam, 19-20 November 2018) offers yet another opportunity to discuss court specialisation and international business courts, along with other topics of dispute resolution.

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).

Asser's Enduring Vision: The HCCH Celebrates its 125th Anniversary

By the Permanent Bureau of the Hague Conference on Private International Law

On 12 September 1893, Tobias Asser, Dutch Jurist, Scholar and Statesman, realised a vision: he opened the first Session of the Hague Conference on Private International Law (HCCH). Today, exactly 125 years later, the HCCH celebrates Asser's vision and the occasion of this First Session with a solemn ceremony in the presence of his Majesty The King Willem-Alexander of the Netherlands.

Believing passionately that strong legal frameworks governing private cross-border interactions among people and businesses not only make a life across borders easier, but are also apt to promote peace and justice globally, Asser conceived the HCCH as multilateral platform for dialogue, discussion, negotiation and collaboration. Asser organised this first Session to canvass issues relating to general civil procedure and jurisdiction. More specifically, delegates, who hailed from 13 States, dealt with subject matters comprising marriage, the form of documents, inheritance/wills/gifts and civil procedure. The First Session was a

great success producing the Hague Convention on Civil Procedure. This instrument was adopted during the Second Session in 1894 and signed on 14 November 1896. Its entry into force on 23 May 1899 coincided with the first Hague Peace Conference – another of Asser's great visions. The global community honoured the enormous value of Asser's vision in 1911, bestowing upon him the Nobel Peace Prize for instigating the First Session of the Hague Conference on Private International Law to "prepare the ground for conventions which would establish uniformity in international private law and thus lead to greater public security and justice in international relations." (J G Løvland, Chairman of the Nobel Committee, Presentation Speech, Oslo, 10 December 1911).

Since this First Session, the HCCH has gone forth to develop an array of private international law instruments in the areas of international child protection and family law, international civil procedure and legal cooperation as well as international commercial and finance law. It is the pre-eminent international organisation for the development of innovative, global solutions in private international law. The HCCH remains steeped in Asser's vision. It continues to connect, protect, and cooperate. Since 1893.

The race is on: German reference to the CJEU on the interpretation of Art. 14 Rome I Regulation with regard to third-party effects of assignments

By Prof. Dr. Peter Mankowski, University of Hamburg

Sometimes the unexpected simply happens. Rome I aficionados will remember that the entire Rome I project was on the brink of failure since Member States could not agree on the only seemingly technical and arcane issue of the law

applicable to the third-party effects of assignments of claims. An agreement to disagree saved the project in the last minute, back then. Of course, this did not make the issue vanish – and this issues concerns billion euro-markets in the financial industry. In the spring of this year the Commission finally ventured to table a Proposal COM (2018) 96 final for a separate Regulation. This was the result of extensive preparation – and does yet deviate in important respects from the majority results reached in a very prominently staffed expert commission. The Commission proposes a compromise and combined model. Regardless of the degree to which one agrees or disagrees with this proposal (for discussion see *Peter Mankowski,* Recht der Internationalen Wirtschaft [RIW] 2018, 488; *Andrew Dickinson,* IPRax 2018, 337; *Michael F. Müller,* Zeitschrift für Europäisches Wirtschaftsrecht [EuZW] 2018, 522; *Leplat,* Petites Affiches n° 155, 3 août 2018, 3), one thing should be clear: The proposed model does definitely not form part of the still *lex lata*.

And now enter the surprise guest. Astonishingly, for ten years after the implementation of Rome I not a single reference to the CJEU had been made on the relevance which Art. 14 Rome I might have in the said regard. But once the Proposal is out, the Oberlandesgericht Saarbrücken (decision of 8 August 2018, case 4 U 109/17) simply did it. The decision is excellently structured and well researched. The questions submitted to the CJEU are pin-point accurate. They follow a strict line. In the author's translation they read:

1. Is Art. 14 Rome I Regulation applicable to the third-party effects of multiple assignments of the same claim by the same assignor?
2. If the first question is to be answered in the affirmative: Which law is applicable to such third-party effects?
3. If the first question is to be answered in the negative: Is Art. 14 Rome I Regulation to be applied *per analogiam*?
4. If the third question is to be answered in the affirmative: Which law is applicable to such third-party effects?

Multiple assignments of the same claim by the same assignor are particularly a field where applying the law of the assignor's habitual residence scores and applying the *lex causae* of the claim assigned fares not too badly whereas applying the law governing the relation between assignor and assignee fails.

But the more interesting question of course is whether the recent reference will

interfere with the progress which the Commission Proposal might make. Will Council and Parliament wait for the CJEU to point into any direction for the *lex lata*? And if the CJEU will utter an opinion as to substance, which influence will it exert on the substance of a possible *lex ferenda*?

If one dares to employ the crystal maze and to conduct some Kirchberg astrology the most likely outcome of the reference procedure might be that the CJEU will answer the first and third questions submitted in the negative thus rendering any answer to the second and fourth questions obsolete. In the light of the drafting history how Art. 14 Rome I Regulation was rescued in the last minute (see the dramatic account by the Dutch delegate, *Pauline van der Grinten,* in: *Westrik/van der Weide* (eds.), Party Autonomy in International Property Law [2011] p. 145, 154-161) this would be a sound way out for the CJEU leaving all liberty and leeway possible for Commission, Council and Parliament.

German Supreme Court refuses to enforce Polish judgment for violation of the German ordre public

It doesn't happen too often that a Member State refuses enforcement of a judgment rendered in another Member State for violation of the ordre public. But in a decision published yesterday exactly this happened: The German Supreme Court (Bundesgerichtshof – BGH) refused to recognize and enforce a Polish judgment under the Brussels I Regulation (before the recast) arguing that enforcement would violate the German public policy, notable freedom of speech and freedom of the press as embodied in the German Constitution. With this decision, the highest German court adds to the already difficult debate about atrocities committed by Germans in Poland during WW II.

The facts of the case were as follows:

In 2013, the ZDF (Zweites Deutsches Fernsehen), one of Germany's main public-service television broadcaster, announced the broadcasting of a documentary about the liberation of the concentration camps Ohrdruf, Buchenwald and Dachau. In the announcement, the camps Majdanek and Auschwitz were described as "Polish extermination camps". Following a complaint by the Embassy of the Republic of Poland in Berlin, the ZDF changed the text of the announcement to "German extermination camps on Polish territory". At the same time, the applicant, a Polish citizen and former prisoner of the Auschwitz-Birkenau and Flossenbürg concentration camps, complained to the ZDF claiming that his personal rights had been violated and demanded, among other things, the publication of an apology.

In 2013, the ZDF apologized to the applicant in two letters and expressed its regret. In spring 2016 it also published a correction message expressing its regret for the "careless, false and erroneous wording" and apologising to all people whose feelings had been hurt as a result. At the end of 2016, on the basis of an action he had brought in Poland in 2014, the applicant obtained a second instance judgment of the Cracow Court of Appeal requiring the ZDF to publish an apology on the home page of its website (not just anywhere on the website) for a period of one month expressing its regrets that the announcement from 2013 contained "incorrect wording distorting the history of the Polish people". The ZDF published the text of the judgment on its home page from December 2016 to January 2017, however, only via a link. The applicant considered this publication to be inadequate and, therefore, sought to have the Polish judgment enforced in Germany.

The Regional Court Mainz as well as the Court of Appeal Koblenz declared the judgment enforceable under the Brussels I Regulation (Reg. 44/2001). The German Federal Supreme Court, however, disagreed. Referring to Article 45 Brussels I Regulation, the Court held that enforcement of the judgment would result in a violation of the German ordre public because the exercise of state power to publish the text of the judgment prepared by the Cracow Court of Appeal would clearly violate the defendant's right to freedom of speech and freedom of press as embodied in Article 5(1) of the German Constitution (Grundgesetz – GG) as well as the constitutional principle of proportionality.

The Court clarified that the dispute at hand did not concern the defendant's original announcement – which was incorrect and, therefore, did not enjoy the

protection of Article 5(1) GG – but only the requested publication of pre-formulated text. This text – which the ZDF, according to the Cracow court, had to make as its own statement – represented an expression of opinion. It required the ZDF to regret the use of "incorrect wording distorting the history of the Polish people" and to apologize to the applicant for the violation of his personal rights, in particular his national identity (sense of belonging to the Polish people) and his national dignity. To require the ZDF to published a text drafted by someone else as its own opinion would, therefore, violate the ZDF's fundamental rights under Article 5(1) GG. In addition, it would violate the constitutional principle of proportionality. The defendant had corrected the disputed wording "Polish concentration camps", which had been available for four days, on the day of the objection by the Embassy of the Republic of Poland. Even before the decision of the Court of Appeal, the ZDF had personally asked the applicant for an apology in two letters and also published an explanatory correction message with a request for apology addressed to all those concerned.

The official press release is available here. The full German decision can be downloaded here.

IM Skaugen SE v MAN Diesel & Turbo SE [2018] SGHC 123

In *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123, the Singapore High Court had the occasion to discuss and resolve various meaty private international law issues. The facts concerned the alleged negligent or fraudulent misrepresentation by the defendants on the fuel consumption of a specific model of engine that was sold and installed into ships owned by the plaintiffs. The issue before the court was whether the Singapore courts had jurisdiction over the misrepresentation claim. The defendants were German and Norwegian incorporated companies so the plaintiffs applied for leave to serve the writ out of Singapore. This entailed fulfilling a 3 stage process, following English common law rules: (1) a good arguable case that the case falls within one of the heads set

out in the Rules of Court, Order 11, (2) a serious issue to be tried on the merits, and (3) Singapore is *forum conveniens* on applying the test set out in *The Spiliada* [1987] AC 460. Stages (1) and (3) were at issue in the case.

The judgment, by Coomaraswamy J, merits close reading. The main private international law issues can be summarised as follows:

(a) Choice of law is relevant when assessing the heads of Order 11 of the Rules of Court.

The plaintiffs had relied on Order 11 rule 1(f) and rule 1(p). Rule 1(f) deals with tortious claims and the court proceeded by ascertaining where the tort was committed. According to the court, this question was to be answered by the *lex fori*. If the tort was committed abroad, the court held that choice of law for tort then came into play: the court must then determine if the tort satisfied Singapore's tort choice of law rule, ie the double actionability rule. It should be noted that the Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 had held that the double actionability rule will apply even in relation to local torts (as the flexible exception may displace Singapore law to point to the law of a third jurisdiction). The double actionability rule thus remains relevant when assessing Order rule 1(f) whether the tort is committed abroad or in Singapore.

(b) 'damage' for the purposes of Order 11 rule 1(f)(*ii*) is not limited to direct damage.

Order 11 rule 1(f)(*ii*) is in these terms: 'the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring.' The court held that 'damage' for the purposes of rule 1(f)(*ii*) included the increased fuel expenditure and reduction in capital value of the ships due to the fuel inefficient engines suffered not just by the original owners of the ships at the time of the misrepresentation, but also the subsequent purchasers of the ships. On the facts, the court held that the damage suffered by the subsequent purchasers arose directly from the misrepresentation as the misrepresentation was also intended to be relied upon by them. Further, the court held that, even if that had not been the case, direct damage is not required under rule 1(f)(*ii*). The difference in wording between Order 11 rule 1(f) and the UK CPR equivalent (CPR PD6B para 3.1(9))

makes the decision on this point less controversial than the reasoning in *Four Seasons v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192.

(c) The test used to ascertain whether 'the claim is founded on a cause of action arising in Singapore' for the purposes of Order 11 rule 1(p) differs from the substance test which applies to determine the *loci delicti* in a multi-jurisdictional tort situation for the purposes of the double actionability rule.

The former test derives from *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458. The court observed that the *Distiller's* test is more plaintiff-centric compared to the substance test used for the purposes of the double actionability rule because Order 11 rule 1(p) 'requires the court to view the facts of the case through the cause of action which the plaintiff has sought to invoke.' Whereas, the latter test is 'the more general and more factual question "where in substance did *the tort take place*."' (para [166], emphasis in original). This point will likely be revisited by the Court of Appeal, not least because it had, as the court itself acknowledged, cited the *Distillers* test as authority for the substance test in *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391.

(d) Whether Singapore is *forum conveniens* for the purposes of a setting aside application and whether Singapore is *forum non conveniens* for the purposes of a stay application should be assessed with reference to current facts.

Norway and Germany were potential alternative fora for the action. After leave had been given to serve out of jurisdiction in the *ex parte* hearing, the plaintiffs commenced proceedings in Norway as a protective measure. No proceedings were commenced in Germany. This meant that, under the Lugano Convention, the Norwegian courts had priority over the German courts. The court treated this as indicating that the courts of Germany ceased to be an available forum to the parties. This was significant, given that the court had earlier held that the *loci delicti* was Germany. The defendants argued that the commencement of Norwegian proceedings was to be ignored and the application to set aside service out of jurisdiction was to be assessed solely with reference to the facts which existed at the time when leave to serve out of jurisdiction was granted. The effect of the defendants' argument would be that the setting aside application would be determined on the basis that Germany was an available forum, while their alternative prayer for a stay would be determined on the basis that Germany was an unavailable forum. The potential for wastage in time and costs is clear on this

argument and the court rightly took a common sense and practical approach on this issue.

(e) The possibility of a transfer of the case from the Singapore High Court (excluding the SICC) to the Singapore International Commercial Court (SICC) is a relevant factor in the *Spiliada* analysis.

This had previously been confirmed by the Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265. The SICC is a division of the Singapore High Court which specialises in international commercial litigation. Its rules allow for a question of foreign law to be determined on the basis of submissions instead of proof. Further, the bench includes International Judges from not only common law but also civil law jurisdictions. The court held that the specific features of the SICC and the possibility of the transfer of the case to the SICC weighed in favour of Singapore being *forum conveniens* compared to Norway and Germany.

(f) In a setting-aside application, where the plaintiffs have succeeded in showing that Singapore is the *prima facie* natural forum in the first stage of the *Spiliada* test, the burden of proof shifts to the defendants to show why they would suffer substantial injustice if the action were to proceed in Singapore.

In an Order 11 case, the second stage of the *Spiliada* test usually operates to give the plaintiffs a second bite of the cherry should they fail to establish Singapore is the natural forum under the first stage of the test. The plaintiffs are allowed to put forward reasons why they would suffer substantial injustice if trial takes place in the natural forum abroad. Very interestingly, the court held that where, as on the facts of the case, the plaintiff had already satisfied the burden of showing that Singapore is the natural forum under the first stage of the *Spiliada* test, the burden then shifts to the defendants to show why they would suffer substantial injustice if trial took place in Singapore.

The case is on appeal to the Court of Appeal. Its judgment is eagerly anticipated.

The Russian Supreme Court's guidelines on private international law

The Russian Supreme Court has published the English translation of the guidelines on Russian private international law, issued in Russian on 27 June 2017 (ruling No 23 'On Consideration by Commercial Courts of Economic Disputes Involving Cross-Border Relations').

The ruling is binding on all the lower courts in Russia: from time to time the Russian Supreme Court gathers in a plenary session to discuss the case law approaches to controversial matters in a particular field of law. It then adopts binding guidelines to ensure a uniform application of law in the future (this role of the Supreme Court is based on art. 126 of the Constitution and arts. 2 and 5 of the law on the Supreme Court of the Russian Federation of 2 February 2014).

The 2017 guidelines are based on more than a decade of case law, as the previous plenary session on private international law was dated 2003.

The guidelines, briefly sketched below, are divided to seven parts, dedicated to the general issues (1), the international jurisdiction of the Russian commercial courts (2), the law applicable to corporation (3), the service of documents (4), the requirements relating to the consular legalisation of foreign documents (5), the application of foreign law (6) and the provisional protective measures (7).

1. In the first part of the guidelines, the Supreme Court explains which disputes have an international character (at [1]). It also recalls the rules on absolute (international) and relative (national) jurisdiction (at [1], further detailed at [8]).

2. Part two is dedicated to the international jurisdiction of Russian commercial courts.
– The Supreme Court lists the matters within the exclusive jurisdiction of the Russian commercial courts (at [5]). If a foreign court accepts jurisdiction in violation of the rules on exclusive jurisdiction of Russian commercial courts, the foreign decision will not be recognised or enforced in Russia (at [4]).

– Several guidelines deal with the choice of court. Parties may choose a court in relation to an existing or a future dispute arising out of any relationship, be it contractual or non-contractual (at [6]). Some substantive and formal requirements relating to the choice of court agreement, including tacit submission, are discussed in detail. Two foreign parties may choose a Russian commercial court. Parties may choose to litigate at the 'court of the defendant' or 'the court of the claimant' (last four paragraphs of [6], [7]–[9], [11] and [18]). The principle of party autonomy in relation to the choice of court is also emphasised later in the guidelines (at [17]; especially in the third paragraph).

– The guidelines confirm the severability of the court choice clause (at [10]), the survival of such clause after the termination of the contract and declaring contract invalid (at [10]), and touch upon the lis pendens with a foreign court (at [11]).

– The Supreme Court recalls the principle of close connection underpinning the rules on the jurisdiction of the Russian courts. It then names a number of factors to be assessed in order to establish a close connection between the dispute and Russia (at [13]–[16]). For this purpose, the concept of activity in Russia is not confined to the registration of an affiliate or a registered office in the Russian trade register. Any activity in Russia should be taken into consideration. It may be, for example, the use of a website with a domain name '.ru' or '.su' to approach the Russian market (at [16]).

3. The third part of the guidelines is dedicated to the law applicable to corporations. After recalling that the Russian conflict of laws rules rely on the theory of incorporation (at [19], third paragraph), the Supreme Court explains which documents should be filed with the court (or consulted by the court of its own motion) to identify the country of a company's incorporation (at [19]). Failure of the first or second instance court to establish this constitutes a ground for cassation (at [22], last paragraph). The Supreme Court also discusses the law applicable to some aspects of company's representation (at [20]–[25]).

4. The fourth part of the guidelines deals with the service of documents (at [26]–[28]): the service of foreign documents on a Russian party, the service of Russian documents on a foreign party, and the relevant procedural terms (at [29]–[31]).
Two points are worth noting. First, if several international instruments on

international legal cooperation containing requirements relating to the service of documents apply, the instrument allowing the fastest and the most informal service prevails (at [28]).
Second, the awareness of a foreign party of the proceedings is presumed, if the court publishes the information about the time and the place of the hearing on its website (at [37]; let us note, most information on the websites is in Russian). In the meantime, a broad range of evidence may be presented to prove awareness of the proceedings on the part of the foreign party (at [36]).

5. Part five discusses the requirements of apostille and consular legalisation of foreign documents (at [39]–[41]).

6. Part six deals with the application of foreign law. If a dispute is governed by a foreign law, Russian commercial courts have the duty to apply foreign law (at [42]). The parties have no obligation to inform the court on the content of foreign law. However, the court may require a party to do so. If the party does not comply, it may not invoke the court's failure to establish the content of foreign law later in the proceedings, provided that the court takes reasonable measures to establish the content of foreign law (at [44]). The guidelines contain some general recommendations for the lower courts on the way to take such measures (at [45]–[46]).

7. Part seven is dedicated to provisional protective measures.
– A provisional protective measure can be taken by a Russian court if it has 'effective' jurisdiction regarding the measure. The Supreme Court describes situations in which a Russian court has 'effective' jurisdiction (at [49]).
– The enforcement of a provisional protective measure granted by a foreign court falls outside the scope of instruments regulating international legal cooperation (at [50]).
– A foreign antisuit injunction cannot prevent a Russian commercial court from hearing the dispute, if the Russian court finds that it has jurisdiction regarding the dispute (at [52]).

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?

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