Between Private and Public International Law: Exorbitant Jurisdiction as Illustrated by the Yukos Case

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Abstract

The article analyses one specific aspect of the long and complicated proceedings in which the Russian oil company Yukos was involved: the question of jurisdiction relating to the application that Yukos made to a court in Houston, Texas, to open bankruptcy proceedings under chapter 11 of the US Bankruptcy Code and thus grant protection against the creditors to permit restructuring of the company. Yukos being a Russian company burdened by massive debt connected with taxes owed to the Russian authorities, and virtually the totality of its assets being located on Russian territory, the first question that arises is how it is possible for a court in the United States to have jurisdiction in this case. This article examines the question of extraterritorial jurisdiction in civil cases, from the point of view of both private and public international law.

Keywords

international jurisdiction, exorbitant forum, extraterritorial jurisdiction, foreign investment protection, private international law, public international law

1. Introduction

In this article, we will consider the question of the exorbitant jurisdiction in civil cases, particularly the aspect of its possible dimension of public international law. Court jurisdiction in civil cases is traditionally seen as a question of private international law or of conflict of laws, and it may,

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1 Strictly speaking, private international law covers only private law and not procedural law, with which this article is concerned. In a broad sense, however, the term 'private international law' is also used for international procedural law, especially in civil proceedings, and this is the meaning that we will apply here. The definition 'conflict of laws', which covers both, is also used in this article.
therefore, seem surprising that we focus on its public international law aspects.

The reason for our interest is to be found in the Yukos case: the Russian oil company which, having faced tax problems with the Russian authorities, applied for protection against the creditors in Houston, Texas, under the US bankruptcy law. Among the arguments presented to object to the American court’s jurisdiction were certain considerations of public international law, to which we would like to devote our attention. We will not analyze the Yukos case in detail, and we will not delve into the technical aspects of international bankruptcy law. Our attention is directed solely to the intersection of private and public international law in respect of international court jurisdiction. From the particular perspective taken here, it is possible to generalize the observations made in this insolvency case so as to address the wider question of jurisdiction in civil and commercial cases.

We will first briefly present the circumstances of the Yukos case; then we will introduce the legal question of exorbitant court jurisdiction in civil cases, the dimension of public international law and, finally, its possible effects in terms of remedies.

2. Circumstances of the Case

Yukos is a Russian oil company which, through active participation in the privatization process during the 1990s, has become one of the most important corporations in Russia. In late 2003, Yukos came under investigation for (among other things) tax evasion, and the company’s principal owner and chairman, Mikhail Khodorkovskii, was arrested. The media reported extensively on how these measures could be understood as a possible reaction by the Russian President to Khodorkovskii’s political ambitions. In any case, the public prosecutor’s office submitted detailed accusations against Yukos, the fiscal authorities demanded substantial payments of back taxes, and the courts confirmed these claims and ordered enforcement amounting to several billion Euros. The court-ordered auction of Yukos subsidiary Yuganskneftegaz, the company’s largest manufacturing arm, was announced for 19 December 2004. The national (semi-privatized) company Gasprom planned to participate in the auction with financing from a consortium of banks led by Deutsche Bank.

A few days before the scheduled auction, on 14 December, Yukos sought in Houston, Texas, protection from creditors according to chapter 11 of the US Bankruptcy Code. The Houston court issued a temporary order preventing any auction regarding Yukos’ assets from taking place

2 Temporary order of the court, No.04-3952.
and any party from financing participation in such auction for ten days. Deutsche Bank participated in the proceedings, objecting to the Houston court’s jurisdiction in the case. The Russian Federation did not take part in the proceedings.

Yukos did not carry out any business activity in the United States. Almost all of its assets and business were located in Russia. The debts that were to be covered by the auction had matured in Russia in respect of Russian taxes imposed on income generated in Russia. The connection between Yukos and Houston consisted of the fact that the financial director of the company had been there since Khodorkovskii’s arrest. Moreover, Yukos established a subsidiary in Houston on the same day on which it filed for insolvency protection there. In addition, Yukos opened a bank account in the name of this new US subsidiary just a few hours before filing for insolvency protection, transferring USD 480,000 from abroad into the account in order to cover lawyers’ fees. Yukos later opened an additional bank account in Houston.

3. The Legal Question of Exorbitant Jurisdiction

The obvious question regarding this case is: why Houston? How can a national court be competent for a company’s insolvency when virtually all of its business, assets and creditors, as well as company headquarters, are located in another state? As this is not an essay on US insolvency law, it is sufficient to refer to the decision rendered by the court in the Yukos case: §109(a) of the US Bankruptcy Code provides that a US court is competent when the debtor carries out activity or has assets in the United States. Judicial practice has repeatedly affirmed that, in this context, even very small sums are considered ‘assets’, and that the presence of a single employee counts as ‘activity’. The court, therefore, had no objections to consider itself territorially competent for Yukos’ insolvency, as the company had a bank account with USD 480,000 for legal costs. The court ultimately dismissed the application, as we will see below, but not for a lack of sufficient connection between the facts of the case and the forum.

This can be seen as an example of the sort of jurisdiction that is deemed exorbitant, because the circumstances of the case have no significant connection with the place of the court.

3 Yukos’ goal with the insolvency procedure was, above all, to prevent the auction in Russia. This would have been the first step towards the commencement of an international arbitration, in which Yukos planned to settle the controversy with the Russian authorities.

4 Memorandum Opinion, United States Bankruptcy Court for the Southern District of Texas, Houston Division, Case No.04-47742-H3, 24 February 2005, 20 et seq.
3.1. The Regulation of International Jurisdiction in Civil Cases

International jurisdiction of a national court is regulated by the court’s own national regulation of private international law. In certain contexts, such as in Europe, some aspects of international jurisdiction are regulated by conventions or supranational instruments. Thus, jurisdiction in civil and commercial matters is determined by the Brussels Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter “Brussels I”) which has replaced, albeit not for Denmark, the Brussels Convention. Within the European Free Trade Association (EFTA), international jurisdiction is regulated by the parallel Lugano Convention. In cases of insolvency, court jurisdiction is regulated within the EU by the Council Regulation on Insolvency Proceedings (hereinafter “Insolvency Regulation”). Article 3 of the Insolvency Regulation provides that the main insolvency proceedings for a company with cross-border activities are to be conducted in the country where the company has the Center of its Main Interests (COMI). This connecting factor is also adopted in the 1997 UNCITRAL Model Law on Cross-Border Insolvency (hereinafter “UNCITRAL Model Law”). The main purpose of the COMI, as a connecting factor, is to avoid multiple proceedings for the same company, as well as to avoid initiating proceedings in countries with which there is no significant connection. The connecting factor serves, thus, to limit exorbitant jurisdiction. An assumption of jurisdiction, as in the Yukos case, would be impossible under either the Insolvency Regulation or the UNCITRAL Model Law.

As long as international jurisdiction is regulated by national private international law, there is a danger that the respective domestic conflict rules will not be coordinated with one another, and, therefore, that courts in several countries will consider themselves competent for the same proceeding. This lack of coordination does not necessarily depend on an overly extensive scope of exorbitant jurisdiction. It is easy to imagine

\[ \text{Council Regulation 44/01/EC of 16 January 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: Reg. 44/01, OJ 2001 L 012, 1-23.} \]

\[ \text{Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1968 (hereinafter "Brussels Convention").} \]

\[ \text{Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1988 (hereinafter "Lugano Convention").} \]

\[ \text{Council Regulation 1346/00/EC of 30 June 2000 on Insolvency Proceedings: Reg. 1346/00, OJ 2000 L 160/1.} \]

\[ \text{Another matter is that the connecting factor does not necessarily provide a clear solution, as demonstrated by the Parmalat Eurofood case, wherein the main question was whether the main interests of a company are to be determined in respect of the subsidiary or of the parent company: case C-341/04, available at \( \text{http://www.curia.eu.int} \).} \]
situations in which there are several real connecting factors, for example, in civil or commercial matters, the place of performance of the obligation and the residence of the defendant. In these cases, but even more clearly in cases of exorbitant competence, where there is no real connection between the case and the court, the need for coordinating the respective international jurisdictions becomes evident. For the sake of completeness, it should be mentioned that, while the United States are notorious for their inclination towards assuming exorbitant jurisdiction, they are by no means alone in this regard. Exorbitant jurisdiction is found in the Austrian Civil Code as well as in the Norwegian, to name just two countries that have found themselves on the blacklists of the Brussels and Lugano Conventions. Within Europe, this is limited and coordinated at a supranational level by the above-mentioned instruments. Outside the scope of application of these instruments, however, if no international conventions or supranational instruments exist, exorbitant fora are again applicable. If international *lis pendens* is not regulated by the countries’ respective domestic private international law, this can lead to contradictory decisions regarding the same facts.

The only possible reaction to this situation is to refuse acknowledgement and enforcement of foreign decisions. This is possible because foreign decisions, in the absence of an international convention or specific domestic regulation, have no legal effects. Thus, a picture emerges in which each country determines its own international jurisdiction, retaining the freedom to refuse acknowledgement of foreign proceedings and decisions. Transnational cases are, thus, subject to a number of domestic systems, which, potentially, are not coordinated with one another.

The question to be answered, therefore, reads: what legal remedies are available either to coordinate or to restrict the domestic regulation of international jurisdiction?

### 3.2. Restrictions under Private International Law

The problem of the extraterritorial effect of national laws and decisions has long been recognized, particularly in the field of economic law. This has frequently led to conflicts in the last decades. In the context of competition law, for example, national law is applied, under the *effects doctrine*, to all the effects taking place in the respective country, even if they were caused by activity that was conducted outside of that country. The legislation promulgated (or decision rendered) in that country is aimed at

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10 Art.99 Jurisdiction Norm—a patrimonial claim may be presented in the place where the defendant has some assets.

11 Art.32 tvml—in the new version, not yet in force, this basis of jurisdiction is no longer so absolutely expressed.
preventing the foreign activity that has effects within the issuing country's own territory, and this implies that it seeks to be applied to activity carried out beyond the borders of the issuing country. The effects doctrine was developed in the United States, but is now recognized in European competition law as well.\footnote{On the legal position in the EC, see Richard Whish, \textit{Competition Law} (Lexis Nexis, London, 5th ed. 2003), 436 et seq. on national competition legislation based on the effects doctrine, see §6(1), Austria's Anti-Trust Code; §6, Norway's Competition Law; §130(2), Germany's Anti-Trust Code (for detailed comments and references to literature and legal practice, see Ulrich Immenga, Ernst Joachim Mestmäcker and Gerhard Dannecker, \textit{GWGB Gesetz gegen Wettbewerbsbeschränkungen. Kommentar} (Beck, München, 2001), §130(2) notes 15 et seq., 220 et seq.).}

This extraterritorial effect can be explained using the categories of private international law. In 1986, the Hamburg Max Planck Institute for Comparative and International Private Law organized a symposium on the extra-territorial application of economic law (\textit{Die extraterritoriale Anwendung von Wirtschaftsrecht}), in which the problem was defined as \textit{Wirtschaftskollisionsrecht} (international economic law)\footnote{Ulrich Drobnig, “Das Profil des Wirtschaftskollisionsrechts”, 52 \textit{Rabels Zeitschrift für ausländisches und internationales Privatrecht} (1988), 1-7, at 1 et seq.} and explained with concepts taken from the private international law doctrine, as \textit{einseitige Anknüpfung} (unilateral connection)\footnote{Jürgen Basedow, “Wirtschaftskollisionsrecht”, 52 \textit{Rabels Zeitschrift für ausländisches und internationales Privatrecht} (1988), 8-38, at 8 et seq.} or \textit{Eingriffsnormen} (overriding mandatory rules).\footnote{Kurt Siehr, “Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht”, 52 \textit{Rabels Zeitschrift für ausländisches und internationales Privatrecht} (1988), 47-102, at 47 et seq.}

Incidentally, Savigny had already recognized the direct applicability of \textit{zwängendes Recht} (overriding mandatory rules) as an exception to the otherwise completely symmetrical system of private international law;\footnote{Friedrich Carl von Savigny, \textit{System des heutigen römischen Rechts} (Veit und Comp., Berlin, 1840-56), Vol.VIII, 33.} under certain circumstances, and if the character of those rules requires it, legal systems may give effect to rules that do not belong to the law that is applicable according to the usual standards of private international law. This is also regulated in the EC Rome Convention on the Law Applicable to Contractual Obligations of 1980 (hereinafter “Rome Convention”), which in Article 7 allows the application of mandatory rules that belong to a law that is not applicable according to the rules of the Rome Convention. This is a description of the phenomenon, but it provides no solution to the problems that arise out of this lack of coordination. This retains the integrity of the system of private international law, but does not represent an improvement to its weaknesses.

\textit{Mutatis mutandis}, the system of private international law can also describe the problem of exorbitant jurisdiction. Each court may retain
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jurisdiction under its own applicable domestic private international law; yet its decision has legal effect only within its own territory, unless there are international instruments or specific legislation attaching legal effects to foreign decisions. In the absence of such a legislative or international ‘vehicle’ (such as, in respect of extraterritorial substantive law, Article 7, Rome Convention), therefore, court decisions with extraterritorial ambitions do not have legal effects outside their own territory.

This is quite understandable in the private international law system: a court decision rendered in compliance with the court’s own private international law—but in violation of other countries’ private international law—needs not have any legal effect in these other countries. However, this may not be enough to meet the interests of the involved parties. If a party, for example, has assets in the territory of the court that has retained exorbitant jurisdiction, it is liable with those assets for any violation of that decision, even if the decision is not acknowledged in any other country.

In the Yukos case, the corresponding scenario would be as follows: had the Houston court finally ruled that the auction in Russia could not take place, the auction could nevertheless have taken place in Russia as planned. A US decision could not be enforced in Russia without recognition by the Russian system. Should Deutsche Bank have decided to finance Gasprom’s purchase in the auction, it would have acted validly in the Russian legal system. However, in this situation, Deutsche Bank would have violated the Houston court’s decision. This violation would not have had consequences in Russia, but Deutsche Bank would have been liable for it in the United States with any assets that it has within that territory.

Accordingly, the parties to the Yukos case followed different strategies. The Russian Federation applied the previously described private international law approach; given that the facts fall under the scope of Russian law, it did not take part in the Houston proceedings, ascribing to them no effect. For the Russian Federation, such an attitude was appropriate, because the enforcement within Russia of the Houston court’s decision against the Russian Federation would be regulated by Russian law, while enforcement within the United States of a decision against the Russian Federation did not seem plausible because of the circumstances of the case and the principle of state immunity. Deutsche Bank, on the contrary, took part in the Houston proceedings; it presented every available objection under private international law to the court’s jurisdiction. However, such objections are likely to fail in a system favoring exorbitant jurisdiction. Deutsche Bank, therefore, supported its argument against the court’s jurisdiction using principles found outside of the applicable domestic private international law. It argued for a dimension of public international
law, which would restrict those national rules of private international law permitting exorbitant jurisdiction.

3.3. Restrictions under Public International Law

There seems to be a general acknowledgement that private international law is a branch of domestic law, and that public international law does not play an important role in shaping the rules of private international law.\textsuperscript{17} Within public international law, the principles of territoriality, nationality and protection are generally deemed to constitute the borders for the effects of national law, and consequently also of the rules of private international law. These principles are usually interpreted so extensively that they can hardly be deemed to restrict the shaping of specific private international law rules. Thus, the above-mentioned effects doctrine in competition law could be subsumed under the protection principle, since the anticompetitive activity carried out abroad has effects within the national territory. Exorbitant jurisdiction in the \textit{Yukos} case could be subsumed under the principle of territoriality, because \textit{Yukos} had assets in the United States (although of minor value) and probably performed business activity within United States territory because of its financial director’s presence there in the last weeks prior to the application.

From these public international law principles, it therefore seems difficult to derive a rule that could restrict the domestic regulation of the court’s international jurisdiction in civil cases. Are there other sources for such a rule in public international law?

International jurisdiction within the EC and the EFTA is regulated by the above-mentioned Brussels I, Brussels Convention and Lugano Convention. In 1992, The Hague Conference on Private International Law (hereinafter “Hague Conference”) also started working on a convention regarding court jurisdiction, with the aim of proposing an instrument that would be open to the whole world. The Hague draft convention was based on the principle that exorbitant jurisdiction is not permitted, and in Article 18 it listed a series of connecting factors that would lead to exorbitant jurisdiction and were, therefore, excluded as bases for jurisdiction. Had the draft been finalized into a convention, many of the problems related to exorbitant jurisdiction would have been resolved in the contracting states. However, in June 2001 it was decided that the draft

would not become a convention, among other reasons, because some states were not willing to waive their access to exorbitant jurisdiction.\textsuperscript{18} The Hague Conference’s work continued, but its scope was limited to choice of court agreements.\textsuperscript{19}

Are the Brussels and Lugano instruments and the failed Hague draft convention a sufficient basis to affirm the existence of a general principle of public international law restricting the domestic regulation of international court jurisdiction in civil cases?

The Hague draft convention seems to contradict the existence of such a principle. The report on the draft clearly states that the contracting states remain free to make use of the exorbitant connecting factors, forbidden in the convention, in cases involving parties from non-contracting states.\textsuperscript{20} The Brussels and Lugano instruments are based on the same principle. From these sources, therefore, it seems that, in the absence of an international convention or other public international law instrument to the contrary, the domestic regulation of international court jurisdiction is not restricted. Thus, exorbitant jurisdiction in civil cases is not limited by public international law (beyond the existing instruments), as long as it remains within the extensive scope of the territoriality, nationality and protection principles.

The American Third Restatement of Foreign Relations Law (hereinafter “Third Restatement”) contains a guideline for the assumption of international court jurisdiction: that the exercise of jurisdiction is reasonable.\textsuperscript{21} What is meant by ‘reasonable’ is illustrated in §421(2) with a list of alternative connecting factors.

\begin{footnotesize}
\begin{enumerate}
\item \footnotesize The Hague Convention on Choice of Court Agreements was adopted on 30 June 2005.
\item \footnotesize “Rather than being deemed as a proper rule of public international law, this represents an ‘international climate of opinion’”, Andreas Lowenfeld, \textit{International Litigation and the Quest for Reasonableness: Essays in Private International Law} (Clarendon Press, Oxford, 1996), 60; that it is possible to formulate a principle of public international law according to which a connecting factor should be reasonable is also stated by Fritz A. Mann, \textit{Studies in International Law} (Clarendon Press, Oxford, 1973), 34 et seq.; this approach has been said to represent the basis for the above-mentioned European instruments; see Joseph Halpern, “Exorbitant Jurisdiction” and the Brussels Convention: Toward a Theory of Restraint”, in Michael Reisman (ed.), \textit{Jurisdiction in International Law} (Ashgate, Dartmouth, 1999), 369-387, at 378 et seq.
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The scope of the Third Restatement is not normally understood as being relevant to civil cases. Professor Lowenfeld, however, who worked a decade on the Third Restatement, has stressed that it did not differentiate between civil and public matters. Lowenfeld states detailed arguments for the applicability of the criteria of the Third Restatement also to civil cases. But he also recognizes that this does not correspond with general practice and theory in the United States. Generally, US courts’ reasoning—in respect of international jurisdiction in civil cases—does not appear to be concerned with the Third Restatement or public international law but, rather, with the Constitution and the principle of due process provided in the XIV Amendment. Reasonableness can be used as a criterion, but then as a conflict-of-law criterion based not on public international law, but on domestic private international law.

Even if the Third Restatement was applicable to civil cases, this would probably not change much in the above-stated considerations on the interaction between private and public international law, whereby the public international law principles (that is, territoriality, nationality and protection principles) are so broad that they do not significantly restrict the shaping of specific rules of private international law.

Admittedly, some of the connecting factors listed in the second paragraph of §421 can, if construed restrictively, prevent the exercise of exorbitant jurisdiction; however, if interpreted extensively, they can be used as a basis for exorbitant jurisdiction. In the introductory note to §421, it is pointed out that it is unclear whether the rules contained therein would be applicable on the basis of public international law or of private international law. A restrictive interpretation would seem not to reflect the existing status of public international law, and would, therefore, indicate that those criteria apply on the basis of the United States’ own

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22 Jurisdiction in civil cases is regulated in the Restatement of the Law Second, Conflict of Laws (American Law Institute, Saint Paul, MN, 1971), chapter 3.
23 Lowenfeld, op.cit. note 21, 18 et seq.
24 Ibid., 53 (footnote 26), 78, 80.
25 See, for example, Scoles et al., op.cit. note 17, 314, 320 et seq., 336 et seq., 492 et seq.
27 “(i) Business activity in the territory of the state, (j) business activity outside of the territory, but affecting the territory, (k) the presence of assets in the territory. In all these cases, a connection with the matters in dispute is required.”
law, and could, therefore, not be invoked as a public international law restriction of the US rules on exorbitant jurisdiction.

4. The Public International Law Dimension of the Yukos Case

In the Yukos case, Deutsche Bank submitted a Legal Opinion (hereinafter "Opinion") by the highly respected Oxford Professor Alan Vaughan Lowe, arguing for the existence and applicability of a rule of public international law forbidding exorbitant jurisdiction.29 Here, we are concerned with the main lines of this reasoning and not with the specifics of the case since our inquiry has to do with the general dimension of court jurisdiction under public international law rather than with the question of jurisdiction in this specific case.

4.1. Deutsche Bank’s Argument

First, Lowe assesses that no rule of public international law determines jurisdiction in cases of transnational insolvency. Many international instruments move clearly in the direction of a rule based on the center of the main interests, but this can not yet be understood as customary public international law.30 However, a rule that Lowe considers generally acknowledged in public international law is the following: court jurisdiction must be based upon a very close and substantial connection between the forum state and the person, its assets or business activity.31

The starting point for arguing that public international law limits exorbitant jurisdiction seems to be the general principle seeking to avoid unreasonable interference with the sovereign authority of other states, which is expressed in §403 of the Third Restatement. If US insolvency law is construed in such a way that it permits the exercise of exorbitant jurisdiction, it would violate public international law, insofar as it represents interference in foreign affairs. An extensive interpretation of the above-mentioned public international law principles regarding jurisdiction (i.e., the principles of territoriality and nationality) would, however,

29 The Opinion is available in 2(3) Transnational Dispute Management (June 2005), at <http://www.transnational-dispute-management.com>.

30 In paras.36 to 40, the Opinion refers to the EU Insolvency Regulation, the IBA cross-border insolvency concord and rationale and an agreement between the US and Canada.

31 Ibid., para.40. This rule probably derives from the previously-mentioned principles of territoriality and nationality, expressed in §421 of the Third Restatement. As already seen, these principles are so general that they present no real limitation on the shaping of specific rules regarding jurisdiction. However, the list in §421(2) is formulated in such a way that it can limit their scope; the classification of this section as a rule of customary public international law, however, is not uncontroversial; see note 28.
either exclude or justify such a violation. Such extensive interpretation would, in turn, be incompatible with the above-stated public international law principle requiring a very close and substantial connection.\textsuperscript{32} The restrictive interpretation of the public international law framework for international jurisdiction would, then, affect the interpretation of the rules under domestic international private law. Thus, the connecting factors are to be interpreted restrictively. The result of this reasoning is that public international law prevents the assumption of exorbitant jurisdiction.\textsuperscript{33}

Even if public international law did not restrict the interpretation of national private international law in the manner indicated above, according to Lowe there would be further public international law arguments against exorbitant jurisdiction.

Lowe refers to §403 of the Third Restatement, which sets forth the principle of comity of nations. This applies in cases in which the exercise of exorbitant jurisdiction is permitted under public international law. In these cases, the exercise of jurisdiction should be made on the basis of a balancing of the involved interests. If the disputed interests point predominantly to the other state, then jurisdiction must be declined. Lowe points out, however, that it is not uncontroversial whether the principle of ‘balancing of interests’ corresponds to a mandatory rule of public international law or, rather, is a rule left to the national laws and the discretion of the judge.\textsuperscript{34}

A further argument, based on the Act-of-State doctrine, applies specifically to this case and is less relevant to our general perspective, and thus will not be addressed here.\textsuperscript{35}

4.2. The Decision

\textit{Yukos} responded to these arguments with a Legal Opinion by Professor Barry E. Carter, stating briefly that public international law was not applicable in this case. Carter referred to the recognized US tradition regarding the extraterritorial scope of application of certain legislation, for example,
in competition law and in insolvency law. Public international law is only relevant to the extent that the legislation is unclear, which is not the case with insolvency law in the context of the *Yukos* case.

Accordingly, the court does not appear to have devoted particular attention to the arguments of public international law. Not even once do the grounds for the decision refer to the Third Restatement.36

The court affirmed that it had jurisdiction from a territorial point of view,37 but dismissed the application on the basis of a discretionary evaluation of the totality of circumstances.

The court started by affirming that, in the United States, jurisdiction is regulated by legislation and in the Constitution. Article 109(a), chapter 11 of the Bankruptcy Code provides that bankruptcy proceedings can be initiated by any person who either resides—or has a domicile, a place of business, or property—in the United States. No restriction of international jurisdiction exists in US law within this framework:38 judicial practice has repeatedly confirmed that even a single employee or a very small sum of money in the territory is sufficient for this purpose. As a counterweight, the court enjoys the discretion to decline jurisdiction when the circumstances call for it.

Regarding the question of the principle of comity of nations, the court stated that it does not apply to this case. The judge justified this with the fact that no such precedent exists in the field of voluntary insolvency proceedings. The comity of nations is, therefore, not a reason itself for a motion of dismissal. But it nonetheless can play a role in the court’s exercise of its discretion to dismiss the case.

The dismissal of the application was based on judicial discretion, as regulated in Article 1112(b). This provision contains a list of circumstances that may be considered grounds for not accepting jurisdiction. The judge found that this list was not exhaustive and dismissed the application on the basis of the totality of the circumstances.

The circumstances considered to be grounds for dismissal are the following:

— that *Yukos* had not acted in good faith (with reference to the circumstances that the real purpose of the proceedings was not a financial reorganization, that the primary purpose of transferring assets in the US was to attempt to create jurisdiction in the US, and that the

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proceedings were an attempt to substitute Russian law with another legal system;
— that Houston was not the only appropriate forum;
— that the assets were mainly located in Russia and, therefore, that any insolvency proceedings had to involve cooperation with the Russian authorities;
— that Yukos’ important position in the Russian economy and oil production made it advisable to conduct the proceedings in a forum where the participation of the Russian Federation was assured.

Based on these arguments, it seemed possible to conclude that the proceedings would have been held in Houston if Yukos had played a smaller role in Russia’s political and economic situation, and if Yukos had been more farsighted and had established a subsidiary in the United States at an earlier date. The practical aspects related to cooperation with the Russian authorities are perhaps more specific to insolvency proceedings than to civil cases in general. Therefore, in other civil cases, this circumstance might not prevent assumption of jurisdiction.

Let us assume, for the sake of illustration, that the facts were different and that the court had decided to exercise jurisdiction. We can assume that the Houston court would finally forbid the auction because the company seeking for insolvency protection is a small-scale enterprise with limited economic and political significance for the foreign state, which long had a subsidiary in the United States.

Had Deutsche Bank (or a hypothetical equivalent third party in our assumed scenario) had a binding contract with Gazprom (or an hypothetical potential purchaser) for the financing of Gazprom’s participation in the auction, it would have faced the choice of either complying with the Houston court’s decision and breaching its contract with Gazprom (thus incurring in contractual liability), or fulfilling its contract with Gazprom and violating the Houston decision (thus, incurring liability as determined by the US system). This can be seen as a conflict of jurisdiction. Professor Lowe considered this conflict of jurisdiction to be a violation of public international law, created by the hypothetical Houston decision.

The Houston decision could even possibly be seen as a violation of the principle of non-intervention. Admittedly, as long as the decision is not recognized in Russia, no formal interference in foreign affairs has taken place because the decision has no legal effect in Russia. De facto, however, such a decision could have prevented the auction if, for example,
the banks financing the auction withdrew for fear of the consequences of the transaction (as actually happened).

5. Consequences of the Violation of Public International Law Restrictions on Exorbitant Jurisdiction

Assuming that public international law contains a rule limiting the scope of extraterritorial effect and the corresponding US rules of private international law on exorbitant jurisdiction, what remedies would exist against a decision issued on the basis of exorbitant jurisdiction and, therefore, in violation of public international law?

In his legal opinion, Lowe mentions the principle of reciprocity, according to which US enterprises can run the risk of becoming subject to insufficiently grounded insolvency procedures abroad.40 Such a risk assumes, naturally, that other countries also allow exorbitant jurisdiction in cases of insolvency. Irrespective of how harmful this prospect might prove to be to US business as a whole, the principle of reciprocity does not appear suitable to the enforcement of Deutsche Bank’s own interests. This argument does not appear to grant Deutsche Bank any reimbursement of damages or other relief; it seems directed at the court as a reminder of the larger dimension of the case rather than useful as a remedy in the specific case.

Lowe suggests that investment arbitration might possibly be initiated under an applicable investment protection treaty.41 This would have to be an investment treaty between the United States and the state of the investor, in this case most probably Germany.42 This arbitration procedure could possibly be initiated as a reaction against the enforcement of fines or other sanctions against Deutsche Bank taken against it in the US system as a consequence of Deutsche Bank’s failure to comply with the Houston decision. If the Houston decision proved to be contrary to public international law, a measure taken to sanction a failure to comply therewith might possibly also be deemed to be illegal under public international law and could be considered as treatment forbidden by an investment protection treaty (for example, as an illegal expropriation of Deutsche Bank’s assets in the territory of the United States, or as an unfair and inequitable treatment). Apart from the potential difficulty of complying with numerous criteria and assumptions for the admissibility of investment arbitration, this path seems to meet the needs of a private party quite well. Private

40 Para.107 et seq.
41 Para.109 et seq.
parties are interested in remedies which are relatively predictable both in practice and in their possible results. Arbitration under an investment treaty fulfills these requirements.

The classic remedy of diplomatic protection under public international law can prove useful in individual cases, but is not generally seen as an effective remedy in a commercial context: the investor’s home state has discretion as to whether diplomatic protection is granted, and the interests that the state would protect are its own, public interests rather than the economic interests of the investor.

This short overview shows that the remedies against the violation of a possible rule of public international law limiting exorbitant jurisdiction are not necessarily appropriate or effective under all circumstances from the perspective of a private party. Recourse to the public international law dimensions of exorbitant court jurisdiction might, nevertheless, be useful to increase the judge’s awareness of the potentially extensive political implications of assuming exorbitant jurisdiction.

6. Closing Remarks

The Russian authorities did not take part in the Houston proceedings. The auction took place on 19 December as planned, in spite of the Houston court’s temporary order and before dismissal by the court of the application. Yuganskneftegas was auctioned off to a previously unknown buyer, a company called Baikal, for a price Yukos claims was considerably lower than its value. Short thereafter, Baikal was taken over by the state company Rosneft. Yukos maintained that this amounted to nationalization without sufficient compensation. This is now the basis for some proceedings introduced by Yukos under the Energy Charter Treaty and before the European Court of Human Rights. Each of these procedures requires the clarification of important legal and factual questions. From our perspective, however, both are clearly public international law procedures, and, therefore, no problems exist concerning the borderline with private international law.

The borderline would again become relevant if, for example, Yukos filed suit before US courts for unlawful expropriation or for human rights violation, as it might under the Federal Sovereign Immunity Act or the Alien Torts Claims Act. A relatively recent (and well known) case in which the Federal Sovereign Immunity Act was applied was the suit that Mrs


Altmann brought in California against the Republic of Austria for the return of several Klimt paintings. The circumstances and the legal framework in this case are very different from those in the Yukos case; but this was another example of the exercise of jurisdiction without a significant territorial connection with the forum. Jurisdiction in the Altmann case was based on the sale of exhibition catalogues in the United States. This was held to constitute 'commercial activity' exercised by Austria in the US and, therefore—together with the alleged expropriation in violation of international law—a sufficient basis for assumption of jurisdiction.

This is a further example of exorbitant jurisdiction in which arguments of private international law are not useful, because the applicable private international law supports this jurisdiction. In the case of the Klimt paintings, various arguments were made which were specific to its circumstances. The Third Restatement would probably have been of little help, particularly because the dispute regarded an alleged violation of public international law; and this circumstance, under consideration of the universality principle, could have prevented an argument attempting to restrict the international jurisdiction.

In other cases, however, it might be worthwhile to consider raising public international law objections to exorbitant jurisdiction. They did not seem openly and directly successful in the Yukos case, but it cannot be excluded that it was useful to put the case into a larger framework. Also, we did see that the point of view that exorbitant jurisdiction is restricted by public international law enjoys highly acknowledged, if not widespread, support.

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46 These two criteria are sufficient basis under the Foreign Sovereign Immunity Act to exclude the principle of state immunity and to establish jurisdiction in the United States; see sections 1603, 1605(a)(3); see, also, Justice Breyer’s Concurring Opinion, 541 US (2004), No.03-13, 3 et seq.