Opinion of Advocate General Jääskinen in Case C-352/13 (CDC) on jurisdiction in cartel damage claims under the Brussels I Regulation

by Jonas Steinle

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On 11 December 2014, Advocate General Jääskinen delivered its Opinion in Case C-352/13 (*CDC*). The case deals with the application of different heads of jurisdiction of the Brussels I Regulation to cartel damage claims.

The facts

The claim arises out of a complex cartel in the sector of the sale of hydrogen peroxide that covered the entire European Economic Area and had been going on for years before it was disclosed and fined by the European Commission. The Commission established that there was a single and continuous infringement of Art. 101 TFEU. The claimant, a Belgian company that is the buyer and assignee of potential damage claims resulting from this cartel, brought proceedings against the members of the cartel at the regional court (*Landgericht*) in Dortmund. The defendants in the case have their seats in different Member States including one defendant who has its seat in Germany.

Being seized in this complex case, the *Landgericht Dortmund* struggles with the application of several heads of jurisdiction under the Brussels I Regulation in order to establish its own jurisdiction. Therefore, the *Landgericht Dortmund* referred to following three questions to the CJEU as an order for reference:

1. Must Art. 6 No. 1 of the Brussels I Regulation be interpreted in a way that

under circumstances like in the case at hand the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings? Is it relevant that the claim against the defendant who is domiciled in the Member State of the seized court was withdrawn after service of process to the defendants?

2. Must Art. 5 No. 3 of the Brussels I Regulation be interpreted in a way that under circumstances like in the case at hand the place where the harmful event occurred or may occur may be located with respect to every defendant in any Member State where the cartel agreement had been concluded or implemented?

3. Does the well-established principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements allow to take into account a jurisdiction or arbitration agreement, even if that would lead to the non-application of jurisdiction grounds such as Art. 5 No. 3 or Art. 6 No. 1 Brussels I Regulation?

The Opinion

As for the application of Art. 6 No. 1 of the Brussels I Regulation, the Advocate General referred first to the well-established principle of the CJEU that a risk of irreconcilable judgments must arise in the context of the same situation of fact and law. For the same situation of fact, the Advocate General simply referred to the binding decision of the European Commission that had established a single and continuous infringement of Art. 1010 TFEU. For the same situation of law the Advocate General pointed out that the members of a cartel are severally and jointly liable and that there was the risk that different Member State courts would interpret the joint and several debt differently which could lead to conflicting decisions in different Member States courts. Furthermore, the Advocate General pointed out that Art. 6 para. 3 Rome II Regulation implicitly refers to Art. 6 No. 1 Brussels I Regulation so that in sum the Advocate General held that Art. 6 No. 1 Brussels I Regulation might be applied to a case like the one at hand. As for the withdrawal of the claim against the German anchor-defendant, the Advocate General did not consider this to be relevant for the jurisdiction of the referring court since he considered the service of process to be the relevant point in time to fulfil the criteria of Art. 6 No. 1 Brussels I Regulation.

With respect to Art. 5 No. 3 Brussels I Regulation, the Advocate General

differentiated, again according to well-established case law of the CJEU, between the place giving rise to the damage and the place where the damage occurred. However, the Advocate General considered both alternatives of Art. 5 No 3 Brussels I Regulation to be inapplicable to the case at hand. The Advocate General observed that in a case of a long-standing and wide-spread cartel like the one at hand, it is essentially impossible to identify one single place where the event giving rise to the damage took place. Similarly, the place where the damage occurred would lead to the place of the claimant's seat as the relevant place of jurisdiction which is contrary to the purpose of the Brussels I Regulation. Hence, the Advocate General held that Art. 5 No. 3 Brussels I Regulation is in applicable in a case like to one at hand.

Finally, Advocate General Jääskinen considered the third question with respect to jurisdiction and arbitration agreements. He therefore drew the line between jurisdiction agreements under Art. 23 Brussels I Regulation on the one hand and jurisdiction agreements that designate Non-Member States courts or arbitration agreements on the other hand. As for agreements under Art. 23 Brussel I Regulation, the Advocate General referred to the principle of mutual trust and held that the principle of effectiveness could not hinder the application of Art. 23 Brussels and thereby the derogation of other grounds of jurisdiction in cartel damage claims. Contrarily, the Advocate General held that the principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements might render agreements of the second type inapplicable if an effective enforcement of EU competition law would not be assured.

Evaluation

The Opinion of the Advocate General is grist to the mill of the ongoing enhancement of private enforcement of competition law in the European Judicial Area. After the Directive on antitrust damage actions has been signed into law on 26 November 2014, jurisdiction in cartel damage claims is the last resort that has been left untouched so far. Jurisdiction is the first hurdle that potential claimants have to overcome in these types of cases. As one can see from the proceedings pending before the *Landgericht Dortmund,* these proceedings can be extremely complex and time-consuming. Guidance on these issues by the CJEU is therefore much awaited.

As the Advocate General points out in his Opinion (para. 7), it is the first time that

the CJEU will have to decide whether and to what extent the substantive EU law (e.g. Art. 101 TFEU) influences the jurisdictional rules of the Brussels I Regulation in their application. According to the Advocate General, the Brussels I Regulation is not very well suited to enhance private enforcement of competition law (para. 8). The consequences that the Advocate General draws from this finding are noteworthy: As considers Art. 5 No. 3 Brussels I Regulation, being the core jurisdictional rule for cartel damages claims, the Advocate General simply promotes to not apply this rule in complex cases such as the one at hand (para. 47). He even goes further and calls for the European legislator to introduce delict-specific jurisdictional rules into the Brussels I Regulation (para. 10).

This line of argumentation is a striking move. The non-application of a head of jurisdiction in a complex case is somewhat surprising. However, this would not solve the existing problems since it remains unclear in which cases Art. 5 No. 3 Brussels might be still applied then. The call for the introduction of delict-specific rules into the Brussels I Regulation is even more problematic since it breaks with the general scheme of the Brussels I Regulation as a general and cross-cutting legal instrument that might uniformly be applied to any case that is not excluded from its scope. Instead of creating more exceptions in this complex area of law, the CJEU should build on the existing system of the Brussels I Regulation and come forward with some guiding principles for the referring court which are drawn from the idea of procedural justice and not so much from substantive law influences from the specific area of law.

Council Decision of 4 December 2014, on the approval of the Hague Convention of 30 June 2005

(OJ)

The Council Decision of 4 December 2014, on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, has been published today (see OJ L 353).

The President of the Council is authorised to designate the person(s) empowered to deposit the instrument of approval provided for in Article 27(4) of the Convention, which shall take place within one month of 5 June 2015. The date of entry into force for the Union of the Convention will be published in the Official Journal of the European Union by the General Secretariat of the Council.

Ortolani's View on the Wathelet Opinion

The AG opinion on Gazprom has triggered quite a lot of reactions within the arbitral world. I asked Dr. Pietro Ortolani, senior research fellow at the MPI Luxembourg, to allow me to have his published in CoL as well. Here they are.

The Advocate General's Opinion on C-536/13 *Gazprom* raises several interesting points, but it is doubtful whether the same approach will be adopted by the CJEU. Interestingly enough, it relies heavily on the recast Regulation, although it is not applicable *ratione temporis*. The AG argues that the recital operates in the manner of a "retroactive interpretative law"; however, this seems quite far-fetched, as a recital is not a binding provision of the Regulation and, as such, it should not be interpreted as having drastic effects on the way the Brussels I system operates (especially as far as the pre-recast scenarios are concerned). Two points in the Opinion are likely to trigger further debate:

- The main argument is that, since judgments on the existence and the validity of the arbitration agreement only do not circulate under the Recast Regulation, then an anti-suit injunction is not incompatible with

the Brussels I system. This argument implies that anti-suit injunctions are only incompatible with Brussels I inasmuch as they prevent MS Courts from issuing a judgment which could circulate under the Regulation: hence, if the judgment does not circulate, there would be no incompatibility. However, Brussels I regulates not only the circulation of judgments, but also the allocation of jurisdiction: therefore, in order to determine whether a problem of compatibility arises, it is necessary to analyse the issue in this broader context. Inasmuch as the main subject matter falls within the scope of application of the Regulation, each Member State Court is put on an equal footing and cannot be deprived of the power to assess its own jurisdiction under the Regulation. Whenever one of the parties raises an *exceptio compromissi*, the court also has to decide on that point, in order to determine whether it has jurisdiction. An anti-suit injunction, therefore, affects not only the possibility for a Member State Court to determine whether the arbitration agreement exists and is valid or not, but also the possibility to subsequently assess the jurisdiction under the Regulation. These two aspects cannot be drastically divided, as they form part of the same assessment on jurisdiction. Therefore, consistently with the subject-matter criterion, it does not seem possible to simply rely on recital 12(2) (which by the way refers to the application of the recognition and enforcement part of the Regulation, rather than jurisdiction) in order to argue that under the Recast Regulation anti-suit injunctions, ordered either by a court or an arbitral tribunal, do not create any problem of compatibility.

- In my opinion, the principle of mutual trust forms part of EU public policy. It is the backbone of the Brussels I system, and hence the foundation for a uniform system of jurisdiction and circulation of judgments in civil and commercial matters in the Union. Although according to the AG these provisions “do not compare with respect for fundamental rights”, they serve the fundamental purpose of setting forth a European mechanism of justice in civil and commercial matters, in accordance with the goal of enhancing access to justice. Furthermore, the public policy status of mutual trust is evinced by the Regulation itself, according to which the public policy test at the recognition and enforcement stage does not apply to jurisdiction. Hence, the requested Member State Court cannot re-assess the jurisdiction of the first Court, but it is bound to accept it. This entails that there can never be an assessment of jurisdiction by a Member

> State Court which runs contrary to public policy, because of mutual trust. The Regulation, in other terms, sets forth an absolute presumption of compatibility of the first Court's assessment with public policy. But then, if that is the case, we must conclude that mutual trust must form part of public policy itself, in order to justify such absolute presumption and to impose a limit to the public policy ground for denial of recognition and enforcement under the Regulation. In this sense, the AG did not take into account several arguments arising out of the Recast, such as the fact that the abolition of *exequatur* clearly militates in favour of a reinforcement of the principle of mutual trust, rather than its marginalization.

In any case, the Opinion offers many extremely interesting insights on the complex interplay between arbitration and court litigation in the EU. It remains to be seen whether the Court will consider the questions admissible – in the case at hand, that is quite debatable. As a follow-up to this debate, I take the chance to refer you to the forthcoming EU Parliament Study on the legal instruments and practice of arbitration in the EU, to which I have contributed with Tony Cole from Brunel University.

Did the Supreme Court Implicitly Reverse Kiobel's Corporate Liability Holding? (J. Ku, Opinio Iuris)

Some reading for Sunday, in case you have not seen it yet.

Antisuit Injunctions by Arbitral Tribunal and Recognition: Opinion of AG Wathelet

The Opinion of AG Wathelet on C-536/13, *Gazprom*, referred by the Lietuvos Aukščiausiasis Teismas, was delivered yesterday and reads as follows:

(1) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not requiring the court of a Member State to refuse to recognise and enforce an anti-suit injunction issued by an arbitral tribunal.

(2) The fact that an arbitral award contains an anti-suit injunction, such as that at issue in the main proceedings, is not a sufficient ground for refusing to recognise and enforce it on the basis of Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958.

The whole document is accesible here.

(A personal bet: the ECJ will not take up the second point of the Opinion).

The Influence of Islam on Banking and Finance

On 12th of October 2012, the Ernst von Caemmerer Foundation organized a symposium on „**The Influence of Islam on Banking and Finance**“ that took

place on the premises of the Commerzbank AG in Frankfurt am Main (Germany). The conference language was English. Subject of the presentations and subsequent discussions were the latest developments in the field of Islamic Banking and its position in the international financial system. Most of the presentations held at the symposium have now been published in: **Uwe Blaurock (ed.), The Influence of Islam on Banking and Finance, Nomos, Baden-Baden, Germany 2014**. With regard to conflict of laws and comparative law, particularly the contributions by Thomas Prüm on „Islamic Capital Markets", by Matthias Casper on „Sharia Boards and Sharia Compliance in the context of European Corporate Governance" and by Herbert Kronke („Towards a Global Contract Law in Banking and Finance? Inventory and Perspectives") deserve attention. More information is available on the publisher's website.

Dealing with Diversity in International Arbitration

We are pleased to announce a forthcoming TDM special issue on "***Dealing with Diversity in International Arbitration***." This Special Issue will analyse discrimination and diversity in international arbitration. It will examine new trends, developments, and challenges in the use of practitioners from different geographical, ethnic/racial, religious backgrounds as well as of different genders in international arbitration, whether as counsel or tribunal members.

International arbitration has experienced substantial growth in the past two decades. The ascendance of international arbitration as a preferred method of resolving disputes between international parties is the product of the growth of world economies and the increased participation in global commerce of emerging markets. The rise of many states as major investment destinations and the expansion of multinational corporations into new markets have increased business opportunities, and thus the numbers of business disputes worldwide.

The high demand for arbitration (and other forms of ADR) services, in turn, has

driven many governments to cultivate a pro-arbitration environment through new arbitration legislation and other mechanisms, and has led to the proliferation of international arbitral centres throughout the world but particularly in Asia (including in Singapore, Hong Kong and elsewhere). Likewise, many global law firms have also responded to this increased demand by aggressively entering new markets and deploying significant resources to those emerging regions.

The expansion of international arbitration into new regions as well as steady growth in more established markets has not, however, been reflected in the greater participation of a greater variety of practitioner whether female or non-European/American or from different ethnic and religious backgrounds. Women are not getting the same opportunities as men, regardless of background. Of equal concern is the fact that practitioners from non-European/American backgrounds or in regions such as Africa and Asia are not getting the same opportunities as their European and American counterparts. In that regard, Islamic Finance Arbitration is a growing field where regional and religious backgrounds may play a role. Only time will tell if that area will be over represented by a homogenous type of arbitrator and counsel.

Statistics published by arbitral institutions indicate quite strongly that, more generally, there is a severe imbalance in the vast number of appointments whether by parties or by the institution concerned. The appointment of European and American arbitrators usually account for a large chunk of the pie chart with the thinnest, barely visible slivers representing arbitrators from other regions or ethnicity. Further analysis of the numbers indicates that things are not really improving.

This TDM Special Issue will provide international practitioners and academics with an overview of the overall position of diversity in international arbitration.

Possible topics for submission to the special issue might include:

- Why an increase in work in the international arbitration area of practice has not lead to the commensurate growth in participation by a more diverse group of practitioners – this might include not only the male/female divide but also the African / Asian / European / American divide;
- Does limiting the field of international arbitration players mean that the

scope of the decisions made at all levels are also being limited?
- Are legal sector reforms necessary to improve the diversity; are quotas a good thing?
- How can the pro-arbitration culture be replicated in a pro-diversity argument;
- Prospect of a fairer representation of participants covering gender, ethnicity, regions and religion in international arbitration;
- Obstacles for the discriminated groups preventing them from getting on in the international arbitration area of practice and how they can be overcome;
- Nature of and empirical study of geographical/regional, ethnic/racial and male/female diversity in international arbitration;
- The impact of differing levels of participation in international arbitration on business dispute resolution and the effect of cultural norms on the practice of international arbitration; and
- Influence of dispute resolution culture / traditions.

This special issue will be edited by **Professor Rashda Rana SC** (Barrister, Arbitrator at *39 Essex Street Chambers*, President *ArbitralWomen*) and **Louise Barrington** (Independent Arbitrator and Director *Aculex Transnational Inc*) with the assistance of the Edition Committee including **Karen Mills** (Partner *Karim Syah Indonesia*) and **Gabrielle Nater Bass** (Partner *Homburger Switzerland*).

For further information click here.

Conference: Migrant Children in the 21st Century (Cagliari, 11-12 December 2014)

The **University of Cagliari** will host on **11-12 December 2014** a two-day conference on children-related legal aspects of immigration: "**Migrant Children in the 21st Century**". All sessions will be held in English, and an entire session

will be devoted to private international law issues. Here's the programme (available as a .pdf file):

Section I – The special vulnerabilities of migrant children (11th December, 15h00-18h00)

Chairman: *Massimo Condinanzi* (Univ. of Milano)

- *Adriana Di Stefano* (Univ. of Catania): Gender perspectives on child migration and international human rights law: a critical approach;
- *Valerie Karr* (Univ. of Massachussets Boston): Children with disabilities and asylum policies;
- *Flavia Zorzi Giustiniani* (Univ. Telematica Nettuno, Roma): The protection of internally displaced children;
- *Federico Lenzerini*, *Erika Piergentili* (Univ. of Siena): Exploitation of migrant children in economic activities;
- *Alessandra Annoni* (Univ. of Catanzaro): The protection of trafficked children in Europe.

Section II – Substantive guarantees for migrant children (12th December, 10h00–13h00)

Chairman: *Riccardo Pisillo Mazzeschi* (Univ. of Siena)

- *Roberto Virzo* (Univ. of Sannio and LUISS, Rome): International legal instruments and the protection of migrant children at sea;
- *Eleanor Drywood* (Univ. of Liverpool): Migrant children and family reunification: do the rights of the child ever prevail over immigration control?
- *Emanuela Pistoia* (Univ. of Teramo): What protection for children of migrant workers deported from EU Member States?
- *Francesca De Vittor* (Univ. Cattolica del Sacro Cuore, Milan): Migrant children's right to education. The gap between recognition of principle and effective protection;
- *Federico Casolari* (Univ. of Bologna): The right of migrant children to political life.

Section III – The protection of best interest of migrant children through private international law (12th December,15h00-18h00)

Chairman: *Roberto Baratta* (Univ. of Macerata)

- *Aude Fiorini* (Univ. of Dundee): Establishing habitual residence of migrant children;
- *Thalia Kruger* (Univ. of Antwerp): The civil aspects of international child abduction;
- *Paul R. Beaumont, Katarina Trimmings* (Univ. of Aberdeen): Legal parentage and reproductive technologies;
- *Maria Caterina Baruffi* (Univ. of Verona): Recognition and enforcement of measures concerning right of access;
- *Laura Carpaneto* (Univ. of Genoa): Recognition of protection measures affecting migrant children.

(Many thanks to Ester di Napoli, Univ. of Cagliari, for the tip-off)

Private International Law in the 20th century

In December 2012, the Institute of Private International and Foreign Private Law of the University of Cologne hosted a symposium to commemorate the 100th birthday of *Gerhard Kegel* and the 80th birthday of *Alexander Lüderitz*. The invited speakers, *Klaus Schurig* (University of Passau), *Karsten Otte* (University of Mannheim), and *Haimo Schack* (University of Kiel) focused on the development of methods of private international law in the 20th century, which has been strongly influenced by the works of both academics, on how these methods may be used to explain conflict-of-laws problems in the 21st century and how they can serve as the fundament of modern methodology of private international law.

The essays by the symposium's speakers have now been published under the title 'Internationales Privatrecht im 20. Jahrhundert: Der Einfluss von *Gerhard Kegel* und *Alexander Lüderitz* auf das Kollisionsrecht', edited by *Heinz-Peter Mansel*. In addition to these essays, which include thoughts on *Kegel's 'Interessenlehre'* as

well as a comprehensive discussion of the *renvoi* doctrine, the book contains a short introduction to the works of *Kegel* and *Lüderitz*, synopses of the oral discussions that followed the talks at the symposium, and complete bibliographies of both *Kegel* and *Lüderitz*.

Recent Case Law of the ECtHR in Family Law Matters

The ERA (Trier) proposes a conference on recent case law of the ECtHR in family law matters, in Strasbourg, 18-19 February 2015.

Participants will have the opportunity to attend a hearing of the Grand Chamber.

The spotlight is centered on Article 8 (respect for family life) in conjunction with Article 14 (prohibition of discrimination) and Article 12 (right to marry).

Key topics

To be understood taking into account that case law of the ECtHR concentrates not only on the legal implications but also on social, emotional and biological factors.

- International child abduction
- Balancing the children's rights, parents' rights and public order
- Adoption
- Surrogacy parenthood
- Recognition of parent-child relations as a result of surrogacy
- Child custody and access rights within parental authority
- Recognition of marriage and civil unions in same-sex relationships

Who should attend?

Lawyers specialised in family law, human rights lawyers, judges dealing with family law matters, ministry officials, representatives of NGOs and child's rights organisations.

For further information click here.