Court of Appeal of Ljubljana and implied consent to application of Slovenian law by not- contesting the application of Slovenian law in first and in appellate instance

Written by Dr. Jorg Sladic, Attorney in Ljubljana and Assistant Professor in Maribor (Slovenia)

In judgment of 25 October 2017 in case I Cpg 1084/2016 (ECLI:SI:VSLJ:2017:I.CPG.1084.2016) published on 31 January 2018 the Slovenian Appellate Court ruled on a question of implied consent to application of Slovenian law.

Unfortunately the underlying facts are not described with the necessary precision. It would appear that there was a three-person contractual chain between an Austrian, an Italian and a Slovenian commercial company. Apparently the Italian company was the seller, the roles of both the Austrian and Slovenian company are not very clearly described. The underlying transaction that led to the dispute was a contract for the sale of goods concluded under the CISG. The ruling does not state where the seller had the habitual residence, yet the condemnation to perform the payment can only be construed in such a way that the Italian plaintiff was the seller.

The court of first instance condemned the defendant (a Slovenian commercial company) to payment of the sum of 52.497,28 EUR to the Italian claimant (Italian commercial company) and dismissed the Slovenian defendant's defense of set-off (exceptio compensationis) in the sum of 50.000,00 EUR.

The condemnation was based upon a sales contract for goods concluded under the application of the CISG. The Slovenian defendant contended that the Italian claimant did not sign the double order / mandate addressed to the Austrian third person (named the client or the orderer) who had been instructed to perform the payment to the Italian company. The Austrian client later withheld the

performance of payment due to a non signed double order / mandate (double order/mandate is a figure where a principal gives the first mandate to the agent to perform an obligation to a third person (recipient) and the second mandate to the third person (recipient) to accept the performance of such an obligation, see Art. 1035 Slovenian Code of Obligations: Through an instruction one person, the principal, authorizes a second person, the agent, to perform an obligation for the latter's account to a certain third person, the recipient (the beneficiary), and authorizes the third person to accept performance in the third person's name. The Slovenian legislative provision corresponds to § 1400 Austrian ABGB, § 784 German BGB and Art. 468 Swiss Code of Obligations). The defendant claimed in his defense of set-off that there was an extra-contractual obligation (a delict) due to lack of performance of the Austrian agent that was caused by the Italian company.

One of the pleas in appeal was that Italian and in the alternative the Austrian substantive law should be applied for assessing the existence of the obligation to be set-off. The Court of Appeal dismissed such a plea. The Slovenian defendant alleged an allegedly mature and liquid non-contractual obligation to be set-off. The assessment of facts narrated by the Slovenian company i.e. the damages set-off due to non signature of an order given to the Austrian company shows that there is in essence a defense of breach of the claimant's obligation in accepting the performance based on the same facts as the claimant's claim to payment. The Appellate Court expressly avoided the characterization of the said breached obligation as contractual or as non-contractual. There was only a precisions that the facts underlying both the contractual obligation to perform a payment and the allegedly breached obligation are identical.

According to the Appellate Court in Ljubljana the court of first instance found that there was an implied consent to apply the Slovenian law, neither party contested the application of Slovenian law in the first and also in the appellate instance. The law applicable to the obligation that was claimed in set – off is therefore Slovenian law. Even if such an obligation were non – contractual, Slovenian law would have to be applied under Art. 4(1) and (3) in connection with Art. 15 Regulation (EC) No 864/2007 (Rome II).

The ruling does not contain any explicit connecting factor. The issue is not Art. 17 Rome I Regulation (Regulation (EC) No 593/2008). One can assume that under Art. 1(1) CISG the applicable law is the CISG as Austria, Italy and Slovenia are

contracting parties to the said UN convention. However, the interesting part is the reference to the implied consent to the application Slovenian substantive law. Under Art. 4(1)(a) Rome I Regulation (Regulation (EC) No 593/2008) “a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence”. This should prima facie be the Italian law, as the Italian company applied for payment after having performed the specific performance under the sales contract. However, not contesting the application of Slovenian substantive law in judicial proceedings in first and also in the appellate instance was then construed as “implied consent” to Slovenian substantive law (Art. 3(2) Regulation Rome I). Seen in pragmatic perspective, in order to avoid a uneasy modus vivendi or fine tuning of Art. 3 and 15 of the Regulation Rome II with Art. 17 Regulation Rome I the Slovenian Appellate Court preferred to refer to Slovenian law even if under conditions that do not easily fit in Art. 3(2) and 10 Rome I Regulation.

Fifty Shades of (Facebook) Blue – ECJ Renders Decision on Consumer Jurisdiction and Assigned Claims in Case C-498/16 Schrems v Facebook

Written by Tobias Lutzi, DPhil Candidate and Stipendiary Lecturer at the University of Oxford.

Yesterday, the ECJ has rendered its decision in Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*. The case will be of interest to many readers of this blog as its facts are not only closely linked to the ECJ’s well-known decision in Case C-362/14 *Schrems* but also could have come straight out of a conflict-of-laws textbook.

Maximilian Schrems has been litigating against Facebook and the way in which the company uses the personal data of its users since 2011, when he first submitted a range of complaints to the Irish Data Protection Commissioner. In 2013, he submitted another complaint, which ultimately lead to the annulment of the 'Safe Harbour' framework between the EU and the US in the aforementioned decision; the proceedings continued with a reformulated version of this complaint and have recently been referred to the ECJ for a second time. Over the course of this litigation, Schrems built a reputation as a privacy activist, publishing two books, giving talks and lectures, and founding a non-profit organisation that uses 'targeted and strategic litigation' to enforce privacy and data protection laws across Europe.

The proceedings that gave raise to yesterday's decision by the ECJ are formally unrelated to the aforementioned litigation. In 2014, Schrems set out to bring a 'class action' against Facebook for numerous violations of privacy and data protection laws. For this purpose, 25,000 Facebook users assigned their claims to him. Only eight of these claims, regarding Schrems' own Facebook account and Facebook 'page' as well as the accounts of seven other users from Austria, Germany, and India, formed the object of the present proceedings. The claims were brought at Schrems' domicile in Vienna, Austria, based on the special head of jurisdiction for consumer contracts in Art 16(1) Brussels I (= Art 18(1) of the recast Regulation).

The proceedings raised two separate questions, which the Austrian *Oberster Gerichtshof* ultimately referred to the ECJ:

- Can Schrems still be considered a consumer in the sense of Art 15(1) Brussels I, despite his continued activism and professional interest in the claims?
- If so, can he also rely on the privilege of Art 16(1) Brussels I regarding claims that have been assigned to him by other consumers who are domiciled in (a) the same EU Member State; (b) another Member State; (c) a non-member State?

Following the Advocate General's opinion (reported here), the Court answered the first question in the positive (I.) and the second one in the negative (II.). Both answers are testimony to a nuanced interpretation of the special rules of jurisdiction for consumer contracts (III.)

I. The Consumer Exception

According to the ECJ's well-known decisions in Case C-269/95 *Benincasa* and Case C-464/01 *Gruber*, the assessment of whether a party is a 'consumer' in the sense of Art 15(1) Brussels I does not depend on their subjective qualities but on the 'the position of the person concerned in a particular contract' (*Benincasa*, [16]), which must have been 'concluded for the purpose of satisfying an individual's own needs in terms of private consumption' (ibid, [17]); where a contract has been concluded for a purpose that is partly private and partly professional, the professional aspect of it must be 'so slight as to be marginal' for the contract to still fall under the provision (*Gruber*, [39]).

In the present case, this definition raised two questions. The Court first had to decide whether the assessment was to be made only at the moment when the contract was originally concluded or whether subsequent changes of circumstances must also be taken into account. It held that

[38] … a user of [a digital social network] may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, ***has not subsequently become predominately professional****.*

Second, the Court had to decide whether this was the case for Schrems, who had originally entered into a contract with Facebook for private purposes but subsequently developed a professional activity involving litigation against Facebook. According to the Court,

[39] … neither the expertise which [a] person may acquire in the field covered by those services nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a 'consumer' within the meaning of Article 15 [Brussels I].

[40] Indeed, ***an interpretation of the notion of 'consumer' which excluded such activities would have the effect of preventing an effective defence of the rights that consumers enjoy*** *in relation to their contractual partners who are traders or professionals, including those rights which relate to the protection of their personal data. …*

Interestingly, the Court put little emphasis on the possible distinction between

Schrems' private Facebook 'profile' and his arguably professional Facebook 'page' (see [34]–[36]). Instead, it seemed to generally exclude 'representing the rights and interests of the users' of a particular service from the range of professional activities that might prevent the contract for this service from being considered a consumer contract. The Court explicitly linked this interpretation to the objective of ensuring a high level of consumer protection in Art 169 TFEU. Thus, its decision might not even have been different had Schrems joined Facebook with the sole aim of enforcing his (and other users') rights. This way, the Court effectively sidestepped the problems created by the increasingly wide range of uses to which social media and other online platform accounts can be put, which the Advocate General had so colourfully described as 'fifty shades of (Facebook) blue' (Opinion, [46]) – and which, for the time being, remain unaddressed.

II. Jurisdiction for Assigned Claims

With regard to using the second alternative of Art 16(1) Brussels I to bring claims that have been assigned to the claimant by other consumers at the claimant's domicile, the Court held:

[45] The rules on jurisdiction laid down, as regards consumer contracts, in Article 16(1) of the regulation ***apply****, in accordance with the wording of that provision,* ***only to an action brought by a consumer against the other party to the contract****, which necessarily implies that a contract has been concluded by the consumer with the trader or professional concerned ….*

…

[48] … ***[T]he assignment of claims cannot, in itself, have an impact on the determination of the court having jurisdiction*** *…. It follows that the jurisdiction of courts other than those expressly referred to by Regulation No 44/2001 cannot be established through the concentration of several claims in the person of a single applicant. …* ***[A]n assignment of claims such as that at issue in the main proceedings cannot provide the basis for a new specific forum for a consumer to whom those claims have been assigned.***

This interpretation seems to align well with earlier decisions by the Court, according to which the special head of jurisdiction in Art 16(1) Brussels I is only available personally to the consumer who is party to the consumer contract in

question (Case C-89/91 *Shearson Lehman Hutton*, [23]; Case C-167/00 *Henkel*), [33]), and according to which the assignment of a claim does not affect international jurisdiction under the Brussels I Regulation (Case C-352/13 *CDC Hydrogene Peroxide*, [35]–[36]).

An interesting, and arguably unfortunate, side effect of this restrictive interpretation is that it may even exclude the consolidation of the claims of other Austrian consumers in the same forum, considering that the second alternative of Art 16(1) does not only contain a rule of international jurisdiction but also determines local (internal) jurisdiction. In this regard, the Advocate General argued that an *additional* forum in which such consumer claims could be brought could be created under national law (Opinion, [117]), a proposition that does not appear easily reconcilable with the clear wording of Art 16(1).

Contrary to the claimant's press release, though, the fact that a consumer is not allowed to avail him- or herself of the privilege in Art 16(1) Brussels I in order to bring the claims 25,000 other consumers that have been assigned to him at his or her domicile does not mean that company's can 'divide and conquer' and 'block enforcement of consumer rights'. A claimant is free to rely on the first alternative of Art 16(1) Brussels I (which mirrors Art 2(1)) and bring all claims in the defendant's Member State of domicile, the procedural law of which will then decide on whether the claims may be consolidated.

III. A Nuanced Approach to the Consumer Exception

What seems to emerge from the decision is a nuanced approach to the special provisions for consumer contracts. The Court applies a rather flexible interpretation to Art 15(1) Brussels I, allowing for changes of circumstances to be taken into account but also distinguishing the enforcement of (consumer) rights from other types of professional activities. At the same time, it interprets the special head of jurisdiction in Art 16(1) restrictively, limiting the privilege to each individual consumer and excluding the possibility of other consumers assigning their claims to one who is domiciled in what may appear as a more favourable forum.

Of course, there may well be strong arguments for the existence of such a possibility, especially in cases where each individual claim is too small to justify litigation but the sum of them is not. But it seems questionable whether Art 16(1)

Brussels I would be the right instrument to create such a mechanism of collective redress – and, indeed, whether it should be the Court's role to implement it.

Sharia law in Greece: Blending European values with Islamic tradition

The Hellenic Republic is the sole EU Member State which provides for the application of Sharia law in its territory for more than a century. A recent amendment is granting Greek Moslems the right to opt-out, and resort to domestic civil law. At the same time, the new law respects the right to opt-in for the application of Sharia law, upon the condition of mutual agreement between the parties.

Law 4511/2018 was enacted on January 15. It contains only one article (the second simply declares that the law will be in force upon publication in the State Gazette), which amends the previous status of Sharia courts in Greece. A new Paragraph (4) is added to Art. 5 Law 1920/1991. By virtue of the new provision, the jurisdiction of the *Mufti* becomes the exception, whereas (until today) it was the rule for Greek Moslems living in the region of (Western) Thrace. The *Mufti* has jurisdiction for a vast number of family and succession matters, which are listed under Article 5.2 Law 1920/1991. A prerequisite is that the parties have submitted the above matters to Sharia law.

The new law grants the right to each party to seek Justice before domestic courts, and in accordance with Greek substantive and procedural law. The *Mufti* may exercise jurisdiction only if both parties file an application for this cause. Once the case is submitted to the *Mufti*, the jurisdiction of national courts is irrevocably excluded.

In addition, the new law paves the path for a more structured procedure before the *Mufti*: A drafting Committee will be authorized to prepare a decree, which will

shape (for the first time) the Rules and Regulations of the *Mufti* 'courts'. Signs of a formalized process are already clearly visible in the new law (Article 4.b).

Inheritance matters are also regulated by the new legislation: In principle they are subjected to Greek law, unless the testator solemnly states before a notary public his wish to submit succession matters to Sharia law. A parallel application of Greek and Sharia law is not permitted. However, revocation of the testator's declaration is allowed, pursuant to Greek succession law provisions embedded in the Civil Code.

The new law has certainly conflict of laws ramifications too, most notably in light of the recent *Sahyouni* case of the CJEU. In this respect it is important to underline that all decisions rendered by the *Mufti* are passing through a hybrid process of domestic exequatur, which is rudimentarily regulated under Article 5.3 Law 1920/1991. Failure to submit the *Mufti* decisions to domestic courts' scrutiny, deprives them of res iudicata and enforceability. Hence, EU Member States courts, whenever confronted with a request to recognize or enforce *Mufti* decisions within their jurisdiction, will always have to examine whether a Greek court has granted full faith and credit to the *Mufti's* ruling.

Japanese Supreme Court Renders Decision on Hague Abduction Convention

On December 21, 2017, the Japanese Supreme Court rendered a decision on the Hague Abduction Convention. The Court upheld a lower court decision in favor of the Japanese mother, even though she had turned back on her promise to return the kids from a visit to Japan, and even though that same court had earlier issued a return order in favor of the American father. The matter had received international press attention, and even a Congressional subcommittee hearing.

Japan had long refused to join the Hague Convention, and when it did, in 2014,

critical observers already expected that courts would find ways to undermine it. Those observers see themselves vindicated.

Colin Jones reports critically on the decision; he has previously written on Japan's joining the Convention and on reluctance to enforce it. Useful background from the Law Library of Congress is here.

Japanese accession to the Convention has been a frequent scholarly topic, both in Japan and elsewhere. Yuko Nishitani, who had already written about "International Child Abduction in Japan" in (2006) 8 Yearbook of Private International Law 125-143, and who wrote a long report (in Japanese) for the Japanese Ministry in 2010, provided a brief analysis in 2011. Dai Yokomizo discussed the accession in (2012) Revue critique 799; Jun Yokohama did so in the Mélanges van Loon (2013, pp 661-72). Vol. 57 (2014) of the Japanese Yearbook of International Law contains articles by Tatsuki Nishioka and Takako Tsujisaka, Masayuki Tanamura, Masako Murakami, Martina Erb-Klünemann, and Nigel Vaughan Lowe. Takeshi Hamano helpfully explains the Japanese reluctance with regard to the Japanese ideology of the family. Outside of Japanese authors, Barbara Stark and Paul Hanley wrote most recently in the United States; the topic is also addressed in several student notes. The accession was also discussed by Bengt Schwemann (in German) and Francisco Barberán Pelegrín (in Spanish).

UKSC on Traditional Rules of Jurisdiction: Brownlie v Four Seasons Holdings Incorporated

Shortly before Christmas the UKSC released its decision on jurisdiction in *Brownlie v Four Seasons Holdings Incorporated* (available here). Almost all the legal analysis is *obiter dicta* because, on the facts, it emerges that no claim against the British Columbia-based holding corporation could succeed (para 15) and the appeal is allowed on that basis. I suppose there is a back story as to why it took a trip to the UKSC and an extraordinary step by that court (para 14) for the defendant to make those facts clear, but I don't know what it is. On the facts there are other potential defendants to the plaintiffs' claim and time will tell whether jurisdictional issues arise for them.

The discussion of the value of the place of making a contract for jurisdiction purposes is noteworthy. In para 16 two of the judges (Sumption, Hughes) are critical of using the traditional common law rules on where a contract is made for purposes of taking jurisdiction. This has been the subject of debate in some recent Canadian decisions, notably the difference in approach between the Court of Appeal for Ontario and the Supreme Court of Canada in *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 (available here). The SCC was fine with using the traditional rules for this purpose. In *Brownlie*, I do not think it is clear as to what view the other three judges take on this point.

Even more interestingly, the UKSC judges split 3-2 on how to understand the idea of damage in the forum as a basis for jurisdiction. Three judges (Hale, Wilson, Clarke) retain the traditional broad common law view – the position in many Canadian provinces prior to *Club Resorts Ltd v Van Breda*, 2012 SCC 17 (available here) – that ongoing suffering in the forum in respect of a tort that happened abroad is sufficient. Two judges (Sumption, Hughes) reject that approach and adopt a more narrow meaning of damage in the forum (it must be direct damage only).

This 3-2 split is closer even than it might first seem, since Lord Wilson (para 57)

suggests that in a different case with fuller argument on the point the court might reach a different result.

Canadian law does not get a fair description in the UKSC decision. The court notes twice (para 21 and para 67) that Canada's common law uses a broad meaning of damage for taking jurisdiction. *Club Resorts*, and the change to the law it represents on this very issue, is not mentioned. This is yet another illustration of the importance of being careful when engaging in comparative law analysis.

Conflicts – Between Domestic and Indigenous Legal Systems?

In *Beaver v Hill*, 2017 ONSC 7245 (available here) the applicant sought custody, spousal support and child support. All relevant facts happened in Ontario.

In response, the respondent asserted that the "inherent right of the Haudenosaunee and the Six Nations to govern themselves includes the right to have inter and intra-familial disputes decided through Haudenosaunee governance processes and protocols and according to Haudenosaunee laws".

This took the court in some very interesting directions. It held "One of the novel issues that this case raises is whether general conflict of laws jurisdiction principles are also relevant on a more 'micro-level,' to an intra-provincial jurisdiction dispute between two Ontario citizens. In my view, these principles remain relevant in this case, even though the dispute has arisen at the intra-provincial level. Although the Respondent is not alleging that the Haudenosaunee or the Six Nations constitute a sovereign nation or other type of territorial entity within Ontario, his jurisdictional challenge is based on an alleged right to be governed by a complete system of dispute resolution, adjudicative processes and laws for handling Family Law matters that is independent of Ontario's court system, processes and laws. This broad claim has raised basic preliminary issues about the appropriate forum for decision-making and the applicable laws. These

are precisely the types of disputes that conflict of laws principles are intended to address." (para 53)

I think the reaction to this analysis will be mixed. It seems possible that a court could have held exactly the opposite: that conflict of laws principles have nothing at all to do with the objections raised by the respondent. Instead, some form of public or constitutional law analysis is required to determine whether the respondent's objections to Ontario jurisdiction and law are valid. But I also understand that some scholars have suggested an approach that accords with the court's: that private international law principles can be used to address conflicts within one jurisdiction between the domestic legal system and indigenous legal systems or approaches. See for example Sara L. Seck, "Treaties and The Emancipatory Potential of International Law" in Michael Coyle and John Borrows, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

NIKI continued (now in Austria)

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 Korneuburg has opened a main insolvency proceeding – not a secondary insolvency proceeding that the German provisional administrator has applied for – on the assets of NIKI Luftfahrt GmbH in Austria (see here). Therefore, it obviously shares the view of the Regional Court of Berlin that NIKI's COMI is located in Austria and not Germany.

However, it will be possible to lodge an appeal ("Rekurs") against the Regional Court's decision within the next 14 days.

As the German Federal Court of Justice still has to decide about the appeal against the ruling of the Regional Court of Berlin, we now see a main (preliminary) insolvency proceeding in Germany and one in Austria. It is not

entirely clear under the EIR how to deal with such a positive conflict of jurisdiction. Depending on the decision of the German Federal Court it might just dissolve (if it locates NIKI's COMI in Austria as well). Otherwise it should be – from my point of view – solved by cooperation and coordination in the spirit of Art. 42 EIR between the German and Austrian courts.

Interestingly the Regional Court Korneuburg has stated that since the decision of the Regional Court of Berlin no main insolvency proceeding is upheld in Germany. However, the Regional Court of Berlin has stated that, due to the fact that it has admitted an appeal ("Rechtsbeschwerde") to the German Federal Court against its ruling, it has no legal force yet (see here).

US Court Refused to Apply the Chosen Chinese Law due to Public Policy Concern

In Fu v. Fu, 2017 IL App (1st) 162958-U, a father brought a claim against his son to revoke an unconditional gift of $590,000 that he donated to his son for the later to pursue an EB-5 Visa to immigrate to the US. Both parties are Chinese citizens and the defendant is currently a resident of Massachusetts. The gift agreement was entered into in China, drafted in Chinese and contained a clause specifying PRC law should apply. The money was held by the International Bank of Chicago. The plaintiff brought the action in Illinois.

Under the US Law (Title 8 of the Code of Federal Regulations, § 204.6) a foreign national must invest at least $500,000 in the US to be considered for an EB-5 Visa, and must 'show that he has invested his own capital obtained through lawful means.' (Matter of Ho, 22 I&N Dec. 206, 210 (AAO 1998)) After a few denied EB-5 approval, the plaintiff sought to recover the money, by claiming that the defendant was estranged from his parents, including the donor and refused to support them, and the purpose of the gift contract was for the defendant to obtain

an EB-5 Visa but the defendant failed to do so.

Under the Illinois law, a valid gift requires 'delivery of the property by the donor to the donee, with the intent to pass the title to the donee absolutely and irrevocably, and the donor must relinquish all present and future dominion and power over the subject matter of the gift." (Pocius v. Fleck, 13 Ill. 2d 420, 427 (1958)). Furthermore, the gift agreement between the parties also used the language that the gift was 'unconditional'. However, the plaintiff argued that under the PRC law, gifts may be revocable after the transfer of ownership, if the donee 'has the obligation to support the donor but does not fulfil it', or a donnee 'does not fulfill the obligations as stipulated in the gift agreement.' (PRC Contract Law, Art 192)

The Appellate Court of Illinois First Judicial District affirmed the judgment of the circuit court of Cook County that the gift agreement was irrevocable. The plaintiff failed to successfully prove Chinese law. And even if the plaintiff properly pled PRC law, such interpretation was 'oppressive, immoral, and impolitic'. Under the US law on EB-5 Visa application, the foreign citizen must prove ownership of those funds to be eligible for an EB-5 Visa. The signed agreement stating the gift 'unconditional' would help the defendant to prove he legally owned the funds to acquire an EB-5 visa. If the governing PRC law indeed allows a gift to be given unconditionally and revoked after delivery and acceptance, as argued by the plaintiff, it would facilitate a deception on the US Government and is against public policy.

The full judgment can be found here.

NIKI continued

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

The Spanish airline Vueling Airlines S.A. is still intending to acquire large parts of

the NIKI business. Vueling is part of the European aviation group IAG, which also includes British Airways, Iberia, Aer Lingus and LEVEL. The provisional insolvency administrator of NIKI Luftfahrt GmbH, therefore, will continue to drive forward the sales process. Vueling has provided interim financing of up to € 16.5 million to finance the NIKI business until the closing of the purchase agreement. This funding is only sufficient for a few weeks.

Meanwhile, NIKI has lodged an appeal with the Federal Court against the ruling by the Regional Court of Berlin. Due to the legal complaint of the NIKI management against the decision, it does not have legal force yet. The preliminary insolvency proceeding in Germany therefore continues.

NIKI is expected to apply for the opening of secondary insolvency proceedings in Austria by the end of the week, as well. According to the provisional insolvency administrator of NIKI this procedure is an important step to ensure the orderly processing of NIKI in Austria. In addition, the purchase agreement for the NIKI business should now be secured at short notice via this Austrian secondary process (see here).

It remains to be seen how the German Federal Court deals with the question of the rebuttal of the assumption that NIKI's COMI is located in Austria (the place of its registered office). It is even possible that the ECJ has to deal with this question for a second time after the Eurofood IFSC (Case C-341/04) case. As we will probably see a secondary proceeding commenced in Austria (NIKI seems to be one of the rare cases where the insolvency administrator of the main proceeding finds the commencement of a secondary proceeding useful for the success of the administration) we might even witness the application of some of the new rules of the EIR on the cooperation and coordination of main and secondary proceedings.

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.