

Opinion 2/13 of the Court (Full Court). Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

On the Compatibility of the draft agreement with the EU and FEU Treaties: a resounding “no”.

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

See the whole text [here](#).

Weller in Search of the Future of European Private International Law

Matthias Weller from the EBS Law School in Wiesbaden has posted a paper on “Mutual Trust: In Search of the Future of European Private International Law” on

SSRN. The paper is forthcoming in the Journal of Private International Law. The pre-edited version can be downloaded here free of charge.

The abstract reads as follows:

What will EU justice policy look like in 2020? – This is the question the European Commission posed at the Assises de la Justice, “a forum to shape the future of EU Justice Policy” held at Brussels on 21-22 November 2013, under the leitmotif of “building trust in justice systems in Europe”. In its press release of 11 March 2014, the Commission again referred to mutual trust as a cornerstone of judicial co-operation in the EU, and submitted several statements and memoranda with a view to the European Council on 26 and 27 June 2014. And indeed, the European Council confirmed that “the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another’s justice systems should be further enhanced”.

This text seeks to establish firmer ground in the search for the future of European private international law as a cornerstone for the implementation of the European Union’s vision of judicial co-operation in civil-matters. It unfolds possible meanings and functions of the rather opaque, yet almost omnipresent buzzword of mutual trust in the European policy-making on private international law. In a first step, the potential role of mutual trust in private international law in general will briefly be considered (II.). The main focus, of course, will be on European law (III.). The law of the European Union will be analyzed first on the level of primary law (1.). On this level, firstly, the rather abstract question will be addressed what to trust in (a.). Secondly, and more concretely, the functioning of the fundamental freedoms and their structural repercussions on European choice of law thinking will be considered insofar as it revolves around a mutual “recognition” of legal relationships (b.). On the level of secondary law (2.). it will be considered (a.) the normative system of judicial co-operation in civil matters in light of mutual trust, (b.) the operation of that normative system by the European Court of Justice in recent and telling cases, (c.) challenges for this normative system from European Human Rights as well as (d.) challenges from the Commission’s 2014 proposal for reacting to systemic deficiencies in the administration of justice in a Member State. Finally (e.), suggestions will be submitted how these challenges could be integrated

into the normative system. The last part (IV.) will sum up insights from the deconstruction of the multifaceted term of “mutual trust”.

Regulation (EU) No 1329/2014 - Forms in Matters of Successions

The Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession has been published today.

[Click here to access OJ L 359.](#)

Liber Amicorum for Hans Micklitz: Varieties of European Economic Law and Regulation

Kai Purnhagen and *Peter Rott* have edited a book entitled “Varieties of European Economic Law and Regulation”. Published by Springer and completely written in English the volume honors the work of *Hans Micklitz*, one of the leading scholars in EU economic law.

The publisher’s official abstract reads as follows:

This is the first book to comprehensively analyze the work of Hans Micklitz, one of the leading scholars in the field of EU economic law. It brings together analysts, academic friends and critics of Hans Micklitz and results in a unique collection of essays that evaluate his work on European Economic Law and Regulation. The contributions discuss a wide range of Micklitz' work: from his theoretical work on private law beyond party autonomy, with a special focus on its regulatory function, to the illustration of how his work has built the basis for current solutions such as used in solving the financial crisis. The book is divided into sections covering foundations of private law, regulatory law, competition and intellectual property law, product safety law, consumer contract law and the enforcement of law. This book clearly shows the enormous impact of Hans Micklitz' work on the EU legal system in both scholarship and practice.

More information is available on the publisher's website.

ELR Issue on PIL and global governance

The latest issue of Erasmus Law Review (vol. 7, issue 3) is dedicated to "The Role of Private International Law in Contemporary Society: Global Governance as a Challenge". It includes the following contributions:

- **The Role of Private International Law in Contemporary Society: Global Governance as a Challenge**

author: Laura Carballo Piñeiro & Xandra Kramer

- **Faith and Scepticism in Private International Law:**

Trust, Governance, Politics, and Foreign Judgments

author: Christopher Whytock

▪ The Role of Private International Law in Corporate Social Responsibility

author: Geert Van Calster

▪ Global Citizens and Family Relations

author: Yuko Nishitani

▪ Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law

author: Laura Maria van Bochove

▪ Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?

author: Aukje A.H. van Hoek

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

Jonas Steinle, LL.M., is fellow at the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr) at EBS Law School in Wiesbaden.

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. 101 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

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 reassess 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 accessible [here](#).

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