Tang on Consumer Collective Redress in European PIL

Zheng Sophia Tang (Leeds University) has posted Consumer Collective Redress in European Private International Law on SSRN.

> *Collective redress is a cost-sharing and procedure-consolidating mechanism. In the area of consumer litigation, it is introduced primarily to compensate the weakness of expensive and time-consuming court proceedings in small claims in order to increase consumers' access to justice. Consumer contractual claims are characterised as of small value, which largely discourages individual consumers from resorting to judicial action to protect their legal rights. Collective redress combines separate consumer claims against the same defendant based on the similar circumstances into one single action. It is helpful to resolve the litigation difficulty, to promote consumers' access to redress and to improve good commercial performance. A recent survey shows 76% of European consumers would be more willing to defend their rights in court if they could join other consumers. It is also believed that collective redress could offer businesses an opportunity to resolve an issue once rather than having repeated proceedings.*
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> *The concept of collective redress is not new. Some common law countries, such as US, Canada and Australia have already established mature and widely used 'class action' mechanism, which enables one or more individuals to bring an action on behalf of putative claimants against the same defendant. Each putative claimant is presumed to consent being presented in the action and being bound by the judicial decision, unless he actively gives notice to opt out. The US-style class action does not exist in Europe, though the revised versions with similar elements exist in the Netherland and Sweden. Currently, thirteen Member States have adopted collective redress mechanisms for consumer claims. Although practices in these countries vary largely, they could be generally categorised into three groups: (1) group action, where exactly defined claimants bring actions in one procedure to enforce their similar claims together. Each group litigant is a party in the litigation; (2) representative action, where an organisation, an authority or an individual brings actions on behalf of a group of individuals, who are not the real party of the litigation; (3)*

test case procedure, under which mass individual claims are filed, and a leading decision is given to one case, which decides the common factual and legal issues of similar legal actions, and serves as an example for other similar cases.

Collective redress in Europe is at an experimental stage and the existing collective redress mechanisms in most Member States are largely domestic tools, the effect of which is primarily limited to domestic claims. There is no common standard in the EU as to the functioning and regulation of collective actions. With the consumer-oriented culture, increasing consumers' access to justice has attracted much attention. In its Consumer Policy Strategy for 2007-2013, the European Commission announced that it would consider the feasibility of an EU initiative on collective action in protecting consumers' access to justice. In November 2008, the European Commission has published a Green Paper on Consumer Collective Redress, which provides four proposals for the possible development of consumer collective redress in Europe, two of which might be of particular interest to conflicts lawyers: (1) to require Member States having a collective redress mechanism to open up the mechanism to consumers from other Member States (option 2 of the Green Paper), and (2) to initiate a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States (option 4). The European Commission specifically points out that these two options with clear cross-border features could generate conflict of laws difficulties.

This research focuses on the jurisdiction problems in cross-border collective redress in Europe. The European jurisdiction rules have two characteristics: firstly, protective jurisdiction is available for consumer contractual claims. Section 4 of the Brussels I Regulation provides that if a contract falls within the protective scope, a consumer is always entitled to sue a business defendant in the consumer's domicile. This approach is incompatible with the nature of cross-border collective redress, where consumers may come from different Member States. Secondly, special jurisdiction rules are designed according to the 'classification' of the claim. There is no special jurisdiction rule designated for the 'collective redress' (Art 6 concerns multiple defendants instead of multiple claimants) and it is necessary to see whether any of the existing jurisdiction provisions can be properly applicable to a collective action.

These characteristics determine the difficulties to apply the Brussels rules in cross-border collective redress. In a representative action, the representative

individual(s) or association brings the lawsuit on behalf of all represented consumers, where the real litigating party is the representative instead of the represented consumers. If the protective jurisdiction does not apply, one needs to study whether the action is a matter relating to contract under Art 5(1). There is no doubt that each putative claimant that has been represented has a contractual claim, but should Article 5(1) require the existence of a contractual claim between the 'litigating parties?' Even if the group action is classified as a matter relating to contract, applying the jurisdiction rules of Article 5(1) can be difficult in a representative action where the goods are delivered to, or services are provided for, consumers domiciled in different Member States.

In group action or test case procedure, each consumer is the real litigant and could individually enforce the decision. Since the Brussels I Regulation does not provide specific jurisdiction rules for these mechanisms, it is necessary for a court to consider jurisdiction over the claim of each consumer in the collective action. A consumer in a contract that falls within the scope of protective jurisdiction is entitled to sue a business defendant either in the court of the defendant's domicile or in the court of the consumer's domicile. According to this rule, where the consumers are domiciled in more than on Member State, only the courts of the defendant's domicile could have jurisdiction. The courts of any one of the consumers' domicile can only hear the action brought by the claimant consumer who has his domicile within this country.

It is concluded that under the current Brussels I Regulation, cross-border consumer collective redress can only be brought in the court of a defendant's domicile, unless all the consumers are domiciled in one Member State. However, it does not mean that the current approach is definitely a barrier to cross-border collective redress. On one hand, it brings disadvantages to those consumers domiciled in a country where very few consumers have transactions with the business and it prevents collective action from being brought where a business's commercial activities are spreading over many Member States and the number of consumers in each State is not high. On the other hand, it brings certainty to business defendants, especially small and medium sized companies, and reduces litigation costs. The research will continue to analyse the socio-economic impact of the current jurisdiction rule, and to consider whether it is necessary to reform the Brussels I Regulation by introducing an innovative provision specifically for collective redress.

The paper was published in the *Journal of Private International Law* in 2011.

Actio Pauliana and More (in Spanish)

Dr. Laura Carballo-Piñeiro, from the University of Santiago de Compostela (Spain) has just published two new articles. The first one, entitled *Acción pauliana e integración europea: una propuesta de ley aplicable (Actio Pauliana* and European Integration: A Proposal Regarding Applicable Law), has appeared in the last number of the *Revista Española de Derecho Internacional;* the abstract reads as follows:

> "The *actio pauliana* is a *rara avis* within Private Law, the principle of which is to uphold sound private relationships. The principle, however, is called into question by acts of fraudulent transfer – the challenging of a valid and effective act in order to recover a creditor's losses involves two conflicting interests that makes identification of the law applicable to the *actio pauliana* a difficult question to remedy. This paper deals with this longstanding problem by examining new EU conflict of laws instruments, which provide the basis for determining the allocation of a debtor's insolvency among his creditors"

The second contribution, *Protección de inversores, acciones colectivas y Derecho internacional privado (Investor Protection, Collective Redress and Private International Law),* is to be found in the *Revista de Sociedades,* 2011 (July-December). Here is the abstract:

> The financial crisis has increased claims on grounds of false or mistaken information given to investors in order to capture capital. Many of them are brought before the United States' jurisdiction seeking for the advantages provided by the securities class actions, which allow to decide in an only proceeding claims involving multiple investors, including the ones resident in other countries. Economic procedural reasons are pushing other States, like Germany or the Netherlands, to introduce some kind of collective remedy as

well. This paper aims at presenting how these procedural mechanisms work as well as at addressing the situation of collective justice for investors in Spain, at the moment just restricted to the investor characterized as consumer. Besides, the already depicted internationalization of markets demands to tackle traditional issues of Private international law, i.e. the criteria on international jurisdiction to interpose a collective action in investment matters, the applicable law to such matters and recognition and enforcement of decisions, maybe the most pressing issue taking into account possible foreign claims against Spanish companies or in which Spanish investors are included. Eventually, this paper closes with the interest of evolving in Spain a collective action comprehending all kind of investors, an issue which could be finally decided by an European instrument, on which the European Commission is actively working.

Basedow on the Optional Instrument of European Contract Law

Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and International Private Law Hamburg, has posted "The Optional Instrument of European Contract Law: Opting-in through Standard Terms – A reply to Simon Whittaker" on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *In a paper recently published (The Optional Instrument of European Contract Law and Freedom of Contract, ERCL 7 (2011) 371 – 388 at p. 388), Simon Whittaker has criticized the "reduction of an individual consumer's protection" resulting from the adoption of an optional instrument on European contract law*

such as the one now contemplated by the European Commission (the "Optional Instrument"). The article contains a number of propositions which will not be tackled here. This comment is confined to consumer contracts and to a pertinent key assumption of Whittaker: that a standard term exercising the option in favour of the Optional Instrument would be subject to judicial review under Directive 93/13 on unfair contract terms in consumer contracts.

German Federal Labour Court Rules on Jurisdiction in Posted Workers Case

In a judgement of 15 February 2012, the German Federal Labour Court *(Bundesarbeitsgericht)* had to deal with the question of whether German courts have jurisdiction concerning contribution claims of a specialised social security fund against a company domiciled abroad. Referring to Articles 1 (1) Sentence 1, 76, 67 of the Brussels I-Regulation as well as Section 8 Sentence 2 of the Posted Workers Act (now: Section 15 of the Revised Posted Workers Act) the court answered the question in the affirmative.

The facts of the case were as follows: The defendant, a Lithuanian company had been responsible for the building of the Lithuanian pavilion at the EXPO 2000 in Hannover. To build the pavilion it had sent at least 42 Lithuanian workers to Germany in January and February 2000. Therefore, the German Holiday and Wage Adjustment Fund for the Building and Construction Industry (*Urlaubs- und Lohnausgleichskasse für die Bauwirtschaft),* a specialised social security fund responsible, among others, for securing workers' holiday benefits including workers' minimum holiday compensation, required the company to pay contributions. The Lithuanian company, however, refused. It argued that it had fulfilled all its obligations under Lithuanian law. The Holiday and Wage Adjustment Fund, therefore, filed a lawsuit for the outstanding contributions that

eventually ended up in the German Federal Labour Court

In answering the question whether German courts had jurisdiction the German Federal Labour Court first discussed whether the suit was within the scope of the Brussels I-Regulation. It held that the claim did not fall within the social security exception of Article 1 (2) lit. c) of the Brussels I-Regulation. The notion of social security had to be interpreted in accordance with Council Regulation(EC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (now: Article 3 (1) of Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system). Article (4) (1) of this Regulation defined social security matters as matters relating to sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. The notion of social security, therefore, did not cover holiday benefits as the ones in dispute in the case at hand.

The court then went on to discuss whether it had jurisdiction under the Brussels I-Regulation. It found that Article 2 (1) of the Brussels I-Regulation, requiring claimants to bring a lawsuit in the courts of the Member States of the defendant's domicile, did not apply because the defendant was not domiciled in Germany. It was not even domiciled in a Member State at the time because Lithuania joined the European Union as late as 2004. However, since Article 2 (1) was subject to the remaining provisions of the Brussels I-Regulation, including Article 67, which provides that the Brussels I-Regulation does not prejudice the application of provisions governing jurisdiction in specific matters, which are to be found in Community instruments or in national legislation implementing such instruments the court relied on Section 8 of the Posted Workers Act (now: Section 15 of the Revised Posted Workers Act) to find that German courts had jurisdiction: implementing Article 6 of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Section 8 of the Posted Workers Act allowed judicial proceedings to be brought in the Member State in whose territory the worker is or was posted in order to enforce the right to the terms and conditions of employment guaranteed in Article 3 of the Directive. An employee who is or was posted in Germany could, therefore, file a suit in Germany to

enforce the minimum conditions of employment outlined in Article 3 of the Directive including holiday benefits. The court found that the same held true for a specialised social security fund such as the Holiday and Wage Adjustment Fund regarding claims against posting companies for outstanding contributions relating to holiday benefits. Furthermore, the court held that interpretation of Section 8 of the Posted Workers Act made clear that it did not matter whether the posting company was domiciled in a EU member state.

The full decision can be downloaded here (in German).

Many thanks to Thomas Pfeiffer for the tip-off.

JHA Council (7-8 June 2012): EU Regulation on Successions and Wills Adopted – General Approach on Brussels I Recast – CESL

The Justice and Home Affairs (JHA) Council of the EU, currently holding its meeting in Luxembourg (7-8 June), **adopted today the successions regulation** (Regulation on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession): see the Council's note and RAPID press release. The final text can be found in doc. no. PE-CONS 14/12.

Denmark, Ireland and the United Kingdom do not participate in the regulation, pursuant to the special position they hold in respect of the Area of Freedom, Security and Justice, **while Malta voted against the adoption**, expressing concerns on the uncertainty that the new rules will create in the legal

regime of international successions, vis-à-vis current Maltese law (see the Maltese statement in the Addendum to Council's doc. no. 10569/1/12).

As pointed out in a previous post, an agreement had been reached by the Council and the Parliament in order to adopt the new instrument at first reading: a history of the legislative procedure, along with the key documents, is available on the OEIL and Prelex websites. Once the regulation is published in the OJ, the whole set of Council's documents relating to the procedure, currently not available, will be disclosed. An interesting reading on the legislative history can also be found on the IPEX website, which gathers the opinions of national parliaments of the Member States on draft EU legislation.

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Two other PIL items are set on the agenda of the JHA meeting on Friday 8 June. **The Council is expected to approve a general approach on the Brussels I recast** (see the state of play in Council's doc. no 10609/12 and the draft text set out in doc. no 10609/12 ADD 1), **and to hold a debate on the orientation and the method** to handle the further negotiations on the proposal for regulation **on a Common European Sales Law** (CESL). As regards the latter, here's an excerpt from the background note of the meeting:

> *The first discussions on the [CESL] proposal have made it clear that this file entails divergences among member states. Several member states had therefore requested that a political debate at the level of the Council takes place before proceeding further with technical discussions.*
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> *To this end, the Presidency submits a discussion paper to the Council (10611/12) proposing that ministers address questions related to the legal basis and the need for the proposal, its scope (focus on sales contracts concluded on-line) and whether to start work on model contract terms and conditions.*

U.S. Symposium on Personal Jurisdiction

The *South Carolina Law Review* publishes a symposium issue on (U.S.) Personal Jurisdiction – The Implications of *McIntyre* and *Goodyear Dunlop Tires.*

Keynote Address

Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*

Articles

Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro

John Vail, *Six Questions in Light of* J. McIntyre Machinery, Ltd. v. Nicastro

Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop

Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*

Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*

Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro

Paul D. Carrington, *Business Interests and the Long Arm in 2011*

Rodger D. Citron, *The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in* J. McIntyre Machinery, Ltd. v. Nicastro*?*

Meir Feder, Goodyear, "Home," *and the Uncertain Future of Doing Business Jurisdiction*

Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction*

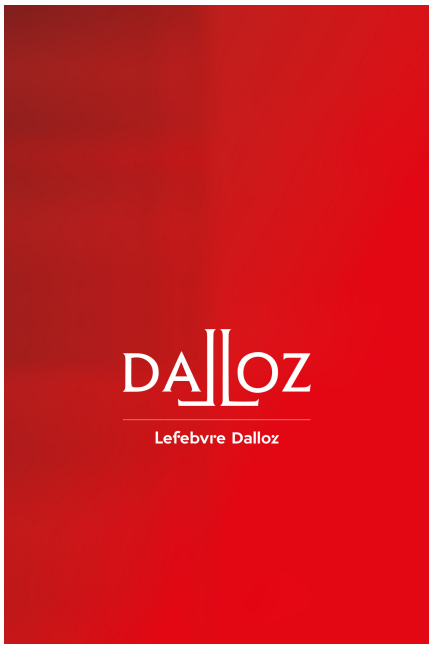
over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown

Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*

Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*

First Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains four articles and several casenotes.



The first article is a survey of the 2011 Polish law of private international law by the late Tomasz Pajor, who was a professor at Lodz University (*La nouvelle loi polonaise de droit international privé*).

The second article is authored by Isabelle Veillard and explores the scope of res judicata of arbitral awards (*Le domaine de l'autorité de la chose arbitrée*). It is this only one to include an English abstract:

Expanding from specific arguments to the cause of action itself, the requirement that the dispute be concentrated may, in the field of arbitral res judicata, be beneficial from the standpoint of procedural speed and fairplay, but it threatens the adversarial principle all the more so that there is a presumption in favour of renunciation of the right to appeal ; this is why the non-concentration of the legal grounds of action should not be sanctioned unless it is the fruit of gross negligence or abuse in the exercise of the right to bring suit. The distrust of French law towards res judicata could be mitigated in respect of arbitral awards given the contractual nature of arbitration, by the adoption as between the parties of a mechanism of collateral estoppel, along with safeguards designed to guarantee both efficiency and fairplay with the requirements of a fair trial ; the distinction between res judicata and third party effects suffices no doubt to protect the latter.

In the third article, Aline Tenenbaum, who lectures at Paris Est Creteil University, discusses the issue of the localization of financial loss for jurisdictional purposes in the light of the Madoff case (*Retombées de l'affaire Madoff sur la Convention de Lugano. La localisation du dommage financier*).

Finally, in the last article, Fabien Marchadier, who is a professor at Poitiers University, explores the consequences of the ECHR case *Genovese v. Malta* as far as awarding citizenship is concerned (*L'attribution de la nationalité à l'épreuve de la Covnentino européenne des droits de l'homme. Réflexion à partir de l'arrêt* Genovese c. Malte).

Advocate General opines on Article 15 (1) lit. c) Brussels I in Mühlleitner (C-190/11)

On 24 May 2012 Advocate General Villalón delivered his opinion in *Mühlleitner* (C-190/11) concerning the interpretation of Article 15 (1) lit. c) of the Brussels I-

Regulation. The Austrian Supreme Court had referred the following question to the European Court of Justice: “Does the application of Article 15 (1) (c) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters presuppose that the contract between the consumer and the undertaking has been concluded at a distance?” In his opinion Advocate General Villalón answers this question in the negative. Neither the history of the provision, nor its purpose nor the decision of the ECJ in *Pammer* and *Alpenhof* required that the contract be concluded at a distance.

The full opinion can be downloaded here, albeit not yet in English.

The Max Planck Institute Luxemburg for International, European and Regulatory Procedural Law

On June 1st, the Max Planck Society and the Government of the Grand Duchy of Luxemburg announced the foundation of a new Max Planck Institute for International, European and Regulatory Procedural Law (more information). Located at the Kirchberg Plateau, the Institute shall operate in three areas: the European law of civil procedure, international litigation and arbitration, financial markets and listed corporations. Professor Burkhard Hess (University of Heidelberg) and Professor Marco Ventoruzzo (University Bocconi Milano) accepted calls to the directorship of the Institute. They intend to start work in Luxemburg before the end of this year. A third Scientific Member of the Board of Directors will be appointed in coordination with the two Founding Directors. Slovenian legal expert Verica Trstenjak, who has been Advocate General at the European Court of Justice since 2006, is an External Scientific Member of the Institute.

The Luxembourg Institute shall comprehensively investigate modern civil procedural law, dispute resolution and different approaches to regulation. It focusses at European and international, at inter-disciplinary and comparative elements of dispute resolution and of regulation. Being the first Max Planck Institute on legal research located outside of Germany, it shall closely cooperate with the Faculty of Law, Economics and Finance of the Luxembourg University.

The Institute is seeking to hire senior and junior legal researchers either on a full time or temporary basis.

Several positions are available in the department for European and comparative procedural law. Interested candidates are kindly invited to send their applications to Professor Burkhard Hess. Please click here for further information.

Information regarding positions in the department of regulatory procedural law can be found here.

ATS and Extraterritoriality: A Point of View

Profs. Juan José Álvarez Rubio, Henry S. Dahl, José Luis Iriarte Ángel, Olga Martín-Ortega, Alberto Muñoz Fernández , Lorena Sales Pallarés, Nicolás Zambrana Tévar and Francisco Javier Zamora Cabot (Reporter), are members of the *Grupo de Estudio Sobre el Derecho internacional privado y los Derechos Humanos (**Group Of Study On Private International Law And Human Rights**)*. The Group has recently produced some notes on *Kiobel* and the issue of extraterritoriality in response to several *Amicus Curiae*, especially those of Germany, the Netherlands and the UK. Main premise of the paper is that discussion of the ATS should steer clear of the debate on extraterritoriality – id. est., be kept apart from what the group consider a sterile, artificial inclusion in the debate, and go on being applied extraterritorial, as it has occured for many

decades. Download here.