German Federal Supreme Court Strengthens Foreign Notaries – A clear Commitment to Substitution of Form?

By Jan Lieder, University of Kiel, and Christoph Ritter, University of Jena

I. Introduction

In a recent decision[1], the German Federal Supreme Court assessed the legal consequences of a foreign notarization with regard to a share transfer of a German limited liability company (LLC). The holding contains the first statements regarding the substitution of form prescribed by sec. 15(3) German Limited Liability Company Act (*GmbHG*) ever since the reform of both this Act and the Swiss Code of Obligations. The lately issued court decision received broad attention both due to its implications for future international M&A transactions involving shares of LLCs, and due to its statements as to a foreign notary's role in the register procedure following a share transfer.

II. Facts and legal history of the case, issue raised on appeal

In the case at hand, a notary from Basel-Stadt (Switzerland) notarized the share transfer of an LLC registered in the Commercial Registry (*Handelsgericht*) of the Local Court of Munich (*Amtsgericht München*). The notary updated the list of shareholders accordingly, and filed the list with the Commercial Registry, which, however, declined to include the updated list in the records of the company. The Higher Regional Court of Munich (*Oberlandesgericht München*) rejected the LLC's and the presumable transferee's appeal. Now, the main issue raised on appeal was whether a foreign notary may file an updated list of shareholders with the Commercial Registry under sec. 40(2) *GmbHG*, or whether, according to sec. 40(1) *GmbHG*, the LLC's directors are solely responsible in such a case.

III. Holding

The highest German court in civil matters reversed the previous judgments and

ordered the Local Court to include the updated list in the records of the company. The decision contains a twofold holding:

(1.) The registration court may not reject a list of shareholders only because it was penned by a foreign notary.

(2.) The amendments due to the *MoMiG*[2] do not prohibit that a notarization prescribed by the *GmbHG* is conducted by a notary of a foreign country, provided that this notarization is equivalent to one under German law.

IV. Interpretation

With the second guiding principle, the Court approves its case law established back in 1981[3]. Thus, the Court finishes, at first glance, the discussion on the *MoMiG*'s effects on substitution of form requirements[4] by upholding the thesis that the equivalence of notarization requires that (a) the foreign notary performs functions in her jurisdiction which are commensurate with those of a German notary with regard to her professional qualification and her legal position, and that (b) the foreign notary, while establishing the relevant deed, has to perform a legal procedure which complies with the fundamental principles of German notarization law. In particular, the German Federal Supreme Court argues that the account of the (German) notary for the list's accuracy shall not be overestimated. Instead, a foreign notary is normally as reliable as a director of the company, who is regularly a layperson, but nevertheless responsible for filing the list of shareholders with the Commercial Registry.

Although this is basically true, sec. 40(2) *GmbHG* requires a notary who has been involved in any change in the person of a shareholder or the extent of their participation to sign the list instead of the directors without undue delay upon the changes becoming effective and to submit the list to the commercial register. Thus, in addition to the Court's thesis of equivalence, it is mandatory for a substitution of sec. 15(3) *GmbHG* that the foreign notary assumes in the deed (an additional) duty to file the updated list of shareholders with the commercial register[5].

Apart from that, the decision remains somewhat ambiguous with regard to the issue of substitution as the Court focuses on the question whether a foreign notary may file an updated list of shareholders with the commercial register. As the Court further develops in the reasoning on the first guiding principle, a

foreign notary would have such a right if her notarization is equivalent as described above. However, the standard of review is a rather limited one. In particular, the register court may only reject a list of shareholders that does evidently not comply with the (formal) requirements of sec. 40 *GmbHG*. Following that line, the Court only examined whether the notarization in Basel-Stadt was evidently invalid (which would give the commercial court the right to reject it) but did not explicitly discuss the substantive law question of substitution. Therefore, it remains unsettled whether the notarization had (substantive) legal consequences, *i.e.* resulted in the transfer of the share, apart from giving the foreign notary the right to file a new list of shareholders with the German registry court.

Accordingly, legal commentaries vary from warnings of uncertainty in foreign notarization[6], to overly positive statements recommending share transactions conducted primarily in Switzerland[7]. Bearing in mind the rather limited standard of review, we understand the holding as a cautious inclination towards the recognition of notarization at least in canton Basel-Stadt[8].

V. Conclusion

On the one hand, the German Federal Supreme Court solved an important procedural issue. The registration court is no longer allowed to reject a foreign notary's list of shareholders filed with the commercial register. On the other hand, the Court missed a good opportunity to clarify the substantive legal status of foreign notarizations under the reformed *GmbHG*. Therefore, legal advisers are forced to examine the respective foreign notary regulation in order to make sure that the equivalence requirements are met[9]. Against this background it remains to be seen whether foreign notarization can further serve as a cost-effective alternative to notarization in Germany.

[1] BGH, 17.12.2013 – II ZB 6/13, *BGHZ* 199, p. 270.

[2] Modernization of the Law on Limited Liability Companies and Combating Abuses Act (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen – MoMiG*), Federal Law Gazette (*BGBl.*) 2008 I, p. 2026.

[3] BGH, 16.2.1981 – II ZB 8/80, BGHZ 80, p. 76, 78.

[4] For an overview on the discussion, see Walter Bayer, »Übertragung von GmbH-Geschäftsanteilen im Ausland nach der MoMiG-Reform«, GmbH-Rundschau (GmbHR) 2013, p. 897, 911.

[5] For a detailed reasoning, cf. Jan Lieder & Christoph Ritter, »Neues aus Karlsruhe zur Zulässigkeit der Auslandsbeurkundung?«, Monatsschrift für die gesamte notarielle Praxis (notar) 2014, p. 187, 192-193, with further references to the contrary prevailing view.

[6] Recently Klaus J Müller, »Auslandsbeurkundung von Abtretungen deutscher GmbH-Geschäftsanteile in der Schweiz«, Neue Juristische Wochenschrift (NJW) 2014, p. 1994, 1999.

[7] Cf. Axel Jäger, »Beurkundung durch einen ausländischen Notar im GmbH-Recht und Einreichung der Gesellschafterliste«, juris Monatszeitschrift (jM) 2014, p. 241, 243; Christian Mense & Marcus Klie, »Beurkundung durch ausländischen Notar nach Inkrafttreten des MoMiG«, Gesellschafts- und Wirtschaftsrecht (GWR) 2014, p. 83.

[8] Similarly Cornelius Götze & Markus Mörtel, »Zulässigkeit der Einreichung der GmbH-Gesellschafterliste durch einen ausländischen Notar«, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, p. 369, 371-372; Mario Leitzen, »Die Zuständigkeit für Einreichung und Korrektur der GmbH-Gesellschafterliste nach den Dezember-Entscheidungen des BGH«, Zeitschrift für die Notarpraxis (ZNotP) 2014, p. 42, 46; Christoph H Seibt, »Anmerkung zum Beschluss des BGH vom 17.12.2013, Az. II ZB 6/13 – Zur Einreichung einer Gesellschafterliste durch einen Notar mit Sitz in der Schweiz«, Entscheidungen zum Wirtschaftsrecht (EWiR) 2014, p. 171, 172.

[9] For an overview on the notary codes of several Swiss cantons, see Klaus J Müller, »Auslandsbeurkundung von Abtretungen deutscher GmbH-Geschäftsanteile in der Schweiz«, Neue Juristische Wochenschrift (NJW) 2014, p. 1994, 1996-1998.

Agreement between the EU and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Source:OJ, 13.08.2014, L 240

According to Article 3(2) of the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter the Agreement), concluded by Council Decision 2006/325/EC, whenever amendments to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are adopted, Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments.

Regulation (EU) No 542/2014 of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice was adopted on 15 May 2014.

In accordance with Article 3(2) of the Agreement, Denmark has by letter of 2 June 2014 notified the Commission of its decision to implement the contents of Regulation (EU) No 542/2014. This means that the provisions of Regulation (EU) No 542/2014 will be applied to relations between the European Union and Denmark.

In accordance with Article 3(6) of the Agreement, the Danish notification that the content of the amendments has been implemented in Denmark creates mutual obligations between Denmark and the European Union. Thus, Regulation (EU) No

542/2014 constitutes an amendment to the Agreement and is considered annexed thereto.

With reference to Article 3(3) and (4) of the Agreement, implementation of Regulation (EU) No 542/2014 in Denmark can take place administratively. The necessary administrative measures entered into force on 18 June.

Register Now: Conference on Coherence in European Private International Law

We mentioned earlier that Jan von Hein from the University of Freiburg and Giesela Rühl from the University of Jena will host a (German language) conference on Coherence in European Private International Law on 10 and 11 October 2014 in Freiburg. Registration is now open. For more information visit the conference website.

The programme reads as follows:

Friday, 10 October 2014

9.00 Welcome and Introduction

1st Session: Grundlagen

9.30 *Kohärenz im IPR und IZVR der EU: Herausforderungen und Perspektiven*, Prof. Dr. Jürgen Basedow, LL.M. (Harvard), Max Planck Institute for Comparative and International Private Law, Hamburg

10.00 Discussion

10.30 Coffee break

11.00 *Gemeinsame oder getrennte Kodifikation von IPR und IZVR auf*

europäischer Ebene: Die bisherigen und geplanten Verordnungen im Familien- und Erbrecht als Vorbilder für andere Rechtsgebiete? Prof. Dr. Anatol Dutta, M.Jur. (Oxford), University of Regensburg

11.30 *Gemeinsame oder getrennte Kodifikation von IPR und IZVR auf nationaler Ebene: Lehren für die EU?,* Prof. Dr. Thomas Kadner Graziano, LL.M. (Harvard), Université de Genève, Switzerland

12.00 Discussion

12.30 Lunch Break

2nd Session: Der räumliche Anwendungsbereich des europäischen IPR/IZVR

14.00 *Das Verhältnis nach „innen": Grenzüber- schreitende v. Nationale Sachverhalte,* Prof. Dr. Burkhard Hess, Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg

14.30 *Das Verhältnis nach „außen": Europäische v. Drittstaatensachverhalte,* Prof. Dr. Tanja Domej, University of Zurich, Switzerland

15.00 *Das Verhältnis zur Haager Konferenz für Internationales Privatrecht*, Dr. Andrea Schulz, LL.M., German Federal Office of Justice, Bonn

15.30 Discussion

16.00 Coffee Break

3rd Session Subjektive und personale Anknüpfungspunkte im europäischen IPR/IZVR

16.30 *Parteiautonomie im IPR und IZVR,* Prof. Dr. Felix Maultzsch, LL.M. (NYU), Johann Wolfgang Goethe University, Frankfurt am Main

17.00 *Die Verortung juristischer Personen im europäischen IPR/IZVR,* Prof. Dr. Frauke Wedemann, University of Münster

17.30 *Die Verortung natürlicher Personen im europäischen IPR/IZVR (Wohnsitz, gewöhnlicher Aufenthalt, Staatsangehörigkeit),* Prof. Dr. Brigitta Lurger LL.M. (Harvard), University of Graz, Austria

18.00 Discussion

18.30 End

19.30 Dinner (special registration required)

Saturday, 11 October 2014

4th Session: Objektive Anknüpfungsmomente für Schuldverhältnisse im europäischen IPR/IZVR

9.00 *Die Behandlung vertraglicher Sachverhalte,* Dr. Michael Müller, LL.M. (Austin), University of Bayreuth

9.30 *Die Behandlung deliktischer Sachverhalte*, Prof. Dr. Haimo Schack, LL.M. (Berkeley), University of Kiel

10.00 Discussion

10.20 Coffee Break

5th Session: Schutz schwächerer Parteien und von Allgemeininteressen im europäischen IPR/IZVR

10.45 *Der Schutz schwächerer Personen im Schuldrecht,* Prof. Dr. Eva-Maria Kieninger, University of Würzburg

11.15 *Der Schutz schwächerer Personen im Familien- und Erbrecht,* Prof. Dr. Urs-Peter Gruber, University of Mainz

11.45 *Ordre public und Eingriffsnormen: Konvergenzen und Divergenzen zwischen IPR und IZVR,* Prof. Dr. Moritz Renner, University of Bremen

12.15 Discussion

13.00 End of conference

New Hague Maintenance Convention in Force in the EU

The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance has entered into force in the member states of the European Union on 1 August 2014. It eases the enforcement of judicial decisions relating to maintenance obligations via the establishment of central authorities in each contracting state.

In addition to the European Union the Maintenance Convention is in force in four more countries: Albania, Bosnia and Herzegowina, Norway and the Ukraine. Ratification in the United States is under way. More information on the Convention's status (including the full text in English and Spanish) is available here.

The Convention is accompanied by the Hague Protocol on the Law Applicable to Maintenance Obligations which entered into force in the European Union on 1 August 2013.

Yassari on Islamic Family Law and Private International Law

Nadjma Yassari from the Max Planck Institut for comparative and international private law in Hamburg has published a comparative monograph on the dower in family property law in islamic countries (Die Brautgabe im Familienvermögensrecht. Innerislamischer Rechtsvergleich und Integration in das deutsche Recht, Mohr Siebeck, 2014, 580 pp.). She examines the financial relations between spouses, as exemplified by the institute of the Islamic dower (mahr), and considers them in the context of the family property law of Egypt, Iran, Pakistan and Tunisia. Emphasizing the function and purpose of the mahr, the book also addresses its incorporation into private international law and

German family law – and does not miss to give a plethora of social, economic and historical background information as regards the state of the art of family finance in selected Islamic countries. It is a rich source of information for everybody who wants to learn more about Islamic legal systems and their complex cultural social, economic and historical context.

Latest Issue of RabelsZ: Vol. 78 No 3 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

- *Klaus Bartels,* **Zum Rückgriff nach eigennütziger Zahlung auf fremde Schuld – Anleihen bei DCFR und common law für das deutsche Recht** (Recourse After Self-serving Payment on Another's Debt – German Law Borrowing From the DCFR and the Common Law) pp. 479-507(29)

Under German law, the self-serving payment on another's debt must be regarded as a performance (Leistung) of the payer to the creditor. The payment leads to a discharge of the debt (§ 267 of the German BGB). A cessio legis, being incompatible with discharge, takes effect only under the exceptions provided by law. A third party may claim reimbursement from the original debtor only under the regime of benevolent intervention in another's affairs (Geschäftsführung ohne Auftrag). But the criteria for determining the meaning of concepts such as "another's affairs" and the "intention of benefiting another" are widely challenged. And having a recourse plan in mind, also positive effects on the debtor's issues, which could support the criteria of § 683 sentence 1 BGB, are regularly missed.

The prevailing German doctrine is comfortable with the Rückgriffskondiktion (§

812 (1) sentence 1, alternative 2 BGB), hereby enabling, subsidiarily, recourse to the benefit of the true debtor. The common law has traditionally been averse to this approach. And the Draft Common Frame of Reference avoids this condictio entirely. It is obvious that the English rules on legal compulsion (with their reservation vis-à-vis full restitution as under continental regimes) are substantially convincing. And despite its cautious approach, the Draft Common Frame of Reference offers similar solutions regarding payments of a third party, who did not consent freely (Art. VII.-2:101(1)(b) DCFR). In cases involving, for instance, an "execution interest", a corresponding interpretation is needed, perhaps even an analogous application of this rule. A similar approach is taken by the German doctrine following § 814 alternative 1 BGB by lowering the restitution barrier for cases of pressure caused by a conflict or compulsion. The already very narrow scope of application of the German Rückgriffskondiktion is thus further and markedly circumscribed: The law of unjust enrichment recognizes gratuitous interference in another's affairs only if the intervener presents substantial reasons to let his conduct be regarded as consistent.

- *Tanja Domej*, D**ie Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht** (The Recast Brussels I Regulation – Quantum Leaps in European Civil Procedure) pp. 508-550(43)

In November and December 2012, the European Parliament and the Council adopted the recast Brussels I Regulation (Regulation 1215/2012). The main feature of the reform is the abolition of the exequatur procedure. With this step, one of the main political goals in the field of European judicial cooperation, the abolition of ,,intermediate procedures" standing in the way of cross-border enforcement of judgments, has been achieved – at the price, however, of retaining the grounds for refusal of recognition and enforcement. In other respects as well, the changes introduced by the recast Regulation are modest, compared to the Commission's original political intentions. Instead of a "great leap forward", the European legislator chose incremental change. The plans to extend the rules on jurisdiction to third-state defendants were largely abandoned. The attempt to create new rules on the interface with arbitration was also unsuccessful. The changes with regard to jurisdiction agreements and provisional measures turned out more moderate than proposed by the Commission. This article discusses the innovations introduced by the recast

Regulation. It analyses the upsides and downsides of the new rules and points out lost opportunities and avenues for further reforms.

- *Claudia Mayer*, **Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen** (Ordre public and Recognition of Legal Parenthood in International Surrogacy Cases), pp. 551-591(41)

Through the use of gestational surrogacy modern artificial reproductive technology provides infertile couples with new opportunities to become parents of children who are genetically their own. While surrogacy is lawful under certain circumstances in a limited number of countries worldwide, in others – including Germany – it is prohibited. Consequently, international surrogacy tourism to countries that allow surrogacy, such as India, the United States, or Ukraine, is booming. However, there is no legal regulation at the international level regarding this matter.

Due to the current legal situation in Germany, infertile couples face severe difficulties in view of the recognition by German courts or by public authorities of their legal parenthood of a child born abroad through surrogacy: Not only is surrogacy illegal in Germany, its prohibition is also considered as part of the German ordre public. Based on this perception, German authorities deny the recognition of existing foreign judgments conferring legal parenthood upon the intended parents, as well as the application of more liberal foreign substantive law, thus paving the way for a recourse to German law: According to the relevant German provisions, the woman who gave birth to the child – i.e. the surrogate mother – is to be considered as the legal mother, and her husband is the legal father. As a consequence, in many cases the child does not acquire German nationality by birth and is thus denied the right to a German passport and the right to enter Germany. In the worst case, the child does not acquire any nationality at all, leaving him or her stateless, which constitutes an unacceptable situation. This article shows that the German ordre publicshould not be considered as an obstacle to the procedural recognition of foreign decisions on legal parentage, nor should it hinder the application of foreign substantive law (designated by the German conflict of law rules) conferring legal parentage on the intended parents. Instead, already de lege lata the welfare of the child must be considered the primary and decisive concern in

surrogacy cases. This also results from Article 8 of the European Convention on Human Rights, guaranteeing the right to respect for one's family life.

Regulation at the international level is overdue, and it is to be welcomed that international institutions have started to give attention to the matter. However, until an international consensus is reached, the national legislator should be called upon to revise the German law on descent, and to provide provisions legalizing surrogacy under certain conditions.

- *A. (Teun) Struycken V.M.*, **The Codification of Dutch Private International LAw- A Brief Introduction to Book 10 BW**, pp. 592-614(23)

Greek Book on Brussels Ibis Regulation [Regulation (EU) No 1215/2012]

'Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters: The New Revised Regulation 1215/2012 Brussels (Ibis)', by Professor Charis P. Pamboukis, has just been published (language: greek). The book constitutes the first issue of a new series called *The Private International Law and Law of International Transactions Series*, which has the aim of publishing outstanding works in these fields under the direction of Professor Charis P. Pamboukis. The publisher is Nomiki Bibliothiki (Athens, 2014, XVI + 308 pages, ISBN 978-960-562-284-8).

> The new Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters plays a vital role in the development of the European procedural law, which gradually dominates in the regulation of the legal relationships occurring in the European Union

and diminishes the practical importance of the national procedural law. It replaces -and this is important for its systematic interpretation- the Brussels I Regulation. In principle it is based on its predecessor but it also revises old and introduces new provisions. It has to be underlined that the new instrument will be applied as a whole by replacing (with a few exceptions which are included in its transitional provisions) the old Brussels I Regulation (the latter has 'communitarised' the 1968 Brussels Convention, a pioneer of great significance for this area).

Taking into consideration the described relationship between these two instruments, this book gives emphasis on the interpretation of the new as well as of the old, revised provisions which form part of the new Regulation, in order to fill a related gap which exists in the Greek, legal bibliography and prepare the ground for its application (10 January 2015, as it is provided by Article 66). Its main purpose is to make familiar to the Greek jurists the adopted amendments. Therefore, it explains the changes which have taken place concerning the scope of the Brussels I Regulation, its rules on international jurisdiction as well as on the free circulation of judgments. Regarding the provisions of the Brussels I Regulation, which have been included *verbamit* in the new Regulation, the older works and contributions remain relevant. Due to this fact, a pertinent list has been included in the end of this book. Furthermore, among others, the text of the new Regulation has also been included.

English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement

By Martin Illmer

In a recent decision, the English Court of Appeal confirmed a damages award for

breach of a jurisdiction agreement ([2014] EWCA Civ 1010); another judgment in the Alexandros T saga, which has been unfolding before the English courts. The judgment was delivered after the Supreme Court had, in November 2013 ([2013] UKSC 70), on appeal from an earlier Court of Appeal judgment in the Alexandros T saga, held that arts 27 and 28 of Brussels I did not apply in relation to the 2006 proceedings, vis-à-vis the 2011 proceedings (see the facts below) because the claims in those proceedings did not concern the same cause of action, but merely arose out of the same factual setting and might raise common issues.

Facts

In May 2006, the vessel Alexandros T, owned by Starlight Shipping Company, sank. Starlight filed a claim with their insurers, who initially denied liability, primarily on the basis that, to Starlight's knowledge, the vessel was unseaworthy. Starlight disputed this argument and in turn alleged that the insurers had improperly influenced witnesses, had spread false and malicious rumors and, in failing to comply with their obligations to pay Starlight under the insurance policies, had caused them consequential financial loss. Accordingly, in 2006, Starlight brought an action against the insurers before the English High Court under the exclusive jurisdiction clauses in the insurance policies. Shortly before the trial, the parties settled the claim on the basis of Tomlin Orders which provided for a stay of the action save for the purposes of carrying into effect the agreed terms of the settlement. The settlement agreements were expressed to be in full and final settlement of all and any claims under the insurance policies, and contained English choice of law and exclusive English jurisdiction clauses. In addition, Starlight agreed to indemnify the insurers in respect of any claims which might be made against them in relation to the loss of the vessel or under the policies. In 2011, however, Starlight brought proceedings in Greece against the insurers, alleging breaches of the Greek Civil and Criminal Code, relying on the factual allegations concerning witness evidence and loss made in the 2006 proceedings. In response to that claim, the insurers sought to lift the stay of the 2006 proceedings under the Tomlin Orders, and commenced proceedings before the English High Court seeking (1) a declaration that the Greek claims are covered by the releases of the settlement agreements, (2)a declaration that bringing the Greek claims was a breach of the releases in the settlement agreements as well as a breach of the jurisdiction clauses in both the policies and

settlement agreements, and, (3) payments based on the indemnity clauses and damages for breach of the release and jurisdiction clauses. At first instance the High Court granted summary judgment on the insurers' claims. Starlight appealed to the Court of Appeal.

Judgment

The relevant passages of the judgment of the Court of Appeal read as follows:

> ***'Do the claims for damages infringe EU law?***

[15] The owners assert that these claims for damages interfere with the jurisdiction of the Greek court to determine its own jurisdiction and, if appropriate, the merits of the owners' claims. For this purpose they rely on Turner v Grovit [2004] 2 Lloyds Rep. 169. This reliance is, however, misplaced because Turner v Grovit related to anti-suit injunctions and no such injunction is claimed in the present case. The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court.

[16] The Greek court is free to consider the Greek claims; it will, of course, have to decide whether to recognise any judgment of the English court that the Greek claims fall within the terms of the Settlement Agreement and have therefore been released. It will also have to decide whether to recognise any judgment awarding damages for breach of the Settlement Agreements and the jurisdiction clauses in both the settlement agreements and the insurance policies. But that is not an interference with the jurisdiction of the Greek court but rather an acknowledgment of the Greek court's jurisdiction. In these circumstances there is no infringement of EU law, nor is there any need for a reference to the Court of Justice of the European Union despite the owners' repetition of their request for

such a reference in their new solicitors' letter of 26th June 2014.

[17] In fact the owners appear almost to recognise that this is the position since they expressly accept that the claim for an indemnity pursuant to the Settlement Agreements is not contrary to EU law (see their supplemental skeleton, para 48). That is plainly right (see also the observations of Lord Neuberger at para 132 of his judgment in the Supreme Court). But if the claims to an indemnity do not infringe EU law, it is very hard to see why claims to damages should infringe that law.'

Short Note

The judgment of the Court of Appeal raises a number of interesting questions, which cannot all be addressed here. From a European perspective, the crucial aspect is the compatibility of such a damages award with the ECJ's judgment in *Turner v Grovit,* and potentially also West Tankers (although the latter concerned an arbitration agreement, raising the additional problem that arbitration is excluded from the Regulation's substantive scope). Although the Court of Appeal's judgment builds partially upon the prior decision of the Supreme Court on the issue of arts 27 and 28 of Brussels I – in particular, the finding of the Supreme Court that the claims in the two proceedings did not concern the same cause of action – it is likely that the Court of Appeal would have reached the same decision irrespective of the Supreme Court's prior decision. What is most striking about the Court of Appeal's judgment is the fact that Longmore LJ, in the first sentence of para 15, refers to the Greek court's right to determine its own jurisdiction whereas subsequently, after having explained the Supreme Court's decision on jurisdiction, the court simply refers to an interference with the Greek court's jurisdiction, which is of course not the same. Even though the Supreme Court held that arts 27 and 28 of Brussels I do not apply, a damages claim may still interfere with the right of the Greek court to determine its jurisdiction, or, more generally speaking, the threat of such a damages claim may deter parties from even bringing a claim in a foreign forum which would have the same effect as an anti-suit injunction. One may well argue that if an anti-suit injunction that amounts to specific performance of the jurisdiction agreement should no longer be granted, damages may equally not be awarded.

In light of the principle of effectiveness, the ECJ might well find an incompatibility of a damages award with the Brussels I Regime, and it is therefore somewhat surprising that the Court of Appeal did not refer the matter to the ECJ for a preliminary ruling. The Court of Appeal simply held, by way of its own interpretation, that there is no infringement of EU law, even though the matter has not yet been decided by the ECJ nor resolved by EU legislation. It is mentioned, in passing, that the English courts, in the litigation that followed the ECJ's West Tankers ruling, appear to be very reluctant to refer matters to the ECJ for a preliminary ruling (see also the issue of enforcement of an arbitral award by entering judgment in terms of the award under section 66(2) Arbitration Act 1996 in West Tankers v Allianz [2011] EWHC 829, confirmed by [2012] EWCA Civ 27). It seems that certain of the ECJ's decisions, such as West Tankers, Turner, and Gasser were so shocking to English courts that they want to avoid a repetition by all means. Moreover, the English courtsequally do not want to see the alternatives to anti-suit injunctions that are provided by English law (some even exclusively by English law) to be destroyed by the ECJ for an incompatibility with the Brussels I Regime.

The matter is somewhat different with regard to arbitration agreements, since arbitration is excluded from the Regulation's scope and there is consequentially no lis pendens mechanism that applies to it. While a state court appears to be barred from granting damages for breach of an arbitration agreement for incompatibility with the ECJ's West Tankers judgment, an arbitral tribunal may well award such damages. While arbitral tribunals are bound by substantive EU law (see ECJ Case C-126/97 Eco Swiss v Benetton [1999] ECR I-3055), they are not bound by procedural EU law that is specifically intended and designed to apply only to the Member States' courts. Consequently, the procedural principles underlying the Brussels I regime do not bind arbitral tribunals even if seated in a Member State, so as to foster mutual trust in other Member States' courts, by allowing them to rule independently on their jurisdiction. The matter was recently heard before the English High Court, which held that the Brussels I Regulation does not apply to an arbitral tribunal, and accordingly that it may award damages for breach of an arbitration agreement free from any restraints due to the principles of the Brussels I Regime (West Tankers v Allianz [2012] EWHC 854). Interestingly, the Swiss Supreme Court reached the same result, (although it was of course not restrained by EU law) when it dealt with an arbitral award rendered by a tribunal whose members included Lord Hoffmann.

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Readers of this blog will know that our email updates (which allows you to subscribe to receive our new content directly into your inbox) had been broken for a while. The service we used, Feedburner, is no longer operational. We're happy to say that we've now created a new email update subscription service for Conflict of Laws .net. You can **subscribe here** (the link is also permanently in the menu to the right.)

The blog has been updated to the latest software available, and we hope everything is working as it should be. If you spot a problem or bug, just let us know.

The Protection of Privacy in the Aftermath of the CJEU's Judgments – Conference at the Max Planck Institute Luxembourg

On September 29, 2014 the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law will host a conference on 'The Protection of Privacy in the Aftermath of the CJEU's Judgments in *eDate Advertising*, *Digital Rights Ireland* and *Google Spain*'.

Ensuring the effective right to privacy regarding the gathering and processing of personal data has become a key issue both in the internal market and in the international arena. The extent of people's right to control their data, the implications of the "right to be forgotten", the actual impact on national systems

of the CJEU's decisions on jurisdiction on the infringement of personality rights, and recent legislation addressing libel tourism are all shaping a new understanding of data protection and the right to privacy, and also have an impact on other fundamental rights such as freedom of speech.

This Conference will explore these issues to assess the status quo and possible developments in this area of the law which is undergoing significant changes and reforms that are not always easy to reconcile.

Program

14:15 *The CJEU's Decision in Google Spain: An Assessment*

Professor Christopher Kuner, Honorary Fellow of the Centre for European Legal Studies, University of Cambridge, and Honorary Professor at the University of Copenhagen

Dr Cristian Oro Martinez, Max Planck Institute Luxembourg – discussant

15:00 *The CJEU's Decision on the Data Retention Directive*

Professor Martin Nettesheim, University of Tübingen

Dr Georgios Dimitropoulos, Max Planck Institute Luxembourg – discussant

16:30 *The CJEU's Decision in eDate Advertising and Its Implementation by National Courts*

Professor Burkhard Hess, Director, Max Planck Institute Luxembourg

Professor Patrick Kinsch, University of Luxembourg – discussant

17:15 *The 2010 U.S. SPEECH Act and the U.K. Reaction of 2013*

Dr Cristina M. Mariottini, Max Planck Institute Luxembourg

Professor David P. Stewart, Georgetown University – discussant

18:00 *Discussion*

For further information and to register, please click here.

Note: The following day, the Institute will host the first meeting of the ILA Committee on the Protection of Privacy in Private International and Procedural Law (this latter event is by invitation only).