Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2013)

Recently, the July/August issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Bettina Heiderhoff***: "Fictitious service of process and free movement of judgments"

When judgments or court orders are to be enforced in other member states, it is an essential prerequisite that the defendant was served with the document which instituted the proceedings in sufficient time (Article 34 Nr. 2 Brussels I Regulation).

When the service was conducted in a fictitious manner, the issue of service "in sufficient time" causes friction. It is acknowledged that the measure for timeliness – or, in such a case, more accurately for rightfulness – is not set by the state of origin, but by the recognising state. However, if the criteria are taken from the autonomous procedural rules of the recognising state, as has occasionally happened, minor differences between national laws can cause unreasonable obstacles to the recognition of titles.

In order to fulfill the aim of the Brussels I Regulation, to improve the free movement of judgments and strengthen mutual trust, the criteria must, therefore, not be taken from the national rules of the recognising state, but ought rather to resemble the standards valid for breaches of public policy. Only such a "mildly Europeanized" standard for fictitious services may avoid a trapping of the claimant who, trusting in the decision of the court of origin, is then surprised by the differing measures of the recognising state.

- ***Haimo Schack***: "What remains of the renvoi?"

The renvoi is one of the main principles of classic private international law. The renvoi doctrine aims for the conformity of decisions in different jurisdictions, which may also facilitate the recognition of the decision abroad. With this goal

in mind the following article gives an overview of the acceptance of renvoi in different national jurisdictions. In addition, the article evaluates and criticizes the tendency to push back the doctrine of renvoi in international treaties and in EU private international law. Especially in the former domain of renvoi, i.e. the law of personal status, family and inheritance law, the European conflict rules are dominating more and more and preventing the conformity of decisions in relation to third countries. As a means to achieve this decisional harmony the renvoi remains useful, it shows the cosmopolitan attitude of classic private international law.

- ***Hannes Wais***: "Hospital contracts and Place of Performance Jurisdiction under § 29 ZPO (German Code of Civil Procedure)"

This article comments on a recent decision of the German Federal Supreme Court, in which the court ruled that, for payment claims from a hospital contract, § 29 ZPO conferred jurisdiction upon the courts in the locality of the hospital. The Court decided that, not only for the purposes of § 29 ZPO, the place of performance of the monetary obligation from a hospital contract is the creditor's seat and not that of the debtor (in contrast to what is generally accepted for monetary obligations). This article will discuss the implications of this decision, and will consider the possibility of a conceptual "reversal" of § 29 ZPO.

- ***Markus Würdinger***: "Der ordre public-Vorbehalt bei Verzugsaufschlägen im niederländischen Arbeitsrecht" – the English abstract reads as follows:

The substantive ordre public rarely plays a role when it comes to recognition and enforcement of foreign legal decisions. This article deals with such a case. It is about the declaration of enforceability of a Dutch court decision in Germany. The judgment in question decided the applicant's claim for unpaid wages plus a statutory increase of 50% as a penalty for late payment in his favour. The Higher Regional Court of Düsseldorf (OLG) rightly interpreted Art. 34 EuGVVO (Regulation (EC) No 44/2001) narrowly and refused to consider this decision as being comparable to an award of punitive damages.

- ***Urs Peter Gruber***: "Die Vollstreckbarkeit ausländischer Unterhaltstitel – altes und neues Recht" – the English abstract reads as follows:

For a maintenance creditor, the swift and efficient recovery of a maintenance obligation is of paramount importance. In the Brussels I Regulation – which until recently was also applicable with regard to maintenance obligations – and in various conventions there are procedures for the declaration of enforceability of decisions. In these procedures, the courts have to ascertain whether there is a maintenance claim covered by the Regulation or the convention and whether there are reasons to refuse recognition of the foreign decision. In the new Regulation (EC) No 4/2009 on maintenance obligations however, a declaration of enforceability of decisions is no longer required, provided that the decision was given in a Member State bound by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. In this case, a decision on maintenance obligations given in a Member State is automatically enforceable in another Member State. The article discusses recent court decisions on the declaration of enforceability in maintenance obligations. It then examines the changes brought about by the Regulation (EC) No 4/2009 on maintenance obligations. Weighing the interests of both the creditor and the debtor, it comes to the conclusion that the abolition of the above-mentioned procedures is fully justified.

- ***Wolf-Georg Ringe***: "Secondary proceedings, forum shopping and the European Insolvency Regulation"

The German Federal Supreme Court held in a recent decision that secondary proceedings according to Article 3(2) of the European Insolvency Regulation cannot be initiated where the debtor only has assets in a particular country. The requirements for an "establishment" go beyond this and require an economic activity with a "minimum of organisation and certain stability". This decision stands in conformity with the leading academic comment and other case-law. Nevertheless, the decision is a good opportunity to stress the importance of secondary proceedings and their function to protect local creditors. This is particularly true where the secondary proceedings are initiated (as here) in the context of a cross-border transfer of the "centre of main interests" (COMI) of the debtor. The ongoing review of the European Insolvency Regulation should respond to this problem in one of the regulatory

options provided.

- ***Moritz Brinkmann***: "Ausländische Insolvenzverfahren und deutscher Grundbuchverkehr" – the English abstract reads as follows:

Art. 16 EIR provides for the automatic recognition of insolvency proceedings which have been commenced in another member state. The recognition of insolvency proceedings pertains not only to the debtor's power with respect to the estate, but also to his procedural position as well as to questions regarding company law or the law of land registries. The decision rendered by the OLG Düsseldorf (March 2, 2012) illustrates that these consequences are easily ignored in the routine of everyday legal life as long as courts and parties have difficulties in accessing reliable information as to the status of foreign proceedings. The existing deficits in terms of access to information regarding foreign insolvency proceedings may thwart the concept of automatic recognition. Hopefully, the coming reform of the EIR will address this issue (see proposed Art. 22 EIR in COM (2012) 744 final).

- ***Kurt Siehr***: "Equal Treatment of Children of Unmarried Parents and the Law of Nationality"

A child of unmarried parents acquires nationality of Malta only if the child is recognized by the Maltese father and legitimized by marriage or court decision. The European Court of Human Rights decided that this provision violates the European Convention of Human Rights, especially Article 8 on the right of family life and Article 14 on non-discrimination. There are doubts whether the decision is correct. A more careful phrasing of Maltese law could avoid the violation of the Convention. Or is the decision of the European Court of Human Rights its step further towards a human right for nationality?

- ***Fritz Sturm***: "Forfeiture of the choice of surname: The European Court of Human Rights compels the Swiss Federal Court to set aside its former judgment"

The Swiss Federal Court, 24 May 2005, did not authorize foreign husbands to have their surname governed by their national law (s. 37 ss. 2 Swiss Private

International Law Act) when they have previously chosen to take the wife's surname as the family name, situation which could not have occured if the sexes had been reversed. In fact, in this case the husband's surname would automatically become the family name and the wife could choose to have her surname governed by her national law. For the Court of Strasburg this difference in treatment is discriminatory (violation of art. 14 in conjunction with art. 8 ECHR). The Swiss Federal Court has therefore been compelled to set aside its former judgment.

- ***Dirk Looschelders:*** "Jurisdiction of the Courts for the Place of Accident in case of a Recourse Direct Action by a Social Insurance Institution against the Liability Insurer of the Tortfeasor"

In the present judgement the Austrian High Court (OGH) deals with the question whether a social insurance institution can sue the liability insurer of the tortfeasor in the courts for the place where the harmful event occurred. The OGH comes to the conclusion that such a jurisdiction is granted at least by Article 5 no 3 Brussels I Regulation. The problematic issue whether the priority provision of Article 11 (2) read together with Article 10 s. 1 Brussels I-Regulation applies, is left undecided. In the decision Vorarlberger Gebietskrankenkasse the European Court of Justice has held that the social insurance institution cannot take a recourse direct action against the liability insurer under Article 11 (2) read together with Article 9 (1) (b) Brussels I Regulation. According to the opinion of the author, jurisdiction in such cases shall generally not be determined by Chapter II Section 3 of the Brussels I Regulation. Therefore, Article 11 (2) read together with Article 10 s. 1 Brussels I Regulation is inapplicable, too. In consequence, contrary to the opinion of the OGH, the social insurance institution cannot be regarded as an injured party in terms of Article 11 (2) Brussels I-Regulation.

- ***Michael Wietzorek***: "On the Recognition of German Decisions in Albania"

There is still no established opinion as to whether the reciprocity requirement of § 328 Sec. 1 No. 5 German Civil Procedure Code is fulfilled with regard to Albania. A decision of the High Court of the Republic of Albania dated 19 February 2009 documents that the Court of Appeals of Durr?s, on 5 December

2005, recognized two default judgments by which the Regional Court of Bamberg had ordered an Albanian company to pay two amounts of money to a German transport insurance company. One single court decision may not be sufficient to substantiate that there is an established judicial practice. Yet the reported decision appears to be the only one available in the publicly accessible database of the High Court dealing with the recognition of such foreign default judgments by which one of the parties was ordered to pay an amount of money.

- ***Chris Thomale***: "Conflicts of Austrian individual labour law and the German law of the works council – intertemporal dimensions of foreign overriding mandatory provisions"

The Austrian Supreme Court (Oberster Gerichtshof) recently held that the cancellation of an individual employment contract between a German employer and an Austrian employee posted in Austria was valid despite the fact that the employer failed to hear his German works council properly beforehand. The case raises prominent issues of intertemporal conflicts of laws, characterization of the mentioned hearing requirement and the applicability of foreign overriding mandatory provisions, which are discussed in this article.

- ***Sabine Corneloup: "***Application of the escape clause to a contract of guarantee"

The French Cour de cassation specifies how to apply the escape clause of Art. 4 n° 5 of the Rome Convention to a contract of guarantee. The ancillary nature of guarantees leads national courts often to the application of the law governing the main contract, on the basis of a tacit choice of law or on the basis of the escape clause. The latter is to be used very restrictively, according to the Cour de cassation. It is necessary to establish first that the ordinary connecting factor, designating the law of the habitual residence of the guarantor, is of no relevance in the examined case. Only after this step, the courts can examine the connections existing with another State. This restrictive interpretation adds a condition to the text that seems neither necessary nor appropriate.

- ***Oliver Heinrich/Erik Pellander***: "Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an

beweglicher Ausrüstung”

- ***Stefan Leible***: “Hannes Unberath † (23.6.1973–28.1.2013)”

Italian Conference on the EU Patent System

University of Milano-Bicocca

Friday 27 September 2013 – Aula Martini U6-4

THE EU PATENT SYSTEM:

THE EUROPEAN PATENT WITH UNITARY EFFECT AND THE UNIFIED PATENT COURT

9.00 – Registration of participants

9.15 – Welcome speeches:

Prof. Marcello Fontanesi – Rector, University of Milano-Bicocca

Dr. Fabrizio Spada – Director, European Commission Representation, Office in Milan

9.30 – Morning session:

The Substantive Law

Chair: Prof. Dr. Hanns Ullrich (MPI München)

Michael König – Head of Unit, Industrial Property, DG Internal Market, EU Commission

- The Long Road from EC Patent to Patent with Unitary Effect: Potentials and Challenges Ahead

Prof. Fausto Pocar – University of Milan, International Criminal Tribunal for the former Yugoslavia

- La cooperazione rafforzata in materia di brevetti e il controllo della Corte di giustizia UE (The Enhanced Cooperation on Patents and the Control by the CJEU)

Prof. Giovanni Guglielmetti – University of Milano-Bicocca

- Natura e contenuto del brevetto con effetto unitario (The Legal Nature and the Content of the Patent with Unitary Effect)

10.30-10.50 Coffee-break

Prof. Manuel Desantes Real – University of Alicante, Former Vice-President EPO

- The European Patent with Unitary Effect and the European Patent Office

Prof. Vincenzo Di Cataldo – University of Catania

- La concorrenza di discipline di fonte diversa nel brevetto ad effetto unitario (Concurring Sources of Law in the Legal Regime of the Patent with Unitary Effect)

Prof. Giandonato Caggiano – University of Roma Tre

- La collocazione normativa delle disposizioni di diritto sostanziale e la loro interpretazione pregiudiziale (The Legal Frame for Substantive Law Provisions and their Referral to the ECJ for Preliminary Ruling)

12.00 – Interventions

Dr. Francesco Macchetta – IP Director, Bracco Imaging

14.30 – Afternoon session:

The Judicial Frame

Chair: Prof. Riccardo Luzzatto (University of Milan)

Prof. Marta Pertegás – First Secretary, Hague Conference of Private International Law, The Hague

- The Institutional Framework for the Enforcement of European Patents and European Patents with Unitary Effect: a View from the Hague Conference

Prof. Roberto Baratta – University of Macerata, Legal Advisor, Permanent Representation of Italy in Brussels

- La natura del Tribunale unificato tra tribunale nazionale «comune agli Stati» e tribunale internazionale (The Unified Patent Court between a National Court "Common to the Member States" and an International Court)

Dr. Marina Tavassi – President of the IP Specialised Section, Milan Tribunal

- Le *Rules of Procedure* e i rapporti tra Tribunale unificato e giudice nazionale (The Rules of Procedure and the Relations between the Unified Patent Court and National Courts)

15.45-16.10 tea-break

Prof. Costanza Honorati – University of Milano-Bicocca

- Il diritto applicabile dal Tribunale unificato: diritto UE, diritto internazionale, diritto interno (The Law Applicable by the Unified Patent Court: EU Law, International Law, National Law)

Prof. Marco Ricolfi – University of Turin

- La 'biforcazione' tra azioni di validità e azioni di contraffazione: ragioni teoriche e problemi applicativi – ('Bifurcation' of Revocation and Infringement Actions: Theoretical Reasons and Practical Problems)

Dr. Micaela Modiano – European Patent Attorney

- Il ruolo del *patent attorney* di fronte al Tribunale unificato (The Role of Patent Attorneys Before the Unified Patent Court)

17.30 – Interventions and discussion

Dr. Francesca Ferrari – University of Insubria

Dr. Benedetta Ubertazzi – University of Macerata

Dr. Lidia Sandrini – University of Milan

18.30 – Closing of the Conference

Scientific Coordinator: prof. Costanza Honorati

The Conference will be held in English and in Italian. Simultaneous translation will be provided.

For further information, please contact costanza.honorati@unimib.it

---

Second Issue of 2013's Belgian PIL E-Journal

The second issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was just released.

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue includes two:

- Herman VERBIST – Transparency In Treaty Based Investor State Arbitration – The Draft Uncitral Rules on Transparency
- Thalia KRUGER en Britt MALLENTJER – Het kind dat een voldongen feit

is

UK Supreme Court Rules on Service Abroad

On June 26, the UK Supreme Court delivered its judgment in Abela and others (Appellants) v Baadarani (Respondent)

The Court issued the following press summary.

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEAL

This case concerns the circumstances in which a court may make an order retrospectively declaring that steps taken by a claimant to bring a claim form to the attention of a defendant should be treated as good service.

On 30 April 2009, Mr Abela and his two companies brought a claim for damages for fraud against Mr Baadarani in connection with a contract for the purchase of shares in an Italian company which the appellants contend were worthless, or were worth far less than the amount for which they were purchased. In September 2009, permission was granted for the claim form and all other documents to be served on Mr Baadarani at an address at Farid Trad Street in Beirut, Lebanon. No relevant bilateral treaty on service of judicial documents existed between the UK and Lebanon, and the Hague Service Convention was not applicable. Time for serving the claim form was extended until 31 December 2009 and permission was granted, if necessary, to serve Mr Baadarani personally at the Farid Trad Street address. The appellants gave evidence that they had used a notary to seek to serve Mr Baadarani at the Farid Trad Street address by instructing a service agent or clerk to attend that property over a period of four consecutive days. Mr Baadarani could not, however, be found. He denies that he

has ever lived at the Farid Trad Street address.

On 22 October 2009 a copy of the claim form and other relevant documents were delivered to the offices of Mr Baadarani's Lebanese lawyer in Beirut, Mr Azoury. That method of service had not been authorised by the judge and it is accepted it that was not good service under Lebanese law; Mr Azoury said that he had never been given instructions to accept service of documents on behalf of Mr Baadarani save in connection with certain Lebanese proceedings. Mr Azoury gave no indication of where Mr Baadarani could be served. Arabic translations of the relevant documents were delivered to the Foreign Process Section of the High Court in November 2009 together with certified translations. The appellants were informed in December 2009 that service on Mr Baadarani in Lebanon via diplomatic channels could take a further three months. In April 2010, Lewison J extended time for service of the claim form and granted permission for the claim form to be served on Mr Baadarani by alternative means, namely via his English or Lebanese solicitors. An application by the appellants that the steps already taken to serve Mr Baadarani be treated as good service was adjourned. Service was subsequently effected by alternative means on Mr Baadarni's English solicitors in May 2010.

Mr Baadarani applied to set aside the various orders that had been made to extend time for service of the claim form and also sought to set aside the order permitting alternative service via Mr Baadarani's English and Lebanese solicitors. That application did not need to be determined because Sir Edward Evans-Lombe made a declaration at the request of the appellants, pursuant to rules 6.37(5)(b) and/or 6.15(2) of the Civil Procedure Rules (CPR), that the steps taken on 22 October 2009 constituted good service of the claim form. The Court of Appeal reversed that decision and held that the various extensions of time for service of the claim form should not have been granted. The claim was, therefore, dismissed. Mr Abela and the other appellants appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Clarke gives the leading judgment.

REASONS FOR THE JUDGMENT

- CPR 6.15(2) can be used retrospectively to validate steps taken to serve a

claim form even if the defendant is not within the jurisdiction [21, 22].

- Orders under CPR 6.15(1) and (2) can be made only if there is "good reason" to do so. The judge's conclusion that there was a good reason to make an order under 6.15(2) constituted a value judgment based on an evaluation of a number of different factors. An appellate court should be reluctant to interfere with such a decision [23].
- The Court of Appeal was wrong to say that the making of an order under CPR 6.15(2) in a service out case is an "exorbitant" power. It is not appropriate to say that such an order may only be made in "exceptional" circumstances, at any rate in a case in which there is no danger of subverting any international convention or treaty. The test under CPR 6.15(2) is simply whether there is good reason to make such an order. [33, 34, 45, 53].
- CPR 6.15(2) applies only in cases where none of the methods of services permitted by CPR 6.40(3) have been successfully adopted, including any method of service permitted by the law of the country in which the defendant is to be served. A claimant seeking an order under CPR 6.15(2) is not, therefore, required to show that the method of service used was good service under local law. The Court of Appeal was, in any event, wrong to say that the judge had concluded that service of the documents on Mr Azoury was good service under Lebanese law; if the judge had reached that conclusion, there would have been no reason for him to make an order under CPR 6.15(2) [24, 32, 46].
- The only bar to the use of CPR 6.15(2), if otherwise appropriate, is the rule, under CPR 6.40(4) that nothing in a court order may authorise any person to do anything which is contrary to the law of the country where the claim form is to be served. Although delivery of the claim form and other documents to Mr Azoury was not good service on Mr Baadarani under Lebanese law, it has not been suggested that it was contrary to Lebanese law [24].
- The mere fact that the defendant learned of the existence and content of the claim form cannot without more, constitute a good reason to make an order under CPR 6.15(2). That is, however, a critical factor. Service has a number of purposes, but the most important is to ensure that the contents of the document served are communicated to the person served. [36].
- The fact that a claimant has delayed before issuing the claim form is not, save perhaps in exceptional circumstances, relevant when determining

whether an order should be made under CPR 6.15(2). The focus must be on the reason why the claim form cannot or could not be served be served within the period of its validity [48].

- The judge was entitled to conclude that an order under CPR 6.15(2) was appropriate. The judge correctly took account of the fact that Mr Baadarani, through his English and Lebanese lawyers, was fully apprised of the nature of the claim being brought against him. The claim form and other documents were delivered to him within the initial period of validity of the claim form. He also took account of the fact that service in Lebanon via diplomatic channels had proved impractical and that Mr Baadarani was unwilling to cooperate by disclosing his address to the appellants. Whilst Mr Baadarani had no obligation to disclose his address, his refusal to cooperate was a highly relevant factor in determining whether there was a good reason to make an order under CPR 6.15(2). The judge was entitled to take the view that an order under CPR 6.15(2) was appropriate notwithstanding the three and a half month delay between the issue of the claim form and the application for permission to service the claim out of the jurisdiction, and despite the fact that the claim against Mr Baadarani may be time barred [37, 39, 40].

Land Grabbing in Mubende-Neumann (article)

Professor Zamora Cabot continues his line of research on the subject of multinational enterprises liability with this article (ckick here to download), where he raids into a field of the out-most concern, such as that of land grabbing, over the very significant case *Mubende-Neumann*.

After an introduction, Section I highlights some of the most relevant aspects of the subject matter; at the same time it indicates the working plan. Then, in Section II, the author implements a definition of the land grabbing phenomenon, together with the trends over which an exponential growth has been based. Also,

some basic questions such as those of property titles on lands and their surrounding problems, together with the influence of the right to food and the right to land, are developed. This Section concludes by referring to regulatory approaches based on non-committal attitudes when it comes to facing land grabbing, and the special scrutiny it should undergo in connection with countries either submerged or suffering from conflict situations, i.e., weak environments where land grabbing problems may develop into human rights questions.

Section III states the facts and legal consequences of the case *Mubende-Neumann,* a procedure of massive eviction that took place in Uganda in 2001, where the Government, after signing an agreement with a firm of German origin, expelled in a particularly brutal and violent way more than two thousand people from the lands they occupied, and delivered them to a branch of the above-cited corporation. These facts prompted a legal proceeding in Uganda, on the one hand, and another one based on the OECD Guidelines for multinational companies, on the other; both are exposed in the article in a synthetic way. The author ends this Section by setting off the report drawn up by GI-ESCR on this case before the United Nations Human Rights Committee, and the notes addressed by the Committee to Germany (October 2012) in its Concluding Observation nº 16.

Section IV deals with the subject of the so-called "extraterritorial obligations" of the States, explaining their precedents, the main actors implied in their development, their legal framework (the Covenant of Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as the most outstanding among them). It also adresses the issue of how to conciliate these obligations with extraterritorial laws.

The study ends up in Section V with some concluding reflections, critical remarks adressed to the German authorities performance in the case under consideration and, more generally, in all cases arising out of human rights violations on the part of the German multinational corporations. Still, as a note of hope, the autor underlines the increasing number of occasions in which the countries hosting companies and investments are reacting in favour of the affected communities through their institutional framework. As exemple, the Instance decision issued by a judge of Kampala in the case *Mubende-Neumann* or, just as well very recently, that of the Supreme Court in India, *Comunidad Dongria Kondh, of Orissa*, in face of the mining colossus Vedanta. Two cases in which the fight both

affected communities undertook in defence of their rights turned to be decisive, thus constituting a most important pattern and a valuable element for reflection towards the future.

South African Constitutional Court does it again

On 27 June 2013 South Africa's constitutional court has ruled on two matters of interest for specialists of private international law, specifically international civil procedure.

In the first judgment, *Government of Zimbabwe v. Fick and Others*, the Court ruled on the enforcement of a costs order granted by the Tribunal of the Southern African Development Community (SADC). At the basis of the dispute was the expropriation of the land of Zimbabwean farmers without compensation. The Tribunal, with its seat in Windhoek, Namibia, has in the meantime been suspended due to the political row that followed this and other judgments.

When Zimbabwe refused to comply with the costs order, the farmers approached the South African courts for registration and enforcement. Property belonging to Zimbabwe, and situated in South Africa, was attached.

On the matter of immunity the Constitutional Court found:

"*Zimbabwe's agreement to be bound by the Tribunal Protocol, including article 32*[on enforcement and execution]*, constitutes an express waiver in terms of section 3(1) of the Immunities Act. It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it.*"

The Constitutional Court ruled that the common law rules on enforcement, applicable to the judgments of foreign states, had to be extended to the judgments granted by international tribunals.

The second judgment, *Mukaddam v. Pioneer Foods (Pty) Ltd and Others*, concerned a class action against a number of producers of bread, based on anti-competitive conduct. Mr Mukaddam was one of a number of bread distributors. The Competition Tribunal had already found the producers guilty of anti-competitive conduct and imposed fines. The High Court of the Western Cape and the refused certification, since many of the applicants were corporate entities and since the courts found that the issues raised against the various respondents were different.

In its judgment, *Children's Resource Centre Trust v Pioneer Food* (delivered on 29 November 2012), the Supreme Court of Appeal grappled with the issue that the South African Constitution allows class actions (in s. 38c), but that there is no legislation on the matter. The Court stated: "*We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice.*"

It has long been disputed whether class actions are only permitted in constitutional matters or also in civil matters. Therefore the claimants invoked their right to access to food (s. 27,1b of the Constitution). The Court, however, found that their right to access to the courts (s. 34) was sufficient to allow a class action, as they would not be able to bring their claims as individual plaintiffs. Moreover, the Court recognised the general possibility of civil class actions and set down requirements for such actions, including certification. The Court set down the elements that a court should use in the assessment of certification:

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct

the action and represent the class;
- whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

The Court subsequently allowed certification of one of the classes and refused certification for the other in this particular case (the different classes related to different geographical areas of the country and different dates).

The standard set by the Supreme Court of Appeal was accepted by all parties, and the Constitutional Court proceeded on that basis. The Court then found that the factors laid down by the Supreme Court of Appeal had to be assessed in view of the interests of justice and that the absence of one factor must not oblige a court to refuse certification. The appeal was allowed on this basis. The South African Courts are thus again developing the law of civil procedure.

A New Rule of Venue for Proceedings involving Foreign Companies in Italy

Pietro Franzina is associate professor of international law at the University of Ferrara.

The Italian Government has recently adopted a package of measures aimed at stimulating growth and enhancing the efficiency of public administration (decree No 69 of 21 June 2013). Some of these measures relate to civil procedure. One of them is specifically concerned with litigation featuring a foreign element.

Under article 80 of the decree, where jurisdiction lies with Italian courts (be it under EU rules, international conventions or domestic provisions), civil proceedings involving a company whose seat is situated outside Italy may be decided solely by the Tribunal of Milan, Rome and Naples. Milan shall be in

charge of proceedings that would otherwise need to be commenced before the courts of northern regions; Rome would do the same in respect of cases that would normally be brought before the courts of central Italy, including Sardinia; Naples will cover the southern part of the country, including Sicily.

The new provision shall apply, in principle, to all proceedings in civil and commercial matters to which a foreign company is a party, provided the latter does not have a branch or an establishment with a permanent representative in Italy. Multi-party proceedings involving but one foreign company shall likewise fall within the scope of the rule. This shall include cases where a foreign company is sued as a third party in an action on a warranty or guarantee: in this scenario, should the original proceedings be instituted before a court other than the "major" courts mentioned above, both the original and the third-party proceedings shall be transferred – upon the request of the foreign company at stake – to the competent "major" court.

By way of exception, the ordinary provisions on venue shall remain applicable in matters relating to consumer contracts, employment contracts and social security, as well as to proceedings to which an Italian administrative authority is a party.

The new provision, it is submitted, shall not prevent an Italian court other than the courts indicated above to entertain a claim where it is the court specifically designated by a valid choice-of-court agreement. In matters governed by article 23 of the Brussels I regulation (and, tomorrow, article 25 of regulation No 1215/2012), a different reading would actually defeat the purpose of the uniform regime and should accordingly be disregarded as inconsistent with the primacy of EU law. The same may be said of choice-of-court agreements governed by the Lugano Convention of 2007, the respect for which is equally ensured by EU law through article 216(2) of the TFEU.

Article 80 of the decree does not purport to affect the provisions governing venue in respect of enforcement and insolvency proceedings.

The new rule is intended to apply to proceedings instituted on or after the thirtieth day following the entry into force of the statute expected to convert the decree into law. During the conversion procedure, due to be concluded by the end of August, the provision might be amended by the Italian Parliament.

It is reasonable to expect that, further to the reform, Italian judges having a particular expertise in the field of private international law will tend to concentrate in the "major" courts indicated above.

UPDATE – On 15 July 2013, the committees of the Italian Chamber of Deputies charged with constitutional affairs and financial matters have jointly adopted a resolution proposing, inter alia, to delete Article 80 of the decree altogether. While the resolution does not represent in itself the final decision of the Italian Parliament on the issue, it is now highly likely that the statute whereby the decree will be converted into law will not include the new rule on venue. As a matter of fact, a strong opposition against the new provision had appeared soon after the decree was published, coming from different stakeholders, including the Italian Bar Council.

Addresses to the French PIL Committee, 2010-2012

The collection of the addresses to the French Private International Law Committee (*Comité français de droit international privé*) during academic years 2010-2011 and 2011-2012 was just published.

The committee is addressed by four speakers each year, typically two young French academics, one practitioner and one foreign academic. The publication includes non only the paper of the speaker, but also the debate which followed (all in French).

The last volume addressed the following topics:

Cyril NOURISSAT : La Cour de justice face aux règlements de coopération judiciaire en matière civile et commerciale

Bénédicte VASSALLO : La réception en France des décisions étrangères d'adoption

George A. BERMANN : Les questions liminaires en arbitrage commercial international

Tristan AZZI : La volonté tacite en droit international privé

Sabine CORNELOUP : Les questions préalables de statut personnel dans le fonctionnement des règlements européens de droit international privé

Horatia MUIR WATT : Les enjeux de l'affaire Kiobel : le chaînon manquant dans la mise en oeuvre de la responsabilité des entreprises multinationales en droit international public et privé

Sandrine CLAVEL : La place de la fraude en droit international privé contemporain

Gabrielle KAUFMANN-KOHLER : La qualification en arbitrage commercial international

---

ECJ Rules on Compatibility of Rules on Liability of Foreign Parent Companies with Freedom of Establishment

On 20 June 2013, the Court of Justice of the European Union ruled in Impacto Azul Lda v. BPSA 9 and Bouygues on whether national legislation which precludes the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State is contrary to the European freedom of establishment.

The Case

On 28 July 2006, Portuguese corporations Impacto Azul and BPSA 9 concluded a promissory contract for sale and purchase ('the contract') under which Impacto Azul promised to sell a new building to BPSA 9 and the latter undertook to purchase it. According to Impacto Azul, BPSA 9 did not fulfil its contractual obligations. BPSA 9 was 100% owned by SGPS, which also had its seat in Portugal, and which was, in turn, wholly controlled by the French company Bouygues Immobilier, the parent company that managed all of the companies that formed the group. Owing to the economic crisis and unfavourable market conditions, Bouygues Immobilier decided to withdraw from the project thereby causing Impacto Azul to suffer losses caused by that withdrawal.

Following an attempt to reach an amicable settlement of the dispute with BPSA 9, Impacto Azul brought before the Tribunal Judicial de Braga (District Court of Braga) an action for damages against that company for non-performance of the contract and claimed, inter alia, that the breach of contract was attributable primarily to SGPS and to Bouygues Immobilier, as parent companies, in accordance with the joint and several liability of parent companies for the obligations of their subsidiaries under Portuguese law.

The defendants contended that joint and several liability of parent companies did not apply to parent companies having their seat in another Member State under Portuguese law. Bouygues Immobilier having its seat in France, it could not therefore be held liable vis-à-vis the creditors of BPSA 9.

Since that exclusion leads to a difference in treatment between parent companies having their seat in Portugal and parent companies having their seat in another Member State, Impacto Azul alleged an infringement of Article 49 TFEU.

The Judgment

Is the Portuguese legislation a restriction to the European freedom of establishment?

> *35 It should be pointed out that, having regard to the fact that the rules concerning corporate groups are not harmonised at European Union level, the Member States remain, in principle, competent to determine the law applicable to a debt of a related company. Thus, Portuguese law provides for the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries, only in respect of parent companies having their seat in Portugal. As the*

Commission correctly points out, in circumstances such as those at issue in the main proceedings, it is not contrary to Article 49 TFEU that a Member State may legitimately improve the treatment of claims of groups present on its territory (see, by analogy, Case 237/82 Jongeneel Kaas and Others [1984] ECR 483, paragraph 20).

36 Indeed, exclusion of the application of rules such as those in Article 501 of the CSC to undertakings established in another Member State, pursuant to the rules set out in Article 481(2) of the CSC, is not such as to make less attractive the exercise, by parent companies having their seat in another Member State, of the freedom of establishment guaranteed by the Treaty.

37 In any event, parent companies having their seat in a Member State other than the Portuguese Republic may choose to adopt, through contractual means, a system of joint and several liability for the debts of their subsidiaries.

Final Ruling:

Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State.

ECJ Rules on Impact of Opposition to European Order for Payment on Jurisdiction

On 13 June 2013, the Court of Justice of the European Union ruled in Goldbet Sportwetten GmbH v. Massimo Sperindeo (Case C 144/12) on the impact of opposition to a European Order of Payment on jurisdiction under the Brussels I

Regulation.

European Orders for Payment are issued ex parte. Defendants are entitled to oppose them. If they do, the case is handled under traditional rules of civil procedure. An issue is whether defendants who merely oppose European Orders, but do not challenge jurisdiction at the same time, submit to the jurisdiction of the court which issued the European Order under Article 24 of the Brussels I Regulation.

The Case

On 19 April 2010, Mr Sperindeo, acting through his lawyer, lodged a statement of opposition to the European order for payment within the prescribed time-limit. The grounds for his opposition were that Goldbet's claim was unfounded and that the sum claimed was not payable.

Prompted by that statement of opposition, the Bezirksgericht für Handelssachen Wien referred the case to the Landesgericht Innsbruck (Innsbruck Regional Court), taking the view that the latter court was the competent court for the ordinary civil procedure within the meaning of Article 17(1) of Regulation No 1896/2006.

Before the Landesgericht Innsbruck, Mr Sperindeo pleaded, for the first time, a lack of jurisdiction of the Austrian courts, on the ground that he was domiciled in Italy. Goldbet contended that the Landesgericht Innsbruck had jurisdiction as the court for the place of performance of the obligation to pay a sum of money, in accordance with Article 5(1)(a) of Regulation No 44/2001. In any event, according to Goldbet, the Landesgericht Innsbruck had jurisdiction under Article 24 of Regulation No 44/2001, since Mr Sperindeo, having failed to plead lack of jurisdiction when he lodged a statement of opposition to the European order for payment in question, had entered an appearance within the meaning of that article.

The Judgment

The ECJ ruled that the statement of opposition to the European Order can only produce the effects prescribed by Regulation No 1896/2006.

> *29 [Regulation No 1896/2006] is not adversarial. The defendant will not be*

aware that the European order for payment has been issued until it is served on him. As is apparent from Article 12(3) of Regulation No 1896/2006, it is only then that he is advised of his options either to pay the amount indicated in that order to the claimant or to oppose the order in the court of origin.

30 The defendant's option of lodging a statement of opposition is thus designed to compensate for the fact that the system established by Regulation No 1896/2006 does not provide for the defendant's participation in the European order for payment procedure, by enabling him to contest the claim after the European order for payment has been issued.

31 However, where a defendant does not contest the jurisdiction of the court of the Member State of origin in his statement of opposition to the European order for payment, that opposition cannot produce, in regard to that defendant, effects other than those that flow from Article 17(1) of Regulation No 1896/2006. Those effects consist in the termination of the European order for payment procedure and in leading – unless the claimant has explicitly requested that the proceedings be terminated in that event – to the automatic transfer of the case to ordinary civil proceedings.

33 It will also be recalled, as is evident from Article 16(1) of Regulation No 1896/2006 and from recital 23 in the preamble thereto, that the defendant may use the standard form set out in Annex VI to that regulation in order to enter a statement of opposition to the European order for payment. That form does not provide for the option of contesting the jurisdiction of the courts of the Member State of origin.

The ECJ also held the European Order and proceedings following opposition are separate.

38 unlike the circumstances giving rise to that judgment, in which the defendant had put forward arguments on the substance of the case in ordinary civil proceedings, the arguments on the substance of the case were put forward in the main proceedings in this instance in the context of a statement of opposition to a European order for payment. Such a statement of opposition coupled with those arguments cannot be regarded, for the purposes of determining the court having jurisdiction under Article 24 of Regulation No 44/2001, as the first defence put forward in the ordinary civil proceedings

that follow the European order for payment procedure.

39 To consider such a statement of opposition as being equivalent to the first defence would be tantamount to acknowledging, as the Advocate General noted at point 36 of his Opinion, that the European order for payment procedure and the subsequent ordinary civil proceedings, in principle, constitute the same procedure. However, such an interpretation would be difficult to reconcile with the fact that the first of those procedures follows the rules laid down by Regulation No 1896/2006, whereas the second continues in accordance with the rules of ordinary civil procedure, as is evident from Article 17(1) of that regulation. Such an interpretation would also fail on account of the fact that although – in the absence of any challenge to international jurisdiction by the defendant – those civil proceedings take their course in the Member State of origin, they will not necessarily be conducted in the same court as that in which the European order for payment procedure is pursued.

Final Ruling:

Article 6 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, read in conjunction with Article 17 thereof, must be interpreted as meaning that a statement of opposition to a European order for payment that does not contain any challenge to the jurisdiction of the court of the Member State of origin cannot be regarded as constituting the entering of an appearance within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the fact that the defendant has, in the statement of opposition lodged, put forward arguments relating to the substance of the case is irrelevant in that regard.