Factual Contracts in European Law? Critical Reflections on the Conclusions of AG Bobek of October 27, 2016 in Case C-551/15 Pula Parking ./. Tederahn

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From time to time, the Court of Justice of the EU deals with cases which – at first sight – do not involve much money, but will nevertheless bring about far-reaching consequences for European citizens and consumers. As I would like to demonstrate in this post, Case C-551/15, *Pula Parking*, might become a prominent example in this respect.

The case under consideration

The Conclusions of AG Bobek summarize the facts of the case as follows: Mr Tederahn, a German resident (and obviously a tourist visiting Croatia), parked his car in a public parking space in the town of Pula, Croatia, in September 2010. He did not pay for the parking. Five years later, the publicly-owned company Pula Parking, d.o.o., entrusted with the administration of the parking space in the city, requested a public notary in Croatia to issue a writ of enforcement against Mr. Tederahn. The sum claimed amounted to 100 HRK (around 13.15 EUR). The defendant challenged the writ. In line with standard national procedure, the case was then transferred to the local national court, the Op?inski sud u Puli-Pola (Pula Municipal Court, Croatia), which is the referring court in this case. The Croatian court asked two questions:

(1) Taking into account the legal nature of the relationship between the parties to the proceedings, is Regulation (EU) No 1215/2012 applicable in the present case?

(2) Does Regulation No 1215/2012 relate also to the jurisdiction of notaries in the Republic of Croatia?'

The line of arguments in the conclusions of AG Bobek

The Advocate General briefly addressed the temporal applicability of the Brussels I^{bis} Regulation. As Article 66 (1) refers to all proceedings initiated after January 15, 2015, there was no doubt that the Regulation applied to the present case. The real issue was, however, whether the claim was one of a public or a private nature. In this respect, the answer given by the AG was rather brief. The conclusions stress the autonomous interpretation of the concept of 'civil and commercial matters' under Article 1 (1) of the Brussels I^{bis} Regulation (para 41) and start by saying: "In the present case, the applicant rented a parking space to the defendant" (para 42). Starting from the assumption of the existence of a contract, the AG continues: "In principle, both tenancy agreements and contracts for services are capable of falling within the notion of 'civil and commercial matters', which should 'cover all the main civil and commercial matters apart from certain well-defined matters'. Exceptions should be interpreted strictly (para 44). Classified as a contractual dispute, the case was thus easily qualified as a civil matter in the sense of Article 1 (1) Brussels I^{bis} Regulation. Thereafter, the AG asked whether the fact that the applicant was a publicly-owned entity, having been granted its power by an act of the public authority, changed the nature of the legal relationship into an *acta jure imperii* which – of course – was not the case. Finally, AG Bobek stressed the fact that the sum that the applicant was seeking to recover from the defendant appeared to constitute consideration for the service provided by the former: "Nothing in the file suggests that it constitutes a penalty or sanction." (para 50). As a result, construed as a purely contractual matter, the case could move forward under the Brussels I^{bis} Regulation.

An old precedent – the Hamburger Rathausfall

This line of argument reminded me of an old judgment, given in 1956, of the German Federal Civil Court – the infamous "Hamburger Rathausfall" (BGHZ 23, 396). In this case, the city of Hamburg had converted the public market square in Hamburg into a parking square for which users had to pay a fee of 0,50 Deutschmark per hour. A lawyer who disagreed with this decision parked his car

in the parking area, protested loudly against the obligation to pay and left without doing so. When he was summoned before the civil court he declared that he had loudly protested against the fee and had not concluded any contract with the city of Hamburg. Finally, the German Supreme Civil Court held that there was a "factual contract": according to the court, in the context of modern mass society, contracts concerning the use of commodities and services (such as electricity, gas or parking spaces) can be concluded without or even against the will of the parties. The court expressly referred to the work of two law professors (Haupt and Larenz) who had developed this concept in the 1940s.

However, modern doctrine does not follow this line of argument which is not consistent with the foundational principle of private autonomy and which runs counter to the express will of the parties (which was not highly regarded in the 1940s). Today, the legal argument is as follows: If someone uses the services or goods of common interest without paying the price, he or she will face a claim of unjust enrichment (and additional criminal and administrative sanctions). There is no need to fabricate a contract where – obviously – no contract was concluded among the parties. In the meantime the German BGH has abandoned its former case law.

Civil parking in public streets – a critique of the AG's arguments

In respect of the claim against Mr. Tederahn, one should go a step further and ask generally whether in the EU Member States the parking of private cars amounts to a private activity. If one looks at the different regimes in the Member States (and here I have to admit that I have not made a comprehensive assessment but asked the collaborators and guests of the MPI about their respective jurisdictions), the idea that car drivers conclude private lease contracts is not the general approach taken. Usually, across Europe, parking in public streets is not considered to constitute the renting of a space from the city. Of course, the situation is different if someone enters a parking garage (or a gated parking area and pays a fee to the owner); in this context, a private lease contract is concluded, often via a machine run by the owner of the parking area.

One must admit that the facts in Pula Parking are not entirely clear: we do not know exactly whether Mr. Tederahn parked his car in a public street or in a (private) parking area but it seems to me that he parked it in a public street. In this context, the legal situation is different; usually, the local police or public

servants will sanction the non-payment of the fee by a fine which can amount to a considerable sum of money. Sometimes, private companies are entitled to run the service (obviously the situation in Pula), but their status is regulated by an administrative decision empowering them to implement the regulatory framework. They are acting as trustees of the public authority. Again, in this context, the framework is a public (administrative) law one which prescribes the behavior of the drivers, the fees and the sanctions imposed as well as the powers of the agents implementing the framework. From this perspective, the mere fact that the streets of the city and their use could also be governed via private regulation (servitudes) and lease contracts does not transform the legal relationship between the car drivers and the local cities arising from parking in public streets into a non-public law one. As a result, the Brussels I^{bis} Regulation does not apply to such a relationship.

And if the AG was right?

If one endorses the line of argument of AG Bobek and applies the Regulation Brussels I^{bis} to the present case, further practical consequences would ensue: firstly, the question would arise as to whether jurisdiction must be based on Article 24 (1) of the Regulation as the lease contract on the parking space relates to land. Obviously, the conclusions do not endorse this qualification, but refer to Article 7 (1) which applies to contracts for service. However, the ECJ has held that a lease contract is not a contract for services (Case C-533/07, *Falco*, Case C-469/12, *Krejci Lager*). From its wording, Article 24 (1) of the Brussels I^{bis} Regulation applies to the lease of a parking place. However, if one regards the second subparagraph one might easily realize that this head of jurisdiction does not apply to short-term contracts (in this situation, the lease of a parking space for a couple of minutes or hours). Providing for an exclusive head of jurisdiction does not make sense; indeed, it is telling that this constellation has not been addressed in the pertinent legal literature so far.

If one does not apply Article 24 (1), Article 16 (2) of the Regulation Brussels I^{bis} might preclude the Croatian courts from assuming jurisdiction. Following AG Bobek, the claim is based on a service contract between Pula Parking and Mr. Tederahn. One might wonder whether Mr. Tederahn was contracting as a consumer in the present case – the factual circumstances of his visit to Pula

indicate that he came as a tourist. Furthermore, in Case C-497/13, *Faber*, the ECJ has elaborated a presumption of a consumer dispute when an entrepreneur and a private person are in a contractual relationship. However, Article 17 (1) of the Regulation Brussels I^{bis} requires that the entrepreneur directs his commercial activities to the Member State of the consumer. Yet, much depends again on the (unknown) circumstances of the case under consideration. Nevertheless, if Pula Parking provides for information about parking in foreign languages or if the tourist office promotes tourism to Pula in foreign languages to the German market (i.e. via a website), one might consider this to be a commercial activity in the sense of Article 17 of the Brussels I^{bis} Regulation. So far, the ECJ has not addressed the specific context of marketing activities related to tourism under Article 17 of the Brussels I^{bis} Regulation. It would be interesting to see whether and how Article 17 would be applied to the present case.

Finally, if one does not follow the AG's conclusion that the contract had been concluded by simply parking a car, jurisdiction under Article 7 (2) of the Brussels I^{bis} Regulation cannot be established either: Pula Parking is not a claiming damages based on tort – because there is no damage on the side of Pula Parking. The underlying claim is based on unjust enrichment; however unjust enrichment does not open up the specific jurisdiction under Article 7 (2) of Brussels I^{bis}.

As a result it can be stated that the Brussels I^{bis} Regulation does not open up the jurisdiction of the Croatian judicial authorities unless Article 24 (1) is applied to the lease of parking places. However, it is telling that the notary simply issued the payment order without verifying whether Brussels I^{bis} conferred international jurisdiction to him. This is, indeed, a matter of concern. In this respect, the case under consideration corresponds to other cases of consumer protection where (mainly Hungarian and Spanish) notaries did not sufficiently address mandatory consumer protection law. In Case C-94/14, *Flight Refund*, the Court was confronted with a similar situation concerning Hungarian notaries who applied the European Payment Order Regulation in an extensive way against foreign airlines.

Further (adverse) consequences of the opinion

In answering the second question referred to the ECJ, AG Bobek also comes to the

conclusion that the payment order of the Croatian notary cannot be enforced under the Brussels I[bis] Regulation: according to the conclusions, the Hungarian notary does not meet the requirements of Article 2 lit a) of the Regulation because the notary cannot be regarded as a "court or tribunal of a Member State". This conclusion is certainly correct though I doubt whether the definition elaborated by the conclusions corresponds to the needs of the Brussels I[bis] Regulation.

However, it does not concern the main issue raised here: if the Regulation is declared applicable to the parking of cars in public streets, a new market of cross-border debt collection will be opened up. The European debt collection industry will take up and streamline these cases and will bring claims against the consumers and tourists under the different EU instruments (especially the European Payment Order Regulation) and collect parking fees. The next step might be an increase of the amount of the fees and fines by the local cities and boroughs in order to create substantial profits. Consumers and tourists will be confronted with a further area of debt collection which might be experienced as a kind of "Europe à l'envers": instead of profiting as tourists from the freedom of movement and services within the judicial area, local authorities will profit from the possibility to raise and collect fees cross-border from ordinary people living abroad. As a further result, fees to be paid to the debt collection industry might equally explode. Finally, the satisfaction of the population with the "efficiency" of the justice systems in Europe may decrease as they have to pay for it – in the proper sense off the term. In this respect, the better way to permit the cross-border collection of public debts would be the implementation of a specific instrument by legislation – not by the ECJ.

Therefore, it is to be hoped (and expected) that the Court of Justice will adopt and endorse a different approach to the case under consideration.