Brussels Court of Appeal Rules FIFA and UEFA Arbitration Clauses Inapplicable

On 29 August 2018, in a case involving FIFA (the International Football Association) and UEFA (the European Football Association), the Brussels Court of Appeal (the ***Court of Appeal***), issued an important decision refusing to refer the dispute to arbitration despite the existence of arbitration clauses providing for the jurisdiction of the Court of Arbitration for Sport (***CAS***).

The case at hand (still pending with respect to its substance), concerned a dispute between, on the one hand, the Belgian football club of Seraing (***RFC Seraing***) and the investment fund *Doyen Sports Investment Limited* (***Doyen Sports***), and, on the other hand, FIFA, UEFA and URBSFA (the Belgian football association). RFC Seraing and Doyen Sports contested the validity of sanctions imposed against them by the football associations for violations of FIFA and UEFA rules prohibiting Third-Party Ownership (***TPO***)[1].

RFC Seraing and Doyen Sports had brought their action before

Belgian domestic courts arguing that the arbitration clauses contained in the FIFA/UEFA statutes[2] (and which, in principle, compelled them to refer their dispute against FIFA and UEFA to arbitration) did not comply with the requirement, under Belgian law, that such clauses must relate to a "*defined legal relationship*" and should delimitate the scope of the potential dispute arising between the parties (Article 1681 and 1682 of the Belgian Code on Civil Procedure). More specifically, RFC Seraing and Doyen Sports argued that – despite the existence, in RFS Seraing's bylaws, of a clause explicitly showing RFC Seraing's commitment to follow FIFA and UEFA's statutes – the arbitration clauses at stake were of a general nature and did not, contrary to the requirement under Articles 1681 and 1682 of the Belgian Code on Civil Procedure, relate to "*a defined legal relationship*" but merely referred to any kind of dispute arising between them, irrespective of the object of the dispute.

FIFA and UEFA on the other hand argued that the arbitration clauses at stake were sufficiently specific since (i) they only applied to cases arising out of the activities and corporate purpose of FIFA/UEFA; and (ii) they only applied to sport litigation (since the bylaws of the CAS limit the jurisdiction of the latter to sport-related disputes).

The Court of Appeal rejected all of FIFA and UEFA's arguments and refused to refer the case to arbitration.

First, the Court of Appeal recalled that the requirement, under Belgian law, according to which an arbitration clause must refer to a "*defined legal relationship*" is based on (i) the right of access to justice; (ii) the parties' agreement (*i.e.,* make sure that parties are not compelled to arbitrate disputes that they never intended to refer to arbitration); and (iii) the need to avoid that a party with strong bargaining power imposes its will on the weaker party.

Second, the Court of Appeal found that the fact that the arbitration clauses at issue only concerned matters falling under the activities and corporate purpose of FIFA/UEFA did not define the legal relationship in a sufficient manner.

Third, the fact that the bylaws of the CAS provide that the latter only had jurisdiction in sport-related disputes was not relevant since the CAS can always amend its own bylaws in the future.

Finally, having found that the arbitration clauses contained in the FIFA/UEFA statutes were inapplicable (and since FIFA and UEFA are both domiciled in Switzerland), the Court of Appeal applied Article 6.1 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Lugano Convention***)[3] to conclude that the Belgian courts had jurisdiction to hear this dispute.

Article 6.1 of the Lugano Convention provides that, in cases involving numerous defendants, all defendants can be sued in the State where any one of them is domiciled, provided that the claims against them are so closely connected that it is expedient to hear them together to avoid irreconcilable judgements.

The Court of Appeal applied that provision to the case at hand and found (i) that the URBSFA was domiciled in Belgium; (ii) RFC Seraing was also domiciled in Belgium; (iii) the URBSFA was the Belgian football governing body and a member of FIFA; and (iv) FIFA and URBSFA share regulatory and disciplinary powers. In light of all those elements, the Court of Appeal found that there was a sufficient degree of connection between the claims, which justified the jurisdiction of the Belgian courts to hear the case.

Belgian courts will now hear the substantive aspects of this case.

[UPDATE added on 27 September 2018]: I also wanted to flag another interesting case on a closely similar issue: on 20

February 2018, the Swiss Federal Supreme Court declined to set aside an award rendered by the CAS, confirming, among other points, that the panel constituted under the CAS rules satisfies the requirement of independence as applied in Switzerland. The case also concerned a dispute between a football club and FIFA regarding the prohibition of TPO. More info here.

[1] Third-Party Ownership is a practice whereby a physical or legal person (who is not a football club but usually an investment fund or an agent), invests in the economic rights of a professional football player. Such practice allows this investor to receive a share of the value of any future transfer on that player. Given the potentially harmful effects on football, FIFA and UEFA have issued regulatory decisions banning TPO.

[2] Article 59 of the FIFA statutes reads as follows:

"1. The confederations, member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.

2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited."

Article 61 of the UEFA Statutes reads as follows:

"The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration: a) disputes between UEFA and associations, leagues, clubs, players or officials; b) disputes of European dimension between associations, leagues,

clubs, players or officials.“

[3] The Lugano Convention aims at extending the EU Brussels I Regulation’s regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU to Iceland, Norway and Switzerland.

After Token Rush: International Litigation and Initial Coin Offerings (ICO) – Part 2

*This article considers some of the international litigation questions that arise out of Initial Coin Offering (**ICO**).*

In the [first part of this article](), we discussed in particular *issues relating to jurisdiction. We now continue this discussion while also considering questions relating to applicable laws.*

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Issues of jurisdiction are made somewhat more complex by the circumstance that many ICO's general terms and conditions (***TnC***) contain clauses that may directly or indirectly affect the jurisdiction of courts. In this respect, the most obviously relevant type of agreement are forum selection clauses; in the case of the *Tezos* ICO, for instance, the TnC specified that "*(a)ny dispute arising out of or in connection with the creation of the* [tokens] *and the development and execution of the Tezos Network shall be exclusively and finally settled by the ordinary courts of Zug, Switzerland*". As noted by the District Judge denying the motion to dismiss, this is best understood not as a "*clickwrap agreement*", but as a "*browsestrap*" one: when subscribing, investors were not asked to check a box indicating consent to the TnC, but simply enabled to retrieve the TnC on the website advertising the ICO. In order to determine whether the forum selection clause is binding, hence, a case-by-case assessment is necessary, evaluating whether – given the circumstances of the case, such as the structure of the website – it is reasonable to expect that users in general accessed the TnC, and whether the claimant(s) in particular had any demonstrable knowledge of the contents of the TnC. For these reasons, should the same type of problem arise in the European Union, the case-law of the Court of Justice of the European Union (the ***CJEU***) concerning click-wrap (Case C-322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland*) would not always be directly applicable, depending on how the contribution process was structured – but most importantly, whenever the investors may be qualified as consumers, the enforceability of a pre-dispute forum selection clause would be precluded by Article 19 of

Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I bis Regulation***). Furthermore, additional obstacles would exist in cases where the claimant purchased the tokens on the secondary market: in this case, the forum selection clause would bind the tokenholder only if she/he succeeds in the rights and obligations of the primary market purchasers under the applicable national law, and if she/he has the possibility to acquaint her/himself with the contents of the TnC.[1] And, to add a further layer of complication, it is in any case doubtful to what extent a choice-of-court agreement may cover tortious claims (such as the ones based on an allegation of securities fraud), the language and scope of the agreement playing a crucial role in this respect according to the CJEU[2].

The same observations largely apply to cases where the TnC contain a reference to arbitration agreements: arbitration clauses included in TnC may be regarded as unenforceable in jurisdictions excluding the arbitrability of consumer disputes, and further problems may in any case arise depending on the attitude adopted by the seized court as to the incorporation by reference of agreements to arbitrate[3], and on the scope of the clause *vis-á-vis* non-contractual claims.

A subtler issue concerns TnC provisions purporting to select the place where the contribution procedure and the token creation and allocation takes place. For instance, the *Tezos* TnC read as follows: "*The Contribution Software and the Client are located in Alderney. Consequently, the contribution procedure, the* [token] *creation and* [token] *allocation is considered to be executed in Alderney*". This provision, if accorded deference, may potentially be relevant for the identification of both the place of performance (for contract claims) and the place where the harmful event occurred (for tortious claim). Does this mean that, despite the potential unenforceability of the forum selection clause, the *Tezos* TnC ultimately succeed in influencing the jurisdiction of State courts? Despite its undoubted historical interest, with fortifications described by William Ewart Gladstone as "*a monument of human folly*", the little island (population 1,903) may not be a particularly practical choice for international litigation. In practice, however, the contents of the TnC are unlikely to be decisive, as the analysis necessary to locate the relevant facts of the case ultimately remains a factual one. Any such clause, hence, should normally be disregarded when it appears that, in reality, the relevant facts of the case took place elsewhere.

Finally, what about applicable law? TnC often contain a choice-of-law clause: in the case of the *Tezos* ICO, for instance, the TnC idenfitied Swiss law as the applicable law. In the European Union, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (***Rome I Regulation***) excludes rights and obligations which constitute a financial instrument from the general rule applicable to consumer contracts, in order to ensure uniformity in the applicable law (*see* in particular Recital 28). Therefore, for contractual claims, the law selected in the TnC may potentially be relevant as "*law chosen by the parties*" under Article 3 of Rome I Regulation; however, the same doubts illustrated above with reference to browsestrap agreements are to a certain extent relevant here, and it is therefore necessary to perform a case-by-case assessment of the procedure whereby the contribution took place and the tokens were created and allocated. But, most importantly, any applicable law clause would in any case be irrelevant if the cause of action is in tort. If, hence, the securities laws of the forum are applicable to a certain ICO, their applicability may not be excluded by an agreement whereby the parties subject their contractual relationship to any given foreign law. For this reason, the choice for Swiss law in the *Tezos* TnC is likely to be irrelevant, as far as the claims based on alleged violations of securities law are concerned.

Conclusions

The recent wave of ICO-related litigation raises a number of delicate private international law questions, which are yet to find a definitive answer. Especially in cases where general jurisdiction does not attach to the defendant, determining jurisdiction is likely to require a careful assessment of the facts of the case (both in the US and in the EU), so as to establish some form of territorial link with the forum. The relevance of provisions such as forum selection agreements, contained in ICO TnCs, is sometimes curtailed not only by the arguable consumer status of retail investors, but also by the "*browsestrap*" nature of the agreement, by the difficulties entailed by the extension of the effects of the clause to secondary market purchasers, and by the tortious nature of certain claims. As for the law applicable to the merits, any choice-of-law clause is likely to be irrelevant if the claim is based on an alleged securities fraud. In their short, exciting but troubled history, ICOs have prepared us to expect the unexpected; the latest "*plot twist*" may lead us to explore some uncharted territories of international litigation.

[1] Case C-366/13, *Profit Investment SIM SpA v. Stefano Ossi and Others*.

[2] Case C-595/17, *Apple Sales International and Others*; C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others*.

[3] Alessandro Villani, "*Arbitration Clauses Incorporated by Reference: An Overview of the Pragmatic Approach Developed by European Courts*", Kluwer Arbitration Blog, 3 March 2015, accessible here.

After Token Rush: International Litigation and Initial Coin Offerings (ICO) – Part 1

Between the end of 2016 and the beginning of 2017, many things that we thought were impossible happened. Among them was the meteoric rise of Initial Coin Offerings (***ICO***), an unprecedented development in the fields of venture capital, blockchain technologies and corporate finance law. This post considers some of the international litigation questions that arise out of the phenomenon, especially in light of the recent proliferation of ICO-related court cases.

<u>What is an ICO?</u>

ICOs are a crowdfunding instrument for startup companies. While the details may vary depending on the project, most ICOs are based on the same structure: a startup company is seeking to raise capital to develop a project, typically concerning distributed ledgers and other Blockchain-related technologies. Rather than resorting to more traditional methods to raise capitals, the startup advertises its project in a “*white paper*“, where the company’s agenda for future technological and commercial development is described and a minimum amount of funds necessary for the project is set. Investors (and especially retail investors) are invited to support to the startup by buying “*tokens*“, arguably the Blockchain equivalent of securities. The procedure whereby the investors contribute their money and receive the tokens is normally regulated by a document, sometimes called “*Contribution and Token Allocation Terms*“, setting forth the ICO general terms and conditions. The ICO campaign lasts for a limited period of time, at the end of which the funds coming from the investors should be used to undertake the project, as long as the minimum threshold is reached; if, instead, the funds are insufficient, the ICO is unsuccessful, and the money should be returned to the investors.

Tokens are digital items registered on a blockchain. The investors will be able to benefit from the tokens once the startup project comes to fruition: they may be used as a fiat currency, or entitle holders to receive services of goods, or have some other kind of purpose, depending on the terms of the ICO. And, most importantly, tokens are tradable: investors can exchange them on the secondary market, and thus do not necessarily need to wait until the startup has completed its project.

In 2017, startup companies raised a staggering USD 6 billion through ICOs; the price of Ethereum, the cryptocurrency most frequently used to buy tokens, went from USD 9,70 on 1 January 2017 to USD 1.016,50 on 1 January 2018. For a short period of time, ICOs seemed destined to subvert the landscape of corporate finance, funding a wave of innovation-driven ideas that would disrupt the world as we know it. In the words of the Bard, "*when the sea was calm, all boats alike showed mastership in floating*". Pretty soon, however, waves became to appear. In some cases, the idea underlying the ICO proved to be unviable or unrealistic: the instrument of ICOs was used to fund a wide range of projects, many of which quickly turned out to be unsuccessful. Furthermore, regulators (such as the Securities and Exchange Commission in the United States) turned their attention to the phenomenon, suggesting that tokens qualified as securities and that, hence, many ICOs violated securities law.

From Enthusiasm to Litigation

At the end of 2017, lawsuits began to be filed against legal entities that had conducted ICOs. The causes of action vary, including securities fraud, false advertisement, unfair competition, breach of contract and breach of consumer law. A notable example is the one of the *Tezos* ICO. In 2017, the *Tezos* ICO raised USD 232 million, which investors paid in exchange for tokens called "*tezzies*". Despite the remarkable initial success, the *Tezos* project quickly turned controversial, also due to an internal dispute for the control of the foundation that conducted the ICO. At the time of writing, several class actions concerning the *Tezos* class action have been filed[1], and a United States District Judge for the Northern District of California denied a motion to dismiss filed by the defendants[2].

While probably the most notable case to date, *Tezos* is not the only case of an ICO resulting in court litigation. A number of other cases have been filed in US courts[3]. and the same trend is likely to spread to other jurisdictions as well, given that investors from all over the world were attracted to ICOs in 2017. These cases raise a number of very interesting and largely unresolved legal issues, such as the nature of tokens, the legal qualification of the transaction (sometimes labeled as a donation) whereby funds are exchanged for tokens and the applicability of consumer law. It is, of course, not possible to analyse all of these problems in detail in a single blog post. However, it is interesting to focus on the private international law problems raised by this type of litigation, in order to consider different solutions that may be adopted by courts in the United States and, in a not so distant future, also in Europe.

The International Dimension

An obvious problem arising out of cases such as *Tezos* is the one of jurisdiction, especially in scenarios where the entities conducting the ICO are not located in the same state where the litigation is pending. In the United States, in cases where general jurisdiction does not attach to the defendant, the law imposes three requirements for personal jurisdiction to exist[4]: (i) the defendant must purposefully direct his activities or conduct transactions with the forum or a resident thereof; (ii) the claim must arise out of these activities; (iii) the exercise of jurisdiction must be reasonable. In light of these criteria, specific personal jurisdiction may arguably be established if, for instance, the ICO was advertised on a website hosted on a server located in the forum, which marketed the ICO to retail investors resident in the forum.

Looking at the same problem from the point of view of EU law, in cases where jurisdiction may not be established on the basis of the general head of Article 4(1) of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I bis Regulation***), some guidance as to the establishment of special jurisdiction may be found in *Kolassa*[5]. In that case, the Court of Justice of the European Union (the ***CJEU***) held that consumer jurisdiction can be established in accordance with Articles 15 and 16 of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I Regulation***) – corresponding to Articles 17 and 18 of the Brussels I *bis* Regulation – only if a direct contractual relationship exists between the securities issuer and the consumer. Transposing this reasoning to the field of ICOs, then, claimants may only invoke the protective head of consumer jurisdiction if they acquired the tokens (as non-professional investors) directly from the entities conducting the ICO (and not, conversely, if the tokens were purchased on the secondary market). The same line of reasoning would probably apply to special jurisdiction in contractual matters, as *Kolassa* seems to entail the existence of a privity requirement, which would of course be absent in cases where the claimant did not acquire the tokens directly from the respondent. The door, however, could potentially remain open for tortious jurisdiction (Article 7(2) of the Brussels I *bis* Regulation / Article 5(3) of the Brussels I Regulation). Drawing on its previous case-law, the CJEU held in *Kolassa* that, while the mere fact of having suffered financial damage is not enough to establish tortious jurisdiction at a given location, Member State courts have jurisdiction when the "*damage alleged occurred directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts*"[6]. Adapting the same reasoning to the case of ICOs, the courts of a Member State may possibly have jurisdiction under Article 7(2) of the Brussels I *bis* Regulation, if the private encryption key through which an investor accessed her/his (*e.g.* Ethereum) wallet was stored on a device located in that Member State. It must be noted, though, that the analogy is not perfectly fitting, since the decentralised nature of Blockchain technologies is not entirely comparable with the structure of bank accounts, and physical location of the assets may thus only indirectly be established by assessing where the private key was stored, rather than looking directly at the tokens, or the funds (*e.g.* Ether) through which those tokens were acquired, which essentially exist on a global and non-localised distributed ledger. Furthermore, the CJEU itself distinguished *Kolassa* in the *Universal Music* judgment[7], holding that for tortious jurisdiction to exist the location of a bank account is not sufficient in and of itself, further factual circumstances being necessary to this end. Thus, given that the physical location of a private encryption key may be difficult to determine in practice and easy to manipulate for *forum shopping* purposes, no certainty exists in practice as to the applicability of Article 7(2) to the case of security fraud actions brought by tokenholders who have acquired the tokens on the secondary market. In the near future, further guidance on the matter may be given by the CJEU in the *Löber* case[8].

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The second part of this article is available here.

[1] *In re Tezos Sec. Litig.*, No. 17-CV-06779-RS, 2018 WL 2387845 (N.D. Cal. May 25, 2018); see also *Baker v. Dynamic Ledger Sols., Inc.*, No. 17-CV-06850-RS, 2018 WL 656012 (N.D. Cal. Feb. 1, 2018); *MacDonald v. Dynamic Ledger Sols., Inc.*, No. 17-CV-07095-RS, 2017 WL 6513439 (N.D. Cal. Dec. 20, 2017); *Okusko v. Dynamic Ledger Solutions, Inc. et al.*, Case No. 17-cv-6829; *GGCC, LLC v. Dynamic Ledger Sols., Inc.*, No. 17-CV-06779-RS, 2018 WL 1388488 (N.D. Cal. Mar. 16, 2018).

[2] Order on Defendant's Motion to Dismiss, available at here.

[3] *Rensel v. Centra Tech Inc., et al.*, 17-cv-24500-JLK (S.D. Fla.); *Hodges, et al. v. Monkey Calital, LLC, et al.*, 17-81370 (S.D. Fla.); *Balestra v. ATBCOIN, LLC, et al.*, 17-10001

(S.D.N.Y.); *Stormsmedia, LLC v. Giva Watt, Inc., et al.*, 17-00438 (E.D.Wash.); *Davy, et al. v. Paragon Coin, Inc., et al.*, 18-00671 (N.D.Cal.).

[4] *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

[5] Case C-375/13, *Harald Kolassa v. Barclays Bank plc*, ECLI:EU:C:2015:37.

[6] Case C-375/13, *Harald Kolassa v. Barclays Bank plc*, ECLI:EU:C:2015:37, paras 42-57.

[7] Case C-12/15, *Universal Music International Holding BV v. Michael Tétreault Schilling and Others*, ECLI:EU:C:2016:449, paras 36-39. See also the AG Opinion in the same case, ECLI:EU:C:2016:161, paras 44-45.

[8] Case C-304/17, *Löber*; see AG Opinion, ECLI:EU:C:2018:310, in particular paras 68-81, also with reference to Gargantini, M., "*Capital markets and the market for judicial decisions: in search of consistency*", MPILux Working Paper 1, 2016, p. 18; Lehmann, M., "*Prospectus liability and private international law – assessing the landscape after the CJEU Kolassa ruling (Case C-375/13)*", Journal of Private International Law, 2016, p. 318, at p. 331; Cotiga, A., "*C.J.U.E., 28 janvier 2015, Harald Kolassa c. Barclays Bank PLC, Aff. C-375-13*", Revue internationale des services financiers,2015, p. 40, at pp. 48 to 49.

English High Court Rules on Anti-Suit Injunctions and Disregards AG Wathelet's Opinion in Gazprom

On 6 June 2018, the English High Court (the ***Court***) ruled in *Nori Holding Limited et al.* that a European court was not entitled to grant anti-suit injunctions in order to prevent parallel judicial proceedings taking place in another EU Member State. The Court's judgment is in line with the *West Tankers* ruling handed down by the Court of Justice of the European Union (the ***CJEU***) in 2009.

In the case at hand, the claimants (*Nori Holding Ltd and al.*) asked the Court to issue an anti-suit injunction in order to halt court proceedings in Russia and Cyprus which, they argued, violated arbitration clauses contained in several agreements entered into with the defendant.

The facts of the case are rather complex and are not necessary to understand the opinion of the Court. The most interesting part of the case concerns the possibility, for an English court, to issue an anti-suit injunction against a Cypriot court (*i.e.* another EU court). Consequently, only this aspect of the case is discussed here.

As most of you know, in the *West Tankers* case the CJEU ruled that EU law (and in particular Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I Regulation***)) prohibited the grant, by a court of an EU Member State, of anti-suit injunctions issued to restrain court proceedings brought in another EU Member State in violation of an arbitration agreement.

In the case at hand, however, the claimants argued that two developments took place since the CJEU handed down its *West Tankers*' decision, which justified the reconsideration of those findings.

The first development was the adoption of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Recast Regulation***), which replaced the Brussels I Regulation. In particular, the Brussels Recast Regulation contains a Recital 12 which makes abundantly clear that arbitration proceedings are excluded from the scope of that regulation and that nothing prevents "*the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration*".

The second development was the reasoning of Advocate General Wathelet in his Opinion delivered in the *Gazprom* case before the CJEU. In this Opinion, Advocate General Wathelet found that Recital 12 of the Brussels Recast Regulation was "*a retroactive interpretative law* [which] *explains how* [the exclusion of arbitration from the scope of the European rules on courts' jurisdiction] *should always have been interpreted*".

According to the claimants, these two developments have "*effectively reversed the decision in West Tankers*". More specifically, they argue that those developments removed the basis under which the CJEU in *West Tankers* prevented the grant of an anti-suit injunction restraining continuation of court proceedings in breach of an arbitration agreement. This is because Recital 12 of the Brussels Recast Regulation, which expressly excludes arbitration from the scope of the European rules on courts' jurisdiction, has (according to Advocate General Wathelet) a retroactive effect. In other words, arbitration is now considered as having always been excluded from the scope of the European jurisdictional rules, and, consequently, the *West Tankers* decision is no longer valid – or, at least, would have to be decided differently if it came before the CJEU today. Therefore, according to the claimants, nothing prevents an English court from issuing an anti-suit injunction in order to restrain the pursuit of proceedings in another EU Member State which are in violation of an arbitration agreement.

The Court disagreed with this position.

According to the Court, "[n]*either the* [Brussels] *Recast Regulation itself nor its recitals say expressly that* [the principles affirmed in West Tankers] *no longer apply or that an anti-suit injunction in support of arbitration issued by a court in a member state takes precedence over them. If the EU legislature intended to reverse the* West Tankers *decision, it chose an odd way in which to do so*".

The Court also recalled that the views expressed by Advocate General Wathelet in his *Gazprom* Opinion were not in fact followed by the CJEU in its judgment and that the CJEU "*plainly regarded* West Tankers *as a correct statement of the position under the* [Brussels I Regulation]".

Importantly, the Court added that its findings did not necessarily mean that the proceedings in Cyprus would continue. According to the Court, the Cypriot court might very well stay the proceedings or the arbitrators (and not a court) might issue an anti-suit injunction restraining the further pursuit of the case in Cyprus (something that the CJEU precisely accepted in *Gazprom*).

CJEU Clarifies EU Jurisdictional Rules in Antitrust Damages Claims

On 5 July 2018, the Court of Justice of the European Union (the ***CJEU***) handed down an interesting decision in which it clarified the rules governing court jurisdiction in damages claims resulting from anticompetitive conduct.

In the case at hand, ***FlyLaL*** – a Lithuanian airline – brought a claim before the Lithuanian courts against ***Air Baltic*** and ***Riga***

airport (two Latvian companies) seeking compensation for alleged anticompetitive conduct. More particularly, FlyLaL argued that Air Baltic had abused its dominant position by engaging in predatory pricing on certain routes departing from and arriving at Vilnius airport. FlyLaL also argued that those predatory practices were the result of an anticompetitive agreement entered into between Air Baltic and Riga airport whereby Air Baltic benefited from discounts of 80% on fees for aircraft take-off, landing and security services offered by Riga airport. The savings made on those services allowed Air Baltic to fund its predatory prices which affected FlyLaL.

Relying on Article 2 of the now repealed Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I Regulation***) which provides that "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*", both Air Baltic and Riga airport raised objections claiming that the Lithuanian courts lacked international jurisdiction and that the claim should have been brought before the Latvian courts instead.

However, at first instance, the Lithuanian court found that Article 5 of the Brussels I Regulation* (which provides that "[a] *person domiciled in a Member State may, in another Member State, be sued* […] *3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur* […]") applied to the case at hand and that the Lithuanian courts therefore had jurisdiction to hear the case.

Both Air Baltic and Riga airport challenged that decision.

On appeal, the Lithuanian Court of Appeal was uncertain as to (i) whether the alleged loss of income suffered by FlyLaL as a result of the anticompetitive conduct of Air Baltic and Riga airport could be regarded as damage capable of providing a basis for its jurisdiction pursuant to Article 5(3) of the Brussels I Regulation; and (ii) how to interpret the notion of "*place where the harmful event occurred*" in Article 5(3) of the Brussels I Regulation in the case of damages resulting from violation of competition law. The Lithuanian Court of Appeal therefore stayed the proceedings and referred the matter to the CJEU for a preliminary ruling.

In its judgment, the CJEU confirmed that "*loss of income consisting, inter alia, in loss of sales incurred as a result of anticompetitive conduct* […], *may be regarded as 'damage' for the purposes of applying Article 5(3) of* [the Brussels I Regulation]" (para. 36).

In addition, the CJEU also found that, in the context of an action seeking compensation for loss of sales caused by anticompetitive conduct, the notion of "*place of harmful event*" under Article 5(3) of the Brussels I Regulation consisted of either:

> – the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses (*i.e.* Lithuania in the case at hand); or
>
> – the place of conclusion of this agreement (*i.e.* Latvia in the case at hand), in the case of an anticompetitive agreement between companies; or
>
> – the place where the predatory prices were offered and applied.

By means of derogation to this last possibility, the CJEU also noted (para. 50) that if the predatory pricing policy consisted solely of the implementation of a prior agreed anticompetitive agreement, then the "*place of harmful event*" under Article 5(3) of the Brussels I Regulation would be the place of conclusion of the anticompetitive agreement.

* *Articles 4 and 7 of the currently applicable Regulation (EU)*

No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Ibis Regulation****) contain similar terms to Articles 2 and 5 of the Brussels I Regulation. Consequently, the findings of the CJEU in this case continue to be relevant under the Brussels Ibis Regulation*.

New York Court Rules on Proper Venue for Claims Brought Against Foreign Sovereigns

On 30 March 2018, the U.S. District Court for the Southern District of New York (the ***Court***) handed down an interesting

opinion on the issue of proper venue in relation to suing a foreign sovereign in a U.S. court.

The question of proper venue is distinct from that of jurisdiction which focuses on whether a particular court has authority to hear the case. Venue, however, deals with geographical location. Therefore, a court may have jurisdiction over a certain matter, yet be considered as an improper venue.

Choosing the proper venue is crucial in any action as a finding of improper venue can lead to burdensome and adverse consequences for the parties involved. For instance, the time spent on litigating the venue issue may render the claim time-barred due to the expiration of the statute of limitations and it will therefore be unable to move forward I another forum. At best, improper venue will lead to additional costs for the parties as a party will need to re-file and re-serve the defendant.

The case at hand concerned an action taken against the Government of Ukraine by a group of plaintiffs consisting of a Ukrainian automobile business, *Luxexpress-II Ltd*; its founders, Mr. and Mrs. Ivaneko; a U.S. supplier, *Alamo Group Inc.*; and the U.S. corporation *Luxexpress 2016 Corp*. (the ***Plaintiffs***). The claims arose from Ukraine's seizure of land and demolition of the Plaintiffs' business equipment and property and the subsequent refusal to compensate the Plaintiffs. In response, the Plaintiffs filed claims for racketeering, fraud, abuse of process, theft, conversion, unjust enrichment and unlawful takings and wrongful expropriation before the Court. Ukraine sought to dismiss the claims, arguing, *inter alia*, that New York was not the proper venue.

The issue of venue in actions against foreign states under the Foreign Sovereign Immunities Act is governed by 28 U.S.C. § 1391(f) which enumerates three different provisions for deciding the proper venue. Firstly, venue may be established "*in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated*". Secondly, for claims concerning maritime disputes, the proper venue is the district where the vessel or cargo is located. Finally, the U.S. District Court for the District of Columbia is always an appropriate venue.

In the present case, in order to establish that New York was the proper venue, the Plaintiffs relied on two claims. Firstly, it was submitted that Mr. and Mrs. Ivanenko were residents of New York and political refugees from Ukraine. The Court, however, dismissed this argument on the basis that the Plaintiffs failed to articulate the relationship between their resident and refugee statuses, on the one hand, and § 1391(f), on the other hand.

Secondly, the Plaintiffs contended that their contacts with New York demonstrated that it was a proper venue. In support of this, the Plaintiffs relied on three contacts: (i) the Defendant's activity had a direct impact on the Plaintiffs' businesses in New York; (ii) one of the Plaintiffs had to borrow money from a citizen based in New York; and (iii) *Luxexpress 2016 Corp.* is a New York corporation with its principal place of business in New York. Again, however, the Court dismissed these claims on the basis that the Plaintiffs' contacts with New York were irrelevant to the venue analysis under § 1391(f).

The Court maintained that the relevant question was where the events or omissions "*giving rise*" to the Plaintiffs' claims occurred or where the property at issue was located. Bearing this in mind, none of the submitted contacts with New York addressed either of these issues. The Court stated that the fact that the Defendants' actions had a direct impact in New York did not inform where the Plaintiffs' claims arose. Similarly, the fact that one of the Plaintiffs borrowed money from a New York citizen as a result of the Defendants’ actions was irrelevant to the question of where the claim arose. Furthermore, the fact that *Luxexpress 2016 Corp.* – an entity incorporated after the action was filed – is a New York corporation was irrelevant to the venue analysis. The Court noted, in that respect, that if this were so, any plaintiff could create a proper venue by merely incorporating a company in that district.

The Court concluded that New York was an improper venue on the basis that virtually all of the Defendants’ actions giving rise to the Plaintiffs’ claims occurred in Ukraine and all the property that is the subject of the Plaintiffs’ claims was or is located in Ukraine.

The potentially harsh consequences of a finding of improper venue were, however, mitigated by the fact that the Court relied on 28 U.S.C § 1406(a) (which allows a district court to transfer an action from an improper to a proper venue when it is considered to be in the interests of justice) in order to transfer the case to the U.S District Court for the District of Columbia on the basis that the Plaintiffs had “*already expended significant resources in serving Ukraine and possibly the* [i]*ndividual* [d]*efendants, and dismissing the case would achieve nothing but delay*“.

U.S. Supreme Court Excludes Foreign Companies From Alien Tort Statute

On 24 April 2018, the U.S. Supreme Court (the ***Supreme Court***) handed down its judgment in *Jesner v. Arab Bank*, holding that foreign (*i.e.* non-U.S.) companies cannot be sued under the Alien Tort Statute (the ***ATS***). The case builds on the Supreme Court's judgment in *Kiobel v. Royal Dutch Shell*, in which the Supreme Court held that U.S. federal courts did not have jurisdiction under the ATS to hear claims for violations of international law that took place *wholly* outside the territory of the United States. After *Kiobel*, however, the question of whether the ATS also applied to corporations remained open. This question has now been settled in the present case.

The ATS (which is provided for by the Judiciary Act of 1789) allows foreign citizens to seek remedies in U.S. courts for civil wrongs committed (i) outside the United States, and (ii) "*in violation of the law of nations or a treaty of the United States*". Historically, the objective of the ATS for the United States was to avoid diplomatic tensions by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. Most recently, it has been used by non-U.S. citizens to sue in tort for damages arising from human-rights violations.

The applicants in the case at hand were a large group of foreign citizens who had suffered injuries (including the loss of family members) in terrorist attacks in Israel and Palestine from 1995-2005. They claimed that the Arab Bank (the ***Defendant***), a company headquartered in Jordan, was at least partly liable for these injuries as it held accounts for individuals and organisations that supported and funded Hamas and other terrorist organisations. They claimed jurisdiction in the United States through the alleged activities of the Defendant's New York branch in clearing transactions and laundering money for a U.S.-based charitable organisation with links to Hamas.

Writing for the majority, Justice Kennedy first recalled the history of the ATS (which dates back to 1789) and stressed that "*over 190 years or so after its enactment, the ATS was invoked but a few times*". Justice Kennedy then applied the two-part test set out in *Sosa v. Alvarez-Machain* (one of the few cases in which the Supreme Court applied the ATS):

– First the Supreme Court had to ask whether the law of nations imposes liability on corporations for human-rights violations committed by its employees;

– Second, the Supreme Court must ask whether it has authority and discretion in an ATS suit to impose liability on corporations without a specific direction from Congress to do so.

In order to answer the first question, Justice Kennedy relied on the jurisdictional reach of recent international tribunals, such as the international criminal tribunals for Rwanda and Yugoslavia and the Rome Statute of the International Criminal Court whose jurisdiction is limited to natural persons Based on those examples, Justice Kennedy concluded that it did not follow "*that current principles of international law extend liability – civil or criminal – for human-rights violations to corporations or other artificial entities*". In any event, Justice Kennedy found that there was "*at least sufficient doubt on* [this] *point to turn to* Sosa*'s second question*".

Justice Kennedy then turned to the second part of the *Sosa* test and analysed the proper division of powers between the Supreme Court and Congress in recognising new causes of action. On this point, he concluded that – given the foreign policy considerations of the ATS – the extension of liability under the ATS to foreign corporations was not a matter for the Supreme Court. Instead, it should be a matter for the legislative branch of government*.

At the end of the day, the Supreme Court held that the ATS (in its current form) precludes the possibility of foreign corporations being liable for harmful activity committed outside the U.S.

It is worth noting that the Supreme Court decided the case by a narrow 5:4 majority, with a number of partially concurring and dissenting opinions. In particular, the minority (led by Justice Sotomayor) criticised the broad exclusion of corporate liability as being disproportionate. It remains to be seen whether the ATS may nonetheless apply to U.S.-domiciled corporations in certain – narrower – circumstances.

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** This view clearly echoes the late Justice Scalia's dissenting opinion in* Sosa v. Alvarez-Machain*: "We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international* *law into American law. […] This Court seems incapable of admitting that some matters – any matters – are none of its business".*
