Regulatory competition in a post-Brexit EU

Dr. Chris Thomale, University of Heidelberg, has kindly provided us with the following thoughts on the possible consequences of Brexit for European private international law.

Hitherto, academic debate is only starting to appreciate the full ambit and impact a Brexit would have on the European legal landscape. Notably, two important aspects have been neglected, despite their crucial importance in upcoming negotiations about withdrawal arrangements between the EU and the UK under Art. 50 section 2 TEU: First, the vital British interest to leave in force the fundamental freedom of establishment. Second, a possible revival of regulatory competition of corporate laws among remaining Member States, once UK Limited Companies and Limited Liability Partnerships were to lose their EU or EEA status.

As *Hess* and *Requejo-Isidro* are correct in pointing out, Brexit will directly hit the UK judicial market. Brussels I*bis* and its ancillary instruments will cease to apply. It remains yet to be seen if and to what extent new bilateral or multilateral agreements with Member States will make up for this suspension of EU free movement of judgments. This includes an accession to the Lugano Convention, which in itself is due to be reformed. In the meantime, negotiations will have to be based on a default position, according to which not only EU secondary law on jurisdiction and enforcement but notably mutual trust with regard to its application by UK courts will be suspended. The latter aspect cannot be emphasized enough: British insolvency proceedings in particular have been displaying tendencies to find a Centre of Main Interest of companies and entire global corporate groups inside the UK, often based on hardly understandable factual assertions and the most laconic reasonings given by UK courts (see, e.g. the *Nortel* case).

The mentioned expansionist aspect of the UK judicial market neatly ties in with a similar regulatory export of corporate forms. Under the aegis of Art. 49 seqq. TFEU and Art. 31 seqq. of the EEA Agreement, UK companies profit from being recognised throughout the EEA in their original British legal form of

establishment, regardless of their actual place of management. This privilege has been incentivizing a common form of legal arbitrage: Investors establish a Ltd or LLP in the UK, while doing business anywhere else inside the EEA, thereby being able to circumvent mandatory rules applying at their state of business such as laws on co-determination, minimum capital, or mandatory insurance requirements. Such setups will not be available anymore once the UK were to leave the EEA. Putting it bluntly, from the moment UK effectively leaves the EU and the EEA, British companies operating e.g. in France or Germany will be subject to the corporate laws of their administrative seat. For these countries follow the 'real seat' theory, i.e. a conflict of company laws rule that designates the substantive law of the administrative seat as the applicable company law. UK companies not having to show any registration as, say, a *Société à responsabilité limitée* at their real seat, by default will immediately be treated as partnerships, entailing, *inter alia*, unlimited shareholder liability. In order to avoid this, UK companies operating inside the EU will be well advised to reincorporate, i.e. convert into a EU legal form, which better serves their economic interests.

However, will the UK simply let them go? Once Brexit becomes effective, the Directive 2005/56/EC on cross-border mergers will not apply anymore; neither will rulings rendered by the CJEU in *Cartesio* or *Vale*. Restrictions may be put into place, similar to those displayed by British authorities in *Daily Mail*, when corporate mobility required consent by UK Treasury. This may induce a corporate exodus from the UK while its EU membership is still active. Still, leaving UK company forms behind represents only one side of the deal. A second uncertainty rests with the question, exactly which new legal forms UK companies operating abroad will choose instead. Will they go for an Irish Private Company Limited by Shares, a Dutch *Besloten vennootschap met beperkte aansprakelijkheid* or a German *Gesellschaft mit beschränkter Haftung*? We could witness a revival of regulatory competition within the EU. However, even before that, Member States' interests in the Art. 50 section 2 TEU withdrawal negotiations, regarding the question of preserving or abolishing freedom of establishment between the UK and the EU, will be influenced by their individual prospects and ambitions in such regulatory competition. At this point, there is no telling, who will win the race nor whether it will lead to the top of legal reform or to the bottom of deregulation. Be this as it may, exciting days have found us – not only for game theorists.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2016: Abstracts

The latest issue of the "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

F. Eichel, **Private International Law Aspects of Arbitration Clauses in Favor of the Court of Arbitration for Sport**
The validity of arbitration clauses in favor of the Court of Arbitration for Sport (CAS) has been called into question by German courts in the long running proceedings of Claudia Pechstein against the International Skating Union. The courts held that the arbitration clause in the athletes' admission form was void. They referred to provisions in German Civil Law (s. 138 German Civil Code – BGB; s. 19 Act against Restraints of Competition – GWB) which are recognized as being internationally applicable so that the German courts could apply them even though the validity of the arbitration clause was governed by Swiss law. The article reflects the Private International Law aspects of these arbitration clauses illustrating that both the relevant law of International Civil Procedure as well as the choice of law provisions primarily serve the interests of commercial arbitration and thereby reinforce the structural imbalance existing between the sports association and the athlete when signing such arbitration clauses. Against this background, the article argues that the special circumstances of sport arbitration would allow the application of the German law of standard terms (s. 307 BGB) although it is, in principle, not considered to form part of the general ordre public-reservation in Private International Law.

Th. Pfeiffer, **Ruhestandsmigration und EU-Erbrechtsverordnung**
From a German perspective, the most significant change that was brought about by the EU Succession Regulation is the transition from referring to the deceased's nationality as the general connecting factor to the deceased's habitual residence. This transition reflects an analysis of interests which is primarily based on cases

of migrant professionals or workers and their families. However, there is also a large group of migrants already retired at the time of their migration (e.g. the large group of German pensioners on the Spanish island of Mallorca). Their situation is different from migrant workers insofar as their migration occurs at a moment when the most significant decisions in their lives have been made already; as a consequence, migration at that age, usually, does not include following generations. Moreover, it is not unlikely that, in many cases, migrating pensioners, when planning for their estates, will not consider the laws of their new habitual residence. Based on this analysis, this article asks how the EU Succession Regulation addresses these particularities of migrating pensioners. In particular, it is discussed under which circumstances the laws of their home state (based on their nationality) may remain applicable. In this context, the article considers: (1) provisions which do not refer to the moment of deceased's death but to an earlier event, (2) the need for an appropriate definition of habitual residence, (3) the escape clause in Art. 21 (2) of the Regulation, (4) a choice of law by the deceased and (5) waivers of succession. The article concludes that the Regulation is open for applying the laws of the deceased's nationality to a certain extent but that this law must not be applied automatically if the principle of referring to the deceased's habitual residence is taken seriously.

A. Brand, **Damages Claims and Torpedo Actions – The Principle of Priority of Art. 29 para 1 Brussels I-Regulation with a particular focus on Cartel Damages Claims.**

Forum shopping by way of „Torpedo actions" is an unwanted means of a tortfeasor to secure the jurisdiction of their home country rather than having to defend themselves before the courts at the seat of the injured plaintiff. This has gained particular relevance in proceedings concerning cartel-damages claims. The race hunt to the court could and should be avoided by strictly applying the principles of procedural efficiency and fair trial and the requirement of a justified interest for an action for (negative) declaration. As under domestic law, the principle of priority as laid down in art. 29 para. 1 of the Brussels I-Regulation cannot be applied to torpedo actions in case of tort.

W.-H. Roth, **Jurisdictional issues of competition damages claims**

In its CDC-judgment the Court of Justice for the first time had the chance to rule on several issues of jurisdiction concerning cartel-inflicted damages. Claimant was an undertaking specifically set up for the purpose of pursuing such damage

claims that had been transferred to her by potential cartel victims. The Court deals with jurisdiction over multiple defendants (Art. 6 No. 1 Regulation EC 44/2001), the scope of tort jurisdiction (Art. 5 No. 3), based on the place where the event giving rise to the damage occurred and on the place where the damage occurred, and with the interpretation of jurisdiction clauses (Art. 23) potentially covering cartel-inflicted damage claims. The results reached and the arguments advanced by the Court, taken all in all, deserve applause. Given that the judgment deals with a setting of a follow-on action (with a binding decision by the EU-Commission) it will have to be clarified whether the main results of the judgment can also be applied in stand-alone actions.

R. Hüßtege, **A tree must be bent while it is young**

The Federal Constitutional Court of Germany reprimands that the district court in an adoption procedure did not use all sources of knowledge in accordance to the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and to the European Judicial Network, in order to determine whether an effective Romanian adoption exists. Due to this omission fundamental rights of the complainant were injured in the adoption case concerning the recognition of the Romanian decision. This case shows that instruments, like the mentioned regulation and the European Judicial Network in commercial and civil matters are not well known to courts. There is an urgent need for training of judges.

C. F. Nordmeier, **Lis pendens under art. 16 Brussels IIa and Art. 32 Brussels Ia when proceedings are stayed**

The case at hand deals with the decisive moment for lis pendens according to art. 16 (1) (a) Brussels IIa (equivalent to art. 32 (1) (a) Brussels Ia) if proceedings are stayed before service in order to reach an amicable arrangement. The provision contains an own obligation of the applicant. Whether a delay of service restrains lis pendens depends on the breach of this obligation being imputable to the applicant. Intention or negligence should not serve as a basis to impute the breach. The present contribution analyses different types of delay and its imputability: stay of proceedings to reach an amicable arrangement, deficiencies of the documents submitted for service and mistakes of the court while effecting service. For the continuance of lis pendens the author argues that a stay or an interruption of proceedings does not abolish the effects of lis pendens.

B. Heiderhoff, **Perpetuatio fori in custody proceedings**

Even if parents, as in the case at hand, have joint parental responsibility with the exception of the right to determine the child's place of residence, the parent who has the sole right to determine the child's place of residence may lawfully move abroad with the child. The other parent has to accept the complications in exercising parental responsibility. If the child is relocating its habitual residence to a state that is not a member state of the EU, but a signatory state to the Hague 1996 Children's Convention, the Convention must be applied. This is clearly stated in Art. 61 Brussels II-Regulation. Unlike Art. 8 Brussels II-Regulation, the 1996 Children's Convention does not follow the principle of perpetuatio fori. In order to prevent a parent from taking a child abroad during ongoing court proceedings, the courts should regularly consider an injunction by which the right to determine residence of the child is limited to Germany. This applies particularly when both parents have joint responsibility and merely the isolated right to determine the child's place of residence is assigned to one parent. If one parent has sole custody at the beginning of the procedure, the interests must be weighed differently. The right to move abroad with the child during the proceedings should, in general, only be excluded if there is a rather serious chance for the affected parent to lose sole custody.

U. P. Gruber, **How to modify decisions on maintenance obligations**

In scholarly writing, proceedings to modify decisions on maintenance obligations have only attracted limited attention. However, these proceedings raise very intricate und unsolved problems of characterization. The Bundesgerichtshof, in a new decision, has tackled some of the questions while leaving others unanswered. In the author's opinion, the modification of decisions on maintenance obligations is governed by the Hague Protocol of 23 November 2007. The convention's predecessor, the Hague Convention of 2 October 1973, also covered the modification of decisions, and it can be presumed that the Hague Protocol, as far as its scope is concerned, follows the Hague Convention. The procedural framework of the proceedings to modify decisions on maintenance obligations, however, is governed by the lex fori, i.e. the law of the state in which the proceedings to modify the decision are brought. The Hague Protocol of 23 November 2007 is part of EU law. Therefore, it seems likely that the ECJ will be requested to decide on the issue. Whether or not the ECJ will support the application of the Hague Protocol seems impossible to predict.

K. Siehr, **Execution of Foreign Order to Return an Abducted Child**

A child was abducted by his mother from Germany to Poland and after one year re-abducted by his father to Germany. Instead of asking German courts for a return order under the EU Regulation No. 2201/2003 on Matrimonial Matters and Matters of Parental Responsibility the father turned to Polish courts and asked for a return order. Such an order was turned down because the child, in the meantime, had been abducted by the father to Germany. The mother asked the Polish court for a return order and got it as an urgent order because of the habitual residence of the child in Poland. The mother asked German courts to recognize and enforce this Polish order to return the child to Poland. The Court of Appeals of Munich recognized and enforced the Polish return order. The Munich court did not recognize the return order neither under Art. 42 nor under Art. 28 et seq. Regulation 2201/2003 because relevant certificates were missing or some enforcement obstacles (hearing of the father in Poland) were given. The German court decided that the Polish return order should be recognized and enforced under the Hague Convention of 1996 on the Protection of Children without taking care of Art. 61 of the Regulation 2201/2003 which give precedence to the Regulation in this case. Jurisdiction of the Polish court is determined according to Art. 20 of the Regulation and Art. 11 of the Hague Convention of 1996 which granted only territorially limited jurisdiction to local courts in urgent matters. In this case, however, the child was not any more in Poland but in Germany. The German court is criticized because of not explaining properly the application of the Hague Convention of 1996 under Art. 61 of Regulation 2201/2003 and because of misinterpreting Art. 20 of the Regulation 2201/2203 and of Art. 11 Hague Convention by giving them universal jurisdiction.

D. Looschelders, **Problems of Characterization and Adaptation in German-Italian Successions**

German-Italian successions often raise difficult legal questions. In its decision, the Higher Regional Court of Duesseldorf firstly deals with the invalidity of joint wills under Italian law. The main part of the decision is concerned with problems of characterization and adaptation. In the present case, these problems arise due to the parallel applicability of Italian Succession Law and German Matrimonial Property Law. The author supports the decision in general. However, it is stated that the courts considerations with regard to the necessity of adaptation are not convincing in all respects. Finally, it is shown how the problems of the case were to be solved in accordance with the European Succession Regulation which was not yet applicable.

C. Mayer, **Ancillary matrimonial property regime and conflict of laws – characterization of claims arising from an undisclosed partnership between spouses.**

While it is generally agreed that the legal regime for undisclosed partnerships follows the law applicable to contractual obligations, there is debate as regards undisclosed partnerships between spouses. Due to their special connection with the matrimonial property regime, it is argued that compensation claims arising from undisclosed partnerships between spouses are to be characterized as matrimonial. Along with the prevailing opinion, the German Federal Court of Justice now correctly supports a characterization as contractual. Given, however, the close relation to the matrimonial property regime, the court proposes an accessory connection: the partnership agreement is closest connected to the law governing matrimonial property. Subject to criticism is, however, the far-reaching willingness of the court to find an implied choice of law by the spouses.

M. Stöber, **Discharge of Residual Debt and Insolvency Avoidance Actions in Cross-Border Insolvencies with Main and Secondary Proceedings**

15 years after the adoption of the European Regulation on Insolvency Proceedings in the year 2000, it is still difficult to answer the question which national insolvency law applies to cross-border insolvency proceedings within the European Union. The case that – in addition to main insolvency proceedings in one member state – secondary insolvency proceedings have been opened in another member state of the European Union is of particular complexity. In two recent judgments, the German Supreme Court has decided on the impact the opening of secondary proceedings in another state has on a discharge of residual debt (judgement of 18 September 2014) and on insolvency avoidance actions respectively (judgement of 20 November 2014) granted by the national law applicable to the main proceedings opened in the first state.

C. Kohler, **Claims for the payment of holiday allowances by a public fund for paid leave for workers: "civil and commercial" or "administrative" matters?**

By its ruling in BGE 141 III 28 the Swiss Federal Court refused to enforce in Switzerland an Austrian judgment according to which a Swiss company had to make payments to the Austrian fund for paid leave for workers in the construction industry that were due for workers posted to Austria by the defendant company. According to the Federal Court, the judgment is outside the scope of the Lugano-

Convention as it has not been given in a “civil and commercial matter” as required by art. 1 thereof. The ways and means by which the Austrian fund claimed the payments constituted the exercise of public powers and differed from the legal relationship between the parties to an employment contract. The author submits that the judgment of the Federal Court is not in line with the ECJ’s case-law on art. 1 of the Brussels instruments. In order to assess whether a case is a “civil and commercial matter”, one has to look not at the modalities for the enforcement but at the origin of the right which forms the subject matter of the proceedings. In the instant case the right to paid leave stems from the employment contract and is of a private law character. As the Federal Court sees no legal basis for the enforcement of the Austrian judgment outside the Lugano-Convention, its judgment leaves a gap in the judicial protection of posted workers’ rights as between Austria and Switzerland contrary to the objective of Directive 96/71 which applies according to the bilateral agreements between Switzerland and the EU.

Francisco Javier Zamora Cabot on the US Supreme Court case of Obb Personenverkehr AG v. Sachs

Francisco Javier Zamora Cabot has placed the following paper on SSRN:

Access of Victims to Justice and Foreign Conducts: The U.S.S.C. Gives Another Turning of the Screw in the Obb Personenverkeher V. Sachs Case, on Sovereign Immunity

The text is in Spanish, but the English abstract reads:

This Note addresses an outline and a critical approach of the Decision of the Supreme Court of the United States of America in Sachs case. After an introduction bringing to the fore in tune with the rulings made by the High Court in its recent and well-known jurisprudence, outstanding among which are Kiobel

and Daimler, we present the precedents of the case and the main arguments put forward by the reporting Justice Roberts. Such arguments are debated afterwards in a long and detailed way, following overall assessments on the Decision. With respect to our conclusive comments we refer to the possibility of introducing into both the US jurisdictional system and sovereign immunity the foundations of the methodological approaches of the US modern doctrine as far as the choice of the applicable law is concerned, advocating for a greater awareness on the part of the Supreme Court with regard to the critical problem of access to justice.

Brussels IIbis recast

The European Commission today published the Proposal for the Brussels IIbis Recast and issued a press release.

There are no changes to jurisdiction in divorce matters, but quite a few significant ones on parental responsibility.

The Proposed Regulation clearly seeks to **enhance children's rights**, referring explicitly to the EU's Charter of Fundamental Rights and to the UN Convention on the Rights of the Child (see recitals 13 and 23). It also introduces a separate provision on the obligation for courts to give children the opportunity to be heard (Art. 20).

Furthermore the Proposal aims to **improve the efficacy of return proceedings** after international parental child abduction. It requires Member States to concentrate the local jurisdiction for these procedures on a limited number of courts (Art. 22) and to limit the number of appeals to one (Art. 25(4)). It clarifies that the six-weeks time frame applies to each instance (Art. 23(1)). Courts will also have to examine the possibility of mediation and agreed solutions without losing time (Art. 23(2)).

As expected, the Commission seeks to **abolish exequatur proceedings** for all parental responsibility cases (Art. 30). The proposal contains a mechanism to request the refusal of recognition or enforcement (Arts. 40-42). This is similar to

the route eventually taken in Brussels Ibis (Regulation 1215/2012).

There are many other proposed changes, on issues such as provisional measures, cooperation, the resourcing of Central Authorities, the placement of children in another Member State and a better coordination with the 1996 Hague Child Protection Convention, but I will leave the reader to discover them.

On Mutual Trust and the Brexit (Seminar)

A new session within the series *Seminario Julio D. González Campos*, organized by the Department of Private International Law of the Universidad Autónoma de Madrid, will be held on July 8th, 2016, starting at 10:30 pm. The speaker will be Dr. Matthias Weller, Professor of Civil Law, Civil Procedural Law and Private International Law at the EBS Universität für Wirtschaft und Recht; he will address the topic "Mutual Trust: Still Corner Stone for Judicial Cooperation in Civil Matters after the Brexit?"

Venue: Seminar room V (4th Floor), Faculty of Law.

For further information please contact mariajesus.elvira@uam.es.

Just in Time: A New Volume on the Consequences of Brexit

Following the United Kingdom's popular vote to exit the European Union, a very timely book on the various legal, political and economic impacts of Brexit has just

been released: “Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU” (Kluwer Law International 2016), edited by Professor *Patrick Birkinshaw* (Institute of European Public Law, University of Hull) and Professor *Andrea Biondi* (King’s College London), covers practical topics such as the options available to the UK, the effects of Brexit on the constitutional level, the existing and potential role of jurisprudence, post-Brexit residence and labour rights as well as financial and economic governance.

The table of contents reads as follows:

CHAPTER 9 Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?
Maria Kendrick.

CHAPTER 10 Criminal Law
John R. Spencer.

CHAPTER 11 From EU Citizens to Third-Country Nationals: The Legacy of Polydor
Marja-Liisa Öberg.

CHAPTER 12 Britain Alone! The Implications and Consequences of United Kingdom Exit from the European Union: Social Policies
Aileen McColgan.

CHAPTER 13 The Death of Social Europe
Keith D. Ewing.

CHAPTER 14 The United Kingdom without the Charter of Fundamental Rights of the European Union: Putting Down the Dog That Did Not Bark?
Kieron Beal QC.

CHAPTER 15 State Aid Control, Government Spending and the Virtue of Loyalty
Andrea Biondi.

CHAPTER 16 Differentiated Integration and the Single Supervisory Mechanism: Which Way Forward for the European Banking Authority?
Pierre Schammo.

For further information, please see the publisher's website.

Brexit – Immediate Consequences

on the London Judicial Market

Prof. Burkhard Hess and Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg

One of the major misunderstandings of the Brexit is that it won't influence London's importance as a major place of dispute resolution in Europe. Up until now, the adverse consequences of leaving the European Judicial Area have been insufficiently discussed. A first seminar organized by the British Institute for International and Comparative Law and the Max Planck Institute Luxembourg for Procedural Law in May illustrated that the adverse legal consequences will start immediately, even within the transitional period of two years foreseen by Article 50 of the EU Treaty. We would like to briefly summarize the main findings of this seminar which can also be found (as a video) at the websites of the MPI Luxembourg and of BIICL.

Regarding private international and procedural law, all EU instruments on common rules for jurisdiction, parallel proceedings and cross-border enforcement will cease to exist after the transitional period, not only in areas such as insolvency and family matters, but also in the core areas of civil and commercial matters. Judgments given by English courts will no longer profit from the free movement of judgments. Their recognition and enforcement will depend on (outdated) bilateral agreements which were concluded between the 1930 and 1960s. As there are only six bilateral agreements, the autonomous, piecemeal provisions of EU Member States' regimes regarding the recognition of the judgments of third States will apply. Of course, there might be negotiations on a specific regime between the Union and the United Kingdom, but the EU Commission might be well advised to tackle the more pressing problems of the Union (i.e. the refugee crisis where no solidarity is to be expected from the UK) instead of losing time and strength in bilateral negotiations.

From the European perspective, there is now a need to carefully evaluate the benefits of a bilateral agreement with the United Kingdom on issues of private international law. The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation &

arbitration. Examples in this respect are The Netherlands and Sweden. In addition, there is a genuine interest of the Union to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework. A perfect example in this respect, as pointed out by Dr. Matteo Gargantini, – former senior research fellow at the MPI Luxembourg – is provided by the EU legal text concerning the financial markets. Here, the so-called MiFIR provides for a dense regulatory framework where a clear distinction is made between EU Member States and third States. In the future, the United Kingdom will qualify a third State in this respect. This entails that jurisdiction and arbitration clauses providing for the jurisdiction of English courts and/or for London as a seat of arbitration cannot be agreed. The pertinent provision (Article 46 § 6) of the MiFIR reads as follows:

> "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State."

This provision only applies to professional investors. For retail investors, Member States can even mandate that the investment firm establishes a branch in their territory, which of course would impact jurisdiction (also in the light of limitations to jurisdiction agreement vis-à-vis consumers). Here, the relevant provision is Art. 39 MiFID II, which says:

> "A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State."

These provisions entail direct and immediate consequences. Jurisdiction and arbitration clauses in contracts will apply to future controversies, and as such, their validity will be scrutinized at the moment when a dispute arises. An agreement made today to establish London as the place of dispute resolution will no longer guarantee the validity of that respective clause in two years' time. In other words, law firms would be well advised to no longer agree to these clauses as their validity will be challenged in every civil court within the European Union.

Sending anti-suit injunctions abroad won't help either: firstly, their recognition by the courts of EU Member States is not guaranteed (and will depend on the fragmented autonomous laws of EU Member States). Secondly, mandatory EU law (the pertinent articles of MiFID II, for example) will certainly forbid any recognition within the Union. As a result, parties will lose additional money for unnecessary satellite litigation. Finally, the ratification of the Hague Choice of Court Convention or the Lugano Convention will not provide a means to overcome the problem as the MiFIR/MiFID will apply independently from any international framework. This example demonstrates that there might be much more interest on the English side in negotiating with the Union than the other way around. It also shows that there is a need to consider most carefully the immediate consequences of the Brexit.

European Parliament approves enhanced Cooperation in the Area of Property Regimes of International Couples and registered partnerships

In a plenary vote, the European Parliament has formally approved the two proposals on property regimes for international married couples or registered partnerships (see our earlier post) on 23 June 2016 (click here for the press release). The proposals will now need to be formally adopted by the 18 participating member states and will then be published in the Official Journal of the EU. They will apply in full 30 months and 20 days after publication.

UK court on Tort litigation Against Transnational Corporations

Ekaterina Aristova, PhD in Law Candidate, University of Cambridge authored this post on 'Tort litigation Against Transnational Corporations: UK court will hear a case for overseas human rights abuses'. She welcomes comments.

On 27 May 2016, Mr Justice Coulson, sitting as a judge in the Technology and Construction Court, allowed a legal claim against UK-based mining corporation Vedanta Resources Plc ("**Vedanta**") and its Zambian subsidiary Konkola Copper Mines ("**KCP**") to be tried in the UK courts. These proceedings, brought by Zambian citizens alleging serious environmental pollution in their home country, is an example of the so-called "foreign direct liability" cases which have emerged in several jurisdictions in the last twenty years. Other cases currently pending in the UK courts include a claim by a Colombian farmer alleging environmental pollution caused by Equion Energia Ltd (formerly BP Exploration), two environmental claims arising from oil spillages against Shell, litigation against iron ore producer Tonkolili Iron Ore Ltd for alleged human rights violations in Sierra Leone and a dispute between Peruvian citizens and Xtrata Ltd involving grave human rights abuses of persons involved in environmental protest against the mining operations.

Transnational corporations ("**TNCs**") have frequently been involved in various forms of corporate wrongdoing in many parts of the world. Severe abuses, reported by non-governmental organisations, range from murder to the violation of socio-economic rights. To date there has been only modest success in developing theoretical and practical solutions for legal enforcement of international corporate accountability. In the absence of an international legally binding instrument addressing human rights obligations of private corporations and the various regulatory problems in host states, a few jurisdictions have evidenced a growing trend of civil liability cases against TNCs. These cases are examples of private claims brought by the victims of overseas corporate abuse against parent companies in the courts of the home states. While US courts continue to debate issues of jurisdiction over extraterritorial human rights corporate abuses, the UK courts have recently being consistent in allowing claims

against local parent companies of TNCs. The case against Vedanta is the most recent example of this trend.

A. Facts of the case

On 31 July 2015, 1,826 Zambian citizens, residents of four communities in the Chingola region, commenced proceedings against Vedanta and KCM in the Technology and Construction Court of the High Court of England, alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land. The majority of the claimants are farmers who rely on the land and local rivers as their primary source of livehood. They also rely on the local waterways as the main source of clean water for drinking, washing, bathing and irrigating farms. The claimants' communities are located close to the Nchanga Copper Mine that is operated by KCM, an indirect subsidiary of Vedanta. The mine commenced operations in 1937, but Vedanta acquired a controlling share in KCM in 2004. KCM operates a mine as a holder of a mining licence in accordance with the local legislative requirements that operations be run through a locally domiciled subsidiary. The claimants allege that from 2005 they have been suffering from pollution and environmental damage caused by the mine's operations. They allege that the discharge of harmful effluent in the waterways has endangered their livelihoods and physical, economic and social wellbeing.

In September and October 2015, both defendants applied for a declaration that the English court does not have jurisdiction to hear the claims. The defendants argued that Zambia was an appropriate forum to try the claims since it is the place where the claimants reside and where the damage is said to have occurred. In the course of a three-day hearing in April 2016 both parties presented their arguments. The judgement allowing a legal claim against both defendants to be tried in England was delivered on 27 May 2016.

B. Jurisdiction over the Parent Company (Vedanta)

The claimants argued that Vedanta breached the duty of care it owed to them of ensuring that KCM's mining operations did not cause harm to the environment or local communities. The allegations are based on evidence that the parent

company exercised a high level of control and direction over the mining operations of its subsidiary and over the subsidiary's compliance with health, safety and environmental standards (para 31). In their argument, the claimants relied on the Court of Appeal's decision in *Chandler v Cape*, which recognised the possibility of parent company responsibility for injuries of its subsidiary's employee and set a test for the establishment of the parent company's duty of care. Based on their submission on the breach of the duty of care by Vedanta, the claimants argued that the English court has jurisdiction over the parent company "as of right" by virtue of Article 4 of the Brussels I Regulation recast ("**Brussels I**"). Vedanta claimed that the court should apply the *forum non conveniens* argument and stay proceedings in favour of Zambia. Furthermore, the parent company claimed that a case against Vedanta is "a device in order to ensure that the real claim, against, KCM, is litigated in the United Kingdom rather than in Zambia" (para 51). Finally, the parent company sought to establish that there is either no real issue between Vedanta and claimants or, alternatively, the claim is weak and it should impact court's decision on the jurisdiction over the case (para 52).

The judicial response to the arguments of the parties was straightforward and explicit. It was held that Article 4 provided clear grounds to sue Vedanta as a UK-domiciled company in the UK (para 53). Mr Justice Coulson placed considerable weight on the decision of the Court of Justice of European Union ("**CJEU**") in *Owusu v Jackson* preventing UK courts from declining jurisdiction on the basis of the *forum non conveniens,* when the defendant is domiciled in the UK. In the view of the judge the different facts of the present case and any criticism of CJEU's reasoning did not make *Owusu* judgement less binding (para 71). Finally, the judge considered the claimants' arguments on the overall control exercised by Vedanta over Zambian mining operations and ruled that there is a real issue to be tried between the claimants and Vedanta (para 77). It was recognised that, although the claimants' argument against Vedanta was a challenging one, the pleadings set out a careful and detailed case on the breach of duty of care which was already supported by some evidence (para 128).

C. Jurisdiction over the foreign

subsidiary (KCM)

KCM also challenged jurisdiction of the UK court by applying for an order setting aside service of the claim form on it out of the jurisdiction. The defendant company claimed that the entire focus of the litigation was in Zambia, and the claim against Vedanta was "an illegitimate hook being used to permit claims to be brought [in the UK] which would otherwise not be heard in the UK" (para 93). In response, the claimants argued that it was reasonable to try claims against both companies in the UK and, alternatively, the claimants would not have access to justice in Zambia (para 94).

Once again the decision of the court did not leave any ambiguity about the jurisdiction of an English court to hear the case about Zambian operations. It was first held that the claim against KCM undoubtedly had a real prospect of success (para 99). It was then established that the claim against Vedanta was arguable under both English and Zambian law (para 124). Furthermore, the judge ruled that it was reasonable for the court to try the claim against Vedanta, who, as a holding company of the group, had "the necessary financial standing to pay out any damages that are recovered" (para 146). Therefore, it was concluded that KCM was a necessary and proper party to the claim against Vedanta (para 147).

Finally, the court unconditionally established that England is the proper forum in which to bring the claim against KCM in accordance with the tests established by *The Spiliada* decision and *Connelly v RTZ* case. The judge decided that the assessment of England as the appropriate forum should be considered in light of the claims against Vedanta (para 160). Following this conclusion, and the earlier finding of the real issue to be tried between the claimants and Vedanta, it was held that England is an appropriate place to hear the claims against two legal entities of the major international company (para 163). Moreover, it was established that the claimants would not obtain access to justice in Zambia should the trial take place there (para 184). In particular, the judge took into account evidence that the Zambian legal system is not well developed (para 176); that the vast majority of the claimants would be unable to afford legal representation (para 178); that there was an insufficient number of local lawyers able to proceed with a mass tort action of such scale (para 186); and that KCM will be likely to prolong the case (para 195).

D. Significance of the decision

The *Vedanta* decision represents another significant achievement for foreign victims and their lawyers struggling with the jurisdictional hurdles of foreign direct liability cases in the courts of the home states. Following decisions in such cases as *Connelly v RTZ, Lubbe v Cape* and *Ngcobo v Thor Chemicals,* the present case contributes to the development of the law relating to the jurisdiction of English courts over foreign violations of human rights by UK-based TNCs. First, the decision clearly confirmed the mandatory application of Article 4 in tort litigation concerning extraterritorial abuses of TNCs. The first tort liability claims in England were intensely litigated for several years on the *forum non conveniens* issue. However, the trial judge's insistence that *Owusu* decision constitutes a binding authority for all cases involving defendants domiciled in UK, now makes it more difficult for defendant corporations to mount arguments over inadmissibility of the extraterritorial adjudicatory jurisdiction over corporate overseas activities.

Secondly, although at this stage of the proceedings the judge did not consider the case on the merits, there is nonetheless acceptance that the parent company may be held responsible for the human rights abuses committed to the members of the community at the place where the subsidiary runs its operations. The judge considered the claimants' "single enterprise" submission about Vedanta being "the real architects of the environmental pollution" (para 78). Moreover, it was recognised that the argument that "Vedanta who are making millions of pounds out of the mine, […] should be called to account […] has some force" (para 78). The acknowledgement of the economic reality of the TNCs and the decisive role of the parent corporation in the overseas operations of the subsidiary speaks in favour of the increasing awareness about the legal gaps in the international corporate accountability. However, a final determination of the liability of TNCs awaits in future decisions.

Another set of issues is raised by the court's reliance on the decision in *Chandler v Cape*. Despite the fact that the case did not have any foreign element, some commentators have already concluded that the ruling may have an influence in the context of TNCs. The reasoning of Mr Justice Coulson has left no doubts that *Chandler* should be considered as an authority for the resolution of the tort liability cases involving foreign operations of UK-based parent companies. Moreover, it was once again confirmed that invoking duty of care is strategically

beneficial for the claimants since: (1) the claim against the parent company provides the required connecting factor of the claim with the UK; and (2) framing the case through the duty of care doctrine provides a means by which the extraterritoriality concerns may be addressed. These arguments are consistent with the judge's finding that arguing breach of the duty of care by the parent company "could have a direct impact on jurisdiction grounds" (para 44). This approach and claimants' success may result in an increase in foreign direct liability cases in the UK courts.

The judgement also provides interesting material for the analysis with respect to the evaluation of the patterns of corporate behaviour in the host states and weak remedies available for the victims of abuses in their states of residence. The judge put considerable weight on the findings about KCM's financial position. Evidence submitted by the claimants provided that there was a real risk that KCM on its own would be unable to meet the claims (para 24). Indeed, undercapitalisation of the subsidiary remains a significant risk for claimants in the tort litigation against TNCs. The limited liability principle in corporate law creates an incentive for shareholders to engage in high risk projects, which plausibly have the possibility to result in moral hazard. Specifically for mass tort actions involving TNCs, the obtainment of final judgment against a subsidiary with no real assets will effectively mean losing the case. By establishing the case against the parent company, the claimants automatically target a pool of assets that would not otherwise be available were litigation to be commenced against the subsidiary in the host state. The compensational nature of the foreign direct liability claims is what makes them most valuable for the claimants

To date English courts have been consistent in treating the parent company and the subsidiaries as distinct legal entities in the context of allocating responsibility within the corporate groups. Similarly, the case law did not derogate from the conventional concept of corporate legal form. However, the fact that Mr Justice Coulson considered the financial position of the subsidiary as raising "legitimate concerns" (para 82) while deciding on the jurisdiction over the parent company, coupled with the increasing number of cases against parent companies allowed in the courts of their home states, suggests that there may be a shift from the traditional approach to the nature of the corporate groups to the more realistic reflection of the economic reality of these complex structures.

Finally, the decision in *Vedanta* case to restrain from the policy judgement on the

assessment of the Zambian legal system (para 198) is in line with the previous practice of the UK courts. First, in *Connelly v RTZ*, the House of Lords avoided making any assessment on the ability of the South African justice system to guarantee the claimants access to justice. Instead, its judgment focused on the personal ability of the claimant to obtain financial assistance of pursuing complex and expensive litigation. Later, in the *Lubbe v Cape* the House of Lords again decided to refrain from considering the influence of such public interest factors in the private interests of the parties and the ends of justice. Similarly, Mr Justice Coulson held that "criticism of the Zambian legal system" was not "the intention or purpose" of the judgement and, therefore, could not be regarded as "colonial condescension". Nevertheless, findings on the court about weak remedies available for the claimants in Zambia have been already questioned by Zambian President Edgar Lungu, which again raises the issue of judicial imperialism of the developed states through exercise of the extraterritorial jurisdiction over overseas operations of local TNCs.

Whether the English courts will take the ground breaking decision to rule that the parent company should be held liable for the overseas operations of its subsidiary is open to debate. It may not even be answered in this case, with settlement remaining a real possibility. Martin Day, a partner at the firm representing the Zambian farmers, has already called for the defendants to "engage in meaningful discussions and try to resolve these claims". An out-of-court settlement will again leave legal practitioners, academics and human rights activists without a single UK precedent on parent company liability in tort litigation against TNCs.

Does the occurrence of purely

financial damage in a Member State justify in itself the jurisdiction of the courts of that State pursuant to Article 5 (3) of Regulation No 44/2001?

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

Universal Music, a record company established in the Netherlands, acquired the Czech company B&M in the course of 1998. The contracts providing for the sale and delivery of B&M's shares were drawn up by a Czech law firm. Because of negligence by an associate of the Czech law firm the contracts provided a much higher sale price for B&M shares than intended by Universal Music. This led to a dispute between Universal Music and B&M's shareholders which was brought before an arbitration board in the Czech Republic, following a settlement between the parties in 2005. Because of this settlement Universal Music allegedly suffered financial damage of some 2.5 million EUR. Subsequently Universal Music has brought proceedings against the Czech lawyers before the Dutch courts. The Dutch courts have requested the CJEU to answer the question, whether Article 5 (3) of Regulation No 44/2001 must be interpreted as meaning that the *place where the harmful event occurred* can be construed as being the place, in a Member State, where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of an unlawful act committed in another Member State. However the only connecting factor to the Netherlands, besides Universal Music being established in that state, was that the bank account from which Universal Music paid the settlement amount was situated in *Baarn* (The Netherlands). Thus the CJEU now finds that such "purely financial damage which occurs directly in the applicant's bank account can not, in itself, be qualified as a 'relevant connecting factor', pursuant to Article 5(3) of Regulation No 44/2001". Obviously in order not to contradict its ruling in *„Kolassa"* (C-375/13) the CJEU clarifies that only where "other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a

purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place". Referring to *„Kronhofer*" the CJEU further states that the *place where the harmful event occurred* "does not refer to the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State". As a consequence the place where the loss of the claimant´s assets occurs and the place where his assets are concentrated only can be qualified as the *place where the harmful event occurred*, pursuant to Article 5 (3), if other circumstances specific to the case also contribute to attributing jurisdiction to the courts for these places.

The full judgment is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=180329&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1