# New Dutch bill on collective damages action

*Following the draft bill and consultation paper on Dutch collective actions for damages of 2014 (see our previous post), the final – fully amended – draft has been put before Parliament.*

*The following text has been prepared by Ianika Tzankova, professor at Tilburg University.*

On 16 November 2016 the Dutch Ministry of Justice presented to Parliament a new Bill for collective damages actions. The proposal aims to make collective settlements more attractive for all parties involved by improving the quality of representative organizations, coordinating the collective (damages) procedures and offering more finality. It is unclear when or whether the Bill will be passed in its current form, but below are my first impressions and a personal selection of some noteworthy features of the Bill.

1. The proposed regime covers all substantive areas of law, which is a continuation of the status quo. What is new is that plaintiffs would be able to claim collective damages, not only declaratory and injunctive relief, and that the same requirements would apply to all types of actions: injunctive, declaratory or damages. More specifically, under the new legislation it would be much harder for claimants to file actions for injunctive and declaratory relief (see further below under 5. and further).
2. Exclusive jurisdiction in the first instance would be with the Amsterdam District Court, but it would be possible to transfer the collective action to another lower court if that would be more appropriate in a given situation.
3. There would be a registry for class actions so the public is notified once a class action has been initiated.
4. A system of 'lead representative organizations' would be introduced to streamline the process if there are multiple candidates for the position. There could also be co-lead representative organizations if that is appropriate for a specific action. Under the current regime it is possible to have multiple competing collective actions, a situation that is perceived

as confusing for consumers and burdensome for defendants.

5. Only non-profit entities would be allowed to file the collective action, as under current law. Those could also be ad hoc foundations, but heavy governance requirements would be put in place for their Board and Supervisory Board structure, which would require D&O insurance, guarantees for non-profit background of the Board and Supervisory Board members, a website and communication strategy for the group, the preparation of financial statements etc. This would require a significant financial investment beforehand in the logistical infrastructure of the organization, and it is unclear how this could be funded on a non-commercial basis. There is an exception for matters with a idealistic public policy background. Those ad hoc foundations might be exempted from some of the requirements, but in fact the Bill puts the ad hoc foundations in a disadvantageous position in comparison to pre-existing non-profit organizations.
6. Moreover, the lead representative candidates would need to demonstrate expertise and track record in class actions, have a sufficient number of claimants supporting them in relation to the specific action, and have sufficient financial means. The parliamentary notes specify that the court might ask a neutral third party to review the agreement, which would not need to be shared with the defendant.
7. Opt out seems to be the main rule under the new regime, but this is somehow mitigated, because under the selection test for lead representative organization (see under 6 above), the candidate has to demonstrate that it has a large enough group of claimant supporters behind it and is not an empty shell. This assumes at least some book-building effort beforehand and is therefore at least in part an opt in. After the lead representative organization is appointed, the whole group will be represented on an opt out basis.
8. The lead representative organization would need to demonstrate the superiority of the collective action in comparison to individual law suits.
9. The lead representative organization would need to demonstrate a sufficient link with the Netherlands. The Dutch legislator has consulted the Dutch State Commission for Private International Law and the Advisory Commission on Civil Procedure in relation to that requirement. According to the legislature, the test for a sufficient link with the Netherlands is compatible with Brussels I, because it does not concern

the jurisdictional test but the certification of a civil action, which is a matter of national civil procedure. It aims to exclude from the collective action situations where the defendant is not based in the Netherlands, the harmful events did not take place in the Netherlands or the majority of the claimants are not domiciled in the Netherlands. In those situations the claimants will still have the option of starting an individual action. This requirement seems to aim to address the recent VEB v BP type of collective actions, where the Dutch Investors' Association VEB initiated a collective action for declaratory relief for all investors who had their BP shares in bank accounts in the Netherlands, following the ECJ's criteria formulated in the Kolassa ruling (C-375/13). The Amsterdam District Court declared on 28 September of this year that it lacked jurisdiction to hear the action, which is questionable in view of the Kolassa ruling. The current proposal aims to eliminate the use of the new Dutch collective actions regime in situations where Dutch courts under Brussels I and ECJ case law would have jurisdiction to hear individual cases for the 'Kolassa type' of claimant, but those would not be able to use the Dutch collective action regime to effectuate their rights.

10. Group members could opt out at the beginning of the certified class action and start an individual proceeding, but those individual proceedings could be stayed at the request of the defendant, at least for one year after the parties opted out. The court would have discretion to allow the stay of the proceedings. This departs somewhat from the systems existing in other jurisdictions (e.g. US and Canada) where claimants who opt out can resume their individual actions with no delays.
11. The collective action tolls the statute of limitation for the whole group represented by the lead representative organization. Parties who choose to opt out need to preserve their individual rights within 6 months after they have opted out. Under Dutch law it is not necessary to start a civil action to preserve one's rights. It is sufficient to send a letter to that effect to the defendant.
12. Under current Dutch law, adverse cost orders are fixed. Under the proposal it would be possible for the lead representative organization to recover the real costs of litigation if parties reach a settlement. The lead representative organization would be liable for any adverse costs if it loses the action.
13. Any settlement reached under the new collective action regime would

need to be approved by the District Court. It is unclear whether the new regime aims to limit the extra-territorial application of the WCAM: the Dutch act on collective settlements that has already been used twice for global settlement purposes. Presumably not, if globally settling parties choose to invoke the WCAM directly and not via the Dutch collective action regime.

---

# Out Now: Proceedings of the German EUPILLAR Conference on "The Assessment of European PIL in Practice – State of the Art and Future Perspectives" (Freiburg, 14-15 April 2016)

The most recent issue of the *Zeitschrift für Vergleichende Rechtswissenschaft* (German Journal of Comparative Law; Vol. 115 [2016], No. 4) features the contributions to the conference on the application of EU private international law in German legal practice that was held at the University of Freiburg (Germany) on 14 and 15 April 2016 (see our previous post here). This event was part of the EUPILLAR („European Private International Law – Application in Reality") project funded by the EU Commission (see the project's homepage here); it was organized by the German branch of the project team, Prof. Dr. Jan von Hein, University of Freiburg.

The issue starts with a concise introduction by Jan von Hein into the EUPILLAR project (p. 483) and continues with an in-depth analysis of the problems involved in evaluating EU PIL Regulations by Prof. Dr. Giesela Rühl (University of Jena; p. 499). It then contains three articles dealing with pervasive problems inherent in the application of EU PIL: firstly, the challenges it poses for the organization of

domestic courts (by Prof. Dr. Hannes Rösler, University of Siegen; p. 533); secondly, the challenges for the CJEU (by Prof. Dr. Martin Gebauer, University of Tübingen; p. 557); and thirdly, the application of foreign law designated by PIL rules (by Prof. Dr. Oliver Remien, University of Würzburg; p. 570). In the following contributions, the handling of the EU PIL Regulations in German case-law is scrutinized, starting with the application of Rome I by ordinary civil courts (Prof. Dr. Dennis Solomon, University of Passau; p. 586) and by labour courts (Prof. Dr. Dr. h.c. Monika Schlachter, University of Trier; p. 610). Moreover, Prof. Dr. Wolfgang Wurmnest (University of Augsburg) analyzes how German courts have interpreted the Rome II Regulation (p. 624). Finally, German court practice regarding international family law is evaluated as well, Brussels II*bis* and Rome III by Prof. Dr. Peter Winkler von Mohrenfels (University of Rostock; p. 650), and the Maintenance Regulation resp. the Hague Protocol by Prof. Dr. Wolfgang Hau (University of Passau; p. 672).

The *Zeitschrift für Vergleichende Rechtswissenschaft* was founded in 1878 and is Germany's oldest continuously published periodical on comparative and private international law. Its current editor-in-chief is Prof. Dr. Dres. h.c. Werner F. Ebke, University of Heidelberg. Content is available online either through the website of the Deutscher Fachverlag or via beck online.

---

# 26th Meeting of the European Group for Private International Law, Milan 2016

*Many thanks to Hans van Loon for this piece of information.*

At its 26th meeting, which took place in Milan last September, the European Group on Private International Law worked further on the establishment of common rules of conflict of laws in company law, on the basis of the achievements of the Florence and Luxembourg meetings. As a result the Draft rules on the law

applicable to companies and other bodies were agreed upon.

Moreover, a *Resolution on the Commission Proposal for a recast of the Brussels IIa Regulation, concerning parental responsibility and child abduction* was adopted to support the Commission proposal of 30 June 2016 for a recast of the *Brussels II a* Regulation.

Besides a exchange of information on the current state of law of the Union, the Hague Conference and the the jurisprudence of the European Court of Human Rights took place. Finally, various papers were presented on the evolution of Italian civil union law, on the impact of the Brexit on private international law, on the follow-up to the Luxembourg Resolution concerning the legal status of applicants for international protection, and on the principles of interpretation of uniform substantive law.

The report was elaborated in collaboration with Marie Dechamps, Faculty of Law and Criminology of the Catholic University of Louvain, and can be fully read here.

---

# New book on the legal consequences of Brexit

Only five months after the UK Brexit Referendum the first (German) book dealing with the legal consequences of Brexit has been published ("Brexit und die juristischen Folgen, Nomos 2017, ISBN 978-3-8487-3564-8). Edited by Malte Kramme, Christian Baldus and Martin Schmidt-Kessel the book discusses the effects Brexit will have on European private and economic law, notably contract law, corporate law, capital markets law, tax law, labour law, competition law and consumer law.

The most interesting chapter for readers of this blog is the chapter by Johannes Ungerer from the University of Bonn. It deals with the effects of Brexit on the Brussels I Regulation and other Regulations on European private international law and can be downloaded here free of charge.

Ungerer shows that there can be no doubt that Brexit will have considerable effects on jurisdiction, recognition and enforcement of judgments in Europe. Particularly, this concerns the Brussels regime, which threatens to fall back from the modern Recast Regulation to the outdated 1968 Convention developed for relations between the UK and the then EEC Member States. Considering that no transition rules are in existence, this fall back could only be prevented by the withdrawal agreement, which is likely to be negotiated. An alternative might be the UK's accession to the 2007 Lugano Convention (and perhaps rejoining EFTA). The Hague Conventions are expected to be maintained where applicable in international legal proceedings. As for choice of law,
the Rome regime for contracts should basically remain unchanged, yet for non-contractual obligations there might be the risk of legal uncertainty. With regard to international insolvency, the domestic regimes of the Member States will take over from the European Insolvency (Recast) Regulation.

---

# New Proposal for a Directive on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures

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

As announced earlier this year at the Commission's conference on "Convergence of insolvency frameworks within the European Union – the way forward" (see

Blogpost http://wp.me/p4SfbY-4OQ) Vera Jourová, EU Commissioner for Justice, Consumers and Gender Equality has presented a proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures on Thursday 22 November (see http://europa.eu/rapid/press-release_IP-16-3802_en.htm). The proposal has to be seen in the context of the Juncker Plan, the Action Plan on Building a Capital Markets Union and the Single Market Strategy, all aiming at the strengthening of Europe's Economy and the stimulation of investments in Europe. However, it is a much bigger step towards a harmonized European Insolvency Law than the Commission's non-binding recommendation on a new approach to business failure and insolvency from 2014. Furthermore, whereas the EIR recast deals with issues of jurisdiction, applicable law, recognition and enforcement of insolvency decisions, as well as coordination of cross-border insolvency procedures, the proposal now obliges Member States to introduce specific types of procedures and set up measures to ensure that insolvency proceedings are effective in regard to promoting preventive restructurings and second chance. It thereby aims to reduce barriers to cross-border investment related to differences between the Member States' restructuring and second chance frameworks as well as unnecessary liquidations of viable companies. Additionally it shall improve the effectiveness of all restructuring, insolvency and second chance procedures within the EU.

The proposal consists of 47 recitals and 36 Articles on 55 pages. It can be roughly divided into three main parts. It is setting up a preventive restructuring framework (Title II), minimum standards for the second chance for entrepreneurs (Title III) and measures to raise the efficiency of restructuring, insolvency and second chance (Title IV and V).

**Preventive Restructuring Frameworks**

Art. 4 requires the Member States to ensure that, "where is the likelihood of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency." Interestingly Art. 5 states that the appointment of a practitioner in the field of restructuring is not mandatory in all cases. It remains to be seen how the group of insolvency practitioners will react to this aspect. According to Art. 6 a general or a limited stay of individual enforcement actions may be ordered for a maximum period of no more than four

months. The proceeding aims at negotiating a restructuring plan (see Chapter 3). The restructuring plan needs to be approved by the creditors and confirmed by a judicial or administrative authority (Art. 9 and 10). Where the necessary majority of creditors in one or more voting classes is not reached the plan may still be confirmed by ways of a cross-class cram-down compliant to Art. 11.

**Second Chance for Entrepreneurs**

Title III sets up rules about the discharge of debt for over-indebted entrepreneurs. First of all the Member States have to ensure that over-indebted entrepreneurs may be fully discharged of their debts (Art. 19). Additionally the proposal states in Art. 20 that the maximum period of time after which over-indebted entrepreneurs may be fully discharged from their debts shall be no longer than three years. It has to be noted that this might lead to different discharge periods for entrepreneurs and consumers.

**Measures to increase the efficiency of restructuring, insolvency and second chance**

Title IV mainly tries to ensure that judiciary and administrative authorities dealing with restructuring and insolvency are proper trained (art. 25). The same applies to insolvency practitioners (Art. 25). Again, it remains to be seen how the group of insolvency practitioners will react to this aspect. Title V instructs Member States to set up a data collection on annual statistics about restructuring and insolvency proceedings.

Finally some thoughts on the interplay between the proposal and the EIR recast. The new preventive restructuring proceedings will principally fall within the scope of the EIR recast (see Art. 1 c) EIR recast). But as it is a directive we will face many different national proceedings. One may not forget that all these proceedings need to be signed up in Annex A of the EIR to fall within its scope. The proposal might raise some further questions with regard to the EIR recast: Is it possible to give an undertaking pursuant to Art. 36 EIR recast in such a preventive restructuring proceeding? May a court order a stay of the opening of a secondary insolvency proceedings according to Art. 38 III EIR recast where there is a preventive restructuring proceeding in the main proceeding?

The Commission’s proposal is ambitious. However, it lets important parts of substantive insolvency law, for example the ranking of claims or director’s

liabilities, untouched. Furthermore it still has to pass the Council and the European Parliament. As the Commission's proposal on the EIR recast, it will probably undergo some major changes in the upcoming process, too. It will be highly interesting how different interest groups might influence the final version of the Directive.

---

# 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

*A contribution by Prof. Dr. Dres. h.c. Burkhard Hess, Max Planck Institute Luxembourg*

> *Note: This post was previously published at blogdroiteuropeen.com by Alexia Pato.*

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 consideratio**n

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.

---

# SaveComp EU Co-Funded Research Project on Cross-Border Insolvency (Questionnaire)

The Universities of Genoa, Valencia, Amsterdam, Glasgow, Mainz, the Tur?ba University, the Charles University in Prague, the Institute of Private International Law in Sofia, and IPR Verlag Munich are currently conducting a research Project to **collect and develop private and procedural international law best practices in cross border insolvency and pre-insolvency proceedings**. The SaveComp Project, co-funded by the European Union by the Action grants to support judicial cooperation in civil and criminal matters JUST/2014/JCOO/AG/CIVI/7693, foresees the **involvement of practitioners and academics** which are given the opportunity to contribute to determining the state of the art by answering a questionnaire. The subsequent practical comparative and international study of the Partners to the Project, also based on such answers, wishes to provide practitioners with further knowledge and tools to ensure a smoother cross-border cooperation in the subject matter.

On the official website of the Project you can find the **questionnaire** translated into **English, German, Czech, Spanish, Dutch, Bulgarian, Latvian**, and **Italian**. Answering the questionnaire takes approximately **15-20 minutes**, and consultations are open until the end of January 2017. Answers are anonymous; they only require the indication of your profession, and will not be published. On every file you will find the email address to which answers should be sent.

Click here to see the webpage of questionnaire: http://savecomp.eu/questionnaire/.

The Partners to the Project appreciate your involvement!

# New Trends in Collective Redress Litigation: International Seminar in Valencia

Professor Dr. Carlos Esplugues Mota (University of Valencia) has organized an international seminar on new trends in collective redress litigation that will take place on 25 November 2016 at the University of Valencia (Spain). The seminar will be held in English and Spanish. Topics and speakers will include:

*Collective actions in private international law and Spanish legal practice (Prof. Dr. Laura Carballo Piñeiro, Universidad de Vigo)*

*International Mass Litigation in Product Liability Cases (Prof. Dr. Jan von Hein, University of Freiburg)*

*Protection of mortgagors (consumers) in the EU (Prof. Dr. Blanca Vila Costa, Universitat Autònoma de Barcelona)*

*Class actions and arbitration (Prof. Dr. Ana Montesinos García, Universitat de València)*

*The New European Framework for ADR and ODR in the area of consumer protection (Prof. Dr. Fernando Esteban de la Rosa, Universidad de Granada)*

*An Approach to Consumer Law and Mass Redress from Civil Law (Prof. Dr. Mario Clemente Meoro, Universitat de València).*

The panels will be chaired by Professor Dr. Esplugues Mota and Professor Dr. Carmen Azcárraga Monzonís. Participation is free of charge, but requires prior registration with Prof. Maria Jose Catalán Chamorro (Maria.Jose.Catalan@uv.es). The full programme with further details is available here.

# Conflict of Laws and the Internet

Professor Marketa Trimble (UNLV School of Law) has a fascinating post on the Technology and Marketing Law Blog. She notes that "After years of what seemed to the outside world to be a period of denial, internet companies now appear to have awakened to the idea–or at least to have acknowledged the idea–that conflict of laws does play a crucial role on the internet." See this link for more.

---

# Conference Report: "The Impact of Brexit on Commercial Dispute Resolution in London"

*By Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany.*

On 10 November 2016, the Academy of European Law (ERA), in co-operation with the European Circuit, the Bar Council and the Hamburgischer Anwaltverein, hosted a conference in London on "The Impact of Brexit on Commercial Dispute Litigation in London". The event aimed to offer a platform for discussion on a number of controversial issues following the Brexit referendum of 23 June 2016 such as the future rules governing recognition and enforcement of foreign judgements in the UK, the impact of Brexit on the rules determining the applicable law and London's role in the international legal world.

Angelika Fuchs (Head of Section – Private Law, ERA, Trier) and Hugh Mercer QC (Barrister, Essex Court Chambers, London) highlighted in their words of welcome the significant impact of Brexit on business and the practical necessity to find solutions for the issues discussed.

In the first presentation, Alexander Layton QC (Barrister, 20 Essex Street, London) scrutinised Brexit's "Implications on jurisdiction and circulation of titles". He noted that the Brussels I Regulation Recast will cease to apply to the UK after its withdrawal from the EU and examined possible ways to fill the resulting void. Because an agreement between the UK and the EU on retaining the Brussels I Regulation Recast seemed very unlikely, not least because of the ECJ's jurisdiction over questions of interpretation of the Regulation, he favoured a special agreement between the UK and the EU in regard to the application of the Brussels I Regulation Recast based on the Danish model. The ECJ's future role in interpreting the Regulation could be addressed by adopting a provision similar to Protocol 2 to the 2007 Lugano Convention. Yet it was disputed whether or not the participation of the UK in the Single Market would be a political prerequisite for such an arrangement. He argued that there would be no room for a revival of the 1988 Lugano Convention since the 2007 Lugano Convention terminated its predecessor. Furthermore, neither a revival of the 1968 Brussels Convention nor the accession to the 2007 Lugano Convention would lead to a satisfactory outcome as this would result in the undesired application of outdated rules. In a second step Layton discussed from an English point of view the consequences on jurisdiction and on the recognition and enforcement of judgements if at the end of the two year period set out in Article 50 TEU no agreement would be reached. Concerning jurisdiction the rules of the English law applicable to defendants domiciled in third States would also apply to cases currently falling under the Brussels I Regulation Recast. In regard to the recognition and enforcement of judgements rendered in an EU Member State pre-Brussels bilateral treaties dealing with these questions would revive, since they were not terminated by the Brussels I Regulation and its successor. Absent a treaty between the UK and the EU Member State in question the recognition and enforcement would be governed by English common law. Likewise, the recognition and enforcement of English judgements in EU Member States would be governed by bilateral treaties or the respective national laws. In Layton's opinion, the application of these rules might lead to legal uncertainty. He concluded that both the 2005 Hague Choice of Court Convention and arbitration could cushion the blow of Brexit, but limited to certain circumstances.

Matthias Lehmann (Professor at the University of Bonn) analysed the "Consequences for commercial disputes" laying emphasis on the impact of Brexit on the rules determining the applicable law to contracts and contracts related

matters, its repercussions on pre-referendum contracts and potential pitfalls in drafting new contracts post-referendum. Turning to the first issue, he summarised the current state of play, meaning the application of the Rome I Regulation and Rome II Regulation, and stated that these Regulations would cease to apply to the UK after its withdrawal from the EU. In regard to contractual obligations this void could be filled by the 1980 Rome Convention, since the Rome I Regulation had not replaced the Convention completely. Still, this would lead to the application of outdated rules. He therefore recommended to terminate the 1980 Rome Convention altogether. Regarding non-contractual obligations the Private International Law (Miscellaneous Provisions) Act 1995 would apply. Lehmann noted that – unlike the Rome II Regulation – this Act contained no clear-cut rules on issues such as competition law or product liability. Because of these flaws he scrutinised three alternative solutions and favoured a new treaty between the UK and the EU on Private International Law. Even though disagreements over who should have jurisdiction over questions of interpretation could hinder the conclusion of such an arrangement the use of a provision similar to Protocol 2 to the 2007 Lugano Convention could be a way out. If this option failed, the next best alternative would be to copy the rules of the Rome I Regulation and the Rome II Regulation into the UK's domestic law and to apply them unilaterally. As a consequence, the UK courts would not be obliged to follow the ECJ's interpretations of the Regulations causing a potential threat to decisional harmony. Furthermore, the implementation could cause some difficulties because the Regulations' rules are based on autonomous EU law concepts. Finally, he rejected a complete return to the common law as this would lead to legal uncertainty and potential conflicts with EU Member States' courts. Lehmann subsequently discussed Brexit's repercussions on pre-referendum contracts governed by English law. He submitted that in principle Brexit would not lead to a frustration of a contract. By contrast, hardship, force majeure or material adverse change clauses could cover Brexit, depending on the precise wording and the specific circumstances. Concerning the drafting of new contracts he pointed out that it would be unreasonable not to take Brexit into account. Attention should be paid not only to drafting provisions dealing with legal consequences in the case of Brexit but also to Brexit's implications on the contract's territorial scope when referring to the "EU". If the contract contained a choice-of-law clause in favour of English law, Lehmann suggested using a stabilization clause because English law might change significantly due to Brexit.

The conference was rounded off by a round table discussion on "The future of London as a legal hub", moderated by Hugh Mercer QC and with the participation of Barbara Dohmann QC (Barrister, Blackstone Chambers, London), Diana Wallis (Senior Fellow at the University of Hull; President of the European Law Institute, Vienna and former Member of the European Parliament), Burkhard Hess (Professor and Director of the Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg), Alexander Layton QC, Matthias Lehmann, Ravi Mehta (Barrister, Blackstone Chambers, London) and Michael Patchett-Joyce (Barrister, Outer Temple Chambers, London). Regarding the desired outcome of the Brexit negotiations and London's future role in international dispute resolution the participants agreed on the fact that a distinction had to be made between the perspectives of the UK and the EU. Concerning the latter, the efforts of some EU Member States to attract international litigants to their courts were discussed and evaluated. Moreover, Hess stressed London's role as an entry point for international disputes into the Single Market – an advantage London would likely lose after the UK's withdrawal from the EU. Patchett-Joyce argued that Brexit was not the only threat to London's future as a legal hub but that there were global risks that had to be tackled on a global level. In regard to the Brexit negotiations there was widespread consensus that the discussion on the future role of the ECJ would be decisive for whether or not an agreement between the UK and the EU could be achieved. Wallis argued that Brexit might have a very negative impact on access to justice, not least for consumers. To mend this situation, Lehmann expressed his hope to continue the judicial cooperation between the EU Member States and the UK even post-Brexit. An accession to the 2005 Hague Choice of Court Convention was also advocated, though the Convention's success was uncertain. Turning to arbitration, since, as Mehta noted, its use increased significantly in numerous areas of law, and on a more abstract level to the privatisation of legal decision-making, Wallis and Patchett-Joyce addressed the problem of confidentiality and its repercussions on the development of the law. Furthermore, Dohmann stated that it was the duty of the state to provide an accessible justice system to everybody. It would not be enough to refer parties to the possibility of arbitration. Finally, Layton argued that in contrast to the application of foreign law which would create significant problems in practise, the importance of judgement enforcement would be overstated because most judgements were satisfied voluntarily.

It comes as no surprise that these topics sparked lively and knowledgeable

debates between the speakers and attendees. Though these discussions indicated possible answers to the questions raised by the Brexit referendum it became clear once more that at the moment one can only guess how the legal landscape will look like in a post-Brexit scenario. But events like this ensure that the guess is at least an educated one.