Issue 2017.3 of Dutch Journal on Private International Law (NIPR)

The third issue of 2017 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, contains contributions on the consequences of Brexit for the future of private international law in the UK and the EU27, the ex post evaluations of legislative actions in the European Union, the Recast of the Brussels IIa Regulation, and cross-border evidence preservation measures under Brussels I-bis.

Xandra Kramer, 'Editorial: NIPR: over Nederlands, Europees en wereldwijd IPR/NIPR: on Dutch, European, and global PIL', p. 407-410.

Jonathan Fitchen, 'The PIL consequences of Brexit', p. 411-432.

> *The UK's triggering of Article 50 TEU poses problems for the future of private international law in the UK and in the EU27. The UK's departure from the EU will end the mutual application of European private international law within the UK's legal systems and will affect the application of that EU law by the EU27 in matters concerning the UK as a new third State. After setting the problem in context, this article provides a political background to the events that led to the Brexit referendum of 2016 and to the UK's June 2017 general election; thereafter it illustrates certain problems posed by the threat of 'cliff-edges' arising as a consequence of a 'disorderly' UK exit from the European Union, finally it offers various possibilities concerning the future of private international law in the UK and in the EU. It is argued that if the beneficial aspects of the progress achieved for all European citizens by European private international law are to be salvaged from the Brexit process, both the UK and the EU must each consider most urgently the need for a realistic and undogmatic policy on the future of each other's private international law that reflects the political reality that, though the UK will soon be a third State relative to the EU27, many natural and legal persons will remain connected with the EU27 despite Brexit. It is argued that each side might usefully consider the unifying goals underlying private international law.*

Giesela Rühl, '(Ex post) Evaluation of legislative actions in the European Union: the example of private international law', p. 433-461.

Over the last decades systematic ex post evaluations of legislative actions have become an integral part of the European law making process. The present article analyses the European Commission's evaluation practice in the field of private international law and offers recommendations for its improvement.

Thalia Kruger, 'Brussels IIa Recast moving forward', p. 462-476.

The Brussels IIa Regulation (EC 2201/2003) is currently subject to revision. This is a long and cumbersome process. The European Commission published its report on the Regulation's operation in April 2014 and its Proposal for a Recast in June 2016. The European Parliament and the Council are currently discussing the proposed amendments. In order for the Recast to be enacted, unanimity in the Council is required. This article discusses some of the issues currently on the table. These include children's rights, matters of jurisdiction and parallel proceedings in parental responsibility disputes, international child abduction, the abolition of exequatur, the coordination with the 1996 Hague Child Protection Convention, mediation, and information on foreign law.

Tess Bens, 'Grensoverschrijdend bewijsbeslag', p. 477-494.

This article analyses whether the revised Brussels I Regulation ('Recast') allows the Dutch courts to order provisional measures intended to obtain or preserve evidence located in another Member State. Recital 25 of the Recast explicitly states that the notion of provisional measures includes these type of orders. The author discusses whether Dutch measures to preserve evidence qualify as provisional measures under the Recast. Possible substantive barriers to granting these measures, such as the Evidence Regulation and territorial limitations, are taken into account in making this assessment. The author further argues that there are – in principle – no obstacles for the Dutch courts to order provisional measures aimed at obtaining or preserving evidence located in another Member State. The problems seem to begin at the enforcement stage. To illustrate this point, the author discusses the possibility of coordinating the moment of serving the order and the moment of enforcing the measure in order to retain the element of surprise and the adaptation of the

measure for enforcement in France and Germany. As yet there is not a clear answer as to how the enforcement of these kind of measures in a different Member State will function in practice. Moreover, the problems described equally apply to the enforcement of other provisional measures under the Recast and can be expected to give rise to more questions in the future.

---

24 November: unalex-Conference at the University of Innsbruck

Readers of our blog will recall that Prof. Dr. Andreas Schwartze from the University of Innsbruck will host the final conference of the EU-project "unalex – multilingual information for the uniform interpretation of the instruments of judicial cooperation in civil matters" in Innsbruck on 24 November (see our earlier post).

The full and final programme (including information as regards registration and accommodation) is now available here, here, and here.

Cuadernos de Derecho Transnacional vol. 9 (2)

Cuadernos de Derecho Transnacional, vol. 9, nr. 2, has just been released. *Cuaderno*s is a bi-annual electronic law journal specialized in International Private Law, Uniform Law and Private Comparative Law, open to contributions in different languages. It is edited by the Private International Law Department of the University Carlos III, Madrid.

All contents can be freely downloaded. Here is the index of the section “Estudios”:

Miguel Gómez Jene, *El convenio arbitral: statu quo* (The arbitration agreement: statu quo)

Hilda Aguilar Grieder, *Problemas de Derecho Internacional Privado en la contratación de seguros: especial referencia a la reciente directiva (UE) 2016/97 sobre la distribución de seguros* (Private International Law problems of the international insurance contracts: the new directive (UE) 2016/1997 about distribution of insurance)

Isabel Antón Juárez, *La oposición del régimen económico matrimonial y la protección del tercero en Derecho Internacional Privado* (The opposition of the matrimonial property regime and the protection of the third party in Private International Law)

Ilaria Aquironi, *L’addebito della separazione nel diritto internazionale privato dell’Unione Europe*a (Judicial decisions as to the causes of separation under EU private international law)

Naiara Arriola Echaniz, *La Unión Europea y la Organización Mundial del Comercio: comenzando un diálogo proto- constitucional* (The European Union and the World Trade Organization: a budding proto-constitutional dialogue)

Irene Blázquez Rodríguez, *Libre circulación de personas y Derecho Internacional Privado: un análisis a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea* (Free movement of persons and International Private Law: an analysis in the light of the case law of the European Court of Justice)

María Asunción Cebrián Salvat, *La competencia judicial internacional residual en materia contractual en España* (The Spanish rules of residual jurisdiction in matters related to contract)

Silvia Pilar Badiola Coca, *Algunas consideraciones sobre el régimen de la responsabilidad civil del porteador en la legislación marítima de Emiratos Árabes Unidos* (Some considerations regarding the maritime carrier liability under the United Arab Emirates maritime law)

Clara Isabel Cordero Álvarez, *Incidencia de las normas imperativas en los*

contratos internacionales: especial referencia a las normas de terceros estados desde una aproximación europea (Overriding mandatory provisions in international contracts: a special reference to foreign overriding mandatory provisions from a European approach)

Eva de Götzen, *Recognition of same-sex marriages, overcoming gender barriers in Italy and the Italian law no. 76/2016 on civil unions. First remarks* (Riconoscimento dei matrimoni omosessuali, superamento delle barriere di genere in Italia e legge n. 76/2016 sulle unioni civili. Prime riflessioni)

Carlos Manuel Díez Soto, *Algunas cuestiones a propósito del derecho de participación del autor de una obra de arte original sobre el precio de reventa (droit de suite)* (Some questions concerning the artist's resale right (droit de suite)

Dorothy Estrada Tanck, *Protección de las personas migrantes indocumentadas en España con arreglo al Derecho Internacional y Europeo de los derechos humanos* (Protection of undocumented migrant persons in Spain under international and European human rights law)

Ádám Fuglinszky, *Hungarian law and practice of civil partnerships with special regard to same-sex couples* (Das Ungarische Recht und praxis von lebenspartnerschaften mit besonderer rücksicht auf gleichgeschlechtliche pare)

Natividad Goñi Urriza, *El sometimiento de las adquisiciones minoritarias que no otorgan el control a las normas sobre el control de las concentraciones* (The control under merger rules of acquisitions of non-controlling minority shareholdings)

Luis Ignacio Gordillo Pérez, *El TJUE y el Derecho Internacional: la defensa de su propia autonomía como principio constitucional básico* (The CJEU and International Law: the defence of its own autonomy as a basic constitutional principle)

Thais Guerrero Padrón, *Sobre los funcionarios de la Unión Europea y su régimen de seguridad social: los tributos como cotizaciones sociales a efectos del TJUE* (Issues about officials of the European Union and its social security regime: taxes as social contributions to the effects of the CJEU)

Carlos María López Espadafor, *Lagunas en el Derecho Tributario de la Unión Europea* (Gaps in the tax law of the European Union)

Isabel Lorente Martínez, *Brexit y cláusulas de sumisión en los contratos internacionales* (Brexit and prorrogation clauses in international contracts)

Diana Marín Consarnau, L*as uniones registradas en España como beneficiarias del derecho de la UE a propósito de la Directiva 2004/38/CE y del Reglamento (UE) 2016/1104* (Spanish "registered partnerships" as beneficiaries of EU law according to the Directive 2004/38 (EC) and the Regulation (EU) 2016/1104)

Fabrizio Marongiu Buonaiuti, *La disciplina della giurisdizione nel Regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"* (Jurisdiction under Regulation (EU) no. 2016/679 concerning the processing of personal data and its coordination with the "Brussels I-bis" regulation)

Alfonso Ortega Giménez, *El fenómeno de la inmigración y el problema de los denominados "matrimonios de conveniencia" en España* (The phenomenon of immigration and the problem of the denominated "convenience marriages" in Spain)

Marta Requejo Isidro, *La protección del menor no acompañado solicitante de asilo: entre Estado competente y Estado responsable* (The protection of unaccompanied minors asylum-seekers: between competent state and responsible state)

Mercedes Sánchez Ruiz, *La regulación europea actual sobre emplazamiento de producto y la propuesta de reforma de la directiva de servicios de comunicación audiovisual* (The current European rules governing product placement and the new legislative proposal amending the audiovisual media services directive)

Stella Solernou Sanz, *Los límites a la autonomía privada en el marco del contrato de transporte de mercancías por carretera* (Limits on private autonomy in the framework of the contract for carriage of goods by road)

Lenka Válková, *The interplay between jurisdictional rules established in the EU legal instruments in the field of family law: testing functionality through simultaneous application with domestic law* (L'interazione tra le regole di giurisdizione all'interno degli strumenti giuridici dell'UE nell'ambito del diritto di famiglia: la prova del funzionamento attraverso l'applicazione simultanea del diritto nazionale)

Out Now: The Nature and Enforcement of Choice of Court Agreements – A Comparative Study – By Mukarrum Ahmed

This intriguing book examines the fundamental juridical nature, classification and enforcement of choice of court agreements in international commercial litigation. It integrates the comparative and doctrinal analysis of choice of court agreements under the Brussels I Recast Regulation, the Hague Convention on Choice of Court Agreements ('Hague Convention') and the English common law jurisdictional regime into a theoretical framework. In this regard, the book analyses the impact of a multilateral and regulatory conception of private international law on the private law enforcement of choice of court agreements before the English courts – highly recommendable for all who are interested in choice of court agreements!

For more information see here.

Book: Marrella, "Manuale di diritto del commercio internazionale"

Prof. *Fabrizio Marrella*, Chair of International Law ("Cà Foscari" University of Venice & LUISS University of Rome) has recently published "Manuale di diritto del commercio internazionale" (CEDAM, 2017). A presentation has been kindly provided by the author (the complete TOC is available on the publisher's website):

> *Following the success of previous publication by the same Author, this book provides the first University textbook of International Business Law in Italian designed to introduce students and practitioners to this fundamental field of law. It classifies different sources of law affecting trasnational business operations according to their origin and legal system (National – i.e. Italian, European Union, Intergovernmental and non national – i.e. new lex mercatoria and the Unidroit Principles for international Commercial Contracts, as well as identifies the different actors in the field (companies, States, Intergovernmental Organizations, Non Governmental Organizations).*
>
> *In such a framework, rules of International Economic Law (from WTO to the new EU Customs Code, from economic treaties to embargos) provides the setting into which the core contract are operationals. Thus, the main perspective of the book is that of Private International Law by which different rules are applied according to their sphere of application. Among the topics discussed, there are the main transnational business contracts (i.e. sales, transport, payment methods, insurance, agency and distribution contracts, intellectual property, trade finance, bank guarantees, foreign direct investments) and the most prominent dispute resolution mechanisms such as Arbitration and ADRs.*
>
> *The book takes into proper account, inter alia, the Unidroit Principles for International Commercial Contracts 2016; EU Regulation n. 1215/2012 (Regulation Brussels Ia) and the new ICC Arbitration Rules 2017.*

Title: F. Marrella, "Manuale di diritto del commercio internazionale", Padua,

CEDAM, 2017.

ISBN: 978-88-13-36293-5. Price: EUR 55. Pages: XXXII-800. Available at CEDAM.

HCCH internship applications for the March-May 2018 period are now open

Internship applications at the Permanent Bureau of the Hague Conference on Private International Law (HCCH – Hague office) are now open for the March-May 2018 period and will close at midnight (Central European Time) on Friday 1st December 2017.

The duration of the internship will be two to three months. Applications must comply with the requirements set out in the following link: https://www.hcch.net/en/recruitment/internships.

Internships offered by the HCCH are not remunerated.

Conflict of Laws.net selected as one of the "Top 100 UK Law Blogs"

We are pleased to report that Conflict of Laws.net has recently been selected as one of the **Top 100 UK Law Blogs** on the web. As you can see here, we have been ranked 33th.

We thank all our editors and contributors for their commitment and, of course, our readers who have made this success possible.

Global Forum on Private International Law & 2017 Annual Meeting of China Society of Private International Law: Cooperation for Common Progress?Evolving Role of Private International Law" held in Wuhan, China

(This Report is provided by Guo Yujun, professor, Wuhan University Law School; Liang Wenwen, associate professor, Wuhan University Law School)

On 22 and 23 September 2017, the "Global Forum on Private International Law & 2017 Annual Meeting of China Society of Private International Law: Cooperation for Common Progress?Evolving Role of Private International Law" was held in Wuhan, China, under the auspices of the Ministry of Foreign Affairs and China Society of Private International Law. The event was held on the 30th anniversary of China's accession to the Hague Conference on Private International Law (HCCH) and the 30th anniversary of China Society of Private International Law. On the opening ceremony, Mr ZHANG Mingqi, Vice President of China Law Society; LIU Guixiang, Standing Member of the Adjudication Committee of the Supreme People's Court of the People's Republic of China; HAN Jin, President of University Council of Wuhan University; Christophe Bernasconi, Secretary-General of the HCCH; HUANG Jin, President of China Society of Private

International Law, Professor and President of China University of Political Science and Law, and XU Hong, Director-General, Department of Treaty and Law, Ministry of Foreign Affairs of the People's Republic of China, gave speeches. The event gathered over 400 officials and academics from 18 countries and regions.

Mr ZHANG Mingqi reviewed the work of China Society of Private International Law in facilitating the adoption of China's first private international law act and in international exchange, and calls for its further contribution to providing the legal safeguards for the Belt and Road Initiative. Mr Liu Guixiang considered the Belt and Road Initiative an opportunity for Chinese private international law and reviewed the work of the Supreme People's Court in providing the legal safeguards for the Belt and Road Initiative. Mr Han Jin welcomed the participants to Wuhan University, a leading institution in private international law. Mr Christophe Bernasconi recognized that the HCCH conventions can provide the legal safeguards for the Belt and Road Initiative, and China's contribution to the work of the HCCH. Mr Huang Jin reviewed the achievements of China Society of Private International Law in advising the legislature and the judiciary, and education, and called for building a community of private international law. Mr Xu Hong called for the common progress through private international law and legal safeguards of the Belt and Road Initiative.

On Title I: Common Progress through Private International Law over 30 Years, speakers and topics are as follows: GUO Xiaomei, Deputy Director-General, Department of Treaty and Law, Ministry of Foreign Affairs of the People's Republic of China, "Retrospect and Prospect on the 30th Anniversary of China's Membership of the Hague Conference on Private International Law"; Symeon C. Symeonides, Professor, Willamette University College of Law, "Private International Law Codifications: The Last 50 Years"; Hans Van Loon, Former Secretary-General of the HCCH, "Common Progress of Private International Law over the Past 30 Years – China, the Hague Conference, and the World"; LIU Renshan, Professor, Zhongnan University of Economics and Law, "The HCCH and China: the History, Practical Choice and the Future".

On Title II: The Belt and Road Initiative and International Legal Cooperation, speakers and topics are as follows: Christophe Bernasconi, Secretary-General of the HCCH, "The Belt & Road Initiative and the HCCH"; Mathijs H. ten Wolde, Professor, Department of Private International Law, University of Groningen, "Recognition and Enforcement of Chinese Money Judgments in the Netherland

and the EU"; Anselmo Reyes, Professor of Legal Practice at the University of Hong Kong, "Facilitating the Resolution of Cross-Border Commercial Disputes within the Belt and Road Initiative"; Tang Zheng Sophia , Professor, Newcastle University Law School, "The Belt and Road and Cross-Border Judicial Cooperation"; HUO Zhengxin, Professor of Law, Faculty of International Law of the China University of Political Science and Law, "Proof of Foreign Law against the Background of the Belt and Road Initiative".

On Title III: A Global Look at Recent Developments of Private International Law, speakers and topics are as follows: Michael Dennis, Attorney Adviser, Executive Director of the Department of State Advisory Committee on Private International Law, U.S. Department of State, "Improving Business Environment, Filling the Gaps, Missing Economic Legal Infrastructure in APEC Economies"; Kyung Han Sohn, Professor, Emeritus President, Korea Private International Law Association, Sungkyunkwan University School of Law, "Application of Lex Mercatoria in Asia: Focusing on Developments in Korea"; Tiong Min Yeo, Professor, School of Law Singapore Management University, "Party Autonomy in the Choice of Law for Torts in Asia" ; Yuko Nishitani, Professor, Kyoto University Graduate School of Law, "Enforcement of Choice of Court Agreements"; Elizabeth Aguiling-Pangalangan, Professor, College of Law, University of the Philippines, "The Hague Abduction Convention and Cross Border Family Relations"; CHEN Weizuo, Professor of Law, Tsinghua University School of Law, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law"; Mary Keyes, Professor, Griffith Law School, "Developing Australian Private International Law: the Hague Choice of Court Agreements Convention and the Hague Principles of Choice of Law for International Commercial Contracts" ; Choong Yeow-Choy, Professor, Faculty of Law University of Malaya, "Harmonization of Transnational Dispute Resolution Mechanisms and the Recognition and Enforcement of Decisions in the ASEAN Region"; José Antonio Moreno Rodríguez, Lawyer and Professor, "The Hague Principles and the New Paraguayan Law on International Contracts: Potential Influence on Legal Reform in the Americas and Abroad"; Frank Poon, Representative of the Asia Pacific Regional Office (HCCH), "Recent Development of Private International Law" ; GUO Yujun, Vice President and Secretary-General of China Society of Private International Law, Professor, Wuhan University, "Changing the Law on Recognition and Enforcement of Foreign Judgments in China".

On Title IV: The Hague Judgments Project, speakers and topics are as follows: Andreas Stein, Head of Unit, DG Justice and Consumers, European Commission, "The Hague Judgments Project: an EU Perspective"; Ronald A. Brand, Professor, Director, Center for International Legal Education, University of Pittsburgh School of Law, "Determining Qualification for the Global Circulation of a Judgment Under a Hague Judgments Convention"; Geert van Calster, Professor, University of Leuven, "The Hague Judgments Project: A powerful Potion or a Cauldron Full of Jurisdictional Spells?"; Richard Garnett, Professor, Law School of University of Melbourne, "The Hague Judgments Project and Increasing Interaction between Australia and China"; Alex Mills, Professor, UCL University Law School, "The Hague Judgments Project: Back to the Future"; Jan von Hein, Professor, Director, Director of the Institute for Comparative and Private International Law, University of Freiburg, "The Guarantee of a Fair Trial as an Obstacle to the Recognition and Enforcement of Judgments: Comparative Perspectives"; Maria Blanca Noodt Taquela, Professor, Universidad de Buenos Aires, "Relationship between the Hague Judgment Project and Other Instruments: The Argentina-China Treaty on Judicial Cooperation on Civil and Commercial Matters Adopted in 2001"; Knut Benjamin Pissler, M.A, Senior Research Fellow, Max Planck Institute for Comparative and International Private Law, "Recognition and Enforcement of Chinese Court Decisions in Germany: Problems and Perspectives"; SUK Kwang Hyun, Professor, Vice President, KOPILA, Seoul National University, "Several Issues of the Hague Choice of Court Convention"; HE Qisheng, Professor, Wuhan University, "Dilemma and Its Way out in Judgments Reciprocity: From Sino-Japan Model to Sino-Singapore Model".

Chinese scholars gave presentations in Chinese on four titles: Doctrines and Practices of Chinese Private International Law; the Belt and Road Initiative and International Legal Cooperation; the Belt and Road and Innovations in Chinese Arbitration; China and the Hague Choice of Court Convention.

The Closing ceremony was chaired by Ms GUO Yujun. Mr Frank Poon, Representative of HCCH Asia Office, made a speech on behalf of Christophe Bernasconi, Secretary General of the HCCH, appreciating the involvement of China in the HCCH and the potential of the HCCH to the Belt and Road Initiative. Mr XIAO Yongping, Professor, Director of Wuhan University Institute of International Law, Standing Vice President of China Society of Private International Law, made the closing speech, summarizing the discussions and

making three points: first, the Asian regional cooperation needs a set of effective dispute settlement mechanisms; secondly, the current international dispute settlement mechanism is dominated by western developed economies. It is the time for Asian countries to establish a dispute resolution body with regional characteristics; thirdly, to construct a more equitable and reasonable regional dispute resolution body should be the ideal choice for all Asian countries to promote regional cooperation. Professor Huo Zhengxin read the Wuhan Declaration, reviewing the development of private international law and the involvement of China in the work of the HCCH over the past thirty years and the current challenges to private international law, and calling for joint contributions to the prosperity of global private international law of all participants.

Dutch collective redress dangerous? A call for a more nuanced approach

Prepared by Alexandre Biard, Xandra Kramer and Ilja Tillema, Erasmus University Rotterdam

The Netherlands has become dangerously involved in the treatment of mass claims, Lisa Rickard from the US Chamber of Commerce recently said to the Dutch financial daily (*Het Financieele Dagblad*, 28 September 2017) and the Dutch BNR newsradio (broadcast of 28 September 2017). This statement follows the conclusions of two reports published in March and September 2017 by the US Institute for Legal Reforms (ILR), an entity affiliated with the US Chamber of Commerce. Within a few hours, the news spread like wildfire in online Dutch newspapers, see for instance here.

Worryingly enough, the March 2017 report, which assessed collective redress mechanisms in ten Member States, predicted that ‘there are a number of very powerful indicators that all of the same incentives and forces that have led to

mass abuse in other jurisdictions are also gathering force in the EU'. Among the jurisdictions surveyed, the Netherlands appeared as a place particularly prone to such abuse. The September 2017 report focuses on consumer attitudes towards collective redress safeguards, and ultimately concludes that 85% of respondents tend to support the introduction of safeguards for the resolution of mass claims.

The publication of the aforementioned reports is timely as the European Commission's evaluation report on the 2013 Recommendation on Collective Redress is expected this autumn, following the recent call for evidence. Some of the statements in these reports call for a more nuanced view. Indeed, the Dutch approach to the resolution of mass claims might have its drawbacks. It is certainly not exempt from criticisms. However, in a matter of such expedient nature, it is of the utmost importance that *both* sides are thoroughly addressed and assessed.

For the information of readers that are not familiar with the Dutch system: the Netherlands currently has two mechanisms that have been designed for collective redress specifically. The first one is the collective action for *injunctive* or *declaratory* relief. A verdict in such action can provide the basis for an amicable settlement or for individual proceedings to seek monetary compensation. The second mechanism is the much-discussed WCAM settlement (based on the Dutch Collective Settlements Act, see also a previous post linking to papers and a report on the WCAM procedure). In addition, there is a proposal to introduce a collective action for *damages* (see a previous post on this blog).

Bad apples and the bigger picture

In the past years, few incidents have occurred in Dutch collective redress that may indeed come close to 'American situations' that are generally feared in Europe. Unfortunately, some commentators have chosen to mainly highlight such incidents. Notably, the ILR report of March 2017 refers to the notorious case of *Stichting Loterijverlies*, in which a foundation initiated a collective action on behalf of aggrieved lottery ticket holders against the Dutch State Lottery. The report rightfully mentions that the foundation's director has been accused of funnelling elsewhere, for personal gain, part of the consumers' financial contribution to the foundation. However, the report neglects to mention that the foundation had also been litigating for quite some years and that, ultimately, the Supreme Court ruled in its favour: the Dutch State Lottery had misled consumers for years. Furthermore, the report fails to mention that some of the foundation's

participants successfully filed a request to replace the foundation's board. Moreover, despite (or on account of) the complexity of establishing causation and damages, the case has now been amicably settled. As part of the settlement, participants of the foundation have been reimbursed their financial contribution thereto, and all class members were free to participate in the settlement: an extraordinary, one-off lottery draw. Reportedly, 2.5 million individuals have done so.

Obviously, incidents such as the aforementioned case are of no avail to civil justice, and justify concerns about claim vehicles' activities and motives. However, we should also consider the many positive effects of collective redress mechanisms. Generally, Dutch collective actions and WCAM settlements provide for much-needed effective and efficient dispute resolution in mass harm situations.

Safeguards work: learning from experience

The March report by the ILR warns against the gradual decline of safeguards in the Netherlands, and in the EU more generally. Yet, various safeguards already exist, continue to do so, and generally function well in practice. For instance, the admissibility rules regarding representative organizations (that bring collective actions or are involved in a WCAM settlement) have become more stringent and are applied increasingly strict by courts. As to the current Dutch collective actions, there is proof that its numbers have slowly risen since 1994, but no proof exists that this is necessarily attributable to entrepreneurial parties, let alone that they have increased the number of frivolous claims (Tillema 2017). The proposed collective action for damages further raises the current threshold for representative organizations to obtain standing. The requirements concern the organizations' governance, financial means, representativeness, experience and expertise, and individuals' participation in the decision-making process. Indeed, a judgment will have binding effect upon all aggrieved parties who have not opted out, but all actions will be publicly registered, there is a strict scope rule, and individuals can raise objections.

So far, eight WCAM settlement have been declared binding. Undeniably, various parties have entered this market, including US counsels and their sizeable fees. However, in spite of its difficult task, the Amsterdam Court of Appeal seems growingly comfortable in assessing the reasonableness of a collective settlement,

including the representative organizations' remuneration. In Converium, the reasonableness of (contingency) fees was assessed for the first time. In the currently pending eighth WCAM case, the *Fortis*-settlement, the court has demonstrated its awareness of the risks and of its task to also scrutinize the motives of representative organizations. In its interlocutory judgment, it has ruled that the settlement, in its current state, cannot be declared binding. It is deemed not reasonable due to, inter alia, the sizeable remuneration of the representative organizations and their lack of transparency thereon.

A Dutch 'manoeuvre' to become a 'go-to-point' for mass claim or an attempt to enhance access to justice for all?

'The Netherlands and the UK seem to be manoeuvring themselves to become the go-to jurisdictions for collective claims outside the EU', the March report highlighted. Obviously, this not the first time that other countries express their concerns against the extra-territorial effects of the Dutch legislation, an issue that has been discussed for several years in the context of the WCAM (Van Lith, 2011). The ILR report indeed highlighted that in the Converium case, the Amsterdam Court of Appeal declared the settlement binding where a majority of shareholders were domiciled outside the Netherlands. Yet, the key question here is whether, for reasons linked to equality and efficiency, individuals who have suffered from losses resulting from a same misbehaviour should not be treated in a same manner and in the same proceeding, regardless of their actual location. By asserting global jurisdiction, the Amsterdam Court of Appeal ultimately ensured access to justice and equal treatment for all parties placed in similar situations, and ultimately avoided costly fragmentation of the case for parties and courts. In this regard, it should also be highlighted that the WCAM is a settlement-only mechanism, and – to the benefit of victims of wrongdoings – it is the wrongdoing party and the representatives of the aggrieved parties that jointly choose to address the Amsterdam Court of Appeal considering that the Netherlands has a suitable procedure to declare such settlement binding.

It is evident that collective redress mechanisms have both benefits and drawbacks. More than ever, the challenging, yet indispensable key word here is *balance*. As Commissioner Jourova recently observed at the release of the ILR September report, 'the discussion in EU countries is in full swing on how to strike the right balance between access to justice and prevention of abuse'. We hope this short post can contribute to the discussion.

European Procedural Law Study – Publication

The Max Planck Institute Luxembourg (MPI), heading an international consortium, including researchers from the Universities of Florence, Ghent, Heidelberg, Madrid (Complutense), Oxford, Paris (Sorbonne), Rotterdam, Uppsala, Vienna and Warsaw, has undertaken a European Commission-funded Study (JUST/2014/RCON/PR/CIVI/0082) on the laws of national civil procedure of the 28 Member States and the enforcement of European Union law.

The Study has two strands: the first deals with the impact of national civil procedure on mutual trust and the free circulation of judgements within the 28 Member States of the EU and the second deals with the impact of national civil procedure on the enforcement of consumer rights derived from EU law.

On September 28, the first strand of the Max Planck Luxembourg procedural law study has been published by the European Commission on the EU Law and Publications portal.

More information are available here.