Paraguay Adopts New Law on International Contracts

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

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

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

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

H/T: Jose Moreno Rodriguez, Gilles Cuniberti

TDM 6 (2014) – Dispute Resolution from a Corporate Perspective

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

It is no surprise that corporations expect a “service provider” mindset from the legal profession, and lawyers from both sides of the corporate structure tend to

respond differently to those needs. Legal “re”training is inevitable if lawyers are observing the emerging trends in conflict resolution. After years of arbitration reign in the world of alternative dispute resolution (ADR), we are witnessing a rise in mediation and negotiations. This development affects legal training and practice in numerous ways. As we see throughout the special, corporate perspective prompts innovation in dispute resolution management in a variety of ways.

Here are the contents of this special issue:

EDITORIAL

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

Business Mediation, ADR and Conflict Management in the German Corporate Sector – Status, Development & Outlook
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Case Management in Transnational Disputes: The Benefits of Having a Litigation Action Plan
by J.W. de Groot, Houthoff Buruma
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Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement
by J. Lack, Independent ADR Neutral & Attorney-at-Law
P.M. Lurie, Schiff Hardin LLP

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

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

Early Resolution of Disputes – an Expert's Perspective
by H. de Trogoff, Accuracy
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Interview on negotiations with Professor David Lax (Managing Principal) Lax Sebenius LLC The 3D Negotiation™ Group
by K. Karl, GE Oil & Gas
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Interview on the dynamics of conflict with Professor Bernard Mayer, The Werner Institute at Creighton University, Canada
by K. Karl, GE Oil & Gas
B. Mayer, The Werner Institute at Creighton University, Canada

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

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

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

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

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

Over the Horizon: How Corporate Counsel are Crossing Frontiers to Address New Challenges

by KPMG, www.kpmg.com

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

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

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

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

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

– The courts are generally able to cope with the volume of cases;
– Europe-wide trend towards privatisation and greater professionalisation in terms of the execution of judgments.

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

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

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

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

Speakers include Marise Cremona (European University Institute), Paul Beaumont (University of Aberdeen), Serena Forlati (University of Ferrara), Marta Pertegás (Permanent Bureau of the Hague Conference on Private International Law), Alex Mills (University College London), Alessandra Zanobetti (University of Bologna), Chris Thomale (University of Freiburg im Breisgau) and Pietro Franzina (University of Ferrara).

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

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

– thanks to Pietro Franzina for providing the text –

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

by *Dr. Vanessa Seibel*

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

1. Introduction

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

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

would determine the applicable law.

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

2. Facts of the Case

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

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

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

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

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

insolvency law.

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

4. Open Questions

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

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

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

Online Consultation on ISDS in the TTIP: Commission's Analysis Published

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

there is a huge scepticism against the ISDS instrument".

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

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

IIC Conference on the Revised Insolvency Regulation

A two-days conference on the new European insolvency regulation will be held in Brussels, 5-6 February 2015.

Click here for the program, registration and other practical information.

Note: IIC is an informal organization of lawyers, syndics, judges, bankers, finance professionals and consultants (more than 5.000 names in the database). All these professionals work in the field of corporate restructuring through insolvency law.

Regulation (EU) 1215/2012, Update

The notifications by the Member States under Articles 75 and 76 of Regulation No 1215/2012 are available on the European e-Justice portal (click here).

As Andrew kindly reported yesterday the ones concerning Art. 76 are also available in [2015] OJ C4/2.

Staudinger, Article 43-46 EGBGB International Property Law. Revised edition 2015 by Heinz-Peter Mansel

Staudinger, Article 43-46 EGBGB International Property Law. Author: **Heinz-Peter Mansel**. Editor: Dieter Henrich. Revised edition 2015 (Publication date: December 2014), XLVI and 1057 pages

The "Staudinger" is a comprehensive commentary of the German Civil Code, including Private International Law, and a reliable source of academic and practice-oriented expert information on the structure, changes and developments in national and international legislation, court rulings and literature, including the European Union law. The new extensive volume deals with the private international law concerning property.

The German International Property Law, the International Securities Law, the International Law of Expropriation and the Treaties and EU Directives concerning the International Law of Cultural Assets are illustrated. The Commentary also contains an introduction to the Cape Town Convention on International Interests

in Mobile Equipment and the protocols thereto. In addition, national reports on 117 legal systems are included. They offer references to the International and Substantive Property Law. Provisions of International Property Law are often printed (in German or in English). Explanations concerning the German international legal relations on Property Law are provided for the, from the practical German point of view, most important legal systems.

The author is the Director of the Institute of Foreign Private and Private International Law of the University of Cologne and a Director at the International Investment Law Centre Cologne (IILCC). He holds the Chair for Private Law, Private International Law, Civil Procedure Law and Comparative Law of the University of Cologne and is the Managing Editor of the law journal Praxis des Internationalen Privat- und Verfahrensrechts (IPRax).

Regulation (EU) nº 606/2013 Applicable (from 11 January 2015)

Regulation (EU) nº 606/2013 of the European Parliament and of the Council, of 12 June 2013, on mutual recognition of protective measures in civil matters, is applicable from yesterday on protection measures ordered on or after that date, irrespective of when proceedings have been instituted.

To the best of my knowledge, in spite of the technical specialties of the Regulation and of the fact that works on the same topic have also been undertaken at The Hague Conference, this instrument has attracted very little attention so far. In the next future two papers on it will be published, both from the MPI Luxembourg.

Click here to access the text of the Regulation; here, for the Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters.

Update: I'd like to thank Prof. Dutta for his nice email this morning attaching an article of his on the Regulation, the Directive (2011/99/EU) and the German implementing legislation, published January 2015 in FamRZ, 85 ff.