

**CONFERENCE REPORT: 15TH CONFERENCE OF THE
INTERNATIONAL ASSOCIATION FOR CONSUMER LAW
(IACL), "VIRTUES AND CONSUMER LAW", HOSTED
BY THE CENTRE FOR THE STUDY OF EUROPEAN
CONTRACT LAW (CSECL), UNIVERSITY OF
AMSTERDAM, 29 JUNE – 1 JULY 2015**

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The 15th (bi-annual) conference of the International Association of Consumer Law (IACL), devoted to *Virtues and Consumer Law*, was hosted by the Centre for the Study of European Contract Law at the University of Amsterdam (convenors: Professor Marco Loos, Dr Joanna Luzak and Dr Sacha Tamboer). The conference began on Monday, 29 June 2015 and lasted until Wednesday, 1 July 2015. It consisted of 5 plenary sessions (with a total of 10 plenary speakers) and 8 parallel sessions (each of which consisted of 5 parallel workshops, with 3–4 papers per workshop). In sum, there were some 160 papers presented in workshops, and their presentation would certainly exceed the scope of this report. Therefore, the report will be limited to a discussion of the plenary papers as well as to a brief discussion of the papers presented by Polish scholars in the parallel sessions, preceded by a brief presentation of the Centre for the Study of European Contract Law, which hosted the conference, as well as the International Association of Consumers.

The host institution – the Centre for the Study of European Contract Law (CSECL) – is a research and legal education institute based at the University of Amsterdam, headed by a leading expert on European private law, Professor Martijn W. Hesselink. The CSECL focuses both on research and on legal education in the field of the interplay between EU, domestic and international contract law, understood as the law governing economic transactions in Europe. CSECL members collaborate within various networks and on international research projects, including the Trento Common Core Project, the Private Law Theory network and the Ius Commune Research School. As part of its teaching activity, CSECL offers a specialised postgraduate Master's course – the LL.M. in European Private Law, which is

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taught in English. Most members of CSECL staff are Dutch legal academics, including leading experts on European private law. However, there are also international scholars working at the Centre: the Italian Professor Anna Veneziano – currently on leave to serve at the UNIDROIT; two foreign lecturers – Dr Marija Bartl from Croatia and Dr Joanna Luzak from Poland, who graduated from the University of Warsaw; two foreign doctoral candidates – Karoline Haug from Sweden and Candida Leone from Italy; and Polish scholar Dr Rafał Mańko from the European Parliamentary Research Service in Brussels, who is affiliated with the CSECL as its external fellow.

Turning to the International Association of Consumer Law (IACL), it should be pointed out that it was founded on the basis of a series of conferences on consumer law held in Brazil, and was formalised only during the late 1990s. IACL brings together scholars of consumer law from around the world, including the EU, the US, Australia, Brazil, Canada and India. The aim of IACL is to promote research into consumer law and its teaching. IACL annual conferences take place in various academic institutions around the globe. The most recent ones were hosted by the University of Sydney, Australia (2013), Brunel University, UK (2011) and Nalsar University, India (2009).

Unsurprisingly, the 15th IACL conference was a truly international event, bringing together scholars from a total of 27 different countries, including 14 of the EU Member States (Belgium, Croatia, Denmark, Estonia, Finland, Germany, Hungary, Italy, Malta, the Netherlands, Poland, Portugal, Spain and the United Kingdom) and 13 non-EU countries (Argentina, Australia, Brazil, Canada, Indonesia, India, Israel, Japan, New Zealand, Serbia and the United States). Most participants came from the world of academia, but there were also practitioners, e.g. Mark Wissink, Advocate-General at the Dutch Supreme Court, Anita Vegter, board member of the Dutch Authority for Consumers, representatives of organised civil society (e.g. Bart Combée from the Consumentenbond, representatives of BEUC – Ursula Pachl, Augustin Reyna and Dr Christoph Schmon), as well as civil servants (Carina Törnblom from DG Justice of the European Commission, Fergal A. O Regan from the EU Ombudsman's office and Sophia Martini Vial from the Public Attorney's Office in Brazil). One of the keynote speakers was Professor Verica Trstenjak (University of Vienna), former Advocate-General at the CJEU.

The conference was opened by its main convenor, Professor Marco Loos (Centre for the Study of European Contract Law, University of Amsterdam). The first plenary speaker was Professor Mark Wissink (Professor at the University of Groningen, the Netherlands and Advocate-General at the Dutch Supreme Court). Professor Wissink spoke about *Guidance in Dutch Consumer Law* and pointed out that EU consumer law is very complicated from the point of view of Dutch courts, who need guidance in order to apply it correctly. For this purpose, the Dutch legislature has recently introduced a domestic preliminary reference procedure allowing courts and ADR panels to ask questions directly to the Dutch Supreme Court. This allows in particular courts that would otherwise not be able to access the Supreme Court (because e.g. in small claims cases there is no cassation) to ask it a question and receive a binding answer. The domestic preliminary

reference procedure does not preclude asking a question to the CJEU on the basis of Article 267 TFEU. So far 25 requests have been made, and as many as 20% are concerned with consumer law.

The second plenary speaker in the first plenary session was Ms Anita Vegter, member of the board of the Dutch Authority for Consumer and Markets, who spoke about *Public enforcement of consumer law on top of the private foundation*. She stressed that private bodies are important for the enforcement of consumer law, in particular ADR bodies and consumer organisations. She indicated that due to high litigation costs in the Netherlands, consumers cannot enforce small claims in ordinary courts, but rather need to use complaint boards. She also explained that the Dutch Authority for Consumer and Markets considers itself subsidiary to market forces and will intervene in favour of consumers only if the desired outcome cannot be secured by the market itself.

The third plenary speaker was Mr Bart Combée, director of the Dutch consumer organisation Consumentenbond. He spoke about *The gap between consumer law in theory and practice*. Mr Combée pointed out that his organisation is one of the oldest consumer associations in the Netherlands, with some 500,000 members and 700,000 users of its services. He spoke about the level of enforcement of consumer claims in the Netherlands which, in practice, is very low, with as many as 80% of Dutch consumers giving up their claims against traders. As an explanation of this phenomenon, Mr Combée pointed out to the lack of level playing field, the inaccessibility of traders (e.g. the difficulty of contacting the hotline of a company) and the fact that both ADR and court proceedings are not only time consuming but also expensive for consumers. Referring to the Consumer ADR Directive, Mr Combée commented that its promises “are not fulfilled in practice” because traders simply boycott the voluntary CADR scheme. As a practical example of the problems he described, Mr Combée pointed out that the costs of litigating over a EUR 1,000 fridge would amount, for a consumer, to some EUR 3,000, most of which would be consumer by lawyers’ fees (EUR 2,700). In conclusion, Mr Combée argued that only collective redress can be a solution for consumers, and he regretted that it has been explicitly excluded from the scope of the Antitrust Damages Directive. Reacting to questions during the debate, Mr Combée explained that there is no small claims procedure under Dutch law, and any ADR schemes are voluntary, so that traders do not need to take part in them.

During the second plenary session, chaired by Professor Loos, Dr Orla Lynskey (London School of Economics) spoke about *Protecting personal data through competition law: a virtuous or vicious circle?* Dr Lynskey pointed out that two-thirds of UK consumers have a feeling that they have no control over their personal data, despite existing EU and UK legislation in this field. She added that when the existing legal framework for data protection was adopted, data was not yet conceived of as a product (sold and bought between companies) but only as a subsidiary aspect of business

activity. She argued for using EU competition law as a means of protecting consumers against the abuse of their personal data by factoring in consumer welfare among the non-economic concerns of competition law.

The second speaker of the second panel was Professor Norbert Reich (University of Bremen) whose paper was entitled *From defective cars to defective implants: a new look at comparative consumer product liability?* Professor Reich began by recalling the PIP scandal regarding the use of industrial silicon instead of medical silicone for the manufacture of silicone breast implants. The owner of the company went to prison for that, but the company itself became bankrupt and the consumers who suffered could not receive compensation. Starting from this example, Professor Reich proceeded to a comparative analysis of EU and US rules on liability for defective medical products, such as medicines, defibrillators or breast implants. He commented on a number of cases, including *Riegel v Medtronic*, 128 S.Ct. 999 (2008), *Wyeth v Levine*, 129 S.Ct. 1187 (2009) and C-503/13 *Boston* (CJEU judgment of 5 March 2015). The latter decision of the CJEU recognised strict liability for faulty defibrillators.

During the third plenary session, chaired by Dr Joanna Luzak, a keynote lecture was delivered by Professor Omri Ben-Shahar (University of Chicago) who spoke about *Mandatory disclosure: panaceas in consumer law*. Professor Ben-Shahar indicated that mandated disclosure (of information to the consumer) is the chief regulatory technique in all fields of protective law, such as consumer contract law. In his view, however, this technique has not been successful, as it does not in any way affect the reality. Moreover, the keynote speaker argued that mandatory disclosure can even do more harm than good. Professor Ben-Shahar gave a number of practical examples, for instance he showed the general contract terms of iTunes, which amount to hundreds of pages that a consumer cannot possibly digest before clicking “I agree”, or the immense number of various warnings and information that an Illinois consumer must formally take cognisance of before signing a mortgage contract with a bank. These examples show, according to Professor Ben-Shahar, that mandatory disclosure is a pure fiction which does not protect consumers in any meaningful way. During the discussion, Professor Ben-Shahar conceded that mandatory disclosures in fact only protect businesses from liability and that is their main social function.

On Tuesday, 30 June 2015, the fourth plenary panel, chaired by Professor Marco Loos, started with a presentation by Ms Carina Törnblom from DG Justice of the European Commission. Her paper was entitled *Virtues and consumer law: a view from the European Commission*. Ms Törnblom started by pointing out that “justice is fairness” and that the general idea of EU consumer law has been the creation of a level playing field for consumers and businesses. A centrepiece of legislation in this field is the Unfair Commercial Practice Directive, which will soon be the object of a review, leading possibly to a reform proposal.

The second speaker was Ms Ursula Pahl from BEUC, the European Consumer Organisation, who spoke about *Better regulation and better enforcement: challenges for EU consumer policy*. She indicated that in 2016 the Commission's “REFIT” programme is intended to cover two important pieces of EU consumer law, namely the Unfair Commercial Practices

Directive (UCPD) and the Consumer Sales Directive. She expressed concern over the fact that consumer-protection legislation is increasingly being considered as a burden to businesses, and Member States' more favourable rules for consumers, perfectly legal under the doctrine of minimum harmonisation, are being criticised as “gold plating” of EU directives. She indicated that the intent of BEUC will be to defend the existing consumer acquis. Furthermore, she pointed to the logic of the TTIP, where consumer law is being viewed as a barrier to transatlantic trade.

The third plenary speaker of the session was Professor Verica Trstenjak (University of Vienna), former Advocate-General at the CJEU. Professor Trstenjak spoke about *Consumer protection in the financial crisis and the influence of the European Court of Justice*. It should be mentioned here that AG Trstenjak wrote many opinions in cases concerning consumer contract law, in particular regarding the interpretation of the Unfair Terms Directive (93/13/EEC). In her presentation she highlighted the immense role played by the Court of Justice in protecting consumers against unfair terms, in particular in the context of the financial crisis and its consequences for consumers, e.g. of mortgage lending agreements. In particular, the ECJ has been empowering national judges to protect consumers by interpreting the Unfair Terms Directive as giving them the right to control the fairness of terms *ex officio*. The ECJ's judgment in Case C-415/11 *Aziz* helped millions of consumers suffering from harshly unfair terms of mortgage contracts. In Case C-34/13 *Kušionová* the ECJ, following the principles of Article 7 of the Charter of Fundamental Rights, proclaimed the existence of a right to accommodation which it entered into the Unfair Terms Directive.

On the third day of the conference, on Wednesday 1 July 2015, there were three consecutive concurrent workshop sessions, followed by a concluding plenary session chaired by Professor Martijn W. Hesselink. A keynote lecture was delivered by Professor Oren Bar-Gil (Harvard University) who spoke about two virtues of consumer law, namely rationality and efficiency. Professor Bar-Gil focused on the implications of imperfect consumer rationality upon consumer law and the efficiency of markets, which can be promoted through consumer law. He pointed out that consumers have complex choices and need to make decisions for the future, whilst they suffer from what behavioural economics refers to as the “present bias”. This means that consumers make different choices depending on whether they affect the immediate future and when they affect more distant events. This “present bias” is abused by traders through the use of introductory offers, free goods and pricing policies with prices increasing over time. Furthermore, consumer rationality is adversely affected by such factors as myopia, optimism and bounded rationality, which are abused by traders. Consumer law should respond to these problems by resorting to three instruments: mandatory disclosure, price caps and quality floors. By resorting to economic models, Professor Bar-Gil indicated when and under what circumstances each of these

instruments can yield optimum results in terms of consumer protection and market efficiency.

The conference was closed by Professor Marco Loos.

Among the scholars presenting their papers in the parallel sessions, there were seven Polish academics working in Poland and abroad. Dr Mateusz Grochowski (Polish Academy of Sciences & Polish Supreme Court, Civil Chamber) presented a paper entitled *Between Effectiveness and Stability: 'New formalism' in consumer contracts*. Dr Grochowski pointed to such aspects of EU consumer contract law as requirements to make available to consumers the standard terms of a contract (STC), requirements regarding the transparency of the STC, as well as aspects of legislative technique of the “new formalism” which is characterised by a teleological approach (e.g. the requirement of durability of the medium on which the STC is transmitted to the consumer), and departs from certain classical civil law approaches (e.g. liberalisation of the requirement of written form). Mgr Agnieszka Jabłowska (University of Łódź) gave a presentation entitled *Protecting Consumers from Themselves: Will new information requirements under the Directive on consumer rights make consumers better informed?* The speaker argued that the regulatory burden imposed on traders by the Consumer Rights Directive (2011/83/EU) is not excessive compared to the benefits of full harmonisation and that information requirements can be an effective tool of consumer protection, provided that conclusions from behavioural research are drawn. Dr Katarzyna Kłafkowska-Waśniowska (Adam Mickiewicz University in Poznań) presented a paper on *Protection of viewers as consumers in audiovisual media services* in which she presented the problems of the rules on audiovisual commercial communications in the Audiovisual Media Services Directive (2010/13/EU), as one of its objectives is the protection of viewers as consumers. Mgr Patrycja Kozik (PhD candidate in civil law, Jagiellonian University) spoke about *Protection through information under the Directive on Consumer Rights – is it really effective?* Dr Rafał Mańko (external fellow, Centre for the Study of European Contract Law; policy analyst in European private law, European Parliamentary Research Service in Brussels) presented a paper entitled *Virtues and Vices of the European Small Claims Procedure*, in which he presented some practical problems regarding the European Small Claims Procedure (ESCP), especially its lack of popularity among litigants, before indicating the possible reasons for this and presenting the ongoing legislative proceedings aimed at improving the ESCP. Dr habil. Monika Namysłowska (University of Łódź) presented a paper entitled *As far as it gets: The black list of unfair commercial practices as the ultimate b2c unfairness test*. Mgr Izabela Raiwa-Rietbroek (PhD candidate, University of Amsterdam) presented a paper entitled *Rethinking consumer protection for financial services, US-EU perspective: Case study of credit cards*. She pointed out that in the recent years both in the US and EU consumer protection laws for payment services have been undergoing a substantial change. The new developments in US financial consumer law mark a shift away from the “rational consumer” theory that created a foundation of big disclosure statutes of the late 1960s and 1970s and toward the rising influence of behavioural economics. In the European Union the principles of the internal market and consumer protection dominate the

debate on the upcoming revised Payment Services Directive ("PSD2"). Even though the underlying policies differ significantly, the results of the legislative initiatives of the last year seem to be very similar: more substantive consumer protection for payment services and stronger enforcement. Dr Piotr Tereszkiewicz (Jagiellonian University in Kraków) talked about *Nudging consumer toward safer financial products? The case of risky mortgages*. Dr Tereszkiewicz discussed developments regarding foreign currency mortgage loans (e.g. in Swiss Francs), which had been popular in Central and Eastern Europe in recent years, illustrating the data on household mortgage debt indexed in foreign currencies. Subsequently, the speaker analysed possible legal approaches to tackling risky mortgages, in particular the judicial review of contract terms under the EU Unfair Terms Directive (93/13/EEC), a path taken by the CJUE. The speaker concluded by advocating the idea of neutral counselling of mortgage applicants if they are offered risky types of mortgages by lenders.

Furthermore, two Polish legal scholars attended the conference without presenting a paper (Dr habil. Monika Jagielska, University of Silesia, and Dr Aleksandra Kunkiel-Kryńska, legal advisor in Warsaw).