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.

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.

Conference Report on Private Antitrust Litigation: A New Era in the EU

The author of this post is Kristina Sirakova, Research Fellow at the MPI Luxembourg. Thanks, Kristina.

On 24 and 25 October 2016, the Academy of European Law (ERA) in cooperation with the French Cour de cassation hosted a conference in Paris on private antitrust litigation in Europe and the challenges that the implementation of the antitrust damages package entails for the EU Member States. The speakers, who were of both academic and professional acclaim, provided interesting insights and lively debate on procedural and substantive issues, arising from the recent legislative developments in the field of private antitrust litigation. Topics included inter alia: compensation and quantification of harm suffered from competition law infringements, the role of competition authorities and of the CJEU in private enforcement, limitation periods, evidence and forum shopping considerations.

This post provides an overview of the presentations and discussions on the issues raised.

The objectives of Directive 2014/104/EU and future steps

In her words of welcome, Jacqueline Riffault-Silk, Judge at the Commercial Chamber of the Cour de cassation, addressed the objectives of the Damages Directive in light of the institutional landscape and historical background of the Directive. The first step towards the Directive was made by the CJEU which ruled in cases *Courage and Crehan* (C-453/99, ECLI: EU:C:2001:465, para 26) and *Manfredi* (C-295/04, ECLI: EU:C:2006:461, para 60) that it is "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition". Hence, the CJEU established the right to compensation which is the first foundation of the Directive. Furthermore, the Directive is founded on the principles of effectiveness and equivalence. The Directive was eventually proposed by the European Commission in 2013 (COM

(2013) 404 final).

Eddy de Smijter, Head of the European Competition Network and Private Enforcement Unit, DG Competition, European Commission, presented the two main objectives of the Damages Directive, which the Member States must transpose by 27 December 2016. Firstly, it aims at helping victims of cartel law infringements to obtain compensation by removing practical obstacles in different national laws. Secondly, the Damages Directive serves to enhance the interplay between the public and private enforcement of competition law. With regard to *Pfleiderer* (C-360/09, ECLI:EU:C:2011:389), he noted that the CJEU did what it could in the absence of European legislation on the matter. The European Commission subsequently identified in this CJEU judgment a signal to become active.

Mr de Smijter then explained some of the key provisions of the Directive, focusing especially on the principle of full compensation in Article 3. He noted that even though Article 3 (3) Damages Directive excludes the award of punitive damages, the payment of interest could have a similar effect, depending on the duration of the cartel. Regarding the disclosure of evidence, he highlighted the increased possibilities for obtaining access to relevant documents in Article 5 et seq. Damages Directive. However, before granting access to documents, the courts must balance the interests involved: on the one hand, the right to full compensation shall be protected; on the other hand, effective public enforcement shall be ensured.

The morphology and mapping of antitrust damage actions

Assimakis Komninos, Partner at the Brussels office of White & Case LLP, presented "The morphology and mapping of antitrust damage actions" focusing mainly on four key points in damages litigation: types of competition law infringements, types of claimants, follow-on vs. stand-alone claims and types of harm. Firstly, he differentiated between shield litigation and sword litigation. While in shield litigation the claimant seeks for example the nullity of the contract pursuant to Article 101 (2) TFEU, in sword litigation he claims for instance injunctions, damages, restitution or declaratory relief. Secondly, Komninos explained the importance of stand-alone actions for effective judicial protection. In fact, the numbers show that stand-alone actions are more frequently filed than follow-on actions for damages. The claimant's decision to bring a follow-on or a

stand-alone action largely depends on the type of infringement. While follow-on actions are suitable to deal both with exploitative (e.g. cartels) and exclusionary infringements (e.g. foreclosure) stand-alone cases concern mainly exclusionary scenarios. Thirdly, he focused on certain specificities that depend on the type of claimant. Various procedural questions may arise depending on whether the claim was brought by direct/indirect purchasers and/or suppliers, umbrella customers, end consumers, distributors or competitors.

Liability, causality and the principles of effectiveness and equivalence

Sabine Thibault-Liger, Counsel at the Competition/Antitrust department of Linklaters in Paris, presented "Liability, causality and the principles of effectiveness and equivalence". Starting with the principles of effectiveness and equivalence, she explained that they safeguard the effective enforcement of European law. From a substantive standpoint, the effectiveness of the right to compensation depends on the scope of liability which must be sufficiently wide to ensure that the victim is compensated for the damage suffered. In the framework of the personal scope of liability, Thibault-Liger dealt with two problems. Firstly, the Directive does not define the notion of "undertaking"; thus the question arises as to whether an injured party can sue the parent company of an infringing party. She concluded that the concept of "undertaking" shall be understood in the same way as in competition law; thus, the liability of the parental company depends on whether it had decisive influence over its subsidiaries. Secondly, she explored the several liability for multiple infringing parties as regulated in Article 11 Damages Directive. With regard to the material scope of liability, Thibault-Liger raised four main points: the presumption of damage in Article 17 (2) Damages Directive, umbrella claims, the impact of the fault of the victim and the combination of licit and anticompetitive causes for the damage.

Quantification of damages and the passing-on of overcharges

Three presentations dealt with the quantification of damages both from a legal and an economic perspective.

Firstly, Diana Ungureanu, Judge at the Court of Appeal Pitesti, Romania and Marc Ivaldi, Professor of Economics at the Toulouse School of Economics and at the Ecole des Hautes Etudes en Sciences Sociales, jointly presented "The amount of compensation". Ungureanu focused on the principle of full compensation and the

risk of overcompensation. She pointed out the inconsistency between the principle of full compensation and the court's power to estimate the amount of harm. Thus, she concluded that full compensation is a judicial fiction. Ungureanu identified three questions that arise in the framework of the principle of full compensation: Who is damaged? How are they damaged? By how much are they damaged? Focusing on the amount of harm, she warned of the risk of overcompensation which exists in cases of supply chains. If in such a case a direct purchaser brings a claim for damages against his supplier and the defendant is unable to establish the passing-on defense, the direct purchaser would be awarded full damages for the overcharge. In an action for damages brought subsequently by an indirect purchaser against the same defendant, the claimant can rely on the presumption that the overcharge has been passed on (Article 14 (2) Damages Directive). The fact that the defendant was unable to prove the passing-on of overcharges in the previous proceedings, would not be enough to rebut the presumption, thus the defendant will have to pay again. The two judgments would not contradict to each other as each case would be decided according to the applicable rules on burden of proof. Payment of multiple damages by the defendant and unjust enrichment of at least one of the claimants would be likely to arise as a result.

Ivaldi looked at the amount of compensation "through the economic window". He presented the damage as an economic concept, constituting the difference between the economic situation of an actor in the absence of a competition law violation (counterfactual scenario) and the economic situation of the same actor as a result of the competition law violation. He explained that from an economic perspective full compensation has three effects: a direct cost effect (direct overcharge), an output effect and a pass-on effect. The direct cost effect is the price overcharge multiplied by the total quantity purchased, yet the main challenge is to determine the overcharge. The output effect is the cost for the purchaser not to have purchased the desired amount at competitive prices. The sum of the direct cost effect and the output effect is the loss caused by the cartel. On the contrary, the pass-on effect constitutes the gains from higher downstream prices.

In the second presentation on quantification of damages Marc Ivaldi talked about "Quantification in practice: challenges and aids for the national judge". He explained the methods for quantification of harm, which can be divided into two

categories: methods based on an existing price benchmark (so called comparator-based methods) and methods based on a construction of the competitive but-for price (cost-markup methods and simulation analysis). While the comparator-based methods compare existing prices across time and/or across markets to identify the counterfactual price, the cost-markup methods and the simulation analysis construct the counterfactual price by adding to the cost a markup for reasonable profit (cost-markup methods) or a markup for maximized profit (simulation analysis).

The third presentation by Benoît Durand, Partner at RBB Economics, focused on "The study on the passing-on of overcharges arising from competition law infringements: an economic perspective" (the study is now available here). Before explaining the various methods applied to quantify the passing-on effect, Durand commented on the role of economists in private antitrust litigation. He highlighted that they not only provide a framework within which both qualitative and quantitative evidence can be evaluated, but also develop counterfactual analysis to quantify damages. He then pointed out key influences on the extent of passing-on and explained that the passing-on effect is the price increase multiplied by the quantity sold. The main challenge to the quantification of the passing-on effect is thus again to estimate the increase in price. Two approaches can be used for this purpose: Firstly, the direct approach estimates the downstream price increase applying the same comparator-based methods used to estimate the initial overcharge. Secondly, the pass-on rate approach uses the purchaser's pass-on rate and applies it to the input cost increase.

Relationship between public and private enforcement

Wolfgang Kirchhoff, Judge in the antitrust division of the German Federal Court of Justice, presented "Relationship between public and private enforcement". Although public and private enforcement proceedings are separate, they are related through the binding effect which the Commission's and national competition authorities' (NCA) decisions have on courts (Article 16 (1) Reg. 1/2003; Article 9 Damages Directive). German law goes even further than the Directive in this respect and confers on foreign NCA decisions the same binding effect as their own NCA decisions (Article 33 (4) GWB). Kirchhoff explained the scope of the binding effect on the basis of a recent Federal Court judgment in case *Lottoblock II* (KZR 25/14, ECLI:DE:BGH:2016:120716UKZR25.14.0). It follows from it that only the operative part of a final administrative decision and

those parts of the reasons needed to support the final decision with regard to facts and law are binding for courts. He stressed the fact that the binding effect concerns only the competition law infringements and can be extended neither to causality nor to quantification of harm. Furthermore, he explored the possibilities for the Commission and NCAs to act as amicus curiae in private enforcement proceedings and described the extensive German experience with oral statements by the Federal Competition Authority which judges reportedly find very useful. The court, however, is not bound by those statements. Finally, Kirchhoff noted that experience with competition law cases and profound training in competition law are key elements to successful dispute resolution.

The role of the CJEU in interpreting Directive 2014/104/EU

Ian Forrester, Judge at the General Court of the European Union, took a step backwards from the Directive and shared some historical thoughts on the development of European competition law. He explained that in the 70s and 80s it was unusual for firms to bring claims against each other based on competition law. In the 90s, however, the institutionalization of competition law started. Leniency programs were introduced in the US and in Europe. The adoption of competition law measures became desirable and even possibilities to bring actions for damages were mentioned. Yet, in 2003, the case of Courage and Crehan showed how many instances one had to go through to actually be awarded damages suffered from anticompetitive practices. A long discussion followed which finally ended with the adoption of Directive 2014/104/EU. Judge Forrester, however, expressed some doubts about its practical impact. He made a comparison with the Product Liability Directive, which was also controversially discussed before being adopted but has not often been used. He expects that the Damages Directive will share the same destiny because the world has changed since the Directive has been discussed. The law just follows the reality. He stressed the fact that nowadays, settlements are very common in Europe and noted that the need for settlements changes legal professions. This, however, shall not diminish the importance of the Directive, preliminary questions on which will surely be directed to the CJEU. In particular, questions on access to documents, limitation periods, causation and burden of proof are very likely to arise. In his opinion, however, the answers to these particular questions will not be as important as other factors of life.

Limitation periods

Ben Rayment, experienced litigator at Monckton Chambers in London, presented "Limitation periods: When does the clock start and stop?" exploring Articles 10 and 18 Damages Directive. In his presentation he dealt mainly with three groups of issues. Firstly, he addressed factors that start the limitation "clock" and focused on the notion of "knowledge" in Article 10 (2) Damages Directive. Secondly, Rayment discussed issues around stopping the limitation "clock". In other words, he explained under what circumstances time limits can be suspended. Problems can arise in connection with Article 10 (4) Damages Directive because it might not be sufficiently clear when an investigation of an infringement is started and/or finalized. Moreover, Article 18 Damages Directive leaves the question open as to whether formal arrangements for consensual dispute resolution are necessary to suspend the time limit. Thirdly, he addressed some transitional issues arising out of Article 22 Damages Directive. Finally, he concluded that the rules on limitation in the Directive are generous to claimants and are therefore consistent with the aim of the Directive to facilitate private enforcement.

Evidence

Eric Barbier de la Serre, Partner at Jones Day, presented issues of evidence. On the one hand, the Directive aims at facilitating compensation and solving information asymmetry between parties. On the other hand, however, coordination between public and private enforcement requires the protection of leniency statements and settlements. Barbier de la Serre discussed five types of remedies for this controversy: a change of liability test, a definition of proxies, a lower standard of proof, an introduction of presumptions and a facilitation of the collection of evidence. To a certain extent, the Directive adopts to his opinion all of them. With regard to the collection of evidence, he noted that the Directive still leaves discretion to national judges to order disclosure, so it is unclear whether there is a subjective right to it. Furthermore, it remains to be seen whether costs will act as a deterrent and whether disclosure might become a reason for forum shopping. Concerning the introduction of presumptions, he addressed the presumption in Article 9 Damages Directive that an infringement exists, the presumption of damage for cartels in Article 17 (2) Damages Directive as well as the rules concerning passing-on.

Forum-shopping considerations

Finally, a round table on forum shopping considerations and impact closed the conference.

Jonas Brueckner, Senior Associate of Baker & McKenzie's Competition Law Practice Group, explained firstly the rules of the Brussels Ibis Regulation on the basis of case *CDC Hydrogen Peroxide* (C-352/13, ECLI:EU:C:2015:335) which govern the question of jurisdiction. Secondly, he presented four considerations for the choice of a forum: the applicable procedural law, the applicable substantive law, soft factors as well as the possibility for recognition and enforcement abroad. He pointed out that the softened standard of proof for damages and the possibility to litigate in English make Germany an attractive jurisdiction for claimants. However, high advance payments and a rather hostile attitude of the judiciary towards private antitrust litigation might discourage claimants to start litigation in German courts.

Ben Rayment stressed the soft factors that make the UK an attractive forum. Judges are highly specialized and have by no means a hostile attitude towards private enforcement. Furthermore, claimants are attracted by the rules on disclosure and the different funding options available. The numerous cases with which UK courts have already dealt have also led to the development of the law and have increased legal certainty.

Jacqueline Riffault-Silk noted that there are fewer cases in France than in the UK and The Netherlands. She stressed the fact that private enforcement falls under civil matters. Therefore the principle of party disposition applies. It is for the parties to start litigation and to define the subject matter of the action. A problem arises, however, when various claimants start proceedings in different Member States against the same cartel members. She noted that this deconcentration of proceedings is not favorable to private enforcement.

Comments and discussion

Each presentation was followed by a lively debate. The speakers and participants highlighted the significance of private enforcement and assessed to what extent the Directive is likely to achieve its aim of facilitating private enforcement. In particular, practical issues on quantification of damages and access to evidence were often subject to discussion. The potential consequences of Brexit on private enforcement as well as incentives for consensual settlements were also widely

discussed.

The circulation of people and their family status in a globalized world: the foreigner’s family

Bringing together a team of researchers from Europe and Brazil (Universidade de São Paulo), the *Center of Family Law* of the University Jean Moulin Lyon 3, organizes an international seminar entitled:

The circulation of people and their family status in a globalized world: the foreigner’s family

The Seminar will take place in Lyon, wednesday, November 23, 2016, with the following program:

Morning: 9h – 12h30
Introduction:
What is a “foreigner”? Between regionalization and globalization, *J.-S. Bergé and P. Casella (9h – 9h30)*

I – The dimensions of the foreigner’s family
Presidency: P. Casella

– In the European area, *Fulchiron H., A. Slimani, L. Sorisole* (9h30 – 10h)
– In the South American area, *G. Cerqueira* (10h- 10h30)
– Debate: *A. Bonomi* (subject) (10h30 to 10h45)

Coffee Break: 10h45 – 11h

II – The integration of the foreigner’s family (social rights, integration policies)
Chair: F. Menezes

– In the European area, *B. Baret, L. Eck* (11h – 11h30)
– In the South American area, *F. Menezes, D. Cordeiro* (11h30 – 12h)
– Debate: Discussion *A. Bonomi* (subject) (12h – 12h30)

Lunch: 12h30 to 2h15

III – The protection of the foreigner's family (entry, residence permit, displacement)
Chair: *C. Moises*

– Protection of fundamental rights, *L. Robert, C. Moises* (14h15 – 14h45)
– Protection by special statutes (political areas, economic areas), *E. Durand, G. Monaco* (14h45 – 15h15)

Coffee Break: 15h15 – 15h30

– Debate: *A. Bonomi* (subject) (15h30 – 16h30)
– Closing, *G. Monaco, H. Fulchiron* (16h30 – 17h)

Seminar Directors: Hugues Fulchiron and Gustavo Monaco

Language: French

Venue: 15, quai Claude Bernard, Lyon, France – Université Jean Moulin Lyon 3 (Salle Caillemer)

No participation fee.

New Publication in the Oxford Private International Law Series:

Human Rights and Private International Law

By James J Fawcett FBA (Professor of Law Emeritus, University of Nottingham), Máire Ní Shúilleabháin (Assistant Professor in Law, University College Dublin) and Sangeeta Shah (Associate Professor of Law, University of Nottingham)

Human Rights and Private International Law is the first title to consider and analyse the numerous English private international law cases discussing human rights concerns arising in the commercial and family law contexts. The right to a fair trial is central to the intersection between human rights and private international law, and is considered in depth along with the right to freedom of expression; the right to respect for private and family life; the right to marry; the right to property; and the prohibition of discrimination on the ground of religion, sex, or nationality.

Focusing on, though not confined to, the human rights set out in the ECHR, the work also examines the rights laid down under the EU Charter of Fundamental Rights and other international human rights instruments.

Written by specialists in both human rights and private international law, this work examines the impact, both actual and potential, of human rights concerns on private international law, as well as the oft overlooked topic of the impact of private international law on human rights.

Contents

1: Introduction
2: Human rights, private international law, and their interaction
3: The right to a fair trial
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5: The right to a fair trial and recognition and enforcement of foreign judgments under the EU rules
6: The right to a fair trial and jurisdiction under national rules
7: The right to a fair trial and recognition and enforcement of foreign judgments under the traditional English rules
8: The right to a fair trial and private international law: concluding remarks

9: The prohibition of discrimination and private international law
10: Freedom of expression and the right to respect for private life: international defamation and invasion of privacy
11: The right to marry, the right to respect for family life, the prohibition on discrimination and international marriage
12: Religious rights and recognition of marriage and extra-judicial divorce
13: Right to respect for family life and the rights of the child: international child abduction
14: Right to respect for private and family life and related rights: parental status
15: The right to property, foreign judgments, and cross-border property disputes
16: Overall conclusions

For further information, see here.

Journal of Private International Law Conference at Pontifical University of Rio de Janeiro, 3-5 August 2017: Call for Papers

Building on the very successful conferences held in Aberdeen (2005), Birmingham (2007), New York (2009), Milan (2011) Madrid (2013), and Cambridge (2015), we are pleased to announce that the Journal of Private International Law will be holding its next Conference at the **Pontifical Catholic University of Rio de Janeiro, 3-5 August 2017**. We are now calling for abstracts for the Conference. Please submit an abstract if you would like to make a presentation at the Conference and you are willing to produce a final paper that you will submit for publication in the Journal. Abstracts should be up to 500 words in length and should clearly state the name(s) and affiliation(s) of the author(s).

They can be on any subject matter that falls within the scope of the Journal, and can be offered by people at any stage of their career, including postgraduate students. The Journal of Private International Law (J. Priv. Int. L.) was launched in spring 2005 and covers all aspects of private international law, reflecting the role of the European Union and the Hague Conference on Private International Law in the making of private international law, in addition to the traditional role of domestic legal orders. Articles from scholars anywhere in the world writing in English about developments in any jurisdiction on any aspect of private international law are welcomed, as well as shorter articles or analysis from anywhere in the world, including analysis of new treaties and conventions, and lengthy review articles dealing with significant new publications.

Presentation at the Conference will depend on whether your abstract is selected by the Editors of the Journal (Professors Jonathan Harris of King's College, London and Paul Beaumont of the University of Aberdeen) and by the conference organisers in the Pontifical Catholic University (Professors Nadia de Araujo, Daniela Vargas and Lauro Gama). The subsequent article should be submitted to the Journal. Publication in the Journal will be subject to the usual system of refereeing by two experts in the field.

The Conference will be a mixture of plenary (Friday) and parallel panel sessions (Thursday afternoon and Saturday morning). Please indicate on the abstract whether you are willing to present in either or are only willing to do so in one or the other. A willingness to be flexible maximises our ability to select your paper.

The Conference will be held at the main campus of the Pontifical Catholic University of Rio de Janeiro, located in Rio de Janeiro, Brazil (www.puc-rio.br). . Further information will be available soon.

Speakers will not be expected to pay a conference fee but will be expected to pay their travel and accommodation expenses to attend the Conference in Rio de Janeiro. Information on Conference accommodation will be available soon, with a list of hotels and hostels nearby the campus, but the University does not have living arrangements Details about accommodation and the Conference dinner on the Thursday evening will follow.

Please send your abstract to the following email address by November 15th 2016: (jprivintlrioconference2017@gmail.com