



Airline dispute lands in ICJ: a commentary on the Swissair/Sabena case

Proceedings instituted by Belgium against Switzerland, 22 December 2009

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On 23 December 2009 the Belgian government filed an application instituting proceedings against Switzerland at the International Court of Justice (ICJ). The dispute brought before the ICJ involves the refusal of the Swiss courts to stay their proceedings in favour of the Belgian courts where similar proceedings were pending, thereby failing to apply key provisions of the Lugano Convention of 16 September 1988.¹ In doing so, Switzerland, according to the application, violates the rule of international law providing that all State authority, in particular in judicial matters, must be exercised in accordance with the rule of reason.

Facts:

On 23 December 2009 the Belgian government filed an application at the International Court of Justice (ICJ) against Switzerland. The underlying dispute that gave rise to the application relates to Sabena, the now-bankrupt former national airline of Belgium. The two main shareholders of Sabena were the Belgian State and Swissair, the former national airline of Switzerland. Both parties concluded several contracts during the nineties concerning the financing and management of Sabena. On 3 July 2001 the Belgian State brought proceedings against Swissair before the Brussels courts for non-compliance with these contracts and a claim for subsequent damages. Three months later, Swissair (subsequently renamed SAirGroup and its subsidiary SAirLines) applied for a debt-restructuring moratorium in Switzerland. As a precautionary measure and in order to ensure compensation for the aforementioned damages suffered from the alleged breach of contractual and non-contractual obligations, the Belgian shareholders requested to be included in the list of Swissair's and SAirLines' creditors. This request was rejected, leading the Belgian shareholders to take two

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¹ For full text of the Lugano Convention of 16 September 1988 please go to: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41988A0592:EN:HTML>

courses of action: continuing proceedings in relation to the Swiss debt-restructuring proceedings, and lodging an administrative complaint, appealing for a stay of the Swiss proceedings on the grounds that similar proceedings are pending in Belgium. Such a stay of proceedings would be possible on the basis of the Lugano Convention on recognition and enforcement of judgments to which both Belgium and Switzerland are parties. After taking the case through the Swiss District Court and the Court of Appeal, it was up to the Swiss Federal Supreme Court to give a ruling in this case. In its judgment of 30 September 2008 the Supreme Court stated that the Swiss proceedings should not be stayed, because the decision arising out of the Belgian proceedings could not be recognized in Switzerland in the debt-restructuring proceedings.

The reasoning of the Swiss courts behind this outcome was that 1) the Belgian decision could not be recognized for the purposes of the Swiss debt-restructuring proceedings, because the Swiss debt-restructuring proceedings fall under ‘bankruptcy proceedings’ which are excluded from the scope of the Lugano Convention (art. 1 par. 2), and 2) Swiss courts have exclusive jurisdiction over any dispute concerning the schedule of claims and the inclusion of any claims of the Belgian shareholders. This exclusive jurisdiction of the Swiss courts leaves no room for the recognition of a Belgian judgment in which the existence of the Belgian’s shareholders’ debt claims are ascertained. Nor does it justify a stay of the Swiss proceedings in the light of the Belgian proceedings.

Legal grounds of the application

The legal grounds on which the claim of the Belgian government is based, are threefold. Because of the complexity and technical nature of the grounds (relating to the application of certain provisions of the Lugano Convention) they will be summarized.²

The Belgian State states in its application that Switzerland breaches international obligations and the rule of international law by violating the provisions of the Lugano Convention on the recognition and enforcement of judgments for the following reasons.

- The Swiss courts are mistaken in the non-recognition of the Belgian decision. The Belgian decision concerns the Swiss shareholders’ civil liability. All civil or commercial actions based on general rules of the law of liability are ‘civil and commercial matters’ within the meaning of art. 1 of the Lugano Convention, and not a bankruptcy matter. The Belgian decision lies outside the area of bankruptcy and such a decision is thus recognizable and enforceable under the Lugano Convention. The fact that recognition is sought in Switzerland for the purpose of establishing the status of the Belgian shareholders as creditor in Swissair’s debt-restructuring proceedings is in this respect irrelevant.

² For a full text of the application, please visit:
http://www.haguejusticeportal.net/Docs/Court%20Documents/ICJ/Application_Instituting_Proceedings_FR.pdf.

- The Swiss courts are also mistaken in the application of art. 21 and 22 of the Lugano Convention, according to which in instances of parallel proceedings in different states precedence is given to the court first seized (in this case the Belgium court). The argument put forward by the Belgian government is that in the present case the Swiss courts should stay the Swiss debt-restructuring proceedings, because the future Belgian decision is enforceable in Switzerland (see above). By not doing so the Swiss courts are violating the Lugano Convention, and create a situation in which a conflict of judgments can occur.

Commentary

This case is quite a surprise for private international law experts. This is one of the few cases in which a dispute concerning the application of a private international law instrument is discussed before a court that normally deals with issues related to public international law.

The question arises as to why Belgium brought the case to the International Court of Justice in the first place. The answer to this question lies in the Lugano Convention itself, as it does not contain any provisions regarding dispute resolution. This situation has changed under the new Lugano Convention of 30 October 2007 that entered into force in 1 January 2010.³ According to art. 2 of the 2nd protocol to the Convention any State not belonging to the EU (like Switzerland) can submit case statements or written observations to the European Court of Justice, whenever the interpretation of the new Lugano Convention is in dispute. Switzerland has not yet ratified the new Lugano Convention.

The next question to be answered is whether the ICJ has jurisdiction to adjudicate this case. In our view this is clearly the case. Both Switzerland and Belgium have made declarations pursuant to art. 36, paragraph 2 of the Statute of the ICJ, thus conferring jurisdiction on the court. Moreover, it is not contested that the dispute meets the ICJ's admissibility requirements as domestic remedies have been exhausted [see e.g. *Interhandel*, Order of 24 October 1957, ICJ Reports (1957) p. 105-120]. In this case the Belgian State brought the proceedings all the way up to the Swiss Federal Supreme Court, before seeking redress before the ICJ.

Now that the preliminary questions regarding the jurisdiction of the ICJ and the admissibility of the claim are answered, it might be interesting to take a closer look at some of the legal arguments put forward by the Belgian Government.

First, the Belgian State argues that non-recognition of the future Belgian decision is in violation of the provisions of the Lugano Convention. In order to determine whether this viewpoint is sound we have consulted the Convention's provisions, in particular article 26, which states that a judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required. Non-recognition is only

³For the full text of the 'new' Lugano Convention of 30 October 2007 please go to:
http://www.bj.admin.ch/etc/medialib/data/wirtschaft/ipr.Par.0022.File.tmp/20071030_entw_lugano_convention-e.pdf

allowed on the basis of formal grounds that are summarized in art. 27 and 28, or when the decision is rendered in a case that falls outside of the substantive scope of the Lugano Convention as laid down in art. 1.

The Swiss courts argued that the Lugano Convention did not apply in this case, because the Belgian decision whose recognition is sought, is used for the purposes of contesting the schedule of claims in Swissair's liquidation procedure. A liquidation procedure falls under the heading 'bankruptcy proceedings' within the meaning of art. 1, paragraph 2 and is therefore excluded from its formal scope.

In our opinion the view of the Swiss courts is debatable. When determining whether a judgment falls within the scope of the Convention, only the nature of a judgment whose recognition is sought is decisive, rather than the purpose for which the judgments is being used (in this case contesting claims in the bankruptcy proceedings). The nature of the Belgian decision is clearly 'civil or commercial', and thus the Swiss courts are obliged to recognize the decision under the Lugano Convention.

As a second argument, the Belgian government states that the Swiss courts should have stayed their debt-scheduling proceedings, pursuant to art. 21 or 22 Lugano Convention concerning parallel proceedings in two different States. The reasoning behind the decision of the Swiss courts not to stay their proceedings is that the Swiss liquidation proceedings fall outside the scope of the Lugano Convention ('bankruptcy'). The Lugano Convention could not be applied to this situation as there is not a case of parallel proceedings in two different Contracting States.

The question of whether Belgium's second argument holds true will depend on whether the debt-scheduling proceedings and the status of the Belgian shareholders as creditors are to be considered as issues of bankruptcy and thereby excluded from the scope of the Lugano Convention. This question can be considered as a difficult and thorny one. In order to answer this question the ICJ will have to take recourse to a number of sources, most notably the case law that is given by the European Court of Justice within the framework of the Brussels Convention (in 2001 replaced by the Brussels I Regulation (EC nr. 44/2001)). The Brussels Convention (now: Brussels I Regulation) can be considered as a 'sister' to the Lugano Convention. This means that any interpretation given by the ICJ in this case will also have, albeit indirectly, an influence on the interpretation of the Brussels I Regulation.

What the outcome of this case will be remains uncertain. However in our opinion it is very much the question whether the ICJ is the appropriate and proper forum to deal with the very technical issues relating to the Lugano Convention such as those raised in the case under consideration. In our view the ECJ would be a more proper forum given its expertise regarding the interpretation of EC Private International Law instruments, such as the Brussels Convention (now: Brussels I Regulation (EC nr. 44/2001)). However, the ECJ does not have jurisdiction to give an interpretative ruling under the 'old' Lugano Convention, and there is no possibility to 'transfer' the case from the ICJ to the ECJ.