NIKI, COMI, Air Berlin and Art. 5 EIR recast

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

The Regional Court of Berlin has, on the basis of the immediate appeal against the order of the provisional insolvency administration on the assets of NIKI Luftfahrt GmbH (under Austrian law), repealed the decision of the District Court of Charlottenburg (see here) as it finds that international jurisdiction lies with Austrian and not German courts. In its decision, the regional court has dealt with the definition of international jurisdiction, which is based on the debtor's centre of main interests ('COMI'). According to the provisions of the European Insolvency Regulation, that is the place where the debtor usually conducts the administration of its interests and that is ascertainable by third parties.

The court has founded its decisions on the following arguments:
Since the debtor is based in Austria, it is assumed that the centre of their interests is also there (see Art. 3 II EIR recast). If this presumption is to be rebutted, high demands must be made to ensure legal certainty. According to the case-law of the European Court of Justice, objective and, for a third party, recognizable circumstances that would prove that the place of the head office is not located at the registered office are necessary.
The various factors should be considered in their entirety. In the present case, it can not be established with sufficient certainty on the basis of the arguments put forward by the debtor, on the one hand, and the complainant on the other hand, that the COMI is indeed located in Germany. Rather, no uniform picture is recognizable that could justify refuting the presumption.
The place from which the essential business activities of the debtor are controlled, namely Berlin, is not a solely decisive criterion. The fact that Air Berlin had been practically NIKI's only customer, and thus the sales were particularly generated in Germany, was not automatically decisive, as well.
Then again, the fact that the debtor maintains offices in Vienna, in which amongst other things NIKI's financial accounting is conducted, argues for a COMI in Austria. Likewise, the competent supervisory authority is located in Vienna and

the debtor has an Austrian operating license and the airworthiness of the aircraft is monitored from there. In addition, approximately 80% of the employment contracts concluded by the debtor are subject to Austrian employment law.
Finally, the debtor's own behaviour also indicates that it assumes its COMI in Austria. It had not informed the creditors and the public that it had relocated its COMI to Germany. Furthermore, in an insolvency proceeding opened at the request of a creditor before the Korneuburg Regional Court (file reference 35 Se 323 / 17k) in Austria, the debtor did not raise the objection that there was no international competence in Austria.

This should be the first case of application of the 'new' Art. 5 I EIR recast, that regulates the examination of international jurisdiction. It is very likely not the last, as the case shows that the COMI-concept is still controversial. It waits to be seen if the case will even be referred to the German Federal Court of Justice (the Regional Court has admitted the appeal to the German Federal Court of Justice which may be lodged within a period of one month).

The press release of the Regional Court of Berlin can be found here.

Implementation of the EAPO in Greece

By virtue of Article 42 Law 4509/2017, a new provision has been added to the Code of Civil Procedure, bearing the title of the EU Regulation. Article 738 A CCP features 6 paragraphs, which are (partially) fulfilling the duty of the Hellenic Republic under Article 50 EAPO. In brief the provision states the following:

- 1: The competent courts to issue a EAPO are the Justice of the Peace for those disputes falling under its subject matter jurisdiction, and the One Member 1st Instance Court for the remaining disputes. It is noteworthy that the provision does not refer to *the court*, but to its respective *judge*, which implies that no oral hearing is needed.

- 2: The application is dismissed, if

1. it does not fulfil the requirements stipulated in the Regulation, or if
2. the applicant does not state the information provided by Article 8 EAPO, or if
3. (s)he does not proceed to the requested amendments or corrections of the application within the time limit set by the Judge.

Notice of dismissal may take place by an e-mail sent to the account of the lawyer who filed the application. E-signature and acknowledgment of receipt are pre-requisites for this form of service.

The applicant may lodge an appeal within 30 days following notification. The hearing follows the rule established under Article 11 EAPO. The competent courts are the ones established under the CCP.

- 3: The debtor enjoys the rights and remedies provided by Articles 33-38 EAPO. Without prejudice to the provisions of the EU Regulation, the special chapter on garnishment proceedings (Articles 712 & 982 et seq. CCP) is to be applied.
- 4: If the EAPO has been issued prior to the initiation of proceedings to the substance of the matter, the latter shall be initiated within 30 days following service to the third-party.

If the applicant failed to do so, the EAPO shall be revoked ipso iure, unless the applicant has served a payment order within the above term.

- 5: Upon finality of the judgment issued on the main proceedings or the payment order mentioned under § 4, the successful EAPO applicant acquires full rights to the claim.
- 6: The liability of the creditor is governed by Article 13 Paras 1 & 2 EAPO. Article 703 CCP (damages against the creditor caused by enforcement against the debtor) is applied analogously.

Some additional remarks related to the Explanatory Report would provide a better insight to the foreign reader.

1. There is an explicit reference to the German and Austrian model.
2. The placement of the provision (i.e. within the 5th Book of the CCP, on

Interim Measures) clarifies the nature of the EAPO as an interim measure, despite its visible connotations to an order, which is regulated in the 4th chapter of the 4th Book, on Special Proceedings. Nevertheless, the explanatory report acknowledges resemblance of the EAPO to a payment order.

3. There is no need to provide information on the authority competent to enforce the EAPO, given that the sole person entrusted with execution in Greece is the bailiff.

The initiative taken by the MoJ is more than welcome. However, a follow-up is imperative, given that Article 738 A CCP does not provide all necessary information listed under Article 50 EAPO.

Mutual Recognition and Enforcement of Civil and Commercial Judgments among China (PRC), Japan and South Korea

Written by Dr. Wenliang Zhang, Lecturer in the Law School of Renmin U, China (PRC)

Against the lasting global efforts to address the issue of recognition and enforcement of civil and commercial judgments ("REJ"), some scholars from Mainland China, Japan and South Korea echoed from a regional level, and convened for a seminar on "Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era". The seminar was held in School of Law of Renmin University of China on December 19, 2017 and the participants were involved in discussing in depth the status quo and the ways out in relation to

the enduring REJ dilemma between the three jurisdictions, especially that between China and Japan.

Unfortunately, despite the immense volume of civil and commercial interactions, China and Japan have been stuck in the REJ deadlock ever since China first refused to recognize Japanese judgments in the infamous 1994 case Gomi Akira. After this misfortune, both Chinese and Japanese courts have waged rounds of repeated refusals or revenges, forming a vicious circle in the guise of the so-called reciprocity. The Sino-Japanese REJ stalemate is considered to be illustrative of the most formidable blockades lying on the way to free movement of judgments. Between China and South Korea, the REJ future is promising. Although China refused to recognize, at least in one case, Korean judgments for lack of reciprocity, Korean courts have nevertheless recognized Chinese courts on a reciprocity basis. The positive move by Korean courts may well pave the way for Chinese courts to recognize Korean judgments in the future.

For smooth REJ, understanding must be ensured between the three jurisdictions and mutual trust should also be established. In light of China's recent positive movement in applying reciprocity, there may exist a way out for the REJ deadlock if the other two jurisdictions could well join the trend. The papers presented for the seminar will appear in a special 2018 issue of Frontiers of Law in China:

1. Yuko Nishitani, Coordination of Legal Systems by Recognition of Judgments ? Rethinking Reciprocity in Sino-Japanese Relationships
2. Kwang Hyun Suk, Recognition and Enforcement of Foreign Judgments among China, Japan and South Korea: Korean Law Perspective
3. Qisheng He, Wuhan University Law School Topic: Judgment Reciprocity among China, Japan and South Korea: Some Thinking for Future Cooperation
4. Wenliang Zhang, To break the Sino-Japanese Recognition Feud – Lessons Learnt As Yet
5. Lei Zhu, The Latest Development on the Principle of Reciprocity in the Recognition and Enforcement of Foreign Judgments in China
6. Yasuhiro Okuda, Unconstitutionality of Reciprocity Requirement for Recognition and Enforcement of Foreign Judgments in Japan.

The ECtHR rules on the compatibility with the right to respect for private and family life of the refusal of registration of same-sex marriages contracted abroad

By a judgment *Orlandi and Others v. Italy* delivered on December 14 the ECtHR held that the lack of legal recognition of same sex unions in Italy violated the right to respect of private and family life of couples married abroad.

The case concerned the complaint of six same sex-couples married abroad (in Canada, California and the Netherlands). Italian authorities refused to register their marriages on the basis that registration would be contrary to public policy. They also refused to recognize them under any other form of union. The complaints were lodged prior to 2016, at a time when Italy did not have a legislation on same-sex unions.

The couples claimed under articles 8 (right to respect of private and family life) and 14 (prohibition of discrimination) of the Convention, taken in conjunction with article 8 and 12 (right to marry), that the refusal to register their marriages contracted abroad, and the fact that they could not marry or receive any other legal recognition of their family union in Italy, deprived them of any legal protection or associated rights. They also alleged that "*the situation was discriminatory and based solely on their sexual orientation*" (§137).

Recalling that States are still free to restrict access to marriage to different sex-couples, the Court indicated that nonetheless, since the *Oliari and others v. Italy* case, States have an obligation to grant same-sex couples "*a specific legal framework providing for the recognition and the protection of their same-sex*

unions" (§192).

The Court noted that the "*the crux of the case at hand is precisely that the applicants' position was not provided for in domestic law, specifically the fact that the applicants could not have their relationship – be it a de facto union or a de jure union recognized under the law of a foreign state – recognized and protected in Italy under any form*" (§201).

It pointed out that although legal recognition of same-sex unions had continued to develop rapidly in Europe and beyond, notably in American countries and Australia, the same could not be said about registration of same-sex marriages celebrated abroad. Giving this lack of consensus, the Court considered that the State had "*a wide margin of appreciation regarding the decision as the whether to register, as marriage, such marriages contracted abroad*" (§204-205).

Thus, the Court admitted that it could "*accept that to prevent disorder Italy may wish to deter its nationals from having recourse in other States to particular institutions which are not accepted domestically (such as same-sex marriage) and which the State is not obliged to recognize from a Convention perspective*" (§207).

However, the Court considered that the refusal to register the marriages under any form left the applicants in "*a legal vacuum*". The State has failed "*to take account of the social reality of the situation*" (§209). Thus, the Court considered that prior to 2016, applicants were deprived from any recognition or protection. It concluded that, "*in the present case, the Italian State could not reasonably disregard the situation of the applicants which correspond to a family life within the meaning of article 8 of the Convention, without offering the applicants a means to safeguard their relationship*". As a result, it ruled that the State "*failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and the protection of their same-sex union*" (§ 210).

Thus, the Court considered that there had been a violation of article 8. It considered that, giving the findings under article 8, there was no need to examine the case on the ground of Article 14 in conjunction with article 8 or 12. (§212).

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.