Functioning of the ODR Platform: EU Commission Publishes First Results

Written by Emma van Gelder and Alexandre Biard, Erasmus University Rotterdam (PhD and postdoc researchers ERC project Building EU Civil Justice)

On 13 December 2017, the European Commission published a report on the functioning of the Online Dispute Resolution (ODR) Platform for consumer disputes, and the findings of a web-scraping exercise of EU traders' websites that investigated traders' compliance with their information obligations vis-à-vis consumers.

In 2013, two complementary and intertwined legislative instruments – the Consumer ADR Directive (Directive 2013/11/EU) and the ODR Regulation (Regulation 524/2013) – were adopted to facilitate the out-of-court resolution of consumer disputes in the EU. Among other things, the Consumer ADR Directive has promoted a comprehensive landscape of high quality ADR bodies operating across the EU, and the ODR Regulation has established an ODR platform that offers consumers and traders a single point of entry for complaints arising out from online sales and services. The ODR platform is operational since 15 February 2016.

Data about claims lodged between 15 February 2016 and 15 February 2017 reveals:

- **1,9 million individuals** visited the ODR platform, proving the considerable level of coverage and uptake of the platform, as well as a high level of awareness among consumers and traders;
- **Consumers submitted more than 24,000 complaints** via the ODR platform. Reasons for complaining included problems with the delivery of goods (21%), non-conformity issues (15%) and defective goods (12%). 1/3 of complaints related to cross-border issues;
- **85 % of cases were automatically closed within 30 days after submission**, which is the deadline for consumers and traders to agree on a competent ADR body. A large number of traders ultimately did not

follow through using the ODR platform. However, it appears that **40% of consumers were bilaterally contacted by traders to solve their problems outside the scope of the ODR platform**. As the European Commission highlights, the ODR platform has thus **behavioural effects** on traders and 'consumers' mere recourse to the ODR platform has a preventive effect on traders that are more inclined to settle the dispute rapidly without taking the complaint to a dispute resolution body through the ODR platform workflow';

- **9 %** of complaints were not closed by the system, but **refused by the trader**. For 4% of them, parties both pulled backed before they reached an agreement with the ADR entity;**2% of complaints were submitted to an ADR body**. In half of these cases, the ADR body refused to deal with the case on procedural grounds (*e.g.* lack of competence or consumer's failure to contact the trader first). **In the end, only 1% of the cases reached an outcome via an ADR entity**.

In parallel, the web-scraping exercise of 20,000 traders' websites was conducted between 1 June and 15 July 2017. It aimed to investigate traders' compliance with their information obligations, which include in particular the obligation to provide consumers with an easily accessible electronic link to the ODR platform on their websites, and an email address that consumers may use to submit complaint against them on the ODR platform. Key findings of can be summarized as follows:

- **Only 28% of controlled websites included a link to the ODR platform.** Compliance ultimately depended on traders' size (*e.g.*, 42% of large traders included a link vs. 14% of small traders), location (*e.g.*, 66% of online traders located in Germany provided a link vs. 1% in Latvia), and sectors (*e.g.*, 54% in the insurances sector vs. 15% of 'online reservations of offline leisure');
- **85% of investigated traders provided an email address;**
- **Accessibility to the ODR link appears still limited**: for **82%** of websites, the link to the ODR platform was included in the Terms & Conditions, which for consumers might be difficult to retrieve considering the risk of information overload.

The EU Commission now intends to take actions to solve the identified issues. In particular, it will cooperate with national authorities to solve technical issues, and maximize the use of the platform with the view to strengthening its contribution

to the development of the Digital Single Market.

Conference Report: Contracts for the Supply of Digital Content and Digital Services, A legal debate on the proposed directive, ERA Brussels, 22 November 2017

Written by Antonella Nolten, Research Fellow at the EBS Law School, Wiesbaden, Germany

On 22 November 2017 the Academy of European Law (ERA) hosted a conference on the recent developments on the Proposal for a Digital Content Directive in Brussels.

After welcoming remarks by Dr. Angelika Fuchs, Prof. Bénédicte Fauvarque-Cosson, University Paris II – Panthéon-Assas, chaired the first panel on the scope of the Directive. To begin with, Prof. Fauvarque-Cosson reminded the participants of the past developments in European contract law, mentioning the UPICC, the Principles of European Contract Law, and the CESL. The challenges these projects had to face clearly showed that for most member states contract law represented the heart of their legal traditions, and member states were therefore reluctant towards radical changes.

Evelyne Gebhardt, MEP, Co-rapporteur for the IMCO and JURI Committees, explained the position of the IMCO/JURI joined committee after the vote on 21 November 2017. In order to ensure updates for consumers and interoperability, a sensible inclusion of embedded digital content (EDC) was proposed. The scope of the Directive was extended to also include OTTs (Over-the-top content) in order to ensure remedies and conformity rights in this field. The overall objective were a

high level of consumer protection and to anticipate rules for digital content on a European scale in order to prevent deviating national legislation.

Jeremy Rollson, Microsoft, praised the work of the Commission and the European Parliament. With regard to platforms, he proposed a modernization of the scope. Since the release of the proposal in 2015 by the commission, the technology had already gone through major changes. As various forms of OTTs existed, it proved hard to find a one size fits all model, however it were necessary to agree on certain principles. Rollson outlined the difficulties businesses were facing, because many different legal instruments had to be considered. He suggested a targeted scope in order to ensure the applicability of the rules.

The question, which rules should apply to embedded digital content, was addressed by Prof. Karin Sein, University of Tartu, Estonian EU Presidency Team. After having explained the advantages and disadvantages of the different approaches, she reported on the council's opinion to exclude embedded digital content from the scope of the Digital Content Directive. This solution offered the upside that from a consumer's perspective it was easily understandable, that the rules for goods also applied to smart goods. The overall goal was to achieve a future-proof solution, which was at the same time easily understandable for the average consumer.

In the following discussion Evelyne Gebhardt disagreed with Prof. Sein on the topic of embedded digital content and presented the European Parliament's opinion to extent the scope of the directive to EDC. The European Parliament preferred the split approach. This approach offered the main advantage that it were not up to the consumer to define where the product's defect lay, but the supplier had to determine whether the defect touched the digital content or the good itself. Prof. Sein replied that, overall, it was less relevant, where the rules were installed, since this was only a question of technique. Nevertheless, the installation of specific rules remained the main objective. Prof. Staudenmayer, Head of Unit – Contract Law, DG Justice, European Commission, agreed and added the main requirements of the rule were that it needed to be forward-looking and at the same time practical for consumers. Prof. Fauvarque-Cosson highlighted the different scope of the Digital Content Directive in contrast to the CESL, as the scope was limited to B2C-contracts and moreover the territorial scope covered domestic as well as cross-border contracts.

Prof. Karin Sein introduced the audience to the second panel's focus on conformity criteria, remedies and time limits. Agustín Reyna, BEUC, compared the specifications of the conformity criteria in the Commission's proposal to the Council's proposal and the IMCO/JURI report. During the upcoming Trilogues he would expect an agreement on a balance between objective and subjective criteria. He pointed to the possible conflicts between contractual disclaimers (subjective) and consumer expectations (objective). He praised the amendment in Art. 6a (5), which introduced specific rules for updates for digital content or digital services. In his opinion the relation between third party rights and copyright issues needed further clarification.

Staudenmayer added to the discussion on the inclusion of updates that consumers needed to be informed about possible updates as well as a right to terminate. The topic, whether the consumer should be able to keep the old version, was discussed controversially. With regard to the remedies package, Staudenmayer justified the facilitation of the right of termination by stating that most suppliers also preferred a termination of the contract, caused by the fact that they did not want to invest in a bad product and rather develop a new one. On the other hand consumers also profited, as the easier termination gave an incentive to suppliers to develop good products. Regarding the reversal of burden of proof, he reported on the commission's reason to not imply a time limit, since digital content was not subject to wear and tear. However, as the council and the European Parliament supported a time limit for the burden of proof, a discussion on how long this period will be and when it should start is expected. To conclude, Staudenmayer emphasized the transition our economy is undergoing as it is turning towards a digital economy and reminded the participants of the importance of promoting this change in order to stay competitive on a global scale.

Panel II ended with a Round Table on the topic "Balancing the interest of suppliers and consumers? Watering down full harmonization?". Fauvarque-Cosson explained the historic development from a preference for minimum to a preference for maximum harmonization and indicated that recently some member states saw the subsidiarity principle endangered. Therefore she suggested more targeted rules as a substitute for full harmonization. Concerning updates, Anna Papenberg, stated that updates could often be very burdensome and consumers needed access to previous versions. Prof. Schulte-Nölke referred to the suggestion of the ELI regarding embedded digital content, which proposed that in

this case hard- and software should be subject to remedies and the consumer should be allowed to cherry-pick a system. The Round Table ended with the conclusion that defining a targeted scope could lead to similar results as full harmonization.

After a short lunch break, Stephen Deadman, Facebook Global Deputy Chief Privacy Officer reported on "Data and its role in the digital economy". He stated that in the future, as part of a new wave of innovation, people would be made aware of the value of their data with the aim of empowering people in their life by using their data. In his opinion data driven innovation and privacy should become mutually enforcing. He underlined that data were not to be classified as a currency, as it were neither finite nor exclusive. In fact, data were superabundant and, by using data, people did not give up data.

Romain Robert, Legal Officer, Policy & Consultation Unit, EDPS, presented the "Interaction of the GDPR, the e-Privacy legislation and the Digital Content Directive". He stressed the EDPS's opinion that data were significantly different from money as a counter performance. He referred to the EDPS opinion from April 2017 on the proposed Directive and explained the position, why the term "data as a counter performance" should be avoided. Differences between the Digital Content Directive and the GDPR arose with regard to the definition of personal data. In the EDPS opinion almost all data provided by the consumer would be considered as personal data.

Insight on the topic "Data as a price under contract law?" was provided by Prof. Hans Schulte-Nölke, University of Osnabrück and the Radboud University Nijmegen. In his opinion the Digital Content Directive was not properly coordinated with the GDPR. He pointed to a conflict between contract law and the GDPR, as under data protection law personal data were protected as a fundamental right, whereas in contract law personal data could be considered as a counter-performance for a service. Hence under contract law the contract was the reason for the right to exchange, thus for what had been exchanged under the contract. Therefore the supplier had a right to keep the counter performance after proper performance of the contract. Meanwhile the GDPR granted a right to withdraw consent at any time (Art. 7 (3) GDPR). How can a balance be achieved in a way that, on the one hand, contract law is interpreted in the light of the GDPR and, on the other hand, considering the principle that GDPR supersedes contract law, but contract law purposes are still met. He came to the conclusion

the GDPR should not hinder contract law. Further, he raised the question, whether a counter performance could be assumed, in the case that a supplier gathered more information than the amount that were necessary for the performance of the service.

“Provision of data and data processing under the proposed regime” was the subject of the Round Table at the end of the conference day. Jeremy Rollson drew the attention to his opinion that data were neither comparable to oil nor to a currency, but without doubt very valuable. Robert Reyna agreed and further elaborated that the idea of “data as a counter performance” put suppliers in a very strong position, as they could determine, which data to label as a counter performance and which to label a necessity for the contract. A solution to balance this power of determination could be a presumption in consumer law. Anna Papenberg specified that a consumer could not give away personal data, but, more specifically, the exploitation rights of data. The fact that consumers did not give up data, but that their data was being used, were not the same as a counter performance, added Stephen Deadman. It was agreed on the necessity to limit the power of the supplier in order to define, which data counted as counter performance and which was necessary for the execution of the contract. The event ended with warm words of thanks to the organizers and speakers for a highly interesting conference day.

Bob Wessels, International Insolvency Law: Part II European Insolvency Law, 4th edition 2017, Wolters Kluwer

Written by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany

With *International Insolvency Law Part II* having been published, Bob Wessels' 10 volume series 'Insolventierecht' (Insolvency Law) is now completed in its 4th edition. The publication comprehensively deals with the European Insolvency Regulation Recast as entered into force on 26 June 2017, while I*nternational Insolvency Law: Part I Global Perspectives on Cross-Border Insolvency Law*, already published at the end of 2015, covers the core concepts of Cross-Border Insolvency Law, other regional frameworks than the EIR and relevant instruments of soft law. Thus, both books collectively provide a comprehensive overview of the current state on Cross-Border Insolvency Law. The book is 'user supported' as it was possible to send useful information or comments to the author on drafts of texts of the book which were available online in early 2017. *International Insolvency Law Part II* comes in form of a commentary, which makes its structure more or less self-explaining. Besides the commentary itself, it offers an introduction to the EIR, a bibliography, table of cases and legislation, as well as five appendices and a consolidated index for Part I and Part II.

The commentary itself is up to date, as it includes all recent case-law and literature so that you can find profound information on all questions relevant in the context of the EIR. Highly recommended is the part on Cross-Border Cooperation and Communication, which sheds some light into this area of cross-border insolvency law that is shaped by practitioners and courts more than by the legislator. Then again, one might have wished to see some more thoughts on the new instrument of the undertaking in Art. 36 EIR, e. g. on the question of applicable law, especially the interplay between the undertaking and the rules governing rights in rem and acts detrimental to creditors.

Not only the commentary itself, but also its exhaustive bibliography and table of cases covering presumably every source relevant in cross-border insolvency law today make *International Insolvency Law Part II* a standard reference for practitioners as well as academics.

International Insolvency Law: Part II European Insolvency Law, 4th edition 2017 is available here.

Deference to Foreign Sovereign Submissions

As previously reported here, the United States Court of Appeals for the Second Circuit issued a decision in 2016 reversing a $147.8 million price-fixing judgment against two Chinese manufacturers of Vitamin C. The plaintiffs alleged that the Chinese manufacturers engaged in price fixing and supply manipulation in violation of U.S. antitrust laws. In its first ever appearance as an amicus before a U.S. court, the Chinese government filed a formal statement asserting that Chinese law required the Chinese manufacturers to set prices and reduce the quantities of Vitamin C sold abroad. Relying on this statement, the Second Circuit held that because the Chinese manufacturers could not comply with both Chinese law and the U.S. antitrust laws, principles of international comity compelled dismissal of the case.

This case raises a host of interesting questions. First, did the Second Circuit reach the right result? Second, is this a comity case or a foreign sovereign compulsion case? Third, what level of deference is due to a foreign sovereign that appears in private litigation to explain their country's laws? Fourth, should U.S. judges defer to such an explanation?

In June 2017, the United States Supreme Court called for the views of the United States. This past Tuesday, the Solicitor General (SG) filed this brief in response to the Court's order.

In this submission, the SG explains that the Court should grant review of the Second Circuit's decision in order to review the court of appeals' holding that the Chinese government's submission conclusively established the content of Chinese law. According to the SG, "a foreign government's characterization of its own law is entitled to substantial weight, but it is not conclusive." The SG argues that the case warrants the Court's review because "[t]he degree of deference that a court owes to a foreign government's characterization of its own law is an important and recurring question, and foreign sovereigns considering making their views known to federal courts should understand the standards that will be applied to their submissions."

Should the Court grant review, the question of what standard should be applied to foreign sovereign submissions will be key. This is a question I have explored here.

It will be interesting to see whether the Court accepts the SG's request to review the Second Circuit's decision.

Jurisdiction, Conflict of Laws and Data Protection in Cyberspace

Report on the Conference held in Luxembourg on 12 October 2017, by Martina Mantovani, Research Fellow MPI Luxembourg

On 12 October 2017, the Brussels Privacy Hub (BPH) at the Vrije Universiteit Brussel and the Department of European and Comparative Procedural Law of the Max Planck Institute Luxembourg held a joint conference entitled "Jurisdiction, Conflicts of Law and Data Protection in Cyberspace". The conference, which was attended by nearly 100 people, included presentations by academics from around the world, as well as from Advocate General Henrik Saugmandsgaard Øe of the Court of Justice of the European Union. The entire conference was filmed and is available for viewing on the YouTube Channel of the Max Planck Institute Luxembourg (first and second parts)

Participants were first welcomed by Prof. Dr. Burkhard Hess, Director of the MPI, and Prof. Dr. Christopher Kuner, Co-Director of the BPH. Both highlighted the importance of considering each of the discussed topics from both a European and a global perspective.

The first panel was entitled "Data Protection and Fundamental Rights Law: the example of cross-border exchanges of biomedical data – the case of the human genome". The speaker was Dr. Fruzsina Molnár-Gábor of the Heidelberg Academy of Sciences and Humanities, who discussed the regulatory challenges arising in connection to the processing and transfer of biomedical data, including data exchanges between research hubs within the EU and to third-countries (namely the US). The need for innovative regulatory solutions, originating from a bottom-up approach, was discussed against the backdrop of the impending entry into force of the new EU General Data Protection Regulation (GDPR), whose Article 40 encourages the adoption of Codes of Conduct intended to contribute to the proper application of the Regulation in specific sectors. According to Dr. Molnár-Gábor, however, in order to establish an optimal normative framework for biomedical

research, the regulatory approach should be combined with appropriate privacy-enhancing technologies and privacy-by-design solutions (such as the emerging federated clouds, the European Open Science Cloud, and data analysis frameworks bringing analysis to the data). This approach should also be paired with the development of adequate incentives prompting non-EU established companies to express binding and enforceable commitments to abide by EU-approved Codes of Conduct. Her presentation demonstrated the basic problem of data protection and data transfer: The creation of appropriate and applicable legal frameworks often lags behind the necessarily more rapid pace of data exchange seen in successful scientific research.

The second panel was entitled "Territorial Scope of Law on the Internet". According to Prof. Dr. Dan Svantesson of Bond University in Australia, the focus on territoriality, which characterises contemporary approaches to the solution of conflicts of laws, is the result of an inherent "territorial bias" in legal reasoning. A strict application of territoriality would however be destructive when dealing with cyberspace. Here, the identification of the scope of remedial jurisdiction should follow a more nuanced approach. Prof. Svantesson specifically focused on Article 3 of the new GDPR, which he deemed "too unsophisticated" for its intended purposes as a result of its "all-or-nothing approach" In other words, either a data controller is subject to the Regulation in its entirety, or it is totally excluded from its scope of application. As an alternative, he proposed a layered approach to its interpretation, grounded in proportionality. The GDPR, he contended, should be broken down into different sets of provisions according to the objectives pursued, and each of these sets should be assigned a different extraterritorial reach. Against this backdrop, the spatial scope of the application of provisions pertaining to the "abuse prevention layer" may, and should, be different from that of the provisions pertaining to the "rights layer" or "the administrative layer".

A response was made by Prof. Dr. Gerald Spindler of University of Göttingen, who conversely advocated the existence of an ongoing trend toward a "reterritorialization" of the Cyberspace, favoured by technological advance (geo-blocking, Internet filtering). This segmentation of the Internet is, in Prof. Spindler's opinion, the result of a business strategy that economic operators adopt to minimise legal risks. As specifically concerns private international law rules, however, a tendency emerges towards the abandonment of "strict territoriality" in favour of a more nuanced approach based on the so-called

market principle or “targeting”, which is deemed better adapted to the more permeable borders that segment cyberspace.

The third panel was entitled “Contractual Issues in Online Social Media”. The speaker was Prof. Dr. Alex Mills of University College London. A thorough analysis of Facebook’s and Twitter’s general terms and conditions brought to light private international law issues stemming from “vertical contractual relationships” between the social media platform and final users. Professor Mills highlighted, in particular, the difficult position of social media users within the current normative framework. In light of the ECJ case-law on dual purpose contracts, in fact, a characterisation of social media users as “consumers” under the Brussels I bis and the Rome I Regulations may be difficult to support. Against this backdrop, social media users are left at the mercy of choice of court and choice of law clauses unilaterally drafted by social media providers. In spite of their (generally) weaker position vis-à-vis social media giants, European social media users will in fact be required to sue their (Ireland-based) contractual counterpart in Californian courts, which will then usually apply Californian substantive law. In addition to generating a lift-off of these transactions from EU mandatory regulation, these contractual clauses also result in an uneven level of protection of European social media users. In fact, Germany-based social media users seem to enjoy a higher level of protection than those established in other EU countries. Since the contract they conclude with the social media provider usually encompass a choice of law clause in favour of German substantive law, they may in fact benefit from the European standard of protection even before Californian courts.

Prof. Dr. Heike Schweitzer of Freie Universität Berlin, highlighted a fundamental difference between E-Commerce and social media platforms. While the former have an evident self-interest in setting up a consumer-friendly regulatory regime (e.g., by introducing cost-efficient ADR mechanisms and consumer-oriented contractual rights) so as to enhance consumer trust and attract new customers, the latter have no such incentive. In fact, competition among social media platforms is essentially based on the quality and features of the service provided rather than on the regulatory standard governing potential disputes. This entails two main consequences. On the one hand, from the standpoint of substantive contract law, “traditional” contractual rights have to adapt to accommodate the need for flexibility, which is inherent to the new “pay-with-data” transactions and

vital to survival in this harshly competitive environment. On the other hand, from the standpoint of procedural law, it must be noted that within a system which has no incentive in redirecting disputes to consumer-friendly ADR mechanisms (Instagram being the only exception), private international law rules, as applied in state courts, still retain a fundamental importance.

The final roundtable dealt with "Future Challenges of Private International Law in Cyberspace". Advocate General Saugmandsgaard Øe discussed the delicate balance between privacy and security in the light of the judgment of the Court of Justice in the case C-203/15, *Tele2 Sverige*, as well as the specifications brought to the protective legal regime applicable to consumers by case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sarl.* Prof. Kevin D. Benish of New York University School of Law illustrated the US approach to extraterritoriality in the protection of privacy, having particular regard to the recent *Microsoft* case (the U.S. Supreme Court recently granted certiorari). Prof. Dr. Gloria Gonzalez Fuster of Vrije Universiteit Brussels pointed to a paradox of EU data protection legislation, which, on the one hand, regards the (geographic) localisation of data as irrelevant for the purpose of the applicability of the GDPR and, on the other hand, establishes a constitutive link with EU territory in regulating data transfers to third countries. Finally, Dr. Cristina Mariottini, Co-Rapporteur at the ILA Committee on the Protection of Privacy in Private International and Procedural Law, provided an overview of the European Court of Human Rights' recent case-law on the interpretation of Article 8 ECHR. Specific attention was given to the conditions of legitimacy of data storage and use in the context of criminal justice and intelligence surveillance, namely with respect to the collection of biological samples in computerised national databases (case *Aycaguer v. France*), the use as evidence in judicial proceedings of video surveillance footage (*Vukota-Bojic v. Switzerland*) and the telecommunication service providers' obligation to store communications data (case Breyer v. Germany and case C?alovic? v. Montenegro, concerning specifically the police's right to access the stored data).

Overall, the conference demonstrated the growing importance of private international and procedural law for the resolution of cross-border disputes related to data protection. The more regulators permit private enforcement as a complement to the supervisory activities of national and supranational data protection authorities, the more issues of private international law become compelling. As of today, conflict of laws and jurisdictional issues related to data

protection have not been sufficiently explored, as the discussion on private law issues related to the EU General Data Protection Regulation demonstrates. With this in mind, both Brussels Privacy Hub and MPI have agreed to regularly organize conferences on current developments in this expanding area of law.

Chinese courts made decision taking into account of the Hague Choice of Court Convention

China has signed the Hague Choice of Court Convention on 12 September 2017, but has not yet ratified this Convention. The Hague Choice of Court Convention has not entered into force in China. However, Shanghai High Court has already relied on the Hague Choice of Court Convention to make decision.

In Cathay United Bank v Gao, Shanghai High Court, (2016) Hu Min Xia Zhong No 99, the appellant, a Taiwan commercial bank, and the respondent, a Chinese citizen resident in Shanghai, entered into a Guarantee contract. It included a clause choosing Taiwan court as the competent court to hear disputes arising out of the contract. This clause did not specify whether it was exclusive or not. Chinese law does not provide how to decide exclusivity of a choice of court agreement. Facing the legal gap, Shanghai High Court took into account Article 3 of the Hague Choice of Court Convention 2005 and decided that choice of court agreements should be exclusive unless the parties stated otherwise. The Shanghai High Court thus declined jurisdiction in favour of Taiwan Court.

This decision was made on 20 April 2017, even before China signed the Hague Choice of Court Convention. Since the Hague Choice of Court Convention has not entered into force in China, it should not be directly applied by Chinese courts in judicial practice. The question is whether Chinese courts could ‘take into account’ of international conventions not being effective in China to make decision. Although Article 9 of the Chinese Supreme Court’s Judicial Interpretation of

Chinese Conflict of Laws Act allows the Chinese courts to apply international conventions, which have not entered into effect in China, to decide the parties' rights and obligations, such an application is subject to party autonomy. In other words, parties should have chosen the international convention to govern their rights and obligations. Article 9 does not apply to international judicial cooperation conventions that do not deal with individuals' substantive rights and are not subject to party autonomy. Perhaps, a more relevant provision is Article 142(3) of the PRC General Principle of Civil Law, which provides that international customs or practice may be applied to matters for which neither the law of the PRC nor any international treaty concluded or acceded to by China has any provisions. Arguably, the Hague Choice of Court Convention represents common practice adopted internationally and forms a source to fill the gap in the current Chinese law.

EU Member State sees opportunities in Brexit: Belgium is establishing a new English-language commercial court

Expecting higher demands for international commercial dispute resolution following Britain's departure from the EU, Belgium plans to set up a new English-language commercial court, the Brussels International Business Court (BIBC), to take cases away from the courts and tribunals in London. This decision was announced on 27 Oct 2017. This BIBC is designed to address disputes arising out of Brexit and major international commercial disputes. The court will take jurisdiction based on parties' choice, and will do the hearing and deliver judgments in English. The parties would have no right to appeal. BIBC combines elements of both traditional courts and arbitration. See comments here.

Although Brexit may cause uncertainty to litigants in the UK, a survey suggests that the EU judicial cooperation scheme is not the main reason for international parties choosing London to resolve their disputes. The top two factors that attract international litigants to London are the reputation and experience of English judges and combination of choice of court clauses with choice of law clauses in favor of English law, followed by efficient remedies, procedural effectiveness, neutrality of the forum, market practice, English language, effective UK-based counsel, speed and enforceability of judgments. Furthermore, Brexit will not affect the New York Convention and would less likely affect London as an arbitration centre. It may be more reasonable to suggest that the main purpose of BIBC is not to compete with London at the international level, but to offer additional judicial tool and become a new commercial dispute resolution centre within the EU to attract companies and businesses to Brussels.

CJEU on the place of the damage under Article 7(2) of Brussels Ia as regards violation of personality rights of a legal person

First personal impressions presented by Edina Márton, LLM, PhD (Saarbruecken)

For jurisdictional purposes, the localisation of cross-border violations of personality rights under European instruments, such as Regulation (EU) No 1215/2012 (Brussels Ia), has attracted the attention of a considerable number of scholars and often led to different legal solutions in the national judicial practice. At EU level, besides Shevill (C-68/93; ECLI:EU:C:1995:61) as well as eDate and Martinez (C-509/09 and C-161/20; ECLI:EU:C:2011:685), since 17 October 2017, a third judgment in case Bolagsupplysningen (C-194/16; ECLI:EU:C:2017:766) has given further clarification in this area. In the recently delivered judgment, the ECJ specified one of the two limbs of the

connecting factor “where the harmful event occurred or may occur” under Article 7(2) of Brussels Ia, namely the place of the alleged damage.

Two key factual elements of Bolagsupplysningen differentiate this case from Shevill, as well as eDate and Martinez. First, one of the alleged victims is a legal person established under Estonian law and has business activities in Sweden (paras 9 and 10). Secondly, the case concerned *“the rectification of allegedly incorrect information published on … [the] website [of the Swedish defendant], the deletion of related comments on a discussion forum on that website and compensation for [the entire] harm allegedly suffered”* (para 2; emphases omitted; words in square brackets added).

Regarding the determination of the jurisdictionally relevant place of damage, the ECJ basically ruled that a legal person asserting that its personality rights have been violated through the Internet may bring an action for rectification and removal of the allegedly infringing information, and compensation for all the damage occurred before the courts of the Member State in which its centre of interests is situated. In addition, it also stated that the courts of each Member State in which the contested online information is or was accessible are not competent to hear actions brought for rectification and removal of that information.

In the present author’s view, one of the most significant aspects of the judgment is that the ECJ treated the pecuniary and non-pecuniary damage equally for determining the jurisdictionally relevant place of damage (para 36). In addition, the ECJ applied the “centre of interests” connecting factor introduced in eDate and Martinez to this case and identified it vis-à-vis a legal person pursuing business activities in a Member State other than in the Member State in which its registered office is located (paras 40 ff.). The decisive element for this identification seems to be the pursuit of business activities. As a side note, it is worth questioning how to define this approach for entities that do not carry out such activities (cf. the centre of interests of a natural person generally coincides with his/her habitual residence in eDate and Martinez, para 49). Finally, and, in the opinion of the present author, most importantly, regarding claims for rectification and removal of allegedly infringing online information, the ECJ disregarded the so-called mosaic principle (paras 45 ff.).

Is “la réserve héréditaire” part of French international public policy ?

Through two decisions (Civ. 1ère, 27 sept. 2017, n° 16-17198 et 16-13151) both issued on September 27th, The French *Cour de cassation* finally gave an answer to one of the most discussed question of French Succession law: Is *la réserve héréditaire* part of French international public policy?

The circumstances of both cases are very similar. Two French composers living in California, where they had most of their assets, got married respectively in 1984 and 1990. They put their assets in a trust and designated their wives as beneficiaries. In both cases, the settlers did not designate the children they had from previous relationships as beneficiaries of the trust. After the death of their fathers, the latter turned to French courts in order to obtain part of the inheritance. They argued that the Californian law applicable to the succession should be declared contrary to French international public policy for not including a *réserve héréditaire* for certain heirs.

According to Article 912 §1 of the French Civil Code, *la réserve hérédiataire* or the reserved portion « *is that part of the assets and rights of the succession whose devolution, free of charge, the law assures to certain heirs, called forced heirs, if they are called to the succession and if they accept it* ». In other words, under French succession law, a person cannot freely dispose of all of his or her assets. French law set boundaries by putting aside a reserved portion of the deceased’s property. However, he or she can freely dispose of the disposable portion (*quotité disponible*) which is defined as « *that part of the assets and rights of the succession that is not reserved by law and of which the deceased can freely dispose by liberalities* » (Article 912 § 2).

Whereas the Court of Cassation ruled that the reserved portion is mandatory in internal matters, the question of its imperative nature in international cases was

yet unclear. Authors disagree. While some consider that the *réserve héréditaire* cannot be considered as such as part of French *ordre public international*, others consider that due to the fact that it is an expression of solidarity among family members as well as a guarantee of equality between heirs, it has to be part of French international public policy.

The controversy was aggravated in 2011 when the Conseil Constitutionnel condemned le *droit de prélèvement* for amounting to a discrimination based on nationality. The *droit de prélèvement* is another specific French mechanism. It allows French heirs that have been deprived of the reserved portion from the assets located abroad to deduct the equivalent of such reserved portion from the part of the deceased's assets that are located in France. As a consequence of this decision, the reserved portion remained the only protection for heirs from the risk of disinheritance.

However, in both decisions, the Court found that the mere fact that the foreign law does not provide for a mechanism such as the reserved portion does not amount to a violation of French international public policy. The foreign law could nevertheless be disregarded, but only if its concrete application in a specific case leads to a situation that would be incompatible with French essential principles.

Giving the particulars circumstances of the cases, the Court found that in both cases the application of Californian law was not contrary to French public policy. First, the Court outlined that the deceased had lived in California for over thirty years and that most of their assets were located there. As a consequence, both situations were not strongly connected to the French *forum*. Then, the Court pointed out that the children living in France were adults and that their economic situation will not suffer from their being deprived of the succession.

These observations lead the Court to consider that, in these situations, the Californian law is not contrary to French international public policy even though it does not provide for a reserved portion. The Court emphasis on the particular circumstances of the case, namely that the situation was mainly located in California and that none of the claimants was in need or economically instable, indicates that these circumstances weighed strongly on the outcome. It does not exclude that, in different circumstances, a foreign law that would not provide for a reserved portion could be dismissed as contrary to public policy.

Prior to the coming into force of the Succession Regulation, the solution appears in accordance with its public policy provision. Stating that courts could only refuse to apply provisions that are *manifestly* incompatible with the forum's international public policy, Article 35 allows that foreign laws be disregarded when their application could lead to serious consequences. It does not appear to be the case in the present situations.

The new discussed question is now: In which case the application of a foreign law not including a reserved portion could lead to a situation incompatible with French essential principles ?

Freedom of establishment after Polbud: Free transfer of the registered office

Bastian Brunk, research assistant and doctoral student at the Institute for Comparative and Private International Law at the University of Freiburg (Germany), has provided us with the following first thoughts on the CJEU's groundbreaking *Polbud* judgment.

The Judgment

In its judgment in *Polbud* (C-106/16), the CJEU again took the work out of the EU legislature's hands while further developing the freedom of establishment provided for in Articles 49 and 54 TFEU. The case was heard following a request for a preliminary ruling under Article 267 TFEU by the Sad Najwyzszy (Supreme Court of Poland). In short, the CJEU had to decide on the following questions:

(1) Are Articles 49 and 54 TFEU applicable to a transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State with the purpose of converting its legal form, when the company has no intention to change the location of its real head office or to

conduct real economic activity in the latter Member State?

(2) Is a national legislation that makes the removal of a company from the commercial register and, accordingly, the out-migration of that company conditional upon its liquidation compatible with the freedom of establishment?

Answering these questions, the CJEU made *Polbud*, the company at stake, a liberal gift and strengthened the mobility of companies within the European Single Market. First, the CJEU stated that the freedom of establishment applies to the transfer of the registered office of a company from one Member State to another even if no real business is intended to be conducted in the latter Member State. Secondly, the CJEU ruled out national legislation providing for the mandatory liquidation of a company if the company requests the removal from the initial commercial register in cases of outward migration.

The facts

In September 2011, the shareholders of *Polbud*, a limited liablity company established under Polish law, decided to transfer the company's registered office from Poland to Luxembourg. The resolution made no reference to a simultaneous transfer of either the real head office or the place of real economic activity. Based on that resolution, the registry court in Poland recorded the opening of the liquidation procedure. In May 2013, following a resolution adopted by a shareholder meeting in Luxembourg, the registered office of *Polbud* was transferred to Luxembourg. *Polbud* was renamed to *Consoil Geotechnik* and its legal form was changed to the *Société à responsabilité limitée (S. à r. l.)*, the Luxembourgish private limited liability company. Subsequently, *Polbud* lodged an application with the Polish registry court for its removal from the commercial register. This application was refused to be registered because, as the registry court stated, *Polbud* failed to provide evidence of the successful execution of a liquidation procedure. *Polbud* appealed against this decision, arguing that no liquidation was needed because the company continued to exist as a legal person incorporated under Luxembourgish law.

The precedents

Articles 49 and 54 TFEU provide for the freedom of establishment. According to the CJEU case-law, the concept of "establishment" within the meaning of these Articles is a very broad one, allowing a Union national to participate, on a stable

and continuous basis, in the economic life of another Member State and to profit therefrom (CJEU in *Gebhard*, C-55/94, para. 25 and *Almelo*, C-470/04, para. 26). It involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period (CJEU in *Factortame and Others*, C-221/89, para. 20 and *Commission v. United Kingdom*, C-246/89, para. 21). In order to claim freedom of establishment, it is generally necessary to have secured a permanent presence in the host Member State (CJEU in *Centro di Musicologia Walter Stauffer*, C-386/04, para. 19 and *Schmelz*, C-97/09, para. 38). This case law can, generally speaking, be translated as "no freedom of establishment without establishment".

On the other hand, the CJEU generously extended the application of Articles 49 and 54 TFEU to letterbox companies without "fixed establishment" and/or "permanent presence" in their home Member State. In *Centros* (C-212/97) the Court ruled that EU law is applied to the set-up of subsidiaries, branches and agencies in other Member States and, in that regard, it is immaterial that the company was formed in one Member State only for the purpose of establishing itself in another Member State, where its main, or indeed entire, business is to be conducted (*Centros*, para 17).

The CJEU then used its 2009 *Cartesio* judgment (C-210/06) as an opportunity to, *obiter dictu*, set guidelines for cross-border transfers of seat. It stated that, on the one hand, a Member state has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status (thus treating companies as legal creatures of their country of origin). On the other hand, freedom of establishment comprises the right of a company to move from one Member State to another. If domestic legislation of the Member State of origin requires the liquidation of the company, thereby preventing it from converting itself into a legal person governed by the law of the target Member State, such a measure cannot be justified under the rules on freedom of establishment (*Cartesio*, paras. 110 ff.).

This jurisdiction was complemented by the CJEU in *Vale* (C-378/10) where the Court clarified the legal position of the Member State of destination. If a Member State allows for the conversion of companies governed by national law, it must also grant the same possibility to foreign EU companies (*Vale*, para. 46). In the

absence of relevant EU-law, the target Member State may set up procedural rules to cover the cross-border conversion but must ensure that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (*Vale*, para. 48).

The Opinion of AG Kokott

In her *Opinion* of 4 May 2017 (see here), AG *Kokott* took up a distinct position emphasizing the need for actual establishment for the application of Articles 49 and 54. This criterion is sufficiently met, as AG *Kokott* states, if, at least, the company *intends* to set up an actual establishment in the sense of conducting at least a nominal economic activity in the target Member State (*Opinion*, para 36). The AG underlines her position citing the above mentioned CJEU case-law in *Factortame and Others* (C-221/89), *Commission v. United Kingdom* (C-246/89), *Centro di Musicologia Walter Stauffer* (C-386/04) and *Schmelz* (C-97/09). She concludes that the freedom of establishment "*gives economic operators in the European Union the right to choose the location of their economic activity, it does not give them the right to choose the law applicable to them*" (*Opinion*, para. 38).

Implications of the *Polbud* judgment for the internal market

The CJEU now takes a different point of view: Once formed in accordance with the legislation of a Member State, companies enjoy the full range of that freedom. Nothing new, so far, as *Geert van Calster* suggests in his comment (see here). But what makes Polbud (r)evolutionary?

First, the CJEU creates legal certainty in an area that is particularly important for the functioning of the European Single Market. In its *Cartesio* judgment, the Court allowed for the cross-border conversion of EU companies in general but did little to shape the relationship between the involved Member States. Therefore, it was widely thought, that, just like AG *Kokott* propounds, the conversion of a company from one Member State to another required a genuine economic link with the State of destination. In *Polbud*, the CJEU clarifies that the regulatory power of a Member State ends when a company converts itself into a company governed by the law of another Member state. It is for the latter State to determine the legal and/or economic conditions that have to be satisfied by the

company in order to bring the conversion into effect (paras 33 ff.). Under Articles 49 and 54 TFEU, the State of origin is only allowed to provide legislation for the protection of public interests (such as the protection of creditors, minority shareholders and employees) but cannot impose mandatory liquidation.

Secondly, the CJEU obliges the State of origin to observe the *principle of equivalence*. This principle, already known from the *Vale* decision (see above), was generally considered as obliging only the target Member State in cross-border conversion cases to legally treat domestic and foreign companies equally. By contrast, the State of origin was only thought to be bound by the general prohibition of restrictions (i.e. the prohibition of rules hampering or rendering less attractive the exercise of fundamental freedoms, see CJEU in *Kraus*, C-19/92, para. 32). In *Polbud*, the CJEU, without being explicit on this point, extends the scope of application of the principle of equivalence to the Member State of origin by stating that "*the imposition, with respect to such a cross-border conversion, of conditions that are more restrictive than those that apply to the conversion of a company within that Member State itself*" is not acceptable (para. 43).

Finally, recapitulating its jurisdiction in *Daily Mail* and *National Grid Indus* (C-371/10), the CJEU points out that exercising the freedom of establishment for the purpose of enjoying the benefit of the most favourable legislation, does not, in itself, amount to an abuse of rights (para. 62). The Court further explains its position saying that "*the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty*" (para. 63).

Assessment

As already observed, *Polbud* encouragingly facilitates the cross-border mobility of companies but, on the other hand, leaves the reader with open questions.

It was high time to free cross-border conversions from the requirement of a genuine economic link with the Member State of destination. The legal situation before *Polbud*, that allowed letterbox companies to conduct their business in other Member States (which can be compared to initial choice of law) but prevented the formation of letterbox companies through the transfer of an existing company's registered office to another Member State (which can be

compared to subsequent choice of law), was somewhat arbitrary from a legal and economic point of view.

On the other hand, the extension of the scope of application of the principle of equivalence to the Member State of origin can only be seen as inconsistent with the legal doctrine of the freedom of establishment provided for in Articles 49 and 54 TFEU. Heretofore, only EU-foreigners could enjoy the right to non-discrimination, whereas, in regard to EU law, Member States were free to impose (relatively) stricter rules to its own citizens. This principle finds its expression, for example, in the above-mentioned treatment of companies as creatures of their state of origin that the CJEU established in its *Cartesio* judgment. As the principle of equivalence corresponds to the prohibition of discrimination, it is even more astonishing that the CJEU permits exemptions for overriding reasons in the public interest. These unwritten exemptions generally apply only in cases of restrictions of the freedom of movement (see Kraus, para. 32 and *Gebhard*, para. 37). On the contrary, discriminations require the strict observance of the catalogue of justifications set out in Article 52 TFEU. In future decisions, the CJEU should recall this clear distinction and cease to further the linguistic ambiguity.