Policy discussions on ADR/ODR in France: towards greater regulation for the Legaltech?

Current policy discussions on ADR/ODR in France: towards greater regulation for the *Legaltech*?

By Alexandre Biard, Erasmus University Rotterdam (postdoc researcher ERC project Building EU Civil Justice)

In April 2018, the French government published a new draft legislation aimed at reforming and modernizing the French Justice system (*Projet de loi de programmation 2018-2022 et de réforme pour la Justice*). Among other things, the proposal is likely to trigger some significant changes in the French ADR/ODR landscape, and may have important consequences for the future development of the *legaltech*. The proposal is currently discussed before the French Parliament and Senate. The following elements should be noted:

- **A generalisation of compulsory mediation** (*tentative de médiation obligatoire*) for small claims (Article 2 of the draft legislation). It should be noted that France has already launched several pilot projects with the intent to experiment compulsory mediation in several areas, including in family law and for certain administrative matters.
- **A new certification scheme for ODR platforms** (Article 3 of the draft legislation). As a result of the European Directive 2013/11/EU (the Consumer ADR Directive), France has already established a certification scheme applying to consumer ADR providers. Consumer ADR entities seeking certification must show compliance with several quality criteria listed in the Consumer ADR Directive, and transposed in France by Ordinance 2015-1033 of 20 August 2015 and two additional implementing decrees. A new *ad hoc* public entity – Commission d'Evaluation et de Contrôle de la Médiation de la Consommation (CECMC) closely linked to the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF, a branch of the Ministry of Economy) is in charge of certifying consumer ADR providers. CECMC must also verify

that Consumer ADR providers comply with the quality criteria listed in the Directive and the national legislation on an on-going basis. Under the new draft legislation, the proposed certification scheme will apply to all ODR systems. While noticing the development of ODR services, a previous draft legislation of 25 October 2017 suggested to introduce a certification scheme for private ODR platforms, and, in parallel, also aimed to create a free public ODR system (*Service public gratuit en ligne d'aide à la résolution amiable des litiges,* see Article 8 of the proposal). However, the development of this public ODR system was finally discarded for budgetary reasons. Interestingly, whereas the initial proposal from the Government made certification non-compulsory and voluntary, amendments adopted by the French Senate have made certification compulsory for all ODR providers. Senate has also designated the Ministry of Justice as competent authority in charge of certifying ODR providers. At the time of writing, it remains unclear whether certification will ultimately be compulsory or not (an amendment from the National Assembly dated 6 November 2018 reintroduced the voluntary/non-compulsory nature of certification). A decree from the State Council (*Conseil d'Etat*) will specify the details of the certification procedure. As a general rule, to be certified, ODR platforms will have to show that they comply with data protection rules and confidentiality, and prove that they are independent, impartial, and that their procedures are fair and efficient. Importantly, rules also provide that ODR system cannot be based solely on algorithms or automated systems. In other words, human intervention will remain necessary and compulsory. If the ODR platform uses algorithms, it will have to inform parties beforehand, and will have to collect their informed consent. The draft legislation also provides that consumer ADR entities already certified by the CECMC will automatically benefit from the new certification scheme.

The draft proposal has been criticized as a step towards 'a privatisation of justice'. It remains to be seen how the new proposed certification scheme will be implemented.

More information on this topic? Don't hesitate to contact us (biard@law.eur.nl)

Netherlands Commercial Court: English proceedings in The Netherlands

By Friederike Henke, Advocaat & Rechtsanwältin at Buren in Amsterdam

The international demand for English language dispute resolution is increasing as the English language is commonly used in international trade and contracts as well as correspondence, not only between the trading partners themselves, but also by international parties, their legal departments and their advisors. Use of the English language in legal proceedings is expected to save time and money for translations and language barriers in general.

We would like to note that Dutch courts tend to allow parties to provide exhibits in the English language and often allow parties to conduct hearings in English, at least in part. Moreover, the district courts in Rotterdam and The Hague offer the possibility for proceedings in certain types of cases to be held in English: maritime, transportation and international trade cases in Rotterdam and intellectual property rights cases in The Hague. The courts render their judgments in the Dutch language with an English summary.

In order for the Dutch courts to be able to render valid and binding judgments in the English language, the Dutch code of civil procedure needs to be amended.

Netherlands Commercial Court: draft legislation

As mentioned in earlier posts on this blog (see here) in the Netherlands, legislation is on its way for the introduction of English language courts for the settlement of commercial disputes: the Netherlands Commercial Court ("**NCC**")

and the Netherlands Commercial Court of Appeal ("**NCCA**").

On 8 March 2018, the Dutch parliament adopted the draft legislation, following which it was expected to be approved by the Dutch senate soon. However, to date, despite earlier optimism, the legislation has not yet been passed. The (draft) rules of procedures are ready though (see here) and the judges have been selected as well. The courts are now expected to open their doors in 2019.

In anticipation to the adoption and effectiveness of the draft legislation, the below blog offers an overview of the key characteristics of the proceedings with the NCC and NCCA.

The NCC and NCCA: structure and location

The NCC and NCCA will be imbedded in the ordinary judiciary. The NCC will thus be a chamber of the Amsterdam district court and the NCCA will be a chamber at the Amsterdam court of appeals. Any appeal from a judgment by the NCC will go to the NCCA. An appeal (cassation) from the NCCA to the highest court of the Netherlands (*Hoge Raad*) will take place in the Dutch language.

The judges of the NCC and NCCA who have already been selected, will be from the ordinary judiciary. No lay judges will be appointed. The selected judges (six for each instance) are judges who have vast experience in commercial disputes and excellent language skills.

Situating the chambers with the courts of Amsterdam has mostly practical reasons: Amsterdam is the financial capital of the Netherlands and a lot of international companies have their corporate seats there. Also, practical reasons have been mentioned: Amsterdam is easy to reach and internationally active law firms have their offices in Amsterdam.

The NCC procedure

Proceedings with the NCC and NCCA will in principle be held in the English language. All legal documents will be in English. Evidence may be handed in in the French, German or Dutch language, without a translation being required. The court hearing will be held in English and the judgment will be rendered in English.

In addition to the NCC's rules of procedure, the NCC will apply Dutch procedural law and the substantive rules of Dutch private international law. The proceedings

will be paperless and legal documents will be submitted electronically.

According to article 1.2.1 of the NCC's draft rules of procedure, an action may be initiated in the NCC in case the following three requirements have been met:

1. the action is a civil or commercial matter within the autonomy of the parties and is not subject to the jurisdiction of the cantonal court (*kantongerecht*, the court for small claims) or the exclusive jurisdiction of any other chamber or court;
2. the matter has an international aspect;
3. the parties to the proceedings have designated the Amsterdam District Court as the forum to hear their case or the Amsterdam District Court has jurisdiction to hear the action on other grounds; and
4. the parties to the proceedings have expressly agreed that the proceedings will be in English and will be governed by the NCC's rules.

The NCC has jurisdiction in any commercial case, regardless the legal ground. So it may hear both contractual disputes – claims for performance or breach of contract, rescission of a contract, termination or damages – as well as claims for unlawful acts.

In line with the case law of the Court of Justice of the EU, the internationality requirement is to be interpreted broadly. Only if all relevant aspects of a case refer to one case, it will thus be considered an internal dispute. An international aspect can e.g. be that one of the parties has its seat outside of the Netherlands or was incorporated under foreign law, that the contract language is not Dutch or a foreign law applies to the contract, that more than 50% of the employees works outside of the Netherlands, etcetera.

The NCC is only competent if the Parties have agreed to settle their dispute under the procedural rules of the NCC. Such agreement may be done in a procedural agreement, before or after a dispute has arisen. The NCC's rules of procedure contain a template clause for a forum choice reflecting such procedural agreement in Annex I:

"All disputes arising out of or in connection with this agreement will be resolved by the Amsterdam District Court following proceedings in English under that Court's Rules of Procedure of the Chamber for International Commercial Matters ("Netherlands Commercial Court" or "NCC"). Application for provisional

measures, including protective measures, available under Dutch law may be made to the NCC's Preliminary Relief Judge in proceedings in English in accordance with the Rules of Procedure of the NCC."

The choice of parties to conduct proceedings with the NCC is thus not a forum choice but rather a procedural agreement between the parties.

Court fees
The court fees for proceedings with the NCC will amount to EUR 15,000.- for substantive proceedings and EUR 7,500.- for summary proceedings. The court fees for proceedings with the NCCA will amount to EUR 20,000.- for substantive proceedings and EUR 10,000.- for summary proceedings.

When compared to other courts in the Netherlands, the court fees for the NCC and NCCA are relatively high. In comparison: the highest court fee for cases in first instance currently amount to EUR 3,946.- and for appeal cases to EUR 5,270.-. Within the international playing field, the NCC and NCCA courts fees are however relatively low, especially when compared to arbitration.

Alexander Vik v Deutsche Bank AG: the powers of the English court outside of the jurisdiction in contempt of court proceedings

By Diana Kostina

The recent Court of Appeal judgment in *Alexander Vik and Deutsche Bank AG [2018] EWCA Civ 2011*confirmedthat contempt of court applications for alleged non-compliance with a court order can be served on a party outside the jurisdiction of England and Wales. The Court of Appeal's judgment also contains a useful reminder of the key principles governing the powers of English courts to

serve defendants outside of the jurisdiction.

Background

This Court of Appeal's judgment is the latest development in the litigation saga which has been ongoing between Deutsche Bank ('the Bank') and Alexander Vik, the Norwegian billionaire residing in Monaco ('Mr Vik') and his company, Sebastian Holdings Inc ('the Company'). The Bank has been trying to enforce a 2013 judgment debt, which is now estimated to be around US $ 320 million.

Within the enforcement proceedings, the English court made an order under CPR 71.2 requiring Mr Vik to appear before the court to provide relevant information and documents regarding the assets of the Company. This information would have assisted the Bank in its efforts to enforce the judgment against him. Although Mr Vik did appear in court, the Bank argued that he had deliberately failed to disclose important documents and lied under oath. Accordingly, the Bank argued that Mr Vik should be held in contempt of court by way of a committal order.

To obtain a committal order, the Bank could have applied under either CPR 71.8 or CPR 81.4. The difference is that the former rule provides for a simple and streamlined committal procedure, while the latter is more rigorous, slow, and — as accepted by courts — possibly extra-territorial. The Bank filed an application under CPR 81.4, and the court granted a suspended committal order. The Bank then sought to serve the order on Mr Vik in Monaco.

High Court decision

The Judge at first instance, Teare J, carefully considered the multi-faceted arguments. Teare J concluded that permission should not be required to serve the committal order on Mr Vik, because the debtor was already subject to the incidental jurisdiction of the English courts to enforce CPR 71 order. A similar conclusion could be reached by relying on Article 24(5) of the Brussels Recast Regulation (which provides that in proceedings concerned with the enforcement of judgments, the courts of the member state shall have exclusive jurisdiction regardless of the domicile of the parties). However, if the Bank had needed permission to serve the committal order outside the jurisdiction, then his Lordship concluded that the Bank could not rely on the gateway set out in PD 6B 3.1(10) (which provides that a claim may be served out of the jurisdiction with the permission of the court where such claim is made to enforce a judgment or an

arbitral award). Both parties appealed against this judgment.

Court of Appeal decision

The Court of Appeal, largely agreeing with Teare J, made five principal findings.

(1) The court found it ironic that Mr Vik argued that CPR 71.8 (specific ground), rather CPR 81.4 (generic ground) applied to the alleged breach of CPR 71.2, since CPR 81.4 offered greater protections to the alleged contemnor. The likely reason for this "counter-intuitive" step was that the latter provision was extra-territorial. The Court of Appeal confirmed that CPR 71.8 is not a mandatory *lex specialis* for committal applications relating to a breach of CPR 71.2, and that the Bank was perfectly entitled to rely on CPR 81.4.

(2) The Court of Appeal agreed with the findings of Teare J that the court's power to commit contemnors to prison is derived from its inherent jurisdiction. The CPR rules only provide the technical steps to be followed when this common law power is to be exercised. It followed that it did not make much difference which rule to apply – either the broader CPR 81.4 or the narrower CPR 71.8. Thus, if the Bank had made the committal application under CPR 71.8, the application would have had an extra-territorial effect.

(3) Mr Vik sought to challenge Teare J's finding that he should be deemed to be within the jurisdiction in the contempt of court proceedings, because they are incidental to the CPR 71.2 order in which he participated. Instead, he argued, such proceedings were distinguishably "new", and would require permission to serve outside the jurisdiction. The Court of Appeal disagreed and confirmed that the committal order was incidental as the means to enforce the CPR 71.2 order. Therefore, in the light of the strong public interest in the enforcement of English court orders, it was not necessary for the Bank to obtain permission to serve the committal order outside the jurisdiction.

(4) Teare J observed that Article 24(5) of the Brussels Recast Regulation meant that that permission to serve Mr Vik outside of the jurisdiction was not required. Article 24(5) confers exclusive jurisdiction on the courts of the Member State in which the judgment was made and to be enforced by, regardless of the domicile of the parties. The Court of Appeal (in obiter) was generally supportive of this approach, opining that the committal application in the case at hand was likely to fall within Article 24(5) of the Brussels Recast Regulation. However, the careful

and subtle wording of Article 24(5) implied that this conclusion might be subject to further consideration on a future occasion.

(5) Under CPR 6.36, a claimant may serve a claim form out of the jurisdiction with the permission of the court where the claim comes within one of the "gateways" contained in PD 6B. The relevant gateway in the Mr Vik's case was to be found at PD 6B, para 3.1(1), as a claim made to enforce a judgment. Teare J was of the view that the Bank could not rely on this gateway to enforce the committal order. The Court of Appeal was reluctant to give a definitive answer on this point, even though "there may well be considerable force" in the Teare J's approach. Thus, it remains unclear whether the CPR rules regulating service outside the jurisdiction would apply to the CPR 71 order and the committal order.

The importance of the judgment

This Court of Appeal's judgment serves as an important reminder for parties who are involved in the enforcement of English judgment debts. Rather than giving a short answer to a narrow point of civil procedure, the judgment contains an extensive analysis of English and EU law. The judgment highlights the tension between important Rule of Law issues such as "*enforcing court orders on the one hand"* and *"keeping within the jurisdictional limits of the Court, especially as individual liberty is at risk, on the other*" (Court of Appeal judgment, at para. 1).

The judgment demonstrates the broad extra-territorial reach of the English courts. It also confirms the English court's creditor-friendly reputation. The findings on the issues of principle may be relevant to applications to serve orders on defendants out of the jurisdiction in other proceedings, for instance worldwide freezing orders or cross-border anti-suit injunctions.

Nevertheless, the judgment demonstrates the need for clear guidance on the jurisdictional getaways to serve out of the jurisdiction for contempt of court. In giving judgment, Lord Justice Gross carefully suggested that the Rules Committee should consider implementing a specific rule permitting such service on an officer of a company, where the fact that he is out of the jurisdiction is no bar to the making of a committal application.

Another issue that seems subject to further clarification is whether a committal order or a provisional CPR 71 order are covered by the Brussels Recast Regulation. A definitive answer to this question becomes particularly intriguing in

the light of Brexit.

Legal parentage of children born of a surrogate mother: what about the intended mother?

On October 5th, The *Cour de Cassation*, the highest court in France for private law matters, requested an advisory opinion of the ECtHR (Ass. plén. 5 octobre 2018, n°10-19053). It is the first time a Contracting State applies to the ECtHR for an advisory opinion on the basis of Protocol n° 16 which entered into force on August 1st, 2018. The request relates to the legal parentage of children born to a surrogate mother. More specifically, it concerns the intended mother's legal relationship with the child.

The *Mennesson* case is again under the spotlight, after 18 years of judicial proceedings. Previous developments will be briefly recalled, before the Advisory opinion request is summarized.

Previous developments in the *Mennesson* case:

A French couple, Mr and Mrs Mennesson, went to California to conclude a surrogacy agreement. Thanks to the surrogate mother, twins were born en 2000. They were conceived with genetic material from the intended father and eggs from a friend of the couple. The Californian Supreme Court issued a judgment referring to the couple as genetic father and legal mother of the children. Birth certificates were issued and the couple asked for their transcription into the French civil status register.

French authorities refused the transcription, arguing that it would be contrary to public policy. Surrogate motherhood, in particular, is forbidden under article 16-7 of the Civil Code. Such agreements are then considered void and resulting foreign

birth certificates establishing parentage are considered contrary to public policy (Cass. Civ. 1ère, 6 avril 2011, n°10-19053).

As a last resort, The Mennesson family brought a claim before the ECtHR. They claimed that the refusal to transcribe the birth certificate violated their right to respect for private and family life. While the Court considered that the parent's right to family life was not infringed, it ruled that the refusal to transcribe the birth certificates violated the children's right to identity and was not in their best interest. As a consequence, it ruled that the refusal to establish the legal parentage of the indented parents was a violation of the children's right to private life, particularly so if the indented father was also the biological father.

After the ECtHR ruling: the French landscape

After the ECtHR ruling, the *Cour de Cassation* softened its position. In 2015, sitting in *Assemblée plénière*, it ruled that the mere fact that a child was born of a surrogate mother did not in itself justify the refusal to transcribe the birth certificate, as long as that certificate was neither unlawful nor forged, nor did it contain facts that did not correspond to reality (Ass. plén., 3 juillet 2015, n° 14-21323 et n°15-50002).

As a consequence, the Court only accepted the transcription of foreign birth certificate when the intended father is also the biological father. When it came to the other intended parent, the *Cour de Cassation* refused the transcription. By so doing, the *Cour de Cassation* reiterates its commitment to the *Mater semper certa* principle as the sole basis of its conception of motherhood. Meanwhile, in 2017, the *Cour de Cassation* signalled that the genetic father's spouse could adopt the child if all the requirements for adoption were met and if it was in the best interest of the child (Cass. Civ. 1ère, 5 juillet, 2017, n°15-28597, n°16-16455, and n°16-16901 ; 16-50025 and the press release)

However, the Mennessons' fight was not over yet. Although according to the latest decisions, it looked like both Mr and Mrs Mennesson could finally establish their kinship with the twins, they still had to overcome procedural obstacles. As the Cour de Cassation had refused the transcription in its 2011 judgment which had become final, the parents were barred from applying for it again. As pointed out by the ECtHR in the *Foulon and Bouvet v. France* case (21/07/2016, Application n°9063/14 and 10410/14), French authorities failed to provide an

avenue for the parties involved in cases adjudicated before 2014 to have them re-examined in the light of the subsequent changes in the law. Thus, France was again held to be in violation of its obligations under the Convention. (See also *Laborie v. France*, 19/01/2017, Application n°44024/13).

In 2016, the legislator adopted a new procedure to allow for the review of final decisions in matter of personal status in cases where the ECtHR had ruled that a violation of the ECHR had occurred. The review is possible when it appears that the consequences of the violation of the Convention are serious and that the just satisfaction awarded on the basis of article 41 ECHR cannot put an end to the violation (see articles L.452-1 to L.452-6 of the *Code de l'organisation judiciaire*).

Current situation:

Taking advantage of this new procedure, the Mennesson family asked for a review of their situation. They claimed that the refusal to transcribe the birth certificates was contrary to the best interest of the children. They also argued that, as it obstructed the establishment of parentage, it amounted to a violation of article 8 ECHR. Moreover, they argued that the refusal to transcribe the birth certificates on the ground that the children were born of a surrogate mother was discriminatory and infringed article 14 ECHR.

Sitting again in *Assemblée plénière*, the *Cour de Cassation* summarized its previous case law. It concluded that while the issue of the transcription of the father biological parentage is settled, the answer is less certain regarding the intended mother. The Court wondered if its refusal to transcribe the birth certificate as far as the intended mother is concerned is consistent with the State margin of appreciation under article 8. It also wondered whether it should distinguish between cases where the child is conceived with the genetic material of the intended mother and cases where it is not. Finally, it raised the issue of whether its approach of allowing the intended mother to adopt her husband's biological child was compatible with article 8 ECHR.

After pointing out the uncertain compatibility of its reasoning with ECtHR case law, the Court chose to request an advisory opinion from the ECtHR. Protocol 16 allows Contracting States to apply to the ECtHR for its advisory opinion "on questions of principles relating to the interpretation or application of the rights and freedom defined in the Convention or the protocols thereto" (Protocol 16

art.1).

Thus, the *Cour de Cassation* asked the ECtHR the two following questions:

- By refusing to transcribe into civil status registers the birth certificate of a child born abroad from a surrogate mother inasmuch as it refers to the intended mother as the "legal mother", while the transcription has been accepted when the intended father is the biological father of the child, does a State Party exceed its margin of appreciation under article 8 ECHR? In this respect, is it necessary to distinguish between whether or not the child is conceived with the gametes of the intended mother?
- If the answer to one of the two preceding questions is in the affirmative, does the possibility for the intended mother to adopt her husband's biological child, which constitutes a mean of establishing parentage open to her, comply with the requirements of article 8 of the Convention?

As the *Cour de Cassation* indicates on the press release accompanying the request of an advisory opinion, it seized the opportunity of initiating a judicial dialogue between national jurisdictions and the ECtHR. However, it looks more like a sign of caution on the part of the French court, in a particularly sensitive case. Depending on the answer it receives, the *Cour de Cassation* will adapt its case law.

Although Protocol n°16 does not refer to a specific deadline, the Explanatory report indicates that it would be appropriate for the ECtHR to give high priority to advisory opinion proceedings.

Thus, it looks like the Mennesson saga will be continued soon…

A New Zealand perspective on

Israeli judgment against New Zealand-based activists under Israel's Anti-Boycott Law

Last year the New Zealand singer Lorde cancelled a concert in Tel Aviv following an open letter by two New Zealand-based activists urging her to take a stand on Israel's illegal occupation of Palestine. A few weeks later, the two activists found themselves the subject of a civil claim brought in the Israeli court. The claim was brought by the Israeli law group Shurat HaDin, on behalf of three minors who had bought tickets to the concert, pursuant to Israel's so-called Anti-Boycott Law (the Law for the Prevention of Damage to the State of Israel through Boycott). The Israeli court has now released a judgment upholding the claim and ordering the activists to pay NZ$18,000 in damages (plus costs).

Readers who are interested in a New Zealand perspective on the decision may wish to visit The Conflict of Laws in New Zealand, where I offer some preliminary thoughts on the conflict of laws issues raised by the judgment. In particular, the post addresses – from a perspective of the New Zealand conflict of laws – the concern that the judgment represents some kind of jurisdictional overreach, before discussing the enforceability of the judgment in New Zealand (and elsewhere).

Reports of HCCH Experts' Groups on the Surrogacy/Parentage and the Tourism Projects available

The Permanent Bureau of the Hague Conference on Private International Law has made available two reports for the attention of its governance Council (*i.e.* the Council on General Affairs and Policy): the Report of the Experts' Group on the

Parentage / Surrogacy Project and the Report of the Experts' Group on the Co-operation and Access to Justice for International Tourists.

The Group on Parentage/Surrogacy Project will need to meet one more time early next year to reach final Conclusions on future work. In particular, the Group discussed possible methods to ensure cross-border continuity of legal parentage both established by and in the absence of a judicial decision.

Importantly, "[t]he Group recalled that the absence of uniform PIL rules on legal parentage can lead to limping parentage across borders in a number of cases and can create significant problems for children and families. The Group further recalled that uniform PIL rules can assist States in resolving these conflicts and can introduce safeguards for the prevention of fraud involving public documents, while ensuring that the diverse substantive rules on legal parentage of States are respected. Any new instrument should aim to provide predictability, certainty and continuity of legal parentage in international situations for all persons involved, taking into account their fundamental rights, the *UN Convention on the Rights of the Child* and in particular the best interests of children. The Group agreed that any international instrument would need to be developed with a view to complementing the existing Hague Family Conventions and to attracting as many States as possible."

Regarding the Group on the Tourism Project, it should be noted that it is currently exploring the need for an international instrument on the co-operation and provision of access to justice for international tourists. The Group concluded that "[t]he Experts' Group recommends to the CGAP that it mandates the Experts' Group to continue its work, with a view to assessing the need for, the nature (soft law and hard law options) and the key elements of, a possible new instrument. The composition of the Experts' Group should remain open, and, if possible, also include representatives of Stakeholders, such as the UNWTO, as well as representatives of relevant organisations and private international law experts." It was noted that the Consultant will finalise his draft (substantive) Report, which will be circulated at the end of this year.

The aide-mémoire of the Chair of the Tourism Project noted: "[i]f a new instrument were to be developed, the Experts identified a number of possible expected values such instrument might add. These included that tourists might be able to obtain appropriate information, including in a language they understand,

to ascertain and understand their rights, and the potentially available options to seek redress. It might also provide co-operation mechanisms among suitable bodies that can work in a concerted manner to facilitate the resolution of complaints, with a view to guaranteeing access to justice in the broadest sense, including through alternative dispute resolution, in a non- discriminatory way. The instrument might also have a preventive effect. Finally, it might create an official record of the complaint, including for subsequent use abroad."

In March 2019, the HCCH governance Council will determine whether work on these two subjects will go forward.

Forcing a Square Peg into a Round Hole – The Actio Pauliana and the Brussels Ia Regulation

Earlier today, the Court of Justice held that, under certain circumstances, special jurisdiction for an *actio pauliana* can be based on Art. 7(1) Brussels Ia (Case C-337/17 *Feniks*).

The *actio pauliana* is an instrument provided by the national laws of several EU member states that allows the creditor to challenge fraudulent acts by their debtor that have been committed to the creditor's detriment. The ECJ already had several opportunities to decide on the availability of individual grounds of special jurisdiction for such an action, but has reliably denied their availability. In today's decision however, the Court confirmed the availability of special jurisdiction for matters relating to contract, contrary to the proposition of AG Bobek (Opinion delivered on 21 June 2018).

Previous Decisions

Many readers of this blog will be aware of the Court of Justice's earlier decisions on the availability of special or exclusive jurisdiction for a creditor's *actio*

pauliana.

In Case C-115/88 *Reichert I*, the question was referred to the Court in the context of a transfer of immovable property from Mr and Mrs Reichert to their son, which had been challenged in the French courts by their creditor, a German bank. The Court held that the *actio pauliana* did not fall under the head of exclusive jurisdiction for actions concerning *rights in rem*; accordingly, the French courts did not have jurisdiction based on what is now Art 24(1) Brussels Ia.

Still in the context of this transfer of property, the ECJ held in Case C-261/90 *Reichert II* that the heads of jurisdiction in what are now Art 7(2) (matters relating to tort, delict or quasi-delict), Art 24(5) (proceedings concerned with the enforcement of judgments) and Art 35 (provisional, including protective, measures) Brussels Ia would be equally unavailable.

The Court has never explicitly excluded the availability of the ground of jurisdiction for matters relating to contract in what is now Art 7(1) Brussels Ia. In his Opinion on Case C-339/07 *Deko Marty Belgium*, AG Ruiz-Jarabo Colombo still appears to understand the decisions in *Reichert I* and *II* as leading to the conclusion that within the framework of the Brussels Ia Regulation, jurisdiction for an *actio pauliana* 'lies [only] with the courts in the defendant's State of domicile.' (ibid, [32]).

The Decision in *Feniks*

The case underlying today's decision involved two Polish companies, Feniks and Coliseum, who were in a contractual relationship relating to a development project. When Coliseum was unable to pay some of its subcontractors, Feniks had to pay them instead (pursuant to Polish law), thus becoming the creditor of Coliseum. Coliseum subsequently sold some immovable property to a Spanish company, a transaction which Feniks now challenges in the Polish courts, relying on the provisions of the Polish Civil Code that provide for the *actio pauliana*.

While the Court considered the action to be ultimately based on the contract between Feniks and Coliseum (see below), it is not immediately clear to what extent the situation differs from the one in *Reichert*. Still, it is true that the question of whether such an action could be based on the head of special jurisdiction for contract was raised in neither of the two orders for reference. AG Bobek had nonetheless offered several important arguments for why this head of

jurisdiction should not be available. In particular, he had argued that there was no 'obligation freely assumed' by the defendant towards the claimant (Opinion, [68]) and the contractual relationships between the claimant and their debtor and between the debtor and the defendant were 'too tenuous and remote' or too 'detached', respectively, to be considered for the purpose of establishing jurisdiction (Opinion, [65], [67]). More fundamentally, the Advocate General considered the 'chameleon-like nature' of the *actio pauliana*, which allows a creditor to challenge a wide range of legal acts, to prevent it from falling within the scope of any head of special jurisdiction (Opinion, [76]–[87]).

In today's decision, the Court very much rejects these arguments. After having established the applicability of the Brussels Ia Regulation – the action not falling into the scope of Regulation No 1346/2000, which would exclude them from the Brussels Ia Regulation (see Art 1(2)(b) Brussels Ia; Case C-339/07 *Deko Marty Belgium*, [19]) – the ECJ reiterates that the decisive criterion for jurisdiction to be based on Art 7(1) Brussels Ia is the existence of a legal obligation freely entered into by one person towards another on which the claimant's action is based (*Feniks*, [39]; see also Joined Cases C-359/14 and C-475/14, *ERGO Insurance*, [44]); the claimant does not necessarily have to be party to the contract, though (*Feniks*, [48]; see also Joined Cases C-274/16, C-447/16 and C-448/16 *flightright*, [61]). According to the Court,

> *[42] … both the security that Feniks has over the debtor's estate and the present action regarding the ineffectiveness of the sale concluded by the debtor with a third party* ***originate in the obligations freely consented to by Coliseum with regard to Feniks upon the conclusion of their contract relating to those construction works.*** *[own emphasis]*

In such a case, the creditor's action is based on the breach of a contractual obligation (ibid, [43]).

> *[44] It follows that the actio pauliana, once it is brought on the basis of the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' … .*

Accordingly, the contract between Feniks and Coliseum being for construction works to be carried out in Poland, the Polish courts would have jurisdiction under

Art 7(1)(b) Brussels Ia (ibid, [46]).

Special Jurisdiction under the Brussels Ia Regulation

One of several interesting details of today's decision is the degree to which the Court's approach to the grounds for special jurisdiction differs from the Advocate General's opinion. According to AG Bobek, the *actio pauliana* might be

> *[97] … one of the rare examples that only allows for the applicability of the general rule and an equally rare confirmation of the fact that '… there is no obvious foundation for the idea that there should always or even often be an alternative to the courts of the defendant's domicile'.*

Importantly, for AG Bobek, requiring the claimant to rely on the general ground of jurisdiction provided in Art. 4(1) Brussels Ia would not be a problem because

> *[93] … the defendant's domicile is precisely the key connecting factor for the purpose of application of Regulation No 1215/2012.*

– an argument that seems to echo the Court of Justice's considerations in Case C-256/00 *Besix*, [50]–[54].

Besides, allowing for special jurisdiction to be based on Art 7(1) Brussels Ia because the defendant must be aware of the fraudulent nature of the transaction for the action to succeed would amount to

> *[94] … effectively presuming the existence of the awareness of the fraud on the part of the transferee.*

Put differently, if the Court could justify the unavailability of special jurisdiction for matters relating to contract for claims brought by a sub-buyer against the manufacturer in Case C-26/91 *Jakob Handte* by the fact that such jurisdiction would be unforeseeable and 'therefore incompatible with the principle of legal certainty' (ibid, [19]), does the mere allegation that the buyer of a plot of land has been aware of the fraudulent character of the transaction really justify its application?

The Court of Justice seems to believe it does. Indeed, it appears to have remained

rather unimpressed by the above considerations when arguing that if the claim could not be based on Art 7(1) Brussels Ia, then

> *[45] … the creditor would be forced to bring proceedings before the court of the place where the defendant is domiciled, that forum, as prescribed by [Art 4(1) Brussels Ia], possibly having no link to the place of performance of the obligations of the debtor with regard to his creditor.*

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.