Online Public Consultation on Investment Protection and ISDS Dispute Settlement in the TTIP

By Ana Koprivica, research fellow at the Max Planck Institute Luxembourg

The negotiations between the EU and the US, the two largest single trading blocs in the world, concerning a free trade agreement – the Transatlantic Trade and Investment Partnership (TTIP) – started in July 2013. With an ambition of making these negotiations the most open and transparent trade talks until now, the European Commission has just launched a public consultation on it. The questionnaire to be filled in, as well as additional relevant documents, can be found at http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS. The intention of the Commission is to consult the public in the EU on a possible approach to investment protection and ISDS in the TTIP and publish the contributions received by 21st June 2014 in a report, provided the contributors had previously agreed to this.

From the procedural point of view, some relevant novelties (compared to most existing investment treaties) are included in the consultation document and referred to in the Questionnaire: transparency of the investor-state dispute settlement (ISDS); the relationship with domestic courts; the rules on arbitrators' conduct and qualifications; the mechanism for a quick dismissal of frivolous or unfounded claims; the use of "filter mechanisms" and, the creation of an appellate body. For the sake of brevity, only the inclusion of the ISDS mechanism and transparency of the proceedings shall be addressed here.

ISDS and Transparency

At the outset it should be noted that there has been a strong opposition to inclusion of the ISDS in the TTIP. Interestingly enough, the Commission does not seem to question the adequacy of this ISDS in the Questionnaire, unless perhaps in the General Assessment Section, but instead goes on to include the reference to the UNCITRAL Transparency Rules which entered into force on 1st April. This is indeed a result of the ongoing public criticism regarding ISDS, displayed by the NGOs, environmental groups and globalism activists who raised doubts on its legitimacy.

The Commission, however, did react to this criticism also by defending the necessity of keeping ISDS rather than referring the disputes to national

courts, stating that the latter could in some circumstances be unattractive to investors due to the risk of home team bias (e.g., some States may deny foreign nationals access to courts). This is, of course, in line with the main purpose of having international investment agreements and that is to encourage foreign investors from one state party to invest in the territory of the other, although some reports by the World Bank cast doubts on the actual effects of this stimulation.

Even though the arguments set out by the Commission seem sensible and difficult to argue against, it is hard to believe that the US and EU are truly fearing that their investors could be treated unfairly, since the European and American legal systems do not have an investor-unfriendly reputation. In fact, both the US and the EU are currently negotiating investment agreements with China, which should provide the investors with greater legal certainty and market access. Consequently, should the EU and the US fail to include ISDS provisions in the TTIP, there is a concern that China might understand this as a signal to resist the pressure to undertake further liberalisation measures. It is, therefore, the necessity of including such a chapter in TTIP, from the economic point of view, that is still a debatable matter.

The EU's goal is to ensure transparency in the ISDS mechanism under TTIP in order to foster accountability, consistency and predictability and to that end the Questionnaire includes the reference to the UNCITRAL Transparency Rules. To remind, these rules provide for open hearings as well as disclosure of most of the documents, with an exception when it concerns confidential information, allowed by the tribunal. The additional documents whose disclosure is mandatory pursuant to Article xx-33 of EU-Canada Agreement, which is used as a reference for the consultations on transparency under TTIP, are: the request for consultations, the request for a determination, the notice of determination, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation. In addition, a modification of the Rules has been made with regard to exceptions to disclosure. Article xx-33(6) stipulates an obligation for the respondent to disclose information to public if its laws so require and instructs the respondent to apply such laws in a manner sensitive to protecting from disclosure of confidential or protected information.

Once more, due to numerous attacks on the account of lack of transparency, the Commission does not even question whether rules on transparency should be included in the TTIP but asks for views on whether the approach proposed contributes to the EU objective to increase transparency in the ISDS under TTIP. It should be added that, if the US and the EU agree on the applicability of UNCITRAL Transparency Rules, this would not be a precedent since the EU has already reached a political agreement with Canada to introduce these rules in the upcoming free trade agreement between them.

Finally, looking at a broad picture and a long-term impact, one may conclude that if the rules on transparency are included in the TTIP as well as the agreement with Canada (and both are highly likely to happen), it is to be expected that this would certainly put actors in investor-State arbitration under the pressure to allow for greater transparency. It will be interesting to see in which direction the contributions with regard to this and other issues would go until 21st June; however, it seems that the landscape of investor-State arbitration is certainly undergoing significant changes and that this will be yet another step in that direction.

CJEU Rules on Jurisdiction over Several Supposed Perpetrators

By Jonas Steinle

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

On 3 April 2014, the Court of Justice of the European Union delivered in Hi Hotel HCF Sarl ./. Uwe Spoering, C-387/12 another judgment on Art. 5 No. 3 Brussels I Regulation and thereby further developed the application of this head of jurisdiction in cases where there are several supposed perpetrators and one of them is sued in a jurisdiction other than the one he acted in.

The Court held that Art. 5 No. 3 Brussels I Regulation does not allow jurisdiction to be established on the basis of the causal event of the damage (*Handlungsort*), if the supposed perpetrator did not himself act within the jurisdiction of the court seised. On the other hand, the Court ruled that Art. 5 No. 3 Brussels I Regulation does allow jurisdiction to be established on the basis of the place where the alleged damage occurs (*Erfolgsort*), provided that there is the risk, that the damage may occur within the jurisdiction of the court seised (e.g. in a case of copyright infringement where the publication, which contains the object protected by copyright, can be bought).

Facts

The request for a preliminary ruling on Art. 5 No. 3 Brussels I Regulation concerns proceedings between *Hi Hotel Sarl*, established in Nice (France),

and *Mr Spoering*, residing in Cologne (Germany). *Mr Spoering*, who is the claimant in the pending proceedings, is a photographer who took photographs of the interior of some rooms of a hotel run by *Hi Hotel Sarl* and subsequently granted *Hi Hotel* the right to use these photographs for advertising activities. Some years later, the claimant found some of these photographs illustrated in a book in a bookshop in Cologne which was published by a German publisher, the *Phaidon-Verlag*, in Berlin.

The claimant considers the publication of these photographs as an infringement of his copyright and brought proceedings in Cologne against *Hi Hotel Sarl*, seeking an issuance of a prohibitory order and a claim for damages. The defendant alleges that it submitted the photographs only to a subsidiary of the *Phaidon-Verlag* in Paris and that it did not know whether this subsidiary had handed the photographs over to its German sister company. In the subsequent proceedings, the issue arose as to whether jurisdiction of the German courts may be established on the basis of Art. 5 No. 3 Brussels I Regulation. The *Bundesgerichtshof* referred the following question to the Court for a preliminary ruling:

> *15 'Is Article 5(3) of the Regulation … No 44/2001 to be interpreted as meaning that the harmful event occurred in one Member State (Member State A) if the tort or delict which forms the subject-matter of the proceedings or from which claims are derived was committed in another Member State (Member State B) and consists in participation in the tort or delict (principal act) committed in the first Member State (Member State A)?'*

Ruling

Before ruling on the substance, the Court briefly examined the argument of the defendant that the request for a preliminary ruling must be considered inadmissible since it had not been determined whether there was a complete assignment of the copyrights from the claimant to the defendant and if there was no such assignment, no infringement of copyright would be possible. The Court held that for the admissibility of a request for a preliminary ruling it was sufficient that according to the applicant's assertions the referred question is of relevance for the main proceedings and then went on to state that this was the case here.

The subsequent ruling of the Court on the substance must be divided into two parts:

In the first part, the Court considered whether, under the circumstances of the case at hand, jurisdiction could be established in the German courts under Art. 5 No. 3 Brussels I Regulation on the basis of the causal event of the damage (*Handlungsort*). In this context, the Court recalled once again the general scheme of the Brussels I Regulation (Art. 5 No. 3 Brussels I

Regulation as a special head of jurisdiction which is to be interpreted narrowly) and held that it is due to the existence of a particularly close connection between the dispute and the courts of the place where the harmful event occurred that jurisdiction may be established at the place of the causal event of the damage (*Handlungsort*). The Court then referred to the decision in *Melzer* (C-228/11) where it had already ruled on this issue. Considering the case at hand, the Court found that *Hi Hotel* as the only defendant acted outside of the jurisdiction of the court of which it was sued and that therefore no such particularly close connection could be found. This led the Court to the conclusion that accordingly no jurisdiction could be established in the German courts on the basis of the causal event of the damage (*Handlungsort*).

Interestingly, the referring court this time and unlike in previous cases had not limited its question to establishing jurisdiction either on the basis of the causal event (*Handlungsort*) or the place of the occurrence of the damage (*Erfolgsort*) which enabled the Court this time to give the full picture on the issue of establishing jurisdiction under Art. 5 No. 3 Brussels I Regulation in cases where several supposed perpetrators are involved.

In the second part, the Court therefore went on to consider the establishment of jurisdiction on the basis of the place where the alleged damage occurs (*Erfolgsort*). Here, the Court referred to the recent decision in *Pinckney* (C-170/12) where it had already decided that in a claim for a finding of a breach of copyright, jurisdiction may be established where the Member State in which that court is situated protects the rights of copyright relied on by the applicant and the alleged damage my occur within the jurisdiction of the court seised. The Court then found that these requirements have been met in the case at hand and that jurisdiction could be established on the basis of the place where the alleged damage occurs (*Erfolgsort*) under Art. 5 No. 3 Brussels I Regulation in the German courts accordingly. However, as already stated in *Pinckney*, the court seised on the basis of the place where the alleged damage occurs may only decide on the damage caused in the territory of that State.

Evaluation

For attentive observers of the jurisprudence of the CJEU, this decision may not come as a big surprise since it seems that in the ruling at hand, the Court simply put together what he had built in previous cases involving several supposed perpetrators in the context of Art. 5 No. 3 Brussels I Regulation.

As for the first part of the decision, the endorsement of the *Melzer*-approach with respect to the place of the causal event (*Handlungsort*) seems logical and consistent. Once again the Court had to decide on a situation, where only one out of several perpetrators was sued and the assertions of the claimant had based the establishment of jurisdiction for that defendant solely on the

actions pursued by its co-perpetrator. It is therefore clear now, that for the purpose of establishing jurisdiction under Art. 5 No. 3 Brussels I Regulation, one cannot attribute the actions of several perpetrators among each other to establish jurisdiction for all of them at all places of any causal events. This would expand Art. 5 No. 3 Brussels I Regulation beyond its limits, considering the need for a particularly close connection between the dispute and the courts of the place where the harmful event occurred which is the very reason for that head of jurisdiction. This time, the Court endorsed the *Melzer*-approach, even though the presumptive co-perpetrator (*Hi Hotel*) was sued at the place where the presumptive main-tortfeasor acted (*Phaidon-Verlag*) and not, as it was the case in *Melzer*, the main-tortfeasor was sued at the place where the co-perpetrator had acted. The conclusion from the *Hi Hotel* ruling seems to be, that the level of participation is not of any relevance in this context.

In contrast, as for the second part of the decision with regard to the place where the damage occurs (*Erfolgsort*), it was far from clear that the CJEU would expand the approach which it had endorsed in *Pinckney* for copyright infringements via the internet also to other forms of infringement such as the publication of a protected photograph. Recently, the Advocate General in its opinion to *Coty Prestige* (C-360/12), which is the third and last pending decision on the interpretation of Art. 5 No. 3 Brussels I Regulation in cases of several supposed perpetrators, had struggled to expand the *Pinckney*-approach to a case where the infringement of a Community Trade Mark is alleged by several perpetrators (opinion to *Coty Prestige*, para. 66 *et seqq.*). Quite correctly, the Advocate General pointed out that the *Pinckney*-approach leads to a very wide interpretation of Art. 5 No. 3 Brussels I Regulation with respect to the place where the damage occurs (*Erfolgsort*). According to this understanding, one out of several perpetrators may be sued in a jurisdiction in which he neither has his domicile, nor pursued any relevant actions whatsoever and jurisdiction on him may based on the sole fact that according to the applicant’s assertions the action of the defendant in a jurisdiction other than the seised court gave rise to another action by another perpetrator in the state of the seised court (*Hi Hotel*, para. 37).

CJUE Rules on Language

Discrimination In Civil Proceedings

On 27 March 2014, the Court of Justice of the European Union ruled in Ulrike Elfriede Grauel Rüffer v. Katerina Pokorna (Case 322/ 13)

In Italy, the German language may be used in court in the Province of Bolzano in criminal, civil and administrative law proceedings. The use of German before those courts is based on the provisions of Articles 99 and 100 of the Decree of the President of the Republic No 670 of 31 August 1972 authorising of the standardised text of constitutional laws concerning the special arrangements for Trentino-Alto Adige as well as on the Decree of the President of the Republic No 574 of 15 July 1988 on the implementation of the special arrangements for the Trentino-Alto Adige with regard to the use of German or Ladin in relations between citizens and the public administration and in judicial proceedings.

Facts

On 22 February 2009, Ms Grauel Rüffer, a German national domiciled in Germany, fell on a ski run situated in the Province of Bolzano and injured her right shoulder. She claims that that fall was caused by Ms Pokorná, a Czech national domiciled in the Czech Republic. Ms Grauel Rüffer claims compensation from Ms Pokorná for the damage sustained. In proceedings brought before an Italian court the notice of proceedings, served on 24 April 2012, was drafted in German at the request of Ms Grauel Rüffer. Ms Pokorná, who received a Czech translation of that notice of proceedings on 4 October 2012, submitted her defence in German on 7 February 2013 and raised no objection as to the choice of German as the language of the case.

Could two foreigners benefit from the right of using German in Italian Proceedings?

> *18 By its question, the referring court asks essentially whether Articles 18 TFEU and 21 TFEU must be interpreted as precluding national rules which grant the right to use a language other than the official language of the State in civil proceedings brought before the courts of a Member State which are situated in a specific territorial entity of that State only to citizens of the former who are domiciled in that same territorial entity.*
>
> *19 In order to answer that question, it must be recalled, first of all, that, as regards the same provisions, the Court, in Bickel and Franz (C-274/96 EU:C:1998:563, paragraphs 19 and 31), held that the right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the State concerned falls within the scope of*

European Union law, which precludes national rules which confer on citizens whose language is that particular language and who are resident in a defined area, the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other Member States travelling or staying in that area, whose language is the same.

20 The considerations which led the Court, in Bickel and Franz (EU:C:1998:563) to acknowledge that a citizen of the European Union, who is a national of a Member State other than the Member State concerned, is entitled, in criminal proceedings, to rely on language rules such as those at issue in the main proceedings on the same basis as the nationals of the latter Member State, and, therefore, may address the court seised in one of the languages provided for by those rules, must be understood as applying to all judicial proceedings brought within the territorial entity concerned, including, civil proceedings.

21 If it were otherwise, a German-speaking citizen of a Member State other than the Italian Republic, who travels and stays in the Province of Bolzano would be treated less favourably in comparison with a German-speaking Italian national who resides in that province. While such an Italian national may bring proceedings before a court in civil proceedings and have the proceedings take place in German, that right would be refused to a German-speaking citizen of a Member State other than the Italian Republic, travelling in that province.

22 As regards the observation of the Italian Government, according to which there is no reason to extend the right to use the ethnic and cultural minority language concerned to a citizen of a Member State other than the Italian Republic who is present on an infrequent and temporary basis in that region, since the measures are available to him which guarantee that he will able to exercise his rights of defence in an appropriate manner, even where he is without any knowledge of the official language of the host State, it must be observed that the same argument was put forward by the Italian Government in the case which gave rise to the judgment in Bickel and Franz (EU:C:1998:563, paragraph 21) and that the Court dismissed it in paragraphs 24 to 26 thereof, holding that the rules at issue in the main proceedings ran counter to the principle of non-discrimination.

23 Such legislation could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (Bickel and Franz EU:C:1998:563, paragraph 27).

24 In the first place, as regards the argument raised by the Italian Government that the application of the language policy at issue in the main proceedings to citizens of the European Union would have the result of

encumbering the proceedings in terms of organisation and time limits, it must be pointed out that that assertion is expressly contradicted by the referring court, according to which the judges in the Province of Bolzano are perfectly able to conduct judicial proceedings in either Italian or in German, or in both languages.

25 In the second place, as regards the observation made by that government relating to the extra costs which would be incurred by the Member State concerned, the application of those language rules to citizens of the European Union, it is settled case-law that aims of a purely economic nature cannot constitute pressing reasons of public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see Case C109/04, Krannemann, EU:2005:187, paragraph 34 and the case-law cited).

26 Accordingly, the national rules at issue in the main proceedings cannot be regarded as justified.

Ruling:

Articles 18 TFEU and 21 TFEU must be interpreted as precluding national rules, such as those at issue in the main proceedings, which grant the right to use a language other than the official language of that State in civil proceedings brought before the courts of a Member State which are situated in a specific territorial entity, only to citizens of that State who are domiciled in the same territorial entity.

Conference on a Lex Mediterranea of Arbitration

Lotfy Chedly (Faculty of Law of Tunis) and Filali Osman (University of Franche Comté) are hosting next week in Tunis a conference which will explore the prospect of a Lex Mediterranea of Arbitration, ie a law of arbitration common to the countries of the European Union and those surrounding the Mediterranean Sea.

The conference is the fourth of a wider project on the *Lex Mercatoria Mediterranea*, which has already generated three books (see picture).

Friday April 11

8h55– 10h45 : AXE I – INTRODUCTION A L'ARBITRAGE, SOURCES HISTORIQUES ET ARBITRAGE AU PLURIEL
Chair: Prof. Ali MEZGHANI

1- 8h55 : Rapport introductif : Pr. Lotfi CHEDLY, Faculté des sciences juridiques, politiques et sociales de Tunis.
2- 9h15 : Histoire et attentes d'une codification du droit dans les pays de la méditerranée, Pr. Rémy CABRILLAC, Faculté de droit de Montpellier.
3- 9h30 : Arbitrage conventionnel, arbitrage obligatoire, médiation, conciliation, transaction, sentence 'accord-parties', convention de procédure participative : essai de définition ? : Pr. Sylvie FERRE-ANDRÉ, Université Jean Moulin, Lyon 3.
4- 9h45 : Arbitrage v./Médiation : concurrence ou complémentarité ? : Pr. Charles JARROSSON, Université de Paris II.
5- 10h15 : L'arbitrage maritime : une lex maritima pour l'UPM : Pr. Philippe DELEBECQUE, Université Paris1, Panthéon Sorbonne.
6- 10h30 : L'arbitrage sportif : une lex sportiva pour l'UPM : Me Laurence BURGER, Avocat Perréard de Boccard.

10h45-11h45 : AXE II- PRINCIPE D'AUTONOMIE, INSTANCES JUDICIAIRES INSTANCE ARBITRALE
Chair: Pr. Mohamed Mahmoud MOHAMED SALAH

7- 10h45 : Le principe de l'autonomie de la procédure arbitrale : quelles limites à l'ingérence des juges étatiques ? : Pr. Souad BABAY YOUSSEF, Université de Carthage.
8- 11h00 : L'extension et la transmission de la clause d'arbitrage Me Nadine ABDALLAH-MARTIN, Avocat.
9- 11h45 : L'arbitrabilité des litiges des personnes publiques : entre autonomie de la volonté et prévalence du droit national prohibitif : Pr. Mathias AUDIT, Université Paris Ouest, Nanterre La Défense.

14h30-15h15 : AXE III- INSTANCES JUDICIAIRES INSTANCE ARBITRALE
Chair : Pr. Laurence RAVILLON

10- 14h30 : Les interférences des conventions relatives aux droits de l'homme avec l'arbitrage : Catherine TIRVAUDEY, Université de Franche-Comté.
11- 14h45 : Les mesures provisoires dans l'arbitrage : comparaisons méditerranéennes : Pr. Mostefa TRARI TANI, Université d'Oran.
12- 15h00 : Arbitre(s), Arbitrage(s) et procès équitable : Pr. Kalthoum MEZIOU, Faculté des sciences juridiques, politiques et sociales de Tunis

15h15 -16h00 : AXE IV- LE DROIT APPLICABLE AU FOND DU LITIGE
Chair: Pr. Rémy CABRILLAC

13- 15h15 : La lex mercatoria au XXe siècle : une analyse empirique et

comportementale : Pr. Gilles CUNIBERTI, Université du Luxembourg.
14- 15h30 : Les principes UNIDROIT : Pr. Fabrizio MARRELLA, Université de Venise.
15- 15h45 : L'amiable composition : Pr. Ahmet Cemil YILDIRIM, Université de Kemerburgaz –Istanbul-.

16h00-17h00 : AXE V – QUELS PRATICIENS, QUELLE(S) INSTITUTION(S), QUELLE(S) ÉTHIQUE(S) ? L'ARBITRAGE DANS L'UPM ?
Chair: Pr. Louis MARQUIS

16- 16h00 : L'arbitrage institutionnel dans les pays de l'UPM: l'exemple du CCAT (Centre de conciliation et d'arbitrage de Tunis): Pr. Noureddine GARA, Faculté de Droit et de sciences politiques à Tunis.
17- 16h15 : Le développement de l'arbitrage institutionnel international dans trois pays maghrébins : Pr. Ali BENCHENEB, Université de Bourgogne
18- 16h30 : Quelle(s) éthique(s) pour un arbitre méditerranéen ? : Pr. Chiara GIOVANNUCCI ORLANDI, Université de Bologne
19- 16h45 : Quelle(s) règles du jeu pour les conseils dans un arbitrage méditerranéen ? : Me Jalal EL AHDAB, Avocat Ginestié.

Saturday April 12

8h30-9h30: AXE VI- ORDRE PUBLIC INTERNATIONAL, RECONNAISSANCE, EXÉCUTION
Chair: Pr. Ferhat HORCHANI

20- 8h30 : Quel (s) ordre(s) public international dans les pays de l'UPM ? :M. Mohamed Mahmoud MOHAMED SALAH, Faculté de droit de Nouakchott (Mauritanie)
21- 8h45 : Quel (s) régimes de reconnaissance et d'exécution des sentences arbitrales dans les pays de la rive sud de la Méditerranée ? : Pr. Riyad FAKHRI, Université Hassan 1 de Settat.
22- 9h00 : L'exécution des sentences internationales annulées dans leur Etat d'origine : jurisprudence méditerranéenne, Me Abdelatif BOULALF, Avocat BOULALF & MEKKAOUI.
23- 9h15 : L'exéquatur entre la Convention de New York et les droits des pays de l'UPM, M. Ahmed OUERFELLI, Magistrat.

9h30-11h45: AXE VII- INTERNATIONALISATION, EUROPÉANISATION, MÉDITERRANISATION
Chair: PR. CHARLES JARROSSON

24- 9h30 : Internationalité de l'arbitrage : critère économique, critères juridiques, effectivité ou caractère fictif ?: Pr. Sami JERBI, Faculté de Droit de Sfax.
25- 9h45 : La contribution de la Cour de Justice de l'Union européenne à l'européanisation du droit de l'arbitrage: Pr. Cyril NOURISSAT, Université Jean-Moulin, Lyon3.

26- 10h15 : Chari’a Islamiya et arbitrage : Pr. Fady NAMMOUR, Faculté de droit de l’Université Libanaise.
27- 10h30 : La difficile accession à l’harmonisation du droit de l’arbitrage dans les pays de la méditerranée : Me Nathalie NAJJAR, Avocat (Beyrouth, Liban)
28- 10h45 : Les travaux de la CNUDCI en matière d’arbitrage commercial international : Pr. Laurence RAVILLON, Université de Bourgogne.
29- 11h00 : L’avenir des Accords d’investissement dans une perspective méditerranéenne : Pr. M. Farhat HORCHANI, Faculté de Droit et des sciences politiques de Tunis.
30- 11h15 : L’arbitrage d’investissement, approche(s) méditerranéenne(s). : Pr. Sébastien MANCIAUX, Université de Bourgogne
31- 11h30 : Vers une lex mediterranea de l’arbitrage : le modèle québécois comme référence ? Pr. Louis MARQUIS, Université du Québec.

14h00-16h15: TABLE RONDE

Débats animés par Me Samir ANNABI et Pr. Riyad FAKHRI

- Mme le Pr. Chiara GIOVANUCCI ORLANDI,
- Me Javier ÍSCAR DE HOYOS,
- M. Badr BOULAL
- Me Sami KALLEL
- Me Monem KIOUA
- Me Sami HOUERBI,
- Me Abdelatif BOULALF
- Charles JARROSSON,
- Cyril NOURISSAT

15h30 : Propos conclusifs : Vers une lex mediterranea de l’arbitrage ? Filali OSMAN, Université de Franche-Comté

More details can be found here.

TDM Call for Papers: “Dispute

Resolution from a Corporate Perspective”

While companies do not enter into contracts with the expectation of becoming embroiled in litigation, disputes do occur and are part of doing business. The assumption is that disputes should be managed systemically rather than as ad-hoc events. This TDM special on dispute resolution from a corporate perspective seeks to widen and deepen the debate on issues that are central to the efficient management of disputes from a corporate perspective. The editors thus seek contributions related to any of the areas set out below but welcome other relevant contributions as well.

* Commercial Dispute Resolution – Negotiation. In order to successfully resolve commercial disputes, lawyers must possess, in addition to their legal, technical, and industry expertise, the skills to understand, predict and manage conflict through negotiation. While discussion of legal concepts and theory among the community of international dispute resolution lawyers is highly sophisticated, there is less of a debate on
negotiation and limited exchange with other disciplines researching the field of negotiation.

* Managing the cost of dispute resolution: Discussions between law firms and corporations often center on the subject of how much and how to bill, including for dispute related work. While there is an ongoing debate about whether traditional hourly rate billing creates the wrong incentives, alternative fee arrangements for dispute resolution still appear to be exceptional.

* The future of commercial dispute resolution: The arrival of “big data”, i.e., the increasing volume, velocity, and variety of data, is likely to catapult us into a world where analytics of very large data sets may allow predictions of outcomes and behavior that currently does not exist.

The editors of the special are: Kai-Uwe Karl (General Electric), Abhijit Mukhopadhyay (Hinduja Group), Michael Wheeler (Harvard Business School) and Heba Hazzaa (Cairo University).

Publication is expected in October 2014. Proposals for papers should be submitted to the editors by July 31, 2014

Contact details are available on the TDM website

Slovenian Supreme Court Rules on Service under Hague Convention

By Jorg Sladic, attorney-at-law and associate professor in Ljubljana.

Summary

In a recent decision (judgement of 19 November 2013 in case III Ips 86/2011) published in March 2014 the Supreme Court of the Republic of Slovenia had to give a ruling in judicial review limited to the points of law of appellate decisions (basically identical to the German *die Revision* and similar to French *la cassation*) on a question of service of documents instituting proceedings (application for payment as debtor's performance of an international sales contract) in Slovenia effected in Belarus on Belarussian defendants according to the Rules of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The specifics of the Slovenian case are the link between the service of the application instituting proceedings (writ) and the summons to lodge a reply issued by the Slovenian court abroad and a default judgement (without application of Art. 15(2) of the 1965 Hague convention). However, the two issues that will be of importance for international legal community are (i.) the interpretation of the 1965 Hague Convention on service and (ii.) the interpretation of a contractual clause on prorogation of jurisdiction allegedly foreseeing the application of a foreign *lex fori*. The decision can be found on: http://sodnapraksa.si/

Facts

A Slovenian and a Belarussian company had concluded a sales contract on 30 August 2002. The contract contained also the following clause "all disputes by the parties shall be adjudicated before the courts in Ljubljana (*sc.: the capital of Slovenia*) according to the rules of the State of the defendant". The Slovenian seller had supplied the goods, the Belarussian buyer failed to pay for the goods. The Slovenian seller lodged an application for payment as a way of specific performance of buyer's obligations before the competent court in Ljubljana. The application had been served in Belarus on the Belarussian defendant in application of the Hague Convention of 1965 by the Belarussian central authority upon the request of the Slovenian court. The

defendant did not lodge a reply, the consequence being a default judgement issued by the Slovenian court of first instance. The default judgement was then contested by an appeal. After the dismissal of the appeal by an appellate court an application for judicial review limited to the points of law was lodged by the defendant.

Decision

The Slovenian Supreme court first examined the requirement of duly correct service as a precondition for issuing a default judgement (par. 7 of the judgement) and concluded that Slovenia and Belarus are both contracting parties to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, therefore no procedural requirement had been infringed by ordering a service on a foreign defendant according to the cited convention. Referring to the Art. 6 of the 1965 Hague Convention the Supremem Court found that Belarussian judicial authorities did not complete the certificate on service according to the said convention (par. 12). However, considering that Slovenian courts did not issue a special request for service. As the 1965 Hague Convention under Art. 5(1) only provides for two ways of service; namely by methods prescribed by the requested state's internal law for service of documents in domestic actions upon persons who are within its territory (sub-paragraph a), and by a particular method requested by the requesting state (the applicant), unless such a method is incompatible with the law of the state addressed. The interpretation of that provision given by Slovenian Supreme Court is that unless a special method is required by the requesting court (the applicant) then the service abroad is to be performed according to the *lex fori* of the requested or addressed state. If service is performed on a foreign entity according to the *lex fori* of the foreign addressed state, a failure to complete the certificate (on the reverse of the request) has no influence on the whole process of service (par. 13). Perhaps a slightly different approach by the CJEU should be mentioned. Indeed, the CJEU seems to consider that the question whether an application or a document instituting proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of the 1965 Hague Convention (CJEU, C-292/10 *de Visser*, par. 54, C-522/03 *Scania Finance France,* par. 30).

The second issue, i.e. an alleged reference to the foreign *lex fori* in the contractual clause on prorogation of jurisdiction has been dealt quite fast. The rules of procedure are always of mandatory nature and belong to the legal order of the court competent for hearing the case and cannot be chosen by the parties. However, even if the parties had agreed on the application of the Belarus procedural law, this would only imply only a partial voidness of the clause on the choice of law and would not have any influence on the choice of substantive law.

No Need to Know Where Malaysia Airlines Flight 370 is...

to initiate court proceedings.

But where?

Trimble on Foreigners in US Patent Litigation

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted Foreigners in U.S. Patent Litigation: An Empirical Study of Patent Cases Filed in Nine U.S. Federal District Courts in 2004, 2009, and 2012 on SSRN.

> *One of the greatest challenges facing patent holders is the enforcement of their rights against foreign (non-U.S.) infringers. Jurisdictional rules can prevent patent holders from filing patent infringement suits where they have the greatest likelihood of success in enforcement, such as where the infringer is located, has his seat, or holds his assets; instead, patent holders must file lawsuits in the country where the infringed patent was issued. But filing a patent lawsuit in a U.S. court against a non-U.S. infringer may be subject to various difficulties associated with the fact that U.S. substantive patent law (particularly as regards its territorial scope) and conflict of laws rules are not always compatible and interoperable with the conflict of laws rules of other countries. Such insufficient compatibility and interoperability can lead to U.S. judgments not being enforceable outside the United States.*
>
> *In the Hague Conference's Judgments Project, which the Conference re-launched in 2012, the United States has an opportunity to negotiate internationally uniform conflict of laws rules to improve cross-border litigation, including cross-border patent litigation. This article provides*

data on cross-border patent litigation that can be used to assess the extent to which the United States should be concerned about cross-border patent litigation problems and the degree to which the United States should be involved in the Judgments Project to improve cross-border patent litigation.

The statistics in this article are the result of an empirical study of 6,420 patent cases filed in 2004, 2009, and 2012 in nine selected U.S. federal district courts – the federal district courts in which the largest numbers of patent cases per court were filed in 2012. The results show that the numbers of patent cases involving foreign parties are on the rise, although the percentage of such cases in the total number of patent cases filed did not increase from 2009 to 2012. The article brings up to date the author's earlier research on cross-border aspects of patent litigation, contributes to the rapidly growing body of empirical literature on patent litigation (including the literature on the "patent troll" phenomenon), and enriches the literature on foreign litigants in patent disputes and on transnational litigation in general (both of which suffer from a dearth of statistical data).

Internet L@w Summer School in Geneva

The University of Geneva is launching an Internet l@w summer school which will take place from June 16 to June 27, 2014 (www.internetlaw-geneva.ch).

The Internet l@w summer school offers a unique opportunity to learn and discuss Internet law and policies with experts from leading institutions including the Berkman Center for Internet and Society at Harvard University, the Internet Society, the International Telecommunication Union (ITU), the United Nations Commission on International Trade Law (UNCITRAL), the World Economic Forum (WEF), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), as well as from other prestigious academic or governmental institutions and global Internet companies (eBay and Google). The topics that will be covered include privacy and surveillance, free speech, telecom and Internet infrastructure, intellectual property, antitrust, choice of court & choice of law, on-line contracts, consumer protection, legal issues of social media and cloud computing.

Website: www.internetlaw-geneva.ch

Registration deadline: May 15, 2014 (early bird: April 15).

French Supreme Court Denies Effect to Foreign Surrogacies On the Ground of Fraude a la Loi

On 19 March 2014, the French Supreme Court for civil and criminal matters *(Cour de cassation*) ruled that an Indian surrogacy would be denied effect in France on the ground that it aimed at strategically avoiding the application of French law (*fraude à la loi*), which forbids surrogacy.

A French male had entered into a surrogacy agreement with an Indian woman in Mumbai. After a child was born, the man attempted to register the child as his (and hers) on French status registries. A French prosecutor challenged the registration. A court of appeal rejected the challenge on the grounds that it was not alleged that the applicant was not the father, and that the birth certificate was legal.

The *Cour de cassation* allowed the appeal of the French prosecution service and ruled that the behaviour of the French national and resident aimed at avoiding the application of French law. The Court held:

> *Attendu qu'en l'état du droit positif, est justifié le refus de transcription d'un acte de naissance fait en pays étranger et rédigé dans les formes usitées dans ce pays lorsque la naissance est l'aboutissement, en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public selon les termes des deux premiers textes susvisés*

In 2011, the *Cour de cassation* had denied effect to foreign surrogacies on the ground that they violated public policy. Since September 2013, the Court has founded its rulings on the strategic behaviour doctrine.