State Attribution, Extraterritorial Torts and Sovereign Immunity: A New Case to be Heard at the U.S. Supreme Court

The United States Supreme Court just last week granted a Petition for a Writ of Certiorari in *OBB Personenverkehr AG v. Sachs*, a case that involves a key issue of state attribution under the U.S. Foreign Sovereign Immunities Act ("FSIA"). This is an issue that has not been addressed by the Supreme Court for over thirty years

The plaintiff in this case is a California resident who bought a Eurail pass from an online ticket seller based in Massachusetts. She suffered severe injuries while trying to board a train in Innsbruck, Austria. She sued OBB, an agency of the Austrian government, for her injuries in U.S. federal court. The seller and OBB have no direct contractual relationship. OBB argues that United States courts lack jurisdiction because the acts of the U.S. based ticket seller cannot be imputed to OBB.

Over a strong dissent, an *en banc* panel of the Ninth Circuit Court of Appeals held that the Massachusetts-based Internet site that sold Sachs her train ticket was OBB's agent in the U.S., and therefore the railway had conducted commercial activity in the U.S. giving rise to jurisdiction. OBB said in its petition to the Supreme Court that the appeals court ignored the FSIA's definition of "agency" of a foreign state — creating a precedent "divorced from the statutory text" — and instead improperly relied on common law principles of agency. OBB has also argued that the Ninth Circuit was mistaken when it held that Sachs' claims were based upon the sale of the rail pass in the U.S., rather than OBB's alleged mistakes on the Austrian rail platform. The Solicitor General, on behalf of the United States, had urged the Court to deny certiorari in the case.

The Court will answer the following questions: (1) Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the Foreign Sovereign Immunities

Act, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in First National City Bank v. Banco Para el Comercio Exterior de Cuba, or common law principles of agency, control; and (2) whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

A date for argument has not yet been set, but it will be in the 2014 Term. The briefs filed in this case can be found here.

INTEREULAWEAST – call for papers

INTEREULAWEAST, or Journal for International and European Law, Economics and Market Integrations, announced its call for papers. It is looking to publish papers in both the field of law and the field of economics, with an international focus. Topics of particular interest include:

1. legal and economic aspects of European Union and other market integrations, market freedoms and restrictions,
2. competition and intellectual property,
3. company law and corporate governance,
4. international trade and
5. international private and public law.

Additional information is available at the Journal web page.

La Ley Unión Europea, Nº 22 (January 2015)

Number 22 of the Spanish periodical La Ley-Unión Europea (January 2015) has just been released. You will find therein:

Under the heading *Doctrina*

An article by Prof. Jiménez Blanco (University of Oviedo), on "social tourism", entitled "Derecho de residencia en la Unión Europea y turismo social".

Abstract: The judgment of the ECJ of 11 November 2014 (Case C-333/13: Elisabeta Dano, Dano and Jobcentre Florin Leipzig) restates the problem of access to social benefits of the host State by EU citizens. However, the real problem lies in the limited right of residence of European citizens when they are non-active EU citizens and manifestly lack of economic resources. In such cases, European citizenship, stated in the art. 20 TFEU, does not legitimize a residence in the host State based on «social tourism».

A paper by Dr. Muleiro Parada (University of Vigo), entitled "La cooperación reforzada en el impuesto sobre transacciones financieras".

Abstract: Some countries of the European Union are willing to the implementation of a financial transaction tax since 2016. In order to achieve this goal, it´s necessary to use the enhanced cooperation mechanism regulated in the EU Treaties. The Commission have been formulated several proposals which will culminate in a fi nal one. It will be expected that the final proposal can be less ambitious. In this paper we analyzes these European proposals, the most problematic issues and the future of European regulation, on the basis of recent political agreements.

Under the heading *Tribuna*

A contribution by Dr. Oró Martínez (Max Planck Institute Luxembourg), entitled "Las reclamaciones por daños derivados de una infracción del Derecho de la competencia de la UE: primeras observaciones sobre la Directiva 2014/14/UE", analizing Directive 2014/104/EU

Abstract: This comment makes some general remarks on the recent Directive 2014/104/EU, on actions for damages arising out of infringements of EU competition law. After presenting its background and the legal context of the Directive, we examine the scope of application of the Directive, the general design of these actions for damages, as well as the relationship between the Directive and the Commission Recommendation on collective redress mechanisms. The different procedural and substantive provisions of the text are examined, together with the rules on coordination with public enforcement and consensual dispute resolution. The comment concludes with some remarks on the scarce impact of cross-border situations in the content of the Directive.

A study on the 2005 Hague Convention by Prof. Arenas García (University Autónoma, Barcelona), under the title "La aprobación por la UE del Convenio de La Haya sobre acuerdos de elección de foro: un cruce de caminos".

Abstract: The acceptance by the EU of the Hague Convention of 2005 on Choice of Court Agreements will allow the entry into force of the Convention since Mexico has already ratifi ed it. In this work we deal with the fundamental issues of the Convention and also with the particularities linked to the participation in the Convention of the EU and its Member States.

Two comments are included under the chapter *Sentencia seleccionada*.

The first one, "Trabajadores extranjeros en situación irregular e instituciones de garantía salarial", focus on the CJEU ruling on case C-311/13, *O. Tümer*. It's signed by Prof. Espiniella Menéndez (University of Oviedo).

Abstract: The Court of Justice rules that a national legislation as the Dutch legislation, which denies the insolvency benefit in favor of foreign employees in irregular situation, is contrary to the EU Law. The Judgment can be analyzed from the two legal rationales under the issue: the social policy and the immigration policy. This approach permits to conclude that the ruling is right, although some arguments are unconvincing.

The second one, under the headline "Ley aplicable a los contratos internacionales en defecto de elección: la interpretación del artículo 4 del Convenio de Roma y su proyección sobre el Reglamento Roma I" corresponds to the ruling on case C-305/13. The author is Dr. Unai Belintxon Martín (Univesity of the País Vasco).

Abstract: The aim of this study is to analyze and evaluate the European Court of Justice Judgement in the Haeger & Schmidt case, on the interpretation of Article 4 of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations. In particular, the research will focus on analyzing the interpretive contribution of the Court in this new decision and its repercussion on articles 4 and 5 of the Rome I Regulation.

The current issue includes a section on case law (*Jurisprudencia*) and another one on updated EU news and events (*Actualidad de la Unión Europea*) as well.

Call for papers: Extraterritorial application of EU Law

Erasmus+ Program/Jean Monnet Project:
EU Law between Universalism and Fragmentation: Exploring the Challenge of Promoting EU Values beyond its Border

Call for papers (Young researchers)

THE EXTRATERRITORIAL APPLICATION OF EU LAW

Vigo (Spain)

The Spanish Association of Professors of International Law and International Relations (AEPDIRI) is the beneficiary of a Jean Monnet project on the pressures experienced by EU law in a globalized world that become apparent in the conflicting trends towards universalism on the one hand and states' legal fragmentation on the other hand. Overall objective of the project is promoting research on EU policies from the viewpoint of the Association's research areas – public international law, private international law and international relations –

with a view to enhancing EU values beyond its borders.

It is in the framework of this Jean Monnet project that AEPDIRI will organize an international Conference in Vigo (Spain) on **June 18/19, 2015** entitled ***The Extraterritorial Application of EU Law***. In order to draw the attention of young researchers to this field of study, the AEPDIRI is pleased to make this call for papers.

While under public international law states cannot exercise their sovereign rights in the territory of another state without the concurrence of its consent, there are some areas of law in which this principle may experience exceptions or modulations. These are areas that show the complexity of this issue both in theory and in practice. Among the possible topics of research the following can be mentioned:

1. *Law of Treaties*: Despite the general principle of treaties' being binding on the territory of each contracting party, there are cases where these instruments may have application beyond that scope for various reasons such as containing provisions concerning third States, regulating an area beyond national jurisdiction, or because it is a human rights convention.

2. *Compulsory enforcement of International law*: In this framework it could fit both claw-back clauses adopted by other countries and sanctions.

3. *Competition law and its extraterritorial effect*: Reference could be made here to tensions with other jurisdictions such as those arising from extraterritorial application of US antitrust law and the corresponding European reactions, the conduct and effects tests, and so on.

4. *Data protection and intellectual property law*: Possible topics could be protection of intellectual property on the Internet, telecommunications and broadcasting, Internet communications and sale of private data, the role of state intelligence agencies in monitoring the activities of citizens, duties of carriers with particular reference to the agreement between the United States and the European Union on data registries on names of passengers (PNR), and so on.

5. *Environmental Law*: marine and air pollution caused by ships, protection of endangered species, illegal fishing, trading systems of emission rights, protecting the environment and tort law.

All those interested in presenting a paper on any of the items listed or other related issue should send their proposal by April 1, 2015. The proposal must contain, in addition to a title, a 5-line abstract and a 1-2 pages excerpt in word format. Proposals dealing with public international law and international relations issues should be sent to Professor Montserrat Abad Castelos (mabad@der-pu.uc3m.es) and those on private international law issues to Professor Laura Carballo Piñeiro (laura.carballo@usc.es). A CV and a letter of recommendation must be attached as well.

Presentations can be made in Spanish or English and the papers will be published in either language in a book. The publishing house will be announced in due time.

The organization will be responsible for the costs of selected candidates' participation in the Conference, always within the limits of the allocated budget.

Which Court is Competent for Prospectus Liability Cases? The CJEU Rules in Kolassa (Case C-375/13)

by *Matthias Lehmann*, University of Bonn

On 28 January 2015, the CJEU has decided for the first time on the question of jurisdiction over alleged liability for a wrong prospectus. The Kolassa judgment is of paramount importance for the future handling of investor claims. In a nutshell, the CJEU holds that the court at the place where the investor is domiciled and has its damaged bank account is competent to decide on the claim under Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation).

The Facts (as Easy as Possible)

The case concerned an Austrian investor who had bought a certificate from an investment firm in Austria. The certificate had been issued by Barclays UK, which had also distributed an accompanying prospectus, inter alia in Austria. After the value of the certificate had been wiped out completely, the investor brought a claim against Barclays before an Austrian court, alleging that Barclays' prospectus would not have given correct information regarding the way in which the money was to be invested. The Austrian court questioned whether it had jurisdiction to hear the case and submitted a reference for a preliminary ruling.

The Decision (in a Bit more Detail)

The CJEU first rejects to consider prospectus liability as a matter relating to a consumer contract under Art 15 Brussels I Regulation (now Art 17 Brussels Ia Regulation). The Court also rules out a characterization as a contract matter under Art 5(1) Brussels I Regulation (now Art 7(1) Brussels Ia Regulation). This is understandable as the issuer arguably has not freely assumed an obligation towards the investors, at least not with regard to the accurateness of the content of the prospectus. It is astounding, however, that the CJEU refuses a final qualification and asks the Member State tribunal to verify whether there is a contractual obligation or not. The judgment does not provide any guidance on the criteria the national tribunal should use in making such a determination. This is rather unfortunate, given that the term 'contract' must be given an EU autonomous meaning.

In principle, the Court accepts the proposition that prospectus liability is a matter relating to a tort, delict or quasi-delict in the sense of Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation). Using its twin approach to localise the harmful event (see *Mines de potasse*, Case 21/76, aka as "*Bier*"), the Court considers the place of the event giving rise to the damage and the place where the damage occurred.

With regard to the event giving rise to the damage occurred, the CJEU denies that it took place in Austria because all relevant decisions as to the arrangement of the investments and the content of the prospectus had been taken by Barclays in the UK. The Court also highlights that the prospectus had originally been drafted and distributed there. It follows by implication that the place of the causal event is at the seat of Barclays unless the prospectus has originally been drafted and

distributed elsewhere.

The most important and interesting part of the judgment concerns the localisation of damage. The CJEU first reminds of its judgment in Kronhofer (C-168/02), where it had ruled out the domicile of the investor *as such* as the place of financial damage. It goes on to say, however, that the courts in the country of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of jurisdiction of those courts' (margin no 55).

This reference to the place of the establishment of the bank that manages the damaged account is remarkable. It coincides with what has been said earlier about the location of economic loss (see Lehmann, (2011) 7 Journal of Private International Law 527). One may wonder, though, why the CJEU also refers to the domicile of the investor. Does the Court want to suggest that it plays a role in determining the place of damage? This would be rather surprising. Perhaps the explanation lies in the way the submitting tribunal had framed the preliminary question, which focused entirely on the question whether the investor's domicile can be a basis of jurisdiction. The best way to read the Court's answer is probably that the damage arises at the domicile *only* under the condition that the investor's bank account is located there. Regrettably, the judgment still leaves room for speculation which court would be competent if the bank account from which the investor paid for the securities were located outside his domicile.

Particularly noteworthy are the criteria that the judgment does not mention. The Advocate General had suggested to consider the place of publication of the prospectus as an 'indicator' for where the harmful event occurred (see Conclusions by GA Szpunar of 3 September 2014, para 64 et seq). Similarly, many authors have proposed to look at the market on which the securities have been offered. The CJEU does not even discuss these views. One must understand its silence as rejection.

Furthermore, the judgment may have far reaching implications for conflict of laws. As is well known, Art 4(1) Rome II Regulation uses the same criterion of the 'place where the damage occurred' that is the second prong of the tort jurisdiction under Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation) in order to determine the applicable tort law. If parallel interpretation still is a goal and Recital 7 of the Rome II Regulation should not be devoid of all

meaning, then it seems that the Kolassa ruling must be followed in the area of conflict of laws as well. Yet this would cause a complete dispersal of the law applicable to prospectus liability. An issuer would potentially be liable under the laws of all countries of the world in which investors are domiciled and have bank accounts. Whether and to what extent this result can be avoided by using the escape clause in Art 4(3) Rome II Regulation is doubtful. The better way seems to introduce a special conflicts rule for financial torts (on this issue, see Lehmann, *Revue critique de droit international privé* 2011, 485).

For Those Not Interested in Financial Law

The Court also rules on a point that is of general interest outside the special area of prospectus liability: To which extent does a court have to take evidence in order to determine its jurisdiction? The answer given by the CJEU is somewhat sibylline. On the one hand, it rules that the tribunal seised does not have to enter into a comprehensive taking of evidence at this early stage of the procedure and may 'regard as established … the applicant's assertions' (paras 62 and 63). At the same time, it requires the national tribunal to examine its international jurisdiction 'in the light of all the information available to it, including, where appropriate, the defendant's allegations' (para 64). Can somebody make sense of this, please?

Cross-border Insolvency Proceedings (ERA/INSOL Conference)

The conference, taking place in Trier in March, 19-20, intends to provide an in-depth analysis of the renewed EU Insolvency Regulation 2015 which will replace the former Insolvency Regulation No 1346/2000.

Key topics

• Scope of the Regulation and definition of “insolvency”

• Concept of COMI

• Relationship between main and territorial proceedings

• Coordination and communication

• Related actions and interplay with Brussels I

• Cross-border security and rights in rem

• Insolvency of groups of enterprises

Who should attend?

Lawyers practising in the field of insolvency law, judges, insolvency administrators, ministry officials, policy-makers, academics.

Speakers

Professor Avv Stefania Bariatti, University of Milan; Of Counsel, Chiomenti Studio Legale,Milan

Professor Gerald Mäsch, University of Münster

Dr Rimvydas Norkus, Judge at the Supreme Court of Lithuania; Lecturer at Mykolas Romeris University, Vilnius

Professor Christoph Paulus, Research Center Institute for Interdisciplinary Restructuring, Humboldt University, Berlin

Dr Bernard Santen, Senior Researcher, Leiden Law School

Pál Szirányi, Legal Officer, Civil Justice Policy, DG Justice, European Commission, Brussels

Jean-Luc Vallens, Judge, Associate Professor, University of Strasbourg

Robert van Galen, Partner, Chairman of the Restructuring & Insolvency Team, NautaDutilh, Amsterdam

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

Jonas Steinle, LL.M., is a doctoral student at the chair of Prof. Matthias Weller at the EBS University for Economic and Law Wiesbaden and research fellow at the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr). He also holds a scholarship of the Max Planck Institute for Innovation and Competition in Munich.

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