CJEU Rules Again on Jurisdiction over Co-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 5 June 2014, the Court of Justice of the European Union delivered another judgment on Art. 5 No. 3 Brussels I Regulation in *Coty Germany GmbH ./. First Note Perfumes NV*, C-360/12. With its decision, the Court completed a series of three pending decisions that all concerned cases where there are several supposed perpetrators and one of them is sued in a jurisdiction other than the one he acted in.

Facts

The German based claimant, the *Coty Germany GmbH,* sells and manufactures perfumes and cosmetics in Germany. Among its products there is one perfume that comes in a bottle, corresponding to a three-dimensional Community trademark whereof *Coty Germany* is the proprietor. The defendant, *First Note*, is a Belgium based perfume wholesaler. One of the perfumes of *First Note* was sold in a bottle, similar to the one that is protected by the Community trademark of *Coty Germany. First Note* sold this perfume to a German based intermediary, the *Stefan P. Warenhandel.* These sales were performed entirely outside of Germany since *Stefan P. Warenhandel* had collected the perfumes directly at the premises of *First Note* in Belgium and resold them in Germany.

Coty Germany claimed that the distribution of the perfume in Belgium by *First Note* constituted an infringement of its Community trademark and commenced proceedings against *First Note* before German (!) courts, although these sales had been performed entirely outside of Germany. *Coty Germany* argued that jurisdiction of the German courts could be established pursuant to Art. 93 para. 5 of the Trademark Regulation, which requires that the defendant allegedly acted within the territory of the seized court. The second basis for establishing jurisdiction of the German courts was Art. 5 No. 3 Brussels I Regulation, which

provides for the place where the damage occurred. *Coty Germany* claims that the acts of the German based *Stefan P. Warenhandel* can be imputed to the Belgium based defendant, *First Note,* and that therefore jurisdiction may be established before the German courts. Both heads of jurisdiction formed each a question for reference to the Court.

Ruling

In its first part of the judgment, the Court referred to Art. 93 para. 5 of the Trademark Regulation as a potential basis for jurisdiction. The Court ruled that the application of Art. 5 No. 3 Brussels I Regulation is expressly precluded under the Trademark Regulation and that Art. 93 para. 5 of the Trademark must therefore be interpreted independently from Art. 5 No. 3 Brussels I Regulation (para. 31) without making reference to the existing case law of the Brussels I Regulation (para. 32). By referring to the wording and the purpose of that rule, the Court came to the conclusion that Art. 93 para. 5 of the Trademark Regulation does only allow jurisdiction to be established before the courts where the trade mark was presumably infringed and not before the courts, where a potential accomplice had made any such infringements.

With regard to the second referred question on Art. 5 No. 3 Brussels I Regulation, the Court distinguished between the place where the causal event occurred and the place where the damage occurred.

As for the first alternative of this rule, the question at hand was whether one can impute the action of one perpetrator to his accomplice in order to establish jurisdiction under Art. 5 No. 3 Brussels I Regulation under the place where the causal event occurred. This would essentially allow the claimant to sue any perpetrator at a place of action of his accomplices and hence at a venue where he himself never acted. Here, the Court simply referred to its ruling in the case *Melzer* in 2013, where the Court clearly had denied such possibility as a basis for jurisdiction under Art. 5 No. 3 Brussels I Regulation.

Since the referring court, the German *Bundesgerichtshof,* had not limited the order for reference to the place where the causal event occurred, the CJEU this time could also address the second alternative under Art. 5 No. 3 Brussels I Regulation as a potential basis for jurisdiction, which is the place where the damage occurred. Here, the Court came to a different conclusion by referring to

the *Wintersteiger* and *Pinckney* decisions where it had held that the occurrence of damage in a particular Member State is subject to the protection in that relevant Member State (para. 55). Holding that this was also true for infringements of unfair competition, which was the case here, the Court stated:

57 "It must therefore be held that, in circumstances such as those of the main proceedings, an action relating to an infringement of that law may be brought before the German courts, to the extent that the act committed in another Member State caused or may cause damage within the jurisdiction of the court seised."

Accordingly, the Court does allow jurisdiction to be established on the basis of the place of occurrence of damage, to hear an action for damages against a person established in another Member State who acted in that State and whose actions – through the furtherance of another perpetrator – caused damage within the jurisdiction of the seised court.

Evaluation

As far as the ruling refers to the question of imputation of actions among several perpetrators to establish jurisdiction under the place where the causal event took place, this ruling is no big surprise neither for Art. 93 para. 5 of the Trademark Regulation, nor for Art. 5 No. 3 Brussels I Regulation. Here the Court has had its opportunities to make clear that the very existence of a particularly close linking factor between the dispute and the courts of the place where the harmful event occurred does not allow for such expansive interpretation of Art. 5 No. 3 Brussels I Regulation (which is probably also true for Art. 93 para. 5 of the Trademark Regulation). As far as Art. 5 No. 3 Brussels I Regulation is concerned, this could be expected after the previous rulings of the Court in *Hi Hotel* (C-387/12) (see previous comment on that decision on conflictoflaws.net) and *Melzer* (C-228/11).

The interesting part of the decision is the one on establishing jurisdiction at the place where the damage occurred under Art. 5 No. 3 Brussels I Regulation (para. 52 *et seqq.*). For this part, the Advocate General had very much struggled with the consequences stemming from the *Pinckney* ruling (para. 68 *et seqq.* of the Opinion the Advocate General on *Coty Germany*) and had pointed out that such interpretation of Art. 5 No. 3 Brussels I Regulation would lead to a very extensive application of Art. 5 No. 3 Brussels I Regulation. In fact, it is hard to see the link

between the harmful event (sales of a perfume in in Belgium) and the alleged damage stemming from that event (trademark infringement in Germany) without making reference to the furtherance of this damage by another perpetrator (in the case at hand *Stefan P. Warenhandel)*.

For the CJEU however, there does not seem to be any problem by applying the *Pinckney* ruling to the case at hand. What lies behind this must be some sort of attribution of effects with regard to the place where the damage occurred. The Court seems to be much more susceptible to such attribution on the effects-side rather than on the causation-side. Why this is the case is not answered by the Court, nor does it give any sort of criteria in which cases such attribution of effects may be permissible. One can imagine that the mosaic principle on the effects-side incites the Court to that much more relaxed attitude but since the Court does not say a word about all that there is much to be explored about this relatively new concept of attribution of effects and its potential limits.

11th Edition of Mayer and Heuzé's Private International Law

A new edition of Pierre Mayer and Vincent Heuzé's leading treaty on French private international law is scheduled for publication in June.

Mayer is professor emeritus, and Heuzé currently teaches, at Paris I (Panthéon-Sorbonne) School of Law.

More details on the book can be found here.

Chinese Supreme Court to Rule on Power of Foreign Insolvency Official

Here.

Moses on the Arbitration/Litigation Interface in Europe

Margaret Moses (Loyola University Chicago Law School) has posted Arbitration/Litigation Interface: The European Debate on SSRN.

> *Concerns over the interface between arbitration and litigation have been at the core of a debate in the European Union that has culminated in the issuance of the Recast Brussels Regulation (the "Recast"), effective January 2015. The Recast does not provide a fully transparent and predictable interface between international arbitration and cross-border litigation. Primarily, it does not prevent parallel proceedings, which occur when one party that had agreed to arbitrate nonetheless goes to court, while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of the increased cost, inefficiency and delay, as well as the high risk of inconsistent judgments.*
>
> *Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. There is a need for a harmonized consensus on preventing parallel proceedings in order to promote predictability and confidence in the arbitration process. This article considers the reasons for the current European approach, the potential*

interpretations of the Recast's explanatory text, the problems it presents as to its expected application, and the interface between the Recast and the New York Convention.

Although anti-suit injunctions could prevent parallel proceedings, the Court of Justice of the European Union has found that anti-suit injunctions are incompatible with the EU Brussels I Regulation (predecessor to the Recast). The Recast's regulatory regime, which governs jurisdiction of courts and recognition and enforcement of judgments in EU Member States, excludes arbitration. However, the exclusion must be viewed through the lens of an extensive explanation set forth in Recital 12 of the Recast. It is unclear how changes in the Recast, as interpreted in accordance with its explanatory Recital 12, may impact the Court's decision.

The article concludes by proposing various means for encouraging flexible solutions to the problem of parallel proceedings and for achieving gradual harmonization.

Luxembourg Code of Private International Law

I am delighted to announce the publication of the second edition of the Luxembourg code of private international law.

The book gathers all applicable legislation in the field of private international law in Luxembourg: international conventions ratified by the Grand Duchy of Luxembourg, European legislation and Luxembourg domestic provisions.

The full table of contents is available here.

Readers wondering how Luxembourg PIL legislation differs from other EU states legislation should know that the Grand Duchy is one of the few European states which ratified the Cape Town Convention (and indeed the only state in the world

which adopted the Luxembourg Protocol) or the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

And as if it weren´t enough, buyers will enjoy a free post on this very blog tomorrow!

Conference on the Cultural Dimension of Private International Law

On 13 June 2014, the Swiss Institute of Comparative Law in cooperation with the Universities of Lausanne, Geneva and Urbino will host a conference on the Cultural Dimension of Private International Law in Lausanne. Speakers will address the audience in French, Italian or English.

The conference aims at honouring Tito Ballarino, who dedicated his life to develop the themes of the conference and to facilitate the meeting of Private International Law culture and traditions, in his writing as well as in his academic experiences and exchanges.

The abstract of the conference reads as follows:

> *À l'heure où le législateur européen déconstruit les systèmes nationaux de droit international privé en y superposant un appareil normatif de grande ampleur et complexité technique, l'idée de réfléchir autour des éléments culturels qui sous-tendent le droit international privé peut paraître saugrenue. Et pourtant qui aime la matière ne saurait renoncer à s'interroger sur le sens de la profonde transformation en cours qui engage sûrement l'essence même du droit international privé. Il n'est dès lors pas inutile de recentrer l'attention sur les aspects généraux de la discipline et en repenser la valeur sur fond des grandes questions qui, depuis toujours, agitent la pensée sur le phénomène juridique. Et de fait, la fonction d'intégration sociale que s'assigne le droit – dont le droit*

international privé est un instrument d'autant plus essentiel à mesure qu'avance la dynamique de la mondialisation – déborde le cadre de la culture juridique au sens étroit et s'impose comme fait spirituel et problème moral. De là la convergence, dans le discours traditionnel du droit international privé, d'une multitude de perspectives combinant la théorie générale du droit, la sociologie, l'histoire, la philosophie, la science politique, l'éthique, en un mot, ce qui constitue la "culture". Pourquoi le droit international privé ? Quelle place le moment présent prend-il au sein d'une évolution historique qui s'est toujours efforcée de respecter l'autonomie et l'identité des différentes réalités sociales et cultures juridiques ? Comment la fonction régulatrice de cette branche du droit se concilie-t-elle avec la promotion des droits fondamentaux au rang de critère suprême de justice ? Quel rôle peuvent encore jouer les doctrines qui ont marqué l'histoire de la discipline ?

Il est heureux que l'on puisse se pencher sur ces thèmes à l'occasion des quatre-vingt ans du Professeur Tito Ballarino auquel la rencontre est dédiée en hommage à son exceptionnelle œuvre scientifique constamment vouée à saisir, au-delà des contingences du présent, les lignes les plus significatives de l'évolution culturelle de la société.

The program of the conference is available here.

Faculty Position at the University of Windsor (Canada)

The Faculty of Law at the University of Windsor is seeking an outstanding individual or individuals for appointment to the Paul Martin Professorship in International Affairs and Law.

The appointment is intended for established scholars, eminent jurists and distinguished public servants and statespersons who are pursuing research in any area of international or transnational law (which we define widely to encompass

public and private international law, comparative law, and law and globalization). Appropriate academic or professional qualifications and experience will be required.

The commencement date, duration, and other terms of the appointment will be negotiated according to the availability of the successful candidate(s). The appointment may extend over one or more academic terms.

JOB DESCRIPTION: The Paul Martin Professor will have the opportunity to engage in scholarly work and will be expected to teach a course (possibly on an intensive basis). The successful candidate will contribute to the intellectual life of the Faculty, will regularly engage with students and faculty at Windsor Law and the wider University, and will participate in the activities of the Faculty's Transnational Law and Justice Network (TLJN). We would welcome, as well, outreach projects which engage stakeholders and the public in the candidate's chosen field. Remuneration is negotiable and will be commensurate with the experience and expertise of the candidate. Research support will be available.

APPLICATION PROCEDURE: Those interested in applying for the Paul Martin Professorship should send a curriculum vitae and a cover letter indicating scholarly/teaching interests and a proposed project to be undertaken during the course of the appointment to Dean Camille Cameron, Chair, Appointments Committee, Windsor Law School, c/o adawson@uwindsor.ca, by June 9th, 2014.

"The University of Windsor is committed to equity in its academic policies, practices, and programs; supports diversity in its teaching, learning, and work environments; and ensures that applications from members of traditionally marginalized groups are seriously considered under its employment equity policy. Those who would contribute to the further diversification of the University's professional staff include, but are not limited to, women, Aboriginal peoples, persons with disabilities, members of visible minorities, and members of sexual minority groups. The University of Windsor invites you to apply to its welcoming community and to self-identify as a member of one of these groups. International candidates are encouraged to apply; however, Canadians and permanent residents will be given priority."

Bismuth on International Public Policy for Sovereign Debt Contracts

Regis Bismuth (university of Poitiers) has posted The Path Towards an International Public Policy for Sovereign Debt Contracts on SSRN.

> *Recent times have been rich in events highlighting the shortcomings of mechanisms for dealing with sovereign debt crises, especially when they involve private creditors. Both the Greek financial debacle and the spate of litigation arising from Argentina's 2001 default have exposed the obstacles to both the successful implementation of restructuring plans and the attempts to block the legal actions brought by private creditors not willing to participate in the restructuring of sovereign debt. Given this seeming disarray and the impediments to the establishment of sovereign insolvency proceedings, the loan contract emerged as one of the most suitable instrument to ensure an orderly resolution of sovereign insolvency issues. In this context, it seems reasonable to examine the possible emergence of an "international public policy" for sovereign debt, the cornerstone of which would be the loan contract concluded between the State and its creditors.*

Call for Papers for the Third Annual ASIL-ESIL-MPIL Workshop

on Transnational Legal Theory

See here for a call for papers for the Third Annual ASIL-ESIL-MPIL Workshop on International Legal Theory being held September 8, 2014 at the Vienna University of Economics and Business. Abstract submissions should be sent to asil.esil.mpil@gmail.com by June 22, 2014. Short papers (5000 words max.) must be delivered by August 25, 2014.

Questions regarding the workshop may be directed to:

Evan Criddle ejcriddle@wm.edu
Jörg Kammerhofer joerg.kammerhofer@jura.uni-freiburg.de
Alexandra Kemmerer kemmerer@mpil.de

UK Supreme Court Rules on Law Governing Damages

On 2 April 2014, the Supreme Court of the United Kingdom delivered its judgment in C0x v Ergo Versicherung AG.

In this pre-Rome II case, the issue before the court was whether issues of damages were substantive or procedural in character for choice of law purposes.

The court issued the following press summary.

BACKGROUND TO THE APPEALS

These proceedings arise out of a fatal accident in Germany. On 21 May 2004 Major Cox, an officer serving with H.M. Forces in Germany, was riding his bicycle on the verge of a road near his base when a car left the road and hit him, causing injuries from which he died. The driver was Mr Kretschmer, a German national resident and domiciled in Germany. He was insured by the respondent, a German

insurance company, under a contract governed by German law. The appellant, Major Cox's widow, was living with him in Germany at the time of the accident. After the accident, she returned to England where she has at all relevant times been domiciled. She has since entered into a new relationship and has had two children with her new partner.

Liability is not in dispute, but there are a number of issues relating to damages. Their resolution depends on whether they are governed by German or English law, and, if by English law, whether by the provisions of the Fatal Accidents Act 1976 ("the 1976 Act") or on some other basis. The question which law applies was ordered to be tried as a preliminary issue.

There are two relevant respects in which an award under English Law, specifically the 1976 Act, may differ from an award under the relevant German Law, "the BGB". First, damages awarded to a widow under the BGB will take account of any legal right to maintenance by virtue of a subsequent remarriage or a subsequent non-marital relationship following the birth of a child. Section 3(3) of the 1976 Act expressly excludes remarriage or the prospect of remarriage as a relevant consideration in English law. Secondly, Section 844 of the BGB confers no right to a solatium for bereavement. Under section 823 of the BGB the widow may in principle be entitled to compensation for her own pain and suffering, but this would require proof of suffering going beyond normal grief and amounting to a psychological disturbance comparable to physical injury.

English rules of private international law distinguish between questions of procedure, governed by the law of the forum i.e. in this case England, and questions of substance, governed by the local laws, in this case Germany. The issue in the present case is whether Mrs Cox is entitled to rely on the provisions of sections 3 and 4 of the 1976 Act. They provide for a measure of damages substantially more favourable to her than the corresponding provisions of German law, mainly because of the more favourable rule concerning the exclusion of her current partner's payments of maintenance. This issue depends on whether the damages rules in sections 1A and 3 of the 1976 Act fall to be applied (i) on ordinary principles of private international law as procedural rules of the forum, or (ii) as rules applicable irrespective of the ordinary principles of private international law.

The Court of Appeal held that English law should adopt the German damages

rules as its own and apply them not directly but by analogy.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and finds that the German damages rules apply. Lord Sumption writes the leading judgment and Lord Mance writes a concurring judgment [37].

REASONS FOR THE JUDGMENT

- The Court finds that the relevant sections of the 1976 Act do not apply as they do not lay down general rules of English law, but only rules applicable to actions under the Act itself. An action to enforce a liability whose applicable substantive law is German law is not an action under section 1 of the 1976 Act to which the damages provisions of the Act can apply [20].
- As the particular rules of assessment in the 1976 Act do not apply, then the answer must be sought in the rules of assessment which apply generally in English law in the absence of any statute displacing them. The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured. It follows that, in principle, credit must be given for maintenance from her subsequent partner during the period since the birth of their child [21].
- A further issue concerns Mrs Cox's receipt of maintenance from her current partner during the period before they had a child, when he was under no legal obligation to maintain her either in German or in English law [22]. The findings at first instance about the relevant German law indicate that it is not just the maintenance that the appellant would have received from Major Cox that must have been received by virtue of a legal obligation, but also the maintenance from her current partner for which she can be required to give credit. Lord Sumption notes that the classification of a damages rule regulating the receipts for which credit must be given in an award of damages is a difficult question which admits of no universal answer but that, in the present case, the rule in question is one of substance, rather than procedure [22] (Lord Mance [39]).

- Lord Sumption rejects the argument that the 1976 Act should be applied notwithstanding the ordinary rules of private international law. As a matter of construction the Act does not have extraterritorial effect [32 – 34]. Nor do the principles enacted in the 1976 Act represent 'mandatory rules' of English law, applicable irrespective of ordinary rules of private international law [35].
- Lord Mance explains that it makes no difference to the outcome of the appeal whether or not the dependency claims under the 1976 Act and German law are categorised as broadly similar or whether the relevant provisions of the 1976 Act are treated as substantive or procedural [47]. Assuming that the dependency claims are categorised as broadly similar, the provisions of ss. 3 and 4 of the 1976 Act are, if substantive, irrelevant to a tort subject to German substantive law. If on the other hand, the provisions of ss. 3 and 4 were to be treated as procedural, their application could have no effect on the outcome. There is no basis on which an English procedural provision can expand a defendant's liability under the substantive principles of the relevant governing law [48].