CJEU Rules on Jurisdiction over Several Supposed Perpetrators

By Jonas Steinle

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On 3 April 2014, the Court of Justice of the European Union delivered in Hi Hotel HCF Sarl ./. Uwe Spoering, C-387/12 another judgment on Art. 5 No. 3 Brussels I Regulation and thereby further developed the application of this head of jurisdiction in cases where there are several supposed perpetrators and one of them is sued in a jurisdiction other than the one he acted in.

The Court held that Art. 5 No. 3 Brussels I Regulation does not allow jurisdiction to be established on the basis of the causal event of the damage (*Handlungsort*), if the supposed perpetrator did not himself act within the jurisdiction of the court seised. On the other hand, the Court ruled that Art. 5 No. 3 Brussels I Regulation does allow jurisdiction to be established on the basis of the place where the alleged damage occurs (*Erfolgsort*), provided that there is the risk, that the damage may occur within the jurisdiction of the court seised (e.g. in a case of copyright infringement where the publication, which contains the object protected by copyright, can be bought).

Facts

The request for a preliminary ruling on Art. 5 No. 3 Brussels I Regulation concerns proceedings between *Hi Hotel Sarl*, established in Nice (France), and *Mr Spoering*, residing in Cologne (Germany). *Mr Spoering*, who is the claimant in the pending proceedings, is a photographer who took photographs of the interior of some rooms of a hotel run by *Hi Hotel Sarl* and subsequently granted *Hi Hotel* the right to use these photographs for advertising activities. Some years later, the claimant found some of these photographs illustrated in a book in a bookshop in Cologne which was published by a German publisher, the *Phaidon-Verlag*, in Berlin.

The claimant considers the publication of these photographs as an infringement of his copyright and brought proceedings in Cologne against *Hi Hotel Sarl*, seeking an issuance of a prohibitory order and a claim for damages. The defendant alleges that it submitted the photographs only to a subsidiary of the *Phaidon-Verlag* in Paris and that it did not know whether this subsidiary had handed the photographs over to its German sister company. In the subsequent proceedings, the issue arose as to whether jurisdiction of the German courts may be established on the basis of Art. 5 No. 3 Brussels I Regulation. The *Bundesgerichtshof* referred the following question to the Court for a preliminary ruling:

> *15 'Is Article 5(3) of the Regulation … No 44/2001 to be interpreted as meaning that the harmful event occurred in one Member State (Member State A) if the tort or delict which forms the subject-matter of the proceedings or from which claims are derived was committed in another Member State (Member State B) and consists in participation in the tort or delict (principal act) committed in the first Member State (Member State A)?'*

Ruling

Before ruling on the substance, the Court briefly examined the argument of the defendant that the request for a preliminary ruling must be considered inadmissible since it had not been determined whether there was a complete assignment of the copyrights from the claimant to the defendant and if there was no such assignment, no infringement of copyright would be possible. The Court held that for the admissibility of a request for a preliminary ruling it was sufficient that according to the applicant's assertions the referred question is of relevance for the main proceedings and then went on to state that this was the case here.

The subsequent ruling of the Court on the substance must be divided into two parts:

In the first part, the Court considered whether, under the circumstances of the case at hand, jurisdiction could be established in the German courts under Art. 5 No. 3 Brussels I Regulation on the basis of the causal event of the damage (*Handlungsort*). In this context, the Court recalled once again the general scheme of the Brussels I Regulation (Art. 5 No. 3 Brussels I Regulation as a special head

of jurisdiction which is to be interpreted narrowly) and held that it is due to the existence of a particularly close connection between the dispute and the courts of the place where the harmful event occurred that jurisdiction may be established at the place of the causal event of the damage (*Handlungsort*). The Court then referred to the decision in *Melzer* (C-228/11) where it had already ruled on this issue. Considering the case at hand, the Court found that *Hi Hotel* as the only defendant acted outside of the jurisdiction of the court of which it was sued and that therefore no such particularly close connection could be found. This led the Court to the conclusion that accordingly no jurisdiction could be established in the German courts on the basis of the causal event of the damage (*Handlungsort*).

Interestingly, the referring court this time and unlike in previous cases had not limited its question to establishing jurisdiction either on the basis of the causal event (*Handlungsort*) or the place of the occurrence of the damage (*Erfolgsort*) which enabled the Court this time to give the full picture on the issue of establishing jurisdiction under Art. 5 No. 3 Brussels I Regulation in cases where several supposed perpetrators are involved.

In the second part, the Court therefore went on to consider the establishment of jurisdiction on the basis of the place where the alleged damage occurs (*Erfolgsort*). Here, the Court referred to the recent decision in *Pinckney* (C-170/12) where it had already decided that in a claim for a finding of a breach of copyright, jurisdiction may be established where the Member State in which that court is situated protects the rights of copyright relied on by the applicant and the alleged damage my occur within the jurisdiction of the court seised. The Court then found that these requirements have been met in the case at hand and that jurisdiction could be established on the basis of the place where the alleged damage occurs (*Erfolgsort*) under Art. 5 No. 3 Brussels I Regulation in the German courts accordingly. However, as already stated in *Pinckney*, the court seised on the basis of the place where the alleged damage occurs may only decide on the damage caused in the territory of that State.

Evaluation

For attentive observers of the jurisprudence of the CJEU, this decision may not come as a big surprise since it seems that in the ruling at hand, the Court simply put together what he had built in previous cases involving several supposed perpetrators in the context of Art. 5 No. 3 Brussels I Regulation.

As for the first part of the decision, the endorsement of the *Melzer*-approach with respect to the place of the causal event (*Handlungsort*) seems logical and consistent. Once again the Court had to decide on a situation, where only one out of several perpetrators was sued and the assertions of the claimant had based the establishment of jurisdiction for that defendant solely on the actions pursued by its co-perpetrator. It is therefore clear now, that for the purpose of establishing jurisdiction under Art. 5 No. 3 Brussels I Regulation, one cannot attribute the actions of several perpetrators among each other to establish jurisdiction for all of them at all places of any causal events. This would expand Art. 5 No. 3 Brussels I Regulation beyond its limits, considering the need for a particularly close connection between the dispute and the courts of the place where the harmful event occurred which is the very reason for that head of jurisdiction. This time, the Court endorsed the *Melzer*-approach, even though the presumptive co-perpetrator (*Hi Hotel*) was sued at the place where the presumptive main-tortfeasor acted (*Phaidon-Verlag*) and not, as it was the case in *Melzer*, the main-tortfeasor was sued at the place where the co-perpetrator had acted. The conclusion from the *Hi Hotel* ruling seems to be, that the level of participation is not of any relevance in this context.

In contrast, as for the second part of the decision with regard to the place where the damage occurs (*Erfolgsort*), it was far from clear that the CJEU would expand the approach which it had endorsed in *Pinckney* for copyright infringements via the internet also to other forms of infringement such as the publication of a protected photograph. Recently, the Advocate General in its opinion to *Coty Prestige* (C-360/12), which is the third and last pending decision on the interpretation of Art. 5 No. 3 Brussels I Regulation in cases of several supposed perpetrators, had struggled to expand the *Pinckney*-approach to a case where the infringement of a Community Trade Mark is alleged by several perpetrators (opinion to *Coty Prestige*, para. 66 *et seqq.*). Quite correctly, the Advocate General pointed out that the *Pinckney*-approach leads to a very wide interpretation of Art. 5 No. 3 Brussels I Regulation with respect to the place where the damage occurs (*Erfolgsort*). According to this understanding, one out of several perpetrators may be sued in a jurisdiction in which he neither has his domicile, nor pursued any relevant actions whatsoever and jurisdiction on him may based on the sole fact that according to the applicant's assertions the action of the defendant in a jurisdiction other than the seised court gave rise to another action by another perpetrator in the state of the seised court (*Hi Hotel*, para. 37).