# 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*

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**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.

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# 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.

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# 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.

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# 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.

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# 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).

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# 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.*

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# Private International Law Act (Dominican Republic)

On December 18, 2014, the Official Gazette of the Dominican Republic published the Private International Law Act of the Republic, Law 544-14, of 15 October 2014. The Act has been conceived as an all-encompassing one: According to its Art. 1 it aims to "regulate the international private relationships of civil and commercial nature in the Dominican Republic, in particular: the extent and limits of the Dominican jurisdiction; the determination of applicable law; the conditions for recognition and enforcement of foreign decisions". The broad approach is confirmed all throughout the text, which not only provides for grounds of jurisdiction, conflict of laws rules or rules on recognition and enforcement, but also for solutions to common practical problems experienced in those areas – such as situations of *lis pendens*, *forum non conveniens* linked to the localization abroad of evidence in the case at hand, or the proof of the applicable foreign law. Insolvency and arbitration matters are excluded from the scope of the new Act which, conversely, adopts a wide understanding of PIL – see for instance Art. 11.7, on exclusive jurisdiction for proceedings to establish Dominican nationality.

The text (in Spanish) can be downloaded here.

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# Symposium International Civil Procedure – Asser Institute 19 March 2015

**PLEASE NOTE: THIS CONFERENCE IS FULLY BOOKED, NO SPACES AVAILABLE!**

To celebrate the 50th anniversary of the **T.M.C. Asser Institute** and its Private International Law department it organises the symposium:

**International Civil Procedure and Brussels Ibis**

on 19 March 2015

The main theme will be international civil procedure, with an emphasis on the new Brussels Ibis Regulation. Recent developments in international civil procedure and specific features of the Brussels Ibis Regulation will be discussed.

**Time**: 10.30 – 17.30 hrs, followed by a reception
**Venue**: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, 2517 JN The Hague, the Netherlands

Please register for this free event before **1 March 2015**.

**Programme:**

10:30 Registration –Welcome
11:00 Recent Developments on the EU Level
– The future recast of Brussels IIbis *(Ian Curry-Sumner, Voorts Juridische Diensten*)
– Regulations on Wills and Successions: procedural issues (*Andrea Bonomi, Université de Lausanne*)
– Revision of the Insolvency Regulation (*Francisco Garcimartín Alférez, Universidad Autónoma de Madrid*)
– European Account Preservation Order (*Antoinette Oudshoorn, T.M.C. Asser*

*Instituut*)

13.00 Lunch
14.00 Brussels Ibis Regulation and Forum Selection Clauses
– Choice of Court under the Brussels Ibis Regulation and the 2005 Hague Forum Selection Convention (*Xandra Kramer, Erasmus University Rotterdam*)
– Revised lis pendens rule in the Regulation Brussels Ibis (*Christian Heinze, Leibniz Universität, Hannover*)
– Weaker Parties disputes and forum selection and arbitration clauses (*Vesna Lazic, T.M.C. Asser Instituut*)

15:30 Coffee/Tea Break
16:00 Brussels Ibis Regulation and Enforcement
– Provisional Measures (*Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne*)
– Enforcement in Brussels Ibis and enforcement in special European civil procedure Regulations (*Marta Requejo Isidro, Max Planck Institute, Luxembourg*)
– Brussels Ibis in relation to other instruments of unification on the global level (*Paul Beaumont, University of Aberdeen*)

17:30 Reception

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# Issue 2014.4 Nederlands Internationaal Privaatrecht – Recognition and enforcement

The fourth issue of 2014 of the Dutch journal on Private International Law, ***Nederlands Internationaal Privaatrecht***, is dedicated to the Recognition and enforcement of foreign judgments, and focuses on gaps and flaws in the current framework and new pathways. It includes the following contributions:

**Paulien van der Grinten, 'Recognition and enforcement in the European**

**Union: are we on the right track?'**, p. 529-531 (Editorial)

**Paul Beaumont, 'The revived Judgments Project in The Hague'**, p. 532-539.

*This article examines the Hague Judgments Project in three phases. First, the initial ambitious plans for a double convention or a mixed convention (combining direct rules of jurisdiction with rules on conflicts of jurisdiction, exorbitant fora and recognition and enforcement of judgments) that began in 1992 and ultimately failed in 2001. Second, the triumph of rescuing a Choice of Court Agreements Convention from the ashes of the failed mixed convention between 2002 and 2005. Third, the attempt since 2010 to revive the Judgments Project with the aim of securing at least a robust single convention on recognition and enforcement of judgments (possibly with indirect rules of jurisdiction) and with the possibility that at least some States will agree to go further and agree some rules on some or all of the following: conflicts of jurisdiction, declining jurisdiction, outlawing exorbitant fora and some direct rules of jurisdiction. In doing so the article examines the forthcoming adoption of the Hague Choice of Court Agreements Convention by the EU including its declaration excluding certain insurance contracts. Consideration will also be given to the possible ways of establishing in a new single convention what constitutes a sufficient connection between the case and the country which gave the judgment in that case to justify the judgment being recognised and enforced in Contracting States to the convention.*

**Patrick Kinsch, 'Enforcement as a fundamental right', p. 540-544**. The abstract reads:

*There is, under the case law of the European Court of Human Rights, a right to the enforcement of judgments obtained abroad. The nature of that right can be substantive and founded on the right to recognition of the underlying situation. It can also be procedural and derive from the fair trial guarantee of Article 6 of the Convention which includes a right to the effectiveness of judgments rendered by 'any court', a concept considered – without, in the author's opinion, a cogent justification in the present jurisprudence of the Court – as including foreign courts. Once there is a right to enforcement, there can be no interferences by national law with that right (and the national authorities can even have a 'positive obligation' to see to its effectiveness), unless the*

*interference or the refusal to take positive measures is justified, in line with the principle of proportionality.*

**Ian Curry-Sumner, 'Rules on the recognition of parental responsibility decisions: A view from the Netherlands'**, p. 545-558.

*Parental responsibility decisions are increasingly international in nature; international contact arrangements, determinations that the main place of residence will be abroad and the cross-border placement of children are nowadays commonplace instead of seldom. Unfortunately, the story oftentimes does not end after the judge has issued the decision. In many cases, cross-border recognition and/or enforcement of the judgment will be required. This article is devoted to providing an overview of those rules, focussing on the various international regimes currently in operation in Europe, as well as domestic rules applicable in the Netherlands. In doing so, a number of problem areas will be identified with respect to the current rules and their application.*

**Anatol Dutta and Walter Pintens, 'The mutual recognition of names in the European Union de lege ferenda'**, p. 559-562.

*How could the harmony of decision regarding names be attained within the European Union – a harmony of decision which has been demanded by the European Court of Justice in a number of cases? The following contribution presents the results of a working group which has made a proposal for a European Regulation on the law applicable to the names of persons harmonising the conflict rules of the Member States. This classic approach is, however, supplemented by a second element, which shall be the focus in this special issue on recognition and enforcement. The proposal establishes a principle of mutual recognition of names guaranteeing that every person has one name throughout Europe.*

**Mirjam Freudenthal, 'Dutch national rules on the recognition and enforcement of foreign judgments, Article 431 CCP'**, p. 563-572.

*This paper discusses Article 431 CCP. Article 431 CCP states that no decision rendered by a foreign court can be enforced within the Netherlands unless international conventions or the law provides otherwise. According to Article*

*431 paragraph 2 CCP the matter of substance has to be dealt with and settled de novo by a Dutch court. As from its enactment in 1838 Article 431 CCP has been subject to critical discussions and was restricted by case law from the beginning of the 20th century. Since then recognition will be granted if the foreign judgment will meet a set of conditions. But, the enforcement of condemnatory judgments remained impossible. More recently, case law has introduced the pseudo-enforcement procedure, meaning that if the foreign condemnatory judgment meets the conditions for recognition a hearing on the substance according to Article 431 paragraph 2 CCP is not required. However, the disadvantage of this pseudo-enforcement procedure is the lack of legal certainty. A revision of the actual Dutch statutory rules on recognition and enforcement is very much needed.*

**Elsemiek Apers, 'Recognition and enforcement of foreign judicial decisions: Belgium's codification explored**', p. 573-580.

*Belgium's codification of private international law has led to a comprehensive Code containing a detailed set of rules and procedure for the recognition and enforcement of foreign judicial decisions and authentic acts. Increased transparency, the clarity of private international law concepts and harmonisation in a more globalised world with changing values were the main reasons for such a codification. Most of the rules on recognition and enforcement are inspired by the Brussels Convention (now Brussels I Regulation), providing for an almost automatic recognition of foreign judicial decisions and a simplified exequatur procedure. Even though the Code provides a clear framework, in practice difficulties still arise, especially for the recognition of authentic instruments. This article explores the reasons behind Belgium's codification, describes the procedure for recognition and enforcement and provides a brief practical insight.*

# Regulation 1215/2012, Reminder

Art. 81: This Regulation shall apply from 10 January 2015.

See also the transitional provisions:

Art. 66

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.