Is the Shevill Doctrine Still Up to Date? Some Further Thoughts on CJEU's Judgment in Hejduk (C-441/13)

By Kristina Sirakova. Kristina is currently a research fellow at the MPI Luxembourg. In this post she takes up again the CJEU's Hejduk *case and provides her (to my mind, quite interesting) insights into the outcome.*

After Jonas Steinle commented on the judgment from a wider perspective, the CJEU's *Hejduk* case is to be addressed with regard to its ambiguous outcome. On the one hand, the CJEU blindly follows its controversial decision in *Pinckney* (C-170/12) missing the opportunity to relativize it. On the other hand, the fact that the Court does not adopt a restrictive interpretation of Article 5 (3) of the Brussels I Regulation as proposed by AG Cruz Villalón is to be welcomed.

In his Opinion of 11 September 2014, AG Cruz Villalón very precisely elaborated the core question that arises in the case at hand: How does *Hejduk* fit into the scheme of *eDate Advertising & Martinez* (C-509/09 and C-161/10), *Wintersteiger* (C-523/10) and *Pinckney* (para. 21 of the Opinion)? According to the AG, none of the three criteria – the center of the alleged victim's interests, the direction of the website to a specific Member State and the principle of territoriality – should be applied. Therefore, he rather proposed to restrict the scope of Article 5 (3) of the Brussels I Regulation to the place where the tort was committed.

This would be very often the place where the infringer/defendant is established. Therefore, whether jurisdiction is based on Article 5 (3) or Article 2 (1) of the Brussels I Regulation would most likely be irrelevant. This result contradicts the ratio of Article 5 (3) which aims at guaranteeing a jurisdictional balance. The restrictive approach effectively creates a risk that the provision could be deprived of its substance in those cases as the claimant would be entitled to bring his action only before the court at the place of the infringer's seat irrespective of where the damage occurred.

Fortunately, the Court decided not to follow the restrictive approach. Instead, it

applied the principle of territoriality which has already been the key criterion in *Wintersteiger* with regard to a national trade mark and in *Pinckney* concerning copyrights. It should be noted, however, that the principle of territoriality also bears some risks (see Opinion of AG Cruz Villalón in *Hejduk*, paras. 33-40; Opinion of AG Jääskinen in *Coty Germany* (C-360/12), para. 68; *Husovec*, IIC 2014, 370). Especially when the mere access to the website is sufficient to establish jurisdiction this opens up the floodgate for forum shopping. The only limitation set by the CJEU – as Jonas Steinle correctly points out in his post – is the mosaic principle created in *Shevill* (C-98/93).

The mosaic principle has been developed twenty years ago for an offline infringement of personality rights where the harm caused in each Member State could be easily quantified. However, this is not the case with infringements of rights committed via the internet. Here, the application of the mosaic principle causes more practical problems than it solves, therefore it might be worth reconsidering it.

There is thus a need for a criterion limiting the EU-wide jurisdiction which the CJEU created in *Pinckney* and now in *Hejduk*. The answer might be *eDate Advertising & Martinez* (as suggested by Professor Burkhard Hess in his speech 'The CJEU's Decision in eDate Advertising and Its Implementation by National Courts' at the Conference on 'The Protection of Privacy in the Aftermath of the Recent Judgments of the CJEU – eDate Advertising, Digital Rights Ireland and Google Spain' hosted at the Max Planck Institute Luxembourg on 29 September 2014, the proceedings of which will be published shortly).

Admittedly, the center of the alleged victim's interests has also been developed for an infringement of personality rights which, however, occurred in a case of an online infringement. Furthermore, it has to be stressed that personality rights and copyrights share many similarities. They are both ubiquitous rights, the nature of which is inextricably linked to the person itself and are protected in every Member State without the need for registration.

The main advantage of that approach would be, besides creating a balance between a too restrictive and a too extensive interpretation of Article 5 (3) of the Brussels I Regulation/ Article 7 (2) of the Recast, that the claimant would be able to claim the whole damage at one place and would not be forced to initiate various proceedings in order to receive compensation for the same infringement

which is almost impossible to be quantified.

CJEU rules on Jurisdiction in cases of copyright infringement via the internet: C-441/13 – Pez Hejduk ./. EnergieAgentur.NRW GmbH

A comment by Jonas Steinle

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On 22 January 2015, the Court of Justice of the European Union delivered another judgment on international jurisdiction with regard to the application of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation in a case of copyright infringement via the internet.

The facts:

The facts of the case are relatively straightforward: The claimant, a professional photographer residing in Austria, claims the infringement of her copyright rights on several photographs which were made available by the German-based defendant on a German website without her consent. As a consequence of this, the claimant brought proceedings in her home state before the *Handelsgericht Wien* for damages, justifying the selection of that jurisdiction with a reference to Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation. The *Handelsgericht Wien* decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

“Is Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed by keeping a photograph accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only

– in the Member State in which the alleged perpetrator of the infringement is established; and

– in the Member State(s) to which the website, according to its consent, is directed?”

The ruling:

After having made some general remarks on the functioning of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation (para. 16-20), the CJEU pointed out that copyright rights in the EU are harmonised according to the Directive 2001/29 and that they are subject to the principle of territoriality (para. 22). Although clearly not being relevant for the case at hand, the CJEU referred to its ruling in *Wintersteiger* (C-523/10) and stated that the place where the causal event took place in the case at hand would be the seat of the infringing company (para. 26). Only then the Court addressed the core problem of the case, asking whether the place where the damage occurred could be located in Austria. Here, the Court made reference to the judgment in *Pinckney* (C?170/12), where the Court already had decided on the application of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation to a copyright infringement via the internet. The decision of the CJEU can be summarised with three statements:

First, the location of the place where the damage occurred in a particular Member State is subject to the condition that the right whose infringement is alleged is protected in that Member State (para. 29). This follows from the fact that the application of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation may vary according to the nature of the right allegedly infringed. Copyright rights are protected in all Member States subject to the territoriality principle (para. 30). Second, if the infringement is being made through a publication on a website, there is no requirement that this website is ‘directed to’ the Member State where the damage occurred (para. 31-33). The mere accessibility of the content which is protected by copyright law is sufficient (para. 34). Third and last, the mosaic

principle applies which means that a court seised on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State (para. 35-37).

Comment:

The decision itself is no groundbreaking news. For the most part, the Court referred to the previous decisions and particularly to the *Pinckney* case. However, the decision is interesting from a wider perspective, as the CJEU is about to build up a system of international jurisdiction in intellectual property cases. In the *Wintersteiger* case (C-523/10), where an alleged infringement of a national trademark via the internet was at issue, the CJEU had declined to localise the place where the damage occurred at the place where the relevant website can be accessed. Instead, the Court held that the place where the damage occurred is the Member state where the national trademark is registered and the entire damage may be claimed there. As the Court itself puts it, the interpretation of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation may vary according to the nature of the right allegedly infringed. The interpretation in cases involving copyright infringements is therefore a different one. Unlike national trademark rights, copyright rights are protected in every Member State according to the relevant national law without registration. For copyright infringements, the Court now established the jurisdictional rule that the mere accessibility of a website is sufficient to establish jurisdiction according to the second prong of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation. This rule is not subject to any further limitation such as e.g. the ‘directed to’-criteria (which has been criticised by e.g. Husovec, IIC 2014, 370 *et seqq.*). The CLIP project of the European Max Planck Group on Conflict of Laws in Intellectual Property provides for such limitation in Art. 2:202. Rather, the Court upholds the mosaic principle which it had created in the *Shevill* case (C-98/93) as a certain form of limitation.

Arbitration and EU-Procedural Law: Two Advocate Generals of the CJEU Promote Diverging Views

Prof. Dr. Burkhard Hess, Director of the MPI Luxembourg, has very kindly accepted to have his view on two recent AG's opinions published in CoL. Comments are welcome.

Two recent opinions, the one rendered by AG Wathelet on December 8, 2014, in *Gazprom* (Case C-536/13), and the other one given by AG Jääskinen, on December 11, 2014, in *CDC* (Case C-352/13) address the interplay between arbitration and EU law, especially in the context of the Brussels I Regulation. Interestingly, the two opinions adopted different perspectives and, therefore, propose different solutions. Moreover, both cases relate to similar issues on the merits: the enforcement of mandatory Union law in the areas of cartel and of energy law. Accordingly, it appears that the two opinions are also based on diverging conceptions on the role of arbitration *vis-à-vis* mandatory Union law. Therefore, I would like to compare the opinions in order see how EU-law and arbitration should be delineated. As the two cases are currently pending in the CJEU, it is finally up to the Court to decide which direction should be taken.

The opinion in Gazprom: Giving preference to arbitration proceedings

Gazprom is about the admissibility of anti-suit injunctions rendered by an arbitral tribunal (seated in a EU Member State) against civil proceedings pending in civil courts within the European Judicial Area. On the merits, the case is of a highly political significance: it relates to the long-term supply of gas to 90% of the population of Lithuania by the Russian energy giant. According to a framework agreement of 1999 a Lithuanian company (Lietuvos dujos) whose majority was held by Gazprom and the minority by the government was in charge of buying gas from Gazprom and distributing it in Lithuania. In spring 2011, the Lithuanian Ministry of Energy initiated an investigation on price manipulation against Lieutuvos and its directors and tried to change the management. Under Lithuanian company law, it brought an action in the Lithuanian civil courts in order to secure the investigations against the company. As the shareholder

agreement provided for arbitration under the Stockholm Chamber of Commerce, Gazprom initiated arbitration proceedings there. On 31 July 2012, the arbitral tribunal made a "final award" and ordered the Ministry of Energy to withdraw parts of its requests in the Lithuanian court. Finally, the Lithuanian court asked the ECJ whether these orders (which amounted to anti-suit injunctions) were compatible with its empowerment to decide on its jurisdiction under the Regulation Brussels I.

As a starting point, it should be mentioned that the case-law of the CJEU regarding anti-suit injunctions seems to be well settled: In cases C-159/02 *Turner* and C-185/07 *Allianz* (*West Tankers*), the CJEU held that anti-suit injunctions rendered by a court of a EU-Member State against the proceedings pending in another EU-Member State are incompatible with two fundamental principles of EU procedural law. According to the first principle each court has to assess freely whether it has jurisdiction under the Regulation. Furthermore, anti-suit injunctions are incompatible with the principle of mutual trust according to which each court in the European Judicial Area relies, as a matter of principle, on the appropriateness of the judicial systems in other EU-Member States (on this principle, see recently, the Opinion 2/13 of the ECJ of December 18, 2014, on the Accession of the Union to the European Convention of Human Rights, at paras 181 – 195). However, the issue of whether anti-suit injunctions of an arbitral tribunal may impede the proper functioning of European procedural law has not been addressed so far.

In his opinion, AG Wathelet proposed to interpret the Regulation Brussels I in a different way. The Advocate General came to the conclusion that any proceeding where the validity of an arbitration agreement is contested is excluded from the scope of the Brussels I Regulation (para 125). In this respect, the AG proposed to qualify an anti-suit injunction a decision on the validity of the arbitration clause and, consequently, to exclude it from the realm of the Brussels I Regulation. Furthermore, the opinion proposes to reverse the decision of the Grand Chamber in case C-185/07 *Allianz/West Tankers* (paras 126 – 135). According to the Opinion of AG Wathelet, anti-suit injunctions issued by an arbitral tribunals do not create any problem of compatibility with EU law (para 140).

This result is based on the following arguments: Firstly, the AG denies any legal impact of an anti-suit injunction, being an instrument of English law (para 64), on the Lithuanian government because it could only enforced in England (para 65).

Secondly, the Opinion refers to the new Brussels I Regulation 1215/2012 (although temporarily not applicable in the present case, see its Article 66 (1), at para 88). However, the Opinion proposes to apply the (old) Regulation Brussels I as to "be taken into account" (para 89). The AG refers to paragraph 2 of the Recital 12 of the Recast, according to which Art. 1 (2) lit d) of the Brussels I Regulation should be interpreted as excluding "that a ruling regarding the existence and the validity of an arbitration agreement could circulate under the (new) Regulation." According to AG Wathelet, the new Recital should be interpreted as a reinforcement of the arbitration exclusion, in light of which an anti-suit injunction should no longer give rise to the problems of compatibility which had been highlighted by the CJEU in case C-185/07 *Alliance*. Accordingly, under the Recast, anti-suit injunctions by state courts are generally permitted (at para 140). Furthermore, the Opinion proposes that the courts of EU Member States have to refrain from any decision-making when an arbitration clause is invoked unless the clause is considered as obviously void (at para 142). In this respect, it comes close to the French doctrine of the positive competence-competence of arbitral tribunals (paras 149, 151 ff.). Finally, the conclusions deny any application of the principle of mutual trust to arbitral tribunals – even to arbitral tribunal seated in the European union and applying mandatory EU law – because arbitral tribunal are not bound by the Brussels I Regulation (paras 153 ff). Eventually, the AG states that an anti-suit injunction cannot be qualified as a ground of non-recognition for a violation of public policy under article V (2)(b) NYC (paras 160 ff).

If this line of reasoning was endorsed by the Grand Chamber, the case law of the CJEU regarding arbitration would change significantly. However, the conclusions are more directed towards the new Regulation 1215/2012 (temporarily not applicable) than to the case under consideration. Although I do not want to criticize the line of reasoning here in its entirety, I would briefly express the following doubts: First, the origins of anti-suit injunctions in English law do not say anything about their cross-border effects. However, the fact that they are more and more often used in international arbitration tells a lot about their impact on litigation (and there are cases where they had been enforced). Second, the legal value of a Recital should not be over-estimated. They are not part of the operative provisions of a Regulation and cannot be interpreted in a way that impedes the efficiency of the Regulation (see in this respect case C-43/13, *Pantherwerke*, para 20). Furthermore, in the legislative process, there was a

consensus that the Recitals are not intended to change the status quo (see e.g. *Pohl*, IPRax 2013, 110; *Hartley*, ICLQ 2014, 861). In addition, Recital 12, 2nd paragraph itself does not address proceedings of a court confronted with an arbitration clause (and an injunction prohibiting a party from continuing litigation in its court room), but with the recognition of decisions on the validity of arbitration clauses. Finally, Recital 12 does not endorse the French concept of positive competence-competence. Quite to the contrary, the original proposal of the EU-Commission (elaborated by an expert group) providing for an explicit solution of this issue and designed to comply with specifics of French law was rejected by the Parliament and by the Council in the legislative process.

Yet, it remains to be seen whether the CJEU will endorse this "separation" of arbitration from litigation under the Brussels I Regulation. As a result, it may entail a considerable limitation of the effectiveness of the Brussels I system. The opinion mainly addresses the effectiveness of arbitration (paras 98, 148), the effectiveness of the Brussels I Regulation is only considered to the extent that it corresponds to the NYC (see para 142).

The opinion in CDC: Preserving efficient enforcement of EU-law in front of an arbitration clause

Only three days later, in case CDC, AG Jääskinen addressed the interpretation of an arbitration agreement (or of a jurisdiction agreement falling outside of the scope of Article 23 of Brussels I). "CDC" is about the decentralized enforcement of EU-cartel law by actions for damages in the civil courts of EU-Member States. CDC SA is a Belgian corporation which bought claims from 32 pulp and paper companies which had sustained damages by buying hydrogen peroxyde from a Europe wide cartel between 1994 and 2000. CDC brought legal action against six members of the former cartel in the District Court of Dortmund; the jurisdiction of the court is based on articles 5 no 3 and 6 no 1 of the Brussels' I Regulation (2001). The damage claimed amounts of more than EUR 475 million (plus interests).

The defendants contest the jurisdiction of the Dortmund court inter alia by relying on jurisdiction and arbitration clauses found in the general terms of sales contracts on hydrogen peroxide. They assert that these clauses include action for cartel damages and apply to CDC which had acquired the damage claims by assignments. The German court asked the CJEU whether these clauses included

damage claims for infringements of Article 101 TFEU.

To this question, AG Jääskinen gave the following answer: First, he explicitly held that the Dortmund court may interpret the scope of the arbitration clauses (para 98). Second, he stated that party autonomy includes the right to agree jurisdiction and arbitration clauses (para 119). This consideration applies especially when parties are aware of the claims which are included into these agreements. Furthermore, the scope of each clause has to be determined according to its wording. However, the Advocate General concluded that jurisdiction and arbitration clauses should not be interpreted in a way to impede the full effectiveness and the enforcement of mandatory cartel law (para 126). As a result, arbitration and jurisdiction clauses should be interpreted in a way that delictual claims for breaches of article 101 TFEU are excluded.

Again, I do not want to criticize these conclusions in detail (as I have to disclose my involvement in this case). However, the approach of AG Jääskinen seems to differ considerably from the views of AG Wathelet as the former is mainly addressing the efficiency of mandatory EU law (to be implemented by the national courts) and the latter is mainly concerned about the efficiency of arbitration. It remains to be seen what the CJEU will decide. It is to be hoped that the court will draw a fair line between arbitration and litigation bringing both in a balanced situation which permits the efficient enforcement of EU law in dispute resolution.

New Book on Private International Law and Global Governance

The contributions to the first workshop series of PILAGG at Sciences Po law school have just been published in a book edited by H. Muir Watt and D. Fernandez Arroyo, in a new Law and Global Governance Series at OUP. The book

- *Provides a critical approach to private international law in the context of global governance*

- *Explores the potential of private international law to reassert a significant governance function in respect of new forms of authority beyond the state*
- *Contributes to ongoing debates about the changing nature of law in a global era.*

Contemporary debates about the changing nature of law engage theories of legal pluralism, political economy, social systems, international relations (or regime theory), global constitutionalism, and public international law. Such debates reveal a variety of emerging responses to distributional issues which arise beyond the Western welfare state and new conceptions of private transnational authority. However, private international law tends to stand aloof, claiming process-based neutrality or the apolitical nature of private law technique and refusing to recognize frontiers beyond than those of the nation-state. As a result, the discipline is paradoxically ill-equipped to deal with the most significant cross-border legal difficulties – from immigration to private financial regulation – which might have been expected to fall within its remit. Contributing little to the governance of transnational non-state power, it is largely complicit in its unhampered expansion. This is all the more a paradox given that the new thinking from other fields which seek to fill the void – theories of legal pluralism, peer networks, transnational substantive rules, privatized dispute resolution, and regime collision – have long been part of the daily fare of the conflict of laws. The crucial issue now is whether private international law can, or indeed should, survive as a discipline.

This volume lays the foundations for a critical approach to private international law in the global era. While the governance of global issues such as health, climate, and finance clearly implicates the law, and particularly international law, its private law dimension is generally invisible. This book develops the idea that the liberal divide between public and private international law has enabled the unregulated expansion of transnational private power in these various fields. It explores the potential of private international law to reassert a significant governance function in respect of new forms of authority beyond the state. To do so, it must shed a number of assumptions entrenched in the culture of the nation-state, but this will permit the discipline to expand its potential to confront major issues in global governance.

More details available here.

H/T: Gilles Cuniberti

Paraguay Adopts New Law on International Contracts

On January 15th, Paraguay has adopted a new law on the Law Applicable to International Contracts. A press release of the Paraguayan Presidency is available here.

The first part of the law reproduces almost literally the Hague Principles on Choice of Law in International Commercial Contracts. Perhaps pioneering in the field, the law fully recognizes choice of non state law outside of the arbitration context.

The second part deals with the applicable law absent a choice (a matter not addressed by The Hague Principles) and transcribes -also almost literally- the OAS Interamerican Convention on Applicable Law in International Contracts (1994 Mexico Convention).

An English translation of the draft (which was slightly modified) is available here.

H/T: Jose Moreno Rodriguez, Gilles Cuniberti

TDM 6 (2014) – Dispute Resolution

from a Corporate Perspective

TDM has just published a special issue entitled “Dispute Resolution from a Corporate Perspective,” edited by Kai-Uwe Karl (General Electric), Abhijit Mukhopadhyay (Hinduja Group) and Heba Hazzaa (Cairo University). As the title reflects, this issue brings the corporate voice to the debate about reforming alternative dispute resolution and effective conflict management.

It is no surprise that corporations expect a “service provider” mindset from the legal profession, and lawyers from both sides of the corporate structure tend to respond differently to those needs. Legal “re”training is inevitable if lawyers are observing the emerging trends in conflict resolution. After years of arbitration reign in the world of alternative dispute resolution (ADR), we are witnessing a rise in mediation and negotiations. This development affects legal training and practice in numerous ways. As we see throughout the special, corporate perspective prompts innovation in dispute resolution management in a variety of ways.

Here are the contents of this special issue:

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by H. Hazzaa
K. Karl, GE Oil & Gas
A. Mukhopadhyay, Hinduja Group

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Inside Counsel Should be Active in Mediation
by D.H. Burt, DuPont Company

Business Mediation, ADR and Conflict Management in the German Corporate Sector – Status, Development & Outlook
by L. Kirchhoff, Institute for Conflict Management, European University Viadrina
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Case Management in Transnational Disputes: The Benefits of Having a Litigation

Action Plan
by J.W. de Groot, Houthoff Buruma
E. Buziau, Houthoff Buruma

Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement
by J. Lack, Independent ADR Neutral & Attorney-at-Law
P.M. Lurie, Schiff Hardin LLP

Mediation Skills for Lawyers
by G. Carmichael Lemaire, www.carmichael-lemaire.com

Mediation for Corporate Disputes: The Alternative Dispute Resolution Mechanism to end all Corporate Disputes?
by J. Brocas, Linklaters LLP

Early Resolution of Disputes – an Expert's Perspective
by H. de Trogoff, Accuracy
R. Harfouche, Accuracy

Interview on negotiations with Professor David Lax (Managing Principal) Lax Sebenius LLC The 3D Negotiation™ Group
by K. Karl, GE Oil & Gas
D. Lax, Lax Sebenius LLC – The 3-D Negotiation™ Group

Interview on the dynamics of conflict with Professor Bernard Mayer, The Werner Institute at Creighton University, Canada
by K. Karl, GE Oil & Gas
B. Mayer, The Werner Institute at Creighton University, Canada

Common Non Legal Objections to Negotiation Clauses
by F. Bettencourt Ferreira, Cuatrecasas, Gonçalves Pereira

Challenges and Opportunities for Dispute Resolution Practitioners and Institutions in the Changing Legal Market
by K. Campbell-Wilson, Arbitration Institute of the Stockholm Chamber of Commerce

The Future of DISpute Resolution – Tailored, Proficient, Affordable
by R. Mosch, German Institution of Arbitration (DIS)

“Let’s Talk”: Using Mobile Technology to Predict and Prevent Corporate-Community Disputes in the Extractive Industry
by A. Heuty, Ulula
L. Pappagallo, Ulula

Artificial Intelligence can Improve Contract Intelligence, Reduces Legal Risks and Dispute Costs
by S. Copeland, Hawkins Parnell Thackston & Young LLP

Over the Horizon: How Corporate Counsel are Crossing Frontiers to Address New Challenges
by KPMG, www.kpmg.com

Companies in Conflict: How Commercial Disputes Are Won – A Discussion of Some of the Key Issues Arising From the Report
by S. Dutson, Eversheds LLP
C. Redmond, Eversheds LLP

Alternate Dispute Resolution from Indian Corporate Perspective – Analysis and Trends
by K.M. Rustagi, Patanjali Associates

Council of Europe’s Evaluation Report on the Efficiency of European Judicial Systems

It has not yet been mentioned on this blog that the European Commission for the Efficiency of Justice (CEPEJ) published its evaluation report on the functioning of European judicial systems on 9 October 2014. The full report is available here. In its report, the CEPEJ draws on quantitative and qualitative data to outline the main trends observed in 46 European countries. The following findings to emerge from this report, the fifth of its kind since the CEPEJ was set up in 2002, have

been, inter alia, highlighted in the Commission's press release:

– Contrasting effects of the economic crisis on the budgets of judicial systems;
– European states spend on average € 60 per capita and per year on the functioning of the judicial system;
– Increased participation by users in the funding of the public service of justice;
– Trend towards outsourcing non-judicial tasks within courts;
– Access to justice is improving in Europe;
– There are fewer courts in Europe and a stabilised but uneven number of judges depending on the country;
– The "glass ceiling" remains a reality in the judiciary;
– The courts are generally able to cope with the volume of cases;
– Europe-wide trend towards privatisation and greater professionalisation in terms of the execution of judgments.

External relations of the EU in the area of private international law: conference Ferrara

On 13 February 2015, the Department of Law of the University of Ferrara will host a conference in English on:

The external dimension of EU private international law after *Opinion 1/13*.

The conference will consist of two sessions, chaired by Giorgio Gaja (International Court of Justice) and Alfonso-Luis Calvo Caravaca (Carlos III Univeristy of Madrid), respectively.

Speakers include Marise Cremona (European University Institute), Paul Beaumont (University of Aberdeen), Serena Forlati (University of Ferrara), Marta Pertegás (Permanent Bureau of the Hague Conference on Private International Law), Alex Mills (University College London), Alessandra Zanobetti (University of

Bologna), Chris Thomale (University of Freiburg im Breisgau) and Pietro Franzina (University of Ferrara).

Attendance is free, but participants are expected to register by 9 February by filling the form available in the conference website.

For further information, please write an e-mail to *pietro.franzina@unife.it*.

– thanks to Pietro Franzina for providing the text –

Characterising The Liability of Directors of an Insolvent English Limited having its Real Seat in Germany: German Federal Court of Justice Requests a Preliminary Ruling from the CJEU

by *Dr. Vanessa Seibel*

Dr. Vanessa Seibel is an Associate at White & Case LLP, Frankfurt/Main (Germany).

1. Introduction

In a recent request for a preliminary ruling by the CJEU, the German Federal Court of Justice (*Bundesgerichtshof, BGH*) proposes to apply a German provision of the code on limited liability companies (*GmbHG*) to an English Limited having its real seat in Germany, against whose assets insolvency proceedings have been instituted in Germany (BGH, decision of 2 December 2014 – II ZR 119/14, available – in German – here).

The relevant provision, § 64 sent. 1 GmbHG, holds directors of a GmbH liable for any payments effected after the company has become overindebted or unable to pay upcoming obligations, unless such payments are compatible with the due diligence of an orderly director. Even though this kind of liability does not formally require that insolvency proceedings have been initiated, the BGH tends to classifiy it as a "*law applicable to insolvency proceedings*" within the meaning of Art. 4(1) of the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (*Insolvency Regulation*). Thus, the company's Centre of Main Interest (COMI) – and therefore generally the real seat of the company – would determine the applicable law.

Hence, the CJEU is confronted with the questions, (1) whether § 64 sent. 1 GmbHG falls under the scope of Art. 4(1) Insolvency Regulation and (2) whether this characterisation violates the company's freedom of establishment pursuant to Articles 49, 54 TFEU

2. Facts of the Case

The K. Montage- und Dienstleistungen Ltd was founded under the laws of England and Wales in 2004, but mainly operated in Germany. While the company became unable to pay upcoming obligations in 2006 (at least from a legal perspective), it continued its business activities until November 2007, effecting payments during that period of around 110,000.00 EUR to creditors.

Once the company entered into insolvency proceedings in November 2007, the insolvency administrator requested the director of the K. Montage- und Dienstleistungen Ltd to recompense 110,000.00 EUR on the grounds that § 64 sent. 1 GmbHG in conjunction with Art. 4(1) Insolvency Regulation had been violated. The regional court (*Landgericht*) and the higher regional court (*Oberlandesgericht*) have both awarded this claim. In its request for a preliminary ruling, the BGH now suspends court proceedings and refers the case to the CJEU, indicating that it shares the view of the lower courts.

3. The Reasoning of the BGH: § 64 sent. 1 GmbHG as Insolvency Law

The BGH favours the classification of § 64 sent. 1 GmbHG as an insolvency provision – regardless of its formal embedding in German corporate law and despite the fact that an insolvency proceeding is not a technical requirement for triggering this liability –, arguing *inter alia* that

- the provision aims at protecting the insolvency estate in anticipation of upcoming insolvency proceedings;
- all effected payments have to be refunded by the director of the company – even though the payments served to fulfill legally valid claims – with the damage of "prospective insolvency creditors" in view;
- in practice (with rare exemptions) it is the insolvency administrator who asserts the claims arising from § 64 sent. 1 GmbHG;
- from a German point of view, the provision would be regarded as insolvency law.

The BGH further points out that, in its opinion, this interpretation is compliant with Articles 49, 54 TFEU because it does not prevent companies from establishing a real seat in Germany, but merely checks the "misbehavior" of their directors in cases of insolvency.

4. Open Questions

In its request for a preliminary ruling, the BGH shortly summarizes years of a controversial discussion in German legal literature, somewhat abbreviating the current state of the debate. Just to mention a few additional aspects: Even though it is true that in practice any liabilities of directors under the GmbHG are asserted by the insolvency administrator, it remains possible for creditors to directly sue directors, (1) when insolvency proceedings are not initiated or terminated (massive bankruptcy or formal closure of insolvency proceedings after an insolvency plan has been implemented), or (2) before proceedings have been instituted. If § 64 sent. 1 GmbHG is characterised as insolvency law, how should one classify this provision outside the scope of the Insolvency Regulation? Does the Insolvency Regulation leave room for a "German insolvency law" in terms of private international law? In this context, conflicts rules have to be aligned with the international civil procedural law. In general, once the Insolvency Regulation is applicable, Art. 1(2)(b) of the Brussels Ia-Regulation (No. 1215/2012) precludes the jurisdiction in civil matters. Therefore, the characterisation of the German rule on directors' liability as insolvency law would – at least in theory – interfere with the synchronization of procedural and substantive law. With these difficulties in mind, one could consider alternative routes, e.g. characterising § 64 sent. 1 GmbHG as tort law or using the concept of lack of rules (*Normenmangel*) as the English law provides for a functionally similar liability of directors during insolvency of the company in Sec. 214 Insolvency Act 1986 (*wrongful trading*

rule) a rule which is supposedly, however, regarded as insolvency law and not applicable in German insolvency proceedings.

Still, these and other questions have been discussed in German legal literature extensively for years without any definite results. Therefore, any lid on this discussion – at least before the courts – is highly welcomed as well as any specification of CJEU rulings.

In this respect, the CJEU can build on a number of rulings, for example in the cases *Gourdain./.Nadler* (22 February 1979, C 133/78) – in which an early form of the French *action en comblement du passif* was regarded as a provision relating to bankruptcy proceedings – and *Seagon./.Deko Marty* (12. February 2009, C 339/07) – in which an action by the insolvency administrator to set a transaction aside was treated accordingly. According to settled CJEU case law, the insolvency regulation applies to "*actions which derive directly from insolvency proceedings and are closely connected with them*" (see recently *ÖFAB,* 18 July 2013, C?147/12, para. 24). However, all legal rules mentioned so far make it a mandatory requirement that insolvency proceedings have already been initiated. On the contrary, in a quite recent case the CJEU did not apply the Insolvency Regulation on the grounds that the action in question – a Swedish liability for piercing the corporate veil during undercapitalization – did "*not concern the exclusive prerogative of the liquidator to be exercised in the interests of the general body of creditors*" (*ÖFAB,* 18 July 2013, C?147/12, para. 25). Taking this into account, it remains doubtful whether the CJEU is willing to accept common practice and the purpose of the law as a sufficient link to the "*law applicable to insolvency proceedings and their effects*" within the meaning of Art. 4(1) Insolvency Regulation.

Online Consultation on ISDS in

the TTIP: Commission’s Analysis Published

Yesterday the European Commission published its analysis of the almost 150,000 replies to its online consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), whereby the Commission asked the public for their views on a possible approach to protecting investments and settling investment-related disputes between private investors and governments. Cecilia Malmström’s (Commissioner for Trade) comment on it cannot be clearer: “The consultation clearly shows that there is a huge scepticism against the ISDS instrument”.

The press release offers a summary of the background and the details of the report, and explains the next steps -a number of consultation meetings of the Commission with EU governments, the European Parliament, and different stakeholders, including NGOs, business, trade unions, consumer and environment organisations, to discuss investment protection and ISDS in TTIP on the basis of this report. As a first step, the consultation results will be presented to the INTA Committee of the European Parliament on 22 January. Following these consultations during the first quarter, the Commission will develop specific proposals for the TTIP negotiations.

Links to the online consultation, the Memo, and the replies of the participants are also provided there.