Service by Mail. Certiorari Granted

I've come across this piece of news by Stacie I. Strong, and found it worth to be shared.

On Friday, the U.S. Supreme Court granted certiorari in *Water Splash, Inc.* v. *Menon* to address the question of whether the Hague Service Convention authorizes service of process by mail.

Click here to get to the initial submissions on whether the matter should be addressed by the SC.

Brussels Ibis Regulation – Changes and Challenges of the Renewed Procedural Scheme

Brussels Ibis Regulation – Changes and Challenges of the Renewed Procedural Scheme – Short Studies in Private International Law,

is the title of a book just released, edited by Vesna Lazic and Steven Stuij.

The book focuses on major amendments introduced in the Brussels I regulatory framework. The contributions scrutenise the changes introduced in the Brussels Ibis Regulation, a legal instrument that presents a core of the unification of private international law rules on the European Union level. It is one of the first publications addressing all the changes in the Brussels I regulatory scheme, which takes into consideration relevant CJEU case law up to July 2016.

The texts, written by legal scholars who have published extensively in the field of private international law and international civil procedure, will add to the development of EU private international law. In addition, the

authors' critical analysis may open further discussions on the topic and so benefit a consistent and harmonised application of the Regulation. In this respect the book takes a different approach than the commentaries which have so far been published.
It is primarily meant for legal academics in private international law and practitioners who are regularly engaged in cross-border civil proceedings. It may also be of added value to advanced students and to those with a particular interest in the subject of international litigation and more generally in the area of dispute resolution.

Vesna Lazic is a Senior Researcher at the T.M.C. Asser Instituut, an Associate Professor of Private Law at Utrecht University and Professor of European Civil Procedure at the
University of Rijeka.
Steven Stuij is an expert in Private International Law and an external Ph.D. candidate at Erasmus School of Law, Rotterdam.

Click here for more information.

The UK Government Confirms its Intention to Ratify the Unified Patent Court Agreement

The author of this entry is Dr. Arantxa Gandía Sellens, senior research fellow at the MPI Luxembourg.

Yesterday the UK government announced that it is proceeding with preparations to ratify the Unified Patent Court Agreement. Following the Brexit vote, this piece of news is not only relevant for the patent world, but also for the future Brexit negotiations between the UK and the EU (art. 50 Treaty of the European Union).

Here I will focus on the implications of this decision on the unitary patent system.

A brief explanation of the unitary patent system

The European patent with unitary effect –thus different from the «classic»

European patent– was introduced by Regulation (EU) no. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (hereinafter, Regulation 1257/2012).

According to its art. 2 (c), the European patent with unitary effect is a «[…] *European patent which benefits from unitary effect in the participating* ***Member States*** *by virtue of this Regulation*». Furthermore, its arts. 5 (1) and 1 (1) establish that the so-called unitary effect of this kind of patent consists of the protection provided throughout the territories of the **Member States** participating in the enhanced cooperation authorized by Decision 2011/167/EU. The unitary patent protection may be requested for any European patent granted on or after the date of application of Regulation 1257/2012 (art. 18.6), which is linked to the date of entry into force of the Agreement on a Unified Patent Court (hereinafter, UPC Agreement), following its art. 18 (2).

The object of the UPC Agreement is to establish a Unified Patent Court for the settlement of disputes relating to European patents and European patents with unitary effect (art. 1). The Agreement requires for its entry into force the ratification of at least thirteen Member States, including the three Member States in which the highest number of European patents had effect in 2012 (art. 89 (1)). At the moment, eleven States have ratified the convention, and only one of them is among those three States whose ratification is mandatory, namely France.

Who can sign and ratify the UPC Agreement?

According to art. 84 of the UPC Agreement, it is open for signature by any **Member State**. Regarding ratification, the same requirement applies: "*This Agreement shall be subject to ratification in accordance with the respective constitutional requirements of the Member States*. […]".

Thus, while the UPC Agreement is not an EU instrument but a classical international convention, only Member States of the European Union can sign and ratify the UPC Agreement.

Notwithstanding the Brexit vote, the UK remains for the moment a Member State of the European Union; therefore, at this time the requirements established by the UPC Agreement for ratification are met. However, the UK government is determined to proceed to Brexit and to become a non-EU country. Therefore, the

ratification could create a measure that is contrary to the European Treaties to which the UK is still bound. According to art. 4.3 of the Treaty on European Union a Member State "*shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

Consequences of the UK's ratification of the UPC Agreement

Ratification of the UPC Agreement, followed by exit from the EU would create a series of consequences that would have to be dealt with:

1. The unitary patent cannot cover the territory of a third State. According to art. 3 of Regulation 1257/2012, the unitary patent shall have equal effect in all the participating Member States, meaning that States without the status of "Member State" are excluded. In that scenario, the unitary patent would not have effect in the UK, unless the necessary modifications are made in the legal instruments that constitute the so-called "unitary patent package".
2. Both Regulation 1257/2012 and the UPC Agreement use the terms "participating Member States" or "Contracting Member States" when referring to the States taking part in the system. This wording is a reaction to the ECJ's Opinion 1/09, which dealt with the question of the compatibility of the failed agreement creating a Unified Patent Litigation System with EU law (open also to third States). The ECJ opposed the participation of third States in that convention, as the referral of preliminary questions on EU law could not be guaranteed. Moreover, a third State cannot refer preliminary questions on EU law to the ECJ. This means that a non-member State would not be able to comply with Art. 21 of the UPC Agreement, titled "Requests for preliminary rulings": "[…] *the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law* […]".

3. A seat of the central division cannot be located in a third State. Art. 7.2 of the UPC Agreement establishes that the central division shall have its seat in Paris, with sections in London and Munich. Although the UPC Agreement does not require that the sections of the central division must be located in a Contracting Member State (paradoxically, this requisite

does exist for the local and regional divisions, so that it could also be argued that it applies to the central division, *mutatis mutandis*), the question is not clear cut in light of the EU's constitutional framework, which includes the Treaty on European Union and the Treaty on the Functioning of the European Union.

Two options for the unitary patent system after the Brexit vote

Taking into consideration that the UK will have the status of a non-EU country (third State), two options remain open to proceed with the establishment of the system following the Brexit vote:

First option) Maintaining the *status quo*. As discussed above, if the UK ratifies now the UPC Agreement, the other Member States might rely on art. 4.3 EU Treaty in order to block that ratification. Once the UK's ratification is blocked –and the wording of the UPC Agreement remains– the process for the start-up of the unitary patent system will be delayed until the negotiations following the exit declaration (art. 50 EU Treaty) are concluded.

If, after the negotiations, it is agreed that the unitary patent system should be established without the UK, the UPC Agreement will have to be modified, at least regarding the seat of the UPC central division in London (art. 7.2 of the UPC Agreement).

Second option) Including the UK in the unitary patent system. If the UK ratifies the UPC agreement and the other Member States do not rely on art. 4.3 EU treaty, the setting up process will continue as it has been foreseen.

At the moment, as the UK is still an EU Member State, its active participation in the unitary patent system does not entail any problem, formally speaking. On the contrary, the UK is one of the three Member States in which the highest number of European patents had effect in 2012, which makes its ratification a condition for the setting up of the system (art. 89 of the UPC Agreement). However, when the UK loses its status as EU Member State, some modifications to the UPC Agreement will have to be made. Those modifications will have: 1) to make sure that third States are invited to take part in the system, provided that they oblige themselves to respect EU law and refer questions to the ECJ (in light of the Opinion 1/09); and 2) to change Regulation 1257/2012, in order that the unitary patent system can cover the territory of third States. This might also entail the

participation in the system not only by the UK, but also by other interested third States.

The biggest disadvantage of this option is the risk of endangering the application and interpretation of EU law, as already pointed out in the ECJ's Opinion 1/09. The ECJ will have to be consulted on the possibility of the inclusion of third states if those third States are willing to respect the primacy of EU law, referring preliminary questions to the ECJ when necessary. This would be a new feature in comparison to the failed agreement creating a Unified Patent Litigation System, where the referral of preliminary questions to the ECJ was not guaranteed.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2016: Abstracts

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

U. Magnus: **A Special Conflicts Rule for the Law Applicable to Choice of Court and Arbitration Agreements?**
The article examines whether the German legislator should enact a separate conflicts rule which determines the law that is applicable to the conclusion and validity of choice of court and arbitration agreements. With respect to choice of court agreements the national legislator's room for manoeuvre is anyway very limited due to the regulations in Art. 25 Brussels Ibis Regulation and Art. 5 Hague Convention on Choice of Court Agreements of 2005. There is no genuine need for an additional national conflicts rule, in particular since the interpretation and exact scope of the new conflicts rule in Art. 25 (1) Brussels Ibis Regulation still requires its final determination by the CJEU. After weighing all pros and cons the article recommends not to enact a separate conflicts provision. The same result is reached for arbitration agreements. Here, the international practice that in the

absence of a choice the law at the place of arbitration applies should be fixed on the international or European level.

K. Bälz: **Failing states as parties in international commercial disputes: public international law and conflict of laws**
In the aftermath of the "Arab Spring" a number of states in the immediate vicinity of Europe have turned into failing states. Using the Libya cases of the English High Court as a starting point, this article examines the practical questions that arise in commercial disputes involving failing states. The key question is how to implement the international law principles on regime change and state failure in international disputes.

U.P. Gruber: **The new international private law on the equalization of pension rights – a critical assessment**
German international private law contains an extremely complicated rule on the equalization of pension rights. Under this rule, the equalization of pension rights of husband and wife shall be subject to the law applicable to the divorce according to the Rome III Regulation; however, an equalization shall only be granted if accordingly German law is applicable and if such equalization is recognized by the law of one of the countries of which the spouses were nationals at the time when the divorce petition was served. If one of the spouses has acquired during the subsistence of the marriage a pension right with an inland pension fund and carrying out the equalization of pension rights would not be inconsistent with equity, the equalization of pension rights of husband and wife shall be carried out pursuant to German law on application of a spouse.
Lately, Art. 17 (3) *EGBGB* was amended. Whereas in former times, Art. 17 (3) *EGBGB* referred to the law applicable to divorce determined by an autonomous German rule, the provision now makes referral to the Rome III Regulation. In the legislative process, this amendment was neither discussed nor justified. At a closer look, however, the new rule has serious flaws and should be changed.

C. Heinze/B. Steinrötter: **When does a contract fall within the scope of the „directed activity" as provided for in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17(1) (c) Regulation [EU] No 1215/2012)?**
This contribution analyses the recent *Hobohm*-judgment of the European Court of Justice (ECJ), which concerns the requirement "contract falls within the scope of such activities" in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17 (1) (c) Regulation [EU] No 1215/2012). The CJEU decided that the rules on jurisdiction

over consumer contracts are applicable even if the respective contract on its own does not fall within the scope of the professional activity which has been directed to the consumer's home state, provided that it is closely linked to an earlier contract falling under Art. 17 (1) (c). The *authors* analyse the elements of this test of close connection and place it into the more general context of the jurisdiction rules for consumer disputes.

T. Lutzi: **Qualification of the claim for a 'private copying levy' and the requirement of seeking to establish the liability of a defendant under Art. 5 No. 3 Brussels I (Art. 7 (2) Brussels I recast)**
Seized with the question whether a claim for the "blank-cassette levy" under § 42b of the Austrian *Urheberrechtsgesetz* (which transposes Art. 5 (2) b of the European Copyright Directive) qualifies as delictual within the meaning of Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast Regulation), the Court of Justice had an opportunity to refine its well-known *Kalfelis* formula, according to which an action falls under Art. 5 No. 3 if it "seeks to establish the liability of a defendant" and is "not related to a 'contract' within the meaning of Art. 5 No. 1". Holding that the claim in question sought to establish the liability of the defendant "since [it] is based on an infringement […] of the provisions of the UrhG", the Court seems to have moved away from the more restrictive interpretation of this criterion it has applied in the past. Yet, given the implications of such a broad understanding of Art. 5 No. 3, not least for claims in unjust enrichment, a restrictive reading of the decision is proposed.

L. Hübner: **Effects of cross-border mergers on bonds**
The article deals with the complex interplay of international contract law and international corporate law exemplified by the ECJ decision in the *KA Finanz* case. Three issues will be focused on: (i) the law applicable to a bond indenture after a cross-border merger of one of the contracting parties with a third party; (ii) the law applicable to the legal consequences of such a merger (legal and asset succession as well as creditor protection); and (iii) the application of Art. 15 of Directive 78/855 to securities to which special rights are attached.

C. Thomale: **Multinational Corporate Groups, Secondary insolvency proceedings and the extraterritorial reach of EU insolvency law**
In its preliminary ruling on the *Nortel Networks* insolvency dispute, the ECJ has made important assertions on procedural and substantive aspects of secondary insolvency proceedings and their coordination with the main proceedings as well

as their reach to extraterritorial assets of the debtor. At the same time, the decision fuels the general regulatory debate on corporate group insolvencies. This comment analyses the decision and develops an alternative approach.

D.-C. Bittmann: **Requirements regarding a legal remedy in terms of art. 19 of Regulation (EC) No. 805/2004 and competence for carrying out the certification of a judgment as a European Enforcement Order**

The following article examines a judgment of the ECJ, which deals with several problems regarding the interpretation of Regulation (EC) No. 805/2004 creating a European Enforcement Order (EEO) for uncontested claims. The first part of the decision regards the requirements established by Art. 19 of the regulation. The ECJ rules, that Art. 19 (1) of Regulation (EC) No. 805/2004 requires from the national legal remedy in question that it effectively and without exception allows for a full review, in law and in fact, of a judgment in both of the situations referred to in that provision. Furthermore the EJC rules, that this legal remedy must allow the periods for challenging a judgment on an uncontested claim to be extended, not only in the event of force majeure, but also where other extraordinary circumstances beyond the debtor's control prevented him from contesting the claim in question (Art. 19 (1) (b)). In the second part of the decision the ECJ rules, that the certification of a judgment as an EEO, which may be applied for at any time, can be carried out only by a judge and not by the registrar. The latter is only allowed to carry out the formal act of issuing the standard form according to Art. 9 of Regulation (EC) No. 805/2004 after the decision regarding certification as an EEO has been taken by the judge.

S. Arnold: **Contract, Choice of Law and the Protection of the Consumer abroad when lured into business premises**

Consumer protection is a cornerstone of European Law – just like party autonomy. Even in consumer contracts, parties can choose the applicable law. Yet the choice must not be to the detriment of the consumer. This is the core idea of Art. 6 (2) Rome I-Regulation. The *OLG Stuttgart* (Higher Regional Court of Stuttgart) addressed the range of that provision which is a central tool of consumer protection through conflict of laws. During a package holiday in Turkey, an 85 year old lady had bought a carpet. Turkish substantive Law did not allow for the lady to withdraw from the contract, German substantial Law, however, did. The *OLG Stuttgart* decided that the lady could withdraw from the contract on the basis of German substantial Law. The *OLG Stuttgart* found that the Turkish seller

had worked together with the German travel agency in order to lure tourists from Germany into his business premises.

C. Wendelstein: **Cross-border set-off based on counterclaim governed by Italian law**

In the context of an international set-off the German Federal Court of Justice had to deal with various questions in the field of conflict of laws. For the first time the Court had to adjudicate upon the characterization of the notion of *liquidità* in Italian law (Art. 1243 *Codice civile* = Cc). According to the Federal Court of Justice this question has to be answered by the law designated by Art. 17 Rome I Regulation. The author agrees with this finding.

G. Schulze: **The personal statute in case of ineffective dual nationalities (case note on a judgment given by the Federal Court of Justice of Germany on 24th June 2015 – XII ZB 273/13)**

The applicant had been living in Germany since his birth. As he had a double name (according to Spanish customs) registered in the civil registry in Spain he wanted to go by his Spanish family name in Germany as well. The case raises the question of how to determine the personal statute of a multinational person having both a Spanish and a Moroccan nationality if the person has no connections whatsoever to the countries in question. The Federal Court of Justice of Germany (*Bundesgerichtshof, BGH*) held: That in default of an "effective" citizenship the law of habitual residence shall be applicable, *in casu*: German law. That the "limping" name does not violate EU law. There are doubts about this solution: The effectiveness of nationality does not form a part of the elements of Art. 10 (1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*). Effectiveness serves only to clearly define the personal statute for given connecting factors, viz. in order to choose between several citizenships in Art. 5 (1) sentence 1 or to determine the (closer connected) habitual residence in Art. 5 (2) *EGBGB*. *De lege lata* there is no well-founded basis for a supported rejection of the application of law of nationality. However the general tendency to apply the law of habitual residence is not a reason to apply Art. 5 (2) *EGBGB* in analogy given multiple ineffective nationalities. It is not suitable to extend the escape clause in Art. 5 (2) *EGBGB*. In any case it is not a solution if the nationalities are EU nationalities. A former opportunity for choice of law which was unknown by the tenants does not eliminate an infringement of Art. 18 TEU (discrimination) and 21 TEU (freedom of movement).

M. Andrae: **The matrimonial property regime of the spouses with former Yugoslav nationality**

For the determination of the law applicable to matrimonial property referring to spouses who had at the time of marriage the Yugoslav nationality, two principles have a special significance: 1. The law of the former Yugoslavia shall not apply, including its interregional law and its conflict of laws principles. 2. An automatic change of the applicable law must be avoided, if possible and if it is not the consequence of a choice of law. Priority is given to the first principle. The connecting factor of the common nationality pursuant to Art. 15 (1) and 14 (1) No. 1 *EGBGB* must be supplemented. For this it is suitable to use the principle of closest connection by analogy to Art. 4 (3) sentence 2 *EGBGB*. Reference is made to the right of a successor State, if the spouses have had at the time of entering the marriage the Yugoslav nationality and a common closest connection to an area of the former Yugoslavia, which is now the territory of successor state. If such a connection is absent, then the applicable law has to be determined in accordance with Art. 15 (1) and 14 (1) No. 2 of the *EGBGB*, if necessary by Art. 14 (1) No. 3 *EGBGB*.

A. Reinstadler/A. Reinalter: **The decision opening the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is not an insolvency proceeding pursuant to the European Insolvency Regulation (2002)**

The Court of Appeal of Trento, local section of Bolzano (Italy) had to rule on the question whether the debtor-in-possession proceeding/*Verfahren auf Eigenverwaltung* (§ 270a German Insolvency Act) can be qualified as decision opening an insolvency proceeding pursuant to art. 16 European Insolvency Regulation (2002) and has, therefore, to be recognized automatically by operation of law by the courts of other Member States. Judge-Rapporteur *Elisabeth Roilo* concluded (implicitly referring to the *Eurofood*-formula) that the decision issued by the German district court in which opened the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is neither listed in Annex A of the Regulation nor is the appointed provisional liquidator (*vorläufiger Sachwalter*) included in Annex C of the Regulation. Since the decision, furthermore, foresees neither the divestment of debtor’s assets nor the forfeiture of the powers of management which he has over his assets, the criteria set down in the *Eurofood*-judgment are not fulfilled. The result is that the decision may not be qualified as a decision opening an insolvency procedure under the terms of art. 16 European Insolvency Regulation (2002).

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 consideration

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

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

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

The line of arguments in the conclusions of AG Bobek

The Advocate General briefly addressed the temporal applicability of the Brussels I^{bis} Regulation. As Article 66 (1) refers to all proceedings initiated after January 15, 2015, there was no doubt that the Regulation applied to the present case. The real issue was, however, whether the claim was one of a public or a private nature. In this respect, the answer given by the AG was rather brief. The conclusions stress the autonomous interpretation of the concept of 'civil and commercial matters' under Article 1 (1) of the Brussels I^{bis} Regulation (para 41) and start by saying: "In the present case, the applicant rented a parking space to the defendant" (para 42). Starting from the assumption of the existence of a contract, the AG continues: "In principle, both tenancy agreements and contracts for services are capable of falling within the notion of 'civil and commercial matters', which should 'cover all the main civil and commercial matters apart from certain well-defined matters'. Exceptions should be interpreted strictly (para

44). Classified as a contractual dispute, the case was thus easily qualified as a civil matter in the sense of Article 1 (1) Brussels I[bis] Regulation. Thereafter, the AG asked whether the fact that the applicant was a publicly-owned entity, having been granted its power by an act of the public authority, changed the nature of the legal relationship into an *acta jure imperii* which – of course – was not the case. Finally, AG Bobek stressed the fact that the sum that the applicant was seeking to recover from the defendant appeared to constitute consideration for the service provided by the former: "Nothing in the file suggests that it constitutes a penalty or sanction." (para 50). As a result, construed as a purely contractual matter, the case could move forward under the Brussels I[bis] Regulation.

An old precedent – the Hamburger Rathausfall

This line of argument reminded me of an old judgment, given in 1956, of the German Federal Civil Court – the infamous "Hamburger Rathausfall" (BGHZ 23, 396). In this case, the city of Hamburg had converted the public market square in Hamburg into a parking square for which users had to pay a fee of 0,50 Deutschmark per hour. A lawyer who disagreed with this decision parked his car in the parking area, protested loudly against the obligation to pay and left without doing so. When he was summoned before the civil court he declared that he had loudly protested against the fee and had not concluded any contract with the city of Hamburg. Finally, the German Supreme Civil Court held that there was a "factual contract": according to the court, in the context of modern mass society, contracts concerning the use of commodities and services (such as electricity, gas or parking spaces) can be concluded without or even against the will of the parties. The court expressly referred to the work of two law professors (Haupt and Larenz) who had developed this concept in the 1940s.

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

case law.

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

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

One must admit that the facts in Pula Parking are not entirely clear: we do not know exactly whether Mr. Tederahn parked his car in a public street or in a (private) parking area but it seems to me that he parked it in a public street. In this context, the legal situation is different; usually, the local police or public servants will sanction the non-payment of the fee by a fine which can amount to a considerable sum of money. Sometimes, private companies are entitled to run the service (obviously the situation in Pula), but their status is regulated by an administrative decision empowering them to implement the regulatory framework. They are acting as trustees of the public authority. Again, in this context, the framework is a public (administrative) law one which prescribes the behavior of the drivers, the fees and the sanctions imposed as well as the powers of the agents implementing the framework. From this perspective, the mere fact that the streets of the city and their use could also be governed via private regulation (servitudes) and lease contracts does not transform the legal relationship between the car drivers and the local cities arising from parking in public streets into a non-public law one. As a result, the Brussels I^{bis} Regulation does not apply to such a relationship.

And if the AG was right?

If one endorses the line of argument of AG Bobek and applies the Regulation Brussels I^{bis} to the present case, further practical consequences would ensue:

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

If one does not apply Article 24 (1), Article 16 (2) of the Regulation Brussels I^{bis} might preclude the Croatian courts from assuming jurisdiction. Following AG Bobek, the claim is based on a service contract between Pula Parking and Mr. Tederahn. One might wonder whether Mr. Tederahn was contracting as a consumer in the present case – the factual circumstances of his visit to Pula indicate that he came as a tourist. Furthermore, in Case C-497/13, *Faber*, the ECJ has elaborated a presumption of a consumer dispute when an entrepreneur and a private person are in a contractual relationship. However, Article 17 (1) of the Regulation Brussels I^{bis} requires that the entrepreneur directs his commercial activities to the Member State of the consumer. Yet, much depends again on the (unknown) circumstances of the case under consideration. Nevertheless, if Pula Parking provides for information about parking in foreign languages or if the tourist office promotes tourism to Pula in foreign languages to the German market (i.e. via a website), one might consider this to be a commercial activity in the sense of Article 17 of the Brussels I^{bis} Regulation. So far, the ECJ has not addressed the specific context of marketing activities related to tourism under Article 17 of the Brussels I^{bis} Regulation. It would be interesting to see whether and how Article 17 would be applied to the present case.

Finally, if one does not follow the AG's conclusion that the contract had been concluded by simply parking a car, jurisdiction under Article 7 (2) of the Brussels I^{bis} Regulation cannot be established either: Pula Parking is not a claiming

damages based on tort – because there is no damage on the side of Pula Parking. The underlying claim is based on unjust enrichment; however unjust enrichment does not open up the specific jurisdiction under Article 7 (2) of Brussels I^{bis}.

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

Further (adverse) consequences of the opinion

In answering the second question referred to the ECJ, AG Bobek also comes to the conclusion that the payment order of the Croatian notary cannot be enforced under the Brussels I^{bis} Regulation: according to the conclusions, the Hungarian notary does not meet the requirements of Article 2 lit a) of the Regulation because the notary cannot be regarded as a "court or tribunal of a Member State". This conclusion is certainly correct though I doubt whether the definition elaborated by the conclusions corresponds to the needs of the Brussels I^{bis} Regulation.

However, it does not concern the main issue raised here: if the Regulation is declared applicable to the parking of cars in public streets, a new market of cross-border debt collection will be opened up. The European debt collection industry will take up and streamline these cases and will bring claims against the consumers and tourists under the different EU instruments (especially the European Payment Order Regulation) and collect parking fees. The next step might be an increase of the amount of the fees and fines by the local cities and boroughs in order to create substantial profits. Consumers and tourists will be confronted with a further area of debt collection which might be experienced as a

kind of “Europe à l’envers”: instead of profiting as tourists from the freedom of movement and services within the judicial area, local authorities will profit from the possibility to raise and collect fees cross-border from ordinary people living abroad. As a further result, fees to be paid to the debt collection industry might equally explode. Finally, the satisfaction of the population with the “efficiency” of the justice systems in Europe may decrease as they have to pay for it – in the proper sense off the term. In this respect, the better way to permit the cross-border collection of public debts would be the implementation of a specific instrument by legislation – not by the ECJ.

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