TDM Call for Papers: “Arbitration in the Middle East – Expectations and Challenges for the Future”

The volume of international business either in the Middle East or with a Middle Eastern element is increasing and many of the contracts being used provide for arbitration. While arbitration (“tahkim” in Arabic) has long-standing religious and cultural roots in the Middle East, there are a number of differences and tensions between the Western perception of arbitration and certain Islamic legal principles.

Craig Shepherd and Mike McClure issue this call for papers seeking contributions for a TDM Special to be published later this year entitled “Arbitration in the Middle East – expectations and challenges for the future”. The Special will look at some of the differences between the Western and Middle Eastern perceptions of arbitration, and will also consider expectations for the future. Some potential topics include: (a) the legislative framework to support arbitration, including new arbitration laws and regional arbitral centres; (b) whether the modern concept of arbitration can resolve Shari’a disputes; (c) the role public policy should play in relation to judicial involvement with the arbitral process and enforcement or arbitral awards; (d) whether arbitral processes or arbitral laws could or should be reformed so that arbitration better suits the needs of today’s Middle Eastern users; and (e) claims under international investment treaties arising out of regional regime change, particularly in North Africa. Contributions can focus on one or a number of countries and comparative pieces referencing a number of jurisdictions would be welcome.

Papers should be submitted on or before 30 September 2014 to the editors, with a copy to info@transnational-dispute-management.com when you submit material.

More details are available here.

In Memoriam: Professor Andreas Lowenfeld

For those who have not heard, we have lost a giant in our field. Professor Andreas Lowenfeld has passed away. The New York University School of Law website has information here about Professor Lowenfeld's extraordinarily rich life and legacy. We shall not see his like again.

Justice Council Backs Commission's Proposal on Cross-Border Insolvency

Last Friday the national ministers in the Justice Council backed the Commission's proposal to modernise European rules on cross-border insolvency. The proposal (with some amendments) had been accepted by the European Parliament in February 2014 by an overwhelming majority (580 for, 69 against and 19 abstentions). The Justice Council has essentially accepted the Commission text; however, there are also a number of points where the Council has modified it. The specific elements of the compromise can be consulted here. For the text of the Council click here.

The European Parliament, the Council of Ministers and the Commission will now engage in negotiations to reach an agreement on a final text. The adoption of the modernised Insolvency Regulation is expected by the end of the year.

Checking Out

It has been seven years since I wrote my first post on Conflict of Laws .Net.

The blog has been a lot of fun, but also a lot of work. I am stepping back and leaving the blog in the expert hands of my co-editors.

I am sure I will continue to meet many readers in conferences all over the world.

CJEU Rules Again on Jurisdiction over Co-Perpetrators

By Jonas Steinle

Jonas Steinle, LL.M., is a doctoral student at the chair of Prof. Dr. Matthias Weller, Mag.rer.publ., Professor for Civil Law, Civil Procedure and Private International Law at EBS Law School Wiesbaden, Germany.

On 5 June 2014, the Court of Justice of the European Union delivered another judgment on Art. 5 No. 3 Brussels I Regulation in *Coty Germany GmbH ./. First Note Perfumes NV*, C-360/12. With its decision, the Court completed a series of three pending decisions that all concerned cases where there are several supposed perpetrators and one of them is sued in a jurisdiction other than the one he acted in.

Facts

The German based claimant, the *Coty Germany GmbH,* sells and manufactures perfumes and cosmetics in Germany. Among its products there is one perfume that comes in a bottle, corresponding to a three-dimensional Community trademark whereof *Coty Germany* is the proprietor. The defendant, *First Note*, is a Belgium based perfume wholesaler. One of the perfumes of *First Note* was sold in a bottle, similar to the one that is protected by the Community trademark of

Coty Germany. First Note sold this perfume to a German based intermediary, the *Stefan P. Warenhandel.* These sales were performed entirely outside of Germany since *Stefan P. Warenhandel* had collected the perfumes directly at the premises of *First Note* in Belgium and resold them in Germany.

Coty Germany claimed that the distribution of the perfume in Belgium by *First Note* constituted an infringement of its Community trademark and commenced proceedings against *First Note* before German (!) courts, although these sales had been performed entirely outside of Germany. *Coty Germany* argued that jurisdiction of the German courts could be established pursuant to Art. 93 para. 5 of the Trademark Regulation, which requires that the defendant allegedly acted within the territory of the seized court. The second basis for establishing jurisdiction of the German courts was Art. 5 No. 3 Brussels I Regulation, which provides for the place where the damage occurred. *Coty Germany* claims that the acts of the German based *Stefan P. Warenhandel* can be imputed to the Belgium based defendant, *First Note,* and that therefore jurisdiction may be established before the German courts. Both heads of jurisdiction formed each a question for reference to the Court.

Ruling

In its first part of the judgment, the Court referred to Art. 93 para. 5 of the Trademark Regulation as a potential basis for jurisdiction. The Court ruled that the application of Art. 5 No. 3 Brussels I Regulation is expressly precluded under the Trademark Regulation and that Art. 93 para. 5 of the Trademark must therefore be interpreted independently from Art. 5 No. 3 Brussels I Regulation (para. 31) without making reference to the existing case law of the Brussels I Regulation (para. 32). By referring to the wording and the purpose of that rule, the Court came to the conclusion that Art. 93 para. 5 of the Trademark Regulation does only allow jurisdiction to be established before the courts where the trade mark was presumably infringed and not before the courts, where a potential accomplice had made any such infringements.

With regard to the second referred question on Art. 5 No. 3 Brussels I Regulation, the Court distinguished between the place where the causal event occurred and the place where the damage occurred.

As for the first alternative of this rule, the question at hand was whether one can

impute the action of one perpetrator to his accomplice in order to establish jurisdiction under Art. 5 No. 3 Brussels I Regulation under the place where the causal event occurred. This would essentially allow the claimant to sue any perpetrator at a place of action of his accomplices and hence at a venue where he himself never acted. Here, the Court simply referred to its ruling in the case *Melzer* in 2013, where the Court clearly had denied such possibility as a basis for jurisdiction under Art. 5 No. 3 Brussels I Regulation.

Since the referring court, the German *Bundesgerichtshof,* had not limited the order for reference to the place where the causal event occurred, the CJEU this time could also address the second alternative under Art. 5 No. 3 Brussels I Regulation as a potential basis for jurisdiction, which is the place where the damage occurred. Here, the Court came to a different conclusion by referring to the *Wintersteiger* and *Pinckney* decisions where it had held that the occurrence of damage in a particular Member State is subject to the protection in that relevant Member State (para. 55). Holding that this was also true for infringements of unfair competition, which was the case here, the Court stated:

57 "It must therefore be held that, in circumstances such as those of the main proceedings, an action relating to an infringement of that law may be brought before the German courts, to the extent that the act committed in another Member State caused or may cause damage within the jurisdiction of the court seised."

Accordingly, the Court does allow jurisdiction to be established on the basis of the place of occurrence of damage, to hear an action for damages against a person established in another Member State who acted in that State and whose actions – through the furtherance of another perpetrator – caused damage within the jurisdiction of the seised court.

Evaluation

As far as the ruling refers to the question of imputation of actions among several perpetrators to establish jurisdiction under the place where the causal event took place, this ruling is no big surprise neither for Art. 93 para. 5 of the Trademark Regulation, nor for Art. 5 No. 3 Brussels I Regulation. Here the Court has had its opportunities to make clear that the very existence of a particularly close linking factor between the dispute and the courts of the place where the harmful event

occurred does not allow for such expansive interpretation of Art. 5 No. 3 Brussels I Regulation (which is probably also true for Art. 93 para. 5 of the Trademark Regulation). As far as Art. 5 No. 3 Brussels I Regulation is concerned, this could be expected after the previous rulings of the Court in *Hi Hotel* (C-387/12) (see previous comment on that decision on conflictoflaws.net) and *Melzer* (C-228/11).

The interesting part of the decision is the one on establishing jurisdiction at the place where the damage occurred under Art. 5 No. 3 Brussels I Regulation (para. 52 *et seqq.*). For this part, the Advocate General had very much struggled with the consequences stemming from the *Pinckney* ruling (para. 68 *et seqq.* of the Opinion the Advocate General on *Coty Germany*) and had pointed out that such interpretation of Art. 5 No. 3 Brussels I Regulation would lead to a very extensive application of Art. 5 No. 3 Brussels I Regulation. In fact, it is hard to see the link between the harmful event (sales of a perfume in in Belgium) and the alleged damage stemming from that event (trademark infringement in Germany) without making reference to the furtherance of this damage by another perpetrator (in the case at hand *Stefan P. Warenhandel)*.

For the CJEU however, there does not seem to be any problem by applying the *Pinckney* ruling to the case at hand. What lies behind this must be some sort of attribution of effects with regard to the place where the damage occurred. The Court seems to be much more susceptible to such attribution on the effects-side rather than on the causation-side. Why this is the case is not answered by the Court, nor does it give any sort of criteria in which cases such attribution of effects may be permissible. One can imagine that the mosaic principle on the effects-side incites the Court to that much more relaxed attitude but since the Court does not say a word about all that there is much to be explored about this relatively new concept of attribution of effects and its potential limits.

11th Edition of Mayer and Heuzé’s

Private International Law

A new edition of Pierre Mayer and Vincent Heuzé's leading treaty on French private international law is scheduled for publication in June.

Mayer is professor emeritus, and Heuzé currently teaches, at Paris I (Panthéon-Sorbonne) School of Law.

More details on the book can be found here.

Chinese Supreme Court to Rule on Power of Foreign Insolvency Official

Here.

Moses on the Arbitration/Litigation Interface in Europe

Margaret Moses (Loyola University Chicago Law School) has posted Arbitration/Litigation Interface: The European Debate on SSRN.

> *Concerns over the interface between arbitration and litigation have been at the core of a debate in the European Union that has culminated in the issuance of*

the Recast Brussels Regulation (the "Recast"), effective January 2015. The Recast does not provide a fully transparent and predictable interface between international arbitration and cross-border litigation. Primarily, it does not prevent parallel proceedings, which occur when one party that had agreed to arbitrate nonetheless goes to court, while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of the increased cost, inefficiency and delay, as well as the high risk of inconsistent judgments.

Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. There is a need for a harmonized consensus on preventing parallel proceedings in order to promote predictability and confidence in the arbitration process. This article considers the reasons for the current European approach, the potential interpretations of the Recast's explanatory text, the problems it presents as to its expected application, and the interface between the Recast and the New York Convention.

Although anti-suit injunctions could prevent parallel proceedings, the Court of Justice of the European Union has found that anti-suit injunctions are incompatible with the EU Brussels I Regulation (predecessor to the Recast). The Recast's regulatory regime, which governs jurisdiction of courts and recognition and enforcement of judgments in EU Member States, excludes arbitration. However, the exclusion must be viewed through the lens of an extensive explanation set forth in Recital 12 of the Recast. It is unclear how changes in the Recast, as interpreted in accordance with its explanatory Recital 12, may impact the Court's decision.

The article concludes by proposing various means for encouraging flexible solutions to the problem of parallel proceedings and for achieving gradual harmonization.

Luxembourg Code of Private International Law

I am delighted to announce the publication of the second edition of the Luxembourg code of private international law.

The book gathers all applicable legislation in the field of private international law in Luxembourg: international conventions ratified by the Grand Duchy of Luxembourg, European legislation and Luxembourg domestic provisions.

The full table of contents is available here.

Readers wondering how Luxembourg PIL legislation differs from other EU states legislation should know that the Grand Duchy is one of the few European states which ratified the Cape Town Convention (and indeed the only state in the world which adopted the Luxembourg Protocol) or the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

And as if it weren´t enough, buyers will enjoy a free post on this very blog tomorrow!

Conference on the Cultural Dimension of Private International Law

On 13 June 2014, the Swiss Institute of Comparative Law in cooperation with the Universities of Lausanne, Geneva and Urbino will host a conference on the Cultural Dimension of Private International Law in Lausanne. Speakers will address the audience in French, Italian or English.

The conference aims at honouring Tito Ballarino, who dedicated his life to develop

the themes of the conference and to facilitate the meeting of Private International Law culture and traditions, in his writing as well as in his academic experiences and exchanges.

The abstract of the conference reads as follows:

> *À l'heure où le législateur européen déconstruit les systèmes nationaux de droit international privé en y superposant un appareil normatif de grande ampleur et complexité technique, l'idée de réfléchir autour des éléments culturels qui sous-tendent le droit international privé peut paraître saugrenue. Et pourtant qui aime la matière ne saurait renoncer à s'interroger sur le sens de la profonde transformation en cours qui engage sûrement l'essence même du droit international privé. Il n'est dès lors pas inutile de recentrer l'attention sur les aspects généraux de la discipline et en repenser la valeur sur fond des grandes questions qui, depuis toujours, agitent la pensée sur le phénomène juridique. Et de fait, la fonction d'intégration sociale que s'assigne le droit – dont le droit international privé est un instrument d'autant plus essentiel à mesure qu'avance la dynamique de la mondialisation – déborde le cadre de la culture juridique au sens étroit et s'impose comme fait spirituel et problème moral. De là la convergence, dans le discours traditionnel du droit international privé, d'une multitude de perspectives combinant la théorie générale du droit, la sociologie, l'histoire, la philosophie, la science politique, l'éthique, en un mot, ce qui constitue la "culture". Pourquoi le droit international privé ? Quelle place le moment présent prend-il au sein d'une évolution historique qui s'est toujours efforcée de respecter l'autonomie et l'identité des différentes réalités sociales et cultures juridiques ? Comment la fonction régulatrice de cette branche du droit se concilie-t-elle avec la promotion des droits fondamentaux au rang de critère suprême de justice ? Quel rôle peuvent encore jouer les doctrines qui ont marqué l'histoire de la discipline ?*
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> *Il est heureux que l'on puisse se pencher sur ces thèmes à l'occasion des quatre-vingt ans du Professeur Tito Ballarino auquel la rencontre est dédiée en hommage à son exceptionnelle œuvre scientifique constamment vouée à saisir, au-delà des contingences du présent, les lignes les plus significatives de l'évolution culturelle de la société.*

The program of the conference is available here.