Bar Council and Personal Injuries Bar Association response to the Ministry of Justice pre-consultation paper: Compensation for victims of cross-border road traffic accidents in the European Union

1. This response is provided by the General Council of the Bar of England and Wales ("the Bar Council"), in particular the Personal Injuries Bar Association ("PIBA"), to the consultation by the Ministry of Justice on the EU Commission's consultation on limitation periods in cross-border personal injury claims.

2. The Bar Council represents the interests of some 15,000 barrister members in England & Wales. As the Bar's governing body, its role is to promote and improve the functioning of the Bar and its services to its clients, and to represent the interests of the Bar on all matters relating to the profession, including on changes to law or procedure. PIBA is the specialist bar association for barristers who practise in the field of personal injuries. Many of its members are also active members of the Pan-European Organisation of Personal Injury Lawyers ("PEOPIL")

3. The Bar Council supports the position set out in the submission made by the Pan European Organisation of Personal Injury Lawyers (PEOPIL), attached in annex below.

4. It is the common experience of members of the Bar practising in the field of foreign accidents that limitation issues cause a disproportionate amount of uncertainty, and increased expense, when providing advice to an injured victim. The consequence of such uncertainty is to increase cost and complexity in litigation involving accidents abroad. Often, proceedings are commenced to avoid any doubt that a limitation period might expire, when, in fact, according to the terms of the applicable foreign law, there is no formal need to initiate proceedings. Or, because of the same uncertainty, satellite litigation occurs because foreign insurers consider this a vehicle to exert leverage in any settlement discussions. To avoid such difficulties, even lawyers experienced in handling such claims are required to procure expert foreign opinion in the most straightforward cases in respect of the practical application of foreign limitation law.

5. We agree with the analysis set out in response to Questions 1 and 2 of the Commission consultation. This is an area of law that is unnecessarily complex. The standard personal injury practitioner is likely to encounter difficulty in knowing, ahead of time, what is the appropriate course of action to take, which is why the Bar is frequently instructed to advise and to appear in foreign claims. A fortiori, a reasonably informed citizen would find it very difficult to navigate this area of law.

6. Accordingly, we agree with the solution proposed by PEOPIL, namely that, by reference to the direct cause of action against road traffic insurers, guaranteed by the consolidating directive harmonising the protection provided to injured victims seeking compensation in respect of cross-border road traffic accident claims, there should be specific protection provided by way of an EU Regulation. Such an instrument would be proportionate, would meet a real need to protect the interests of road traffic accident victims, without affecting the autonomy of

individual Member States to regulate their own civil procedure and substantive law in respect of domestic personal injury claims.

7. The Bar Council supports the specific recommendations set out in PEOPIL's response as to the scope and content of this new regulation, namely:
   - the scope of harmonisation shall be limited to personal injury/fatal accidents/claims for damage to property arising from cross-border road traffic accidents only and should not extend to any other tortious claims arising in a cross-border context.
   - Moreover the intervention should refer to the cause of action provided in Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009, which provides the proper framework for such an intervention by the EU;
   - the uniform rules should be conceived as minimum standards for the protection of victims' rights, thus making it possible for the competent legislators to enact, or Judges to apply, provisions more favourable to the victim;
   - the harmonisation should consider all relevant aspects (the length of the limitation period, the commencement and expiration of the period, the grounds and methodology for suspension or interruption of the period, etc.).

8. The Bar Council also endorses the call by PEOPIL for an amendment to Article 4 of Regulation (EC) No 864/2007 (Rome II) in order to enable "accident-abroad victims", who pursue their claims in their own countries under Article 18 («*Direct right of action*») of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, (or to provide a lex specialis for cross-border road traffic accident claims, as foreseen by the Rome II Regulation), to have their national law applied when assessing the award of damages (not the assessment of liability).

Bar Council
October 2012

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PEOPIL RESPONSE

– October 2012 –

1. Introduction: PEOPIL and its contribution to the debate on harmonisation of limitation periods in personal injury & fatal accident claims

PEOPIL, is a leading European organisation comprising academics as well as personal injury lawyers who act for victims, defendants and insurers. PEOPIL is devoted to the study of European law and to the promotion of full and fair redress for victims without any frontiers between European countries.

Because of this role, PEOPIL is particularly interested in the aforesaid Public Consultation.

The PEOPIL Research Group carried out an extensive comparative study into similarities and divergences between European Countries as to the compensation of victims of personal injury and limitation law. These comparative efforts lead PEOPIL to publish two books: M. BONA & P. MEAD (EDS), Personal Injury Compensation in Europe, Deventer, Kluwer, 2003; M. Bona, S. Lindenbergh & P. Mead (eds.), *Fatal Accidents and Compensation of Secondary Victims in Europe*, XPL, London, 2005.

Furthermore **since 2004 PEOPIL significantly contributed to the process that has led to the present Public Consultation.**

In particular:

- **August 2004**: **PEOPIL CONTRIBUTION TO THE PUBLIC CONSULTATION «*FUTURE OF JUSTICE AND HOME AFFAIRS*», COM (2004) 4002 final (new multiannual programme Tampere II) CROSS-BORDER LITIGATION AND PERSONAL INJURY LIMITATION LAW**; PEOPIL suggested: 1) the launch by the European Commission of a process of Consultation for the establishment of minimum European requirements for the law of limitation in relation to personal injuries; 2) the following minimum measures in order to protect injured victims involved in cross-border litigation: *A)* special rules protecting minors and persons under disability in respect of limitation law ; *B)* particular provisions permitting the interruption or suspension of the limitation period in cross-border litigation in order to avoid the need for the issue and service of formal proceedings for limitation purposes only; *C)* to introduce a discretionary power permitting the courts to extend the time limit taking into account the reasons for the delay on the part of the foreign injured person, and any prejudice to the defendant by the failure to issue proceedings within the original limitation period;

- **2005**: following further consultation and reflection PEOPIL drafted the «*Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL CONCERNING LIMITATION IN RESPECT OF PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN CROSS-BORDER LITIGATION*» (see Attachment no. 3); this detailed proposal was then incorporated into the annex of the first draft of the ***MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION with recommendations to the Commission on limitation periods in***

cross-border disputes involving injuries and fatal accidents **(2006/2014(INI))**[1];

- <u>30 May 2006</u>: **PEOPIL participation in the session of the Committee on Legal Affairs of the European Parliament on the proposal *Limitation periods in cross-border disputes involving injuries and fatal accidents* (2006/2014 (INI))**; the Legal Affairs Committee heard from PEOPIL representatives, John Pickering and Marco Bona, who provided statistics for cross-border accidents every year, for example in Germany in 2004, over 50,000 foreigners were injured in road traffic accidents (of a total of 450,000 road traffic accidents); the two speakers stated that there was uncertainty for both defendants and claimants, with complexities caused by many different limitation periods; following this session the Committee adopted on 21 November 2006 the ***REPORT with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents (2006/2014(INI))***[2]; finally on 1 February 2007 the European Parliament passed the ***Resolution with recommendations to the Commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI))***[3];

- <u>May 2009</u>: **PEOPIL RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION PAPER ON «*THE COMPENSATION OF VICTIMS OF CROSS-BORDER ROAD TRAFFIC ACCIDENTS IN THE EUROPEAN UNION*»**; in this position paper PEOPIL reminded the European Commission about the above-mentioned recommendations provided in 2007 by the European Parliament and the aforesaid PEOPIL proposal (as incorporated into the

[1] See 9.2.2006, *DRAFT REPORT with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents* (2006/2014(INI)), Committee on Legal Affairs, Rapporteur: Diana Wallis (Initiative – Rule 39 of the Rules of Procedure), PROVISIONAL 2006/2014(INI).
[2] 23.11.2006; FINAL A6-0405/2006.
[3] P6_TA(2007)0020 Limitation periods in cross-border disputes involving personal injuries and fatal accidents, European Parliament resolution with recommendations to the Commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI)), Official Journal of the European Union, 25.02.2007, C 250 E/99.

DRAFT REPORT with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents (2006/2014(INI)), dated 9.2.2006).

2. Answers to the questions and further comments

2.1. Practical dimension of the problem

Answer to Question 1

PEOPIL members reported various cases where primary and/or secondary victims of road traffic accidents faced serious obstacles and delays due to the divergences existing among E.U. Member States in relation to limitation law/prescription.

In particular it is not unusual in cross-border road traffic accident ("RTA") litigation for insurance companies and/or claims representatives or compensation bodies - delegated by Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles to handle victims' claims - to deny compensation on the ground of expiry of limitation periods thus refusing to settle claims and forcing victims to start expensive judicial proceedings.

PEOPIL members' experiences clearly show that in many cross-border RTA cases insurance companies and other defendants, by relying on the law of the place where the accident took place, seek to argue that the relevant limitation period has expired after receiving letters of claim.

The following are among a selection of **cases** and **court decisions** reported by PEOPIL members:

- *Folino v. Link Motor Insurance Ltd. and others*, Lamezia Terme Court, 29 October 2009, no. 1024[4]; in 1998 an Italian citizen was seriously injured in England while crossing a street on a zebra crossing when struck by an

[4] See Attachment no. 5.

English registered and insured vehicle, driven by an English domiciled driver. The victim, before starting civil proceedings in 2003, had sent to the English insurance company letters of claim that, if the accident had taken place in Italy instead of England, under Italian law would have had the effect of stopping the running of the relevant limitation period (Italian law provides that it is possible to interrupt time running for limitation purposes not only by service of proceedings, but also by any other act, including by registered letter of claim, capable of placing the debtor in default; moreover under Italian law whenever the limitation period has been interrupted, time commences running again for the same limitation period; in particular, Article 2945 C.C., paragraph 1, states that "*a new prescription period begins as a result of interruption*"); however the Italian Court held that English law had to be applied, and thus the limitation period had expired as under English law the victim had to issue court proceedings within three years from the date of the accident; **impact of limitation law defence: victim's right to compensation denied**.

- English cyclist killed in a road traffic accident in Spain in 2008. Liability in issue. Spanish limitation/prescription interrupted by buro fax by both English lawyers in the UK and the Spanish lawyers appointed by English solicitors. The Spanish insurers made an offer in respect of liability and a monetary offer both of which were rejected. County Court Proceedings in the UK commenced in 2011 (before the third anniversary of the accident). The Spanish insurers/their English appointed solicitors then filed a defence stating that the claim was being brought out of time and that prescription/limitation had not been properly interrupted and that the claim was subject to a 1 year limitation period in accordance with Spanish law. The matter was listed for a preliminary hearing in England and experts on Spanish law were instructed by both parties. Just before the hearing the defendant made an increased monetary offer to settle and the claim was settled after a further period of negotiation in the global sum of £400,000.00 less the agreed deduction for contributory negligence. The

stance adopted by the defendant Spanish insurers, which they ultimately abandoned, led to **significant increase in costs and delay and further upset and distress for the deceased's widow**[5].

- English victim. Accident took place in Tenerife on 12th December 1997. Victim was a pillion passenger on a moped when it was hit by a Spanish registered taxi driven by the 1st Defendant. He was 18 years old at the time. He sustained a serious leg injury, requiring numerous operations. He developed arthritis and also suffered with PTSD. His social, domestic and professional life was restricted as a result of his injuries. In particular, he was unable to pursue his career as a PE teacher. Following the accident, he instructed lawyers in Spain to deal with his claim. They sent a series of letters to the Defendant insurer on various issues but all confirming the intention to continue pursuing the claim. An English law firm took over the case in 2001, using the same Spanish lawyers as agents. Again further correspondence was sent to the Defendant insurer between 2001 and 2004, some of which related to the position on medical treatment and some of which referred to offers. From 2004, specific burofaxes were sent with the aim of formally interrupting limitation. In 2006 the claim was transferred to English law firm's Spanish office. Following this transfer, further burofaxes were sent to the Defendant's insurer and the law firm also joined the client to the criminal proceedings that had been commenced in Spain (but then adjourned) in 1998. Following the principle established in Odenbreit by the ECJ (2007), proceedings were commenced in England in March 2009. The Defendant alleged that the claim was statute barred and expert advice from Spanish lawyers had to be sought on the following points: 1. The status of the correspondence and whether or not this had interrupted the limitation period (which is one year from date of consolidation unless effectively interrupted); 2. The date of consolidation of the injury; 3. The timing of receipt of the burofaxes; 4.

[5] Case reported by PEOPIL member Matthew Tomlinson, solicitor, partner of Russell Jones & Walker Solicitors, Sheffield, UK.

Whether or not joining the criminal proceedings interrupted limitation. It was not until English lawyers assisting the claimant had spent significant time and incurred significant cost including gathering **expert evidence** that the Defendant finally conceded the limitation point and the claim settled[6]. As well as significant and unnecessary cost, the limitation arguments caused severe and understandable distress to the injured Claimant.

- Italian pedestrian seriously injured in August 2007 in Spain by an English driver of a vehicle insured in England; the English driver lost control of his car hitting three Italian tourists (including the claimant) who were walking on a pavement; registered letter of claim was sent by the claimant's lawyer to the English insurance company and its Italian claims representative in 2008; following the letter of claim the insurance company's medical expert examined the claimant during 2008; as the claims representative did not respond following the medical examination, a further letter of claim was sent in 2009; subsequently the claims representative answered that under Spanish law the letter of claim "*had to be sent by telegram to the insurance company of the person liable within one year from the accident*", thus denying compensation; court proceedings were issued by the claimant and in 2012 the case was settled; had the accident occurred in Italy, the insurance company would not even have dared to raise such a defence (certainly without any chance of success under Italian law)[7]; **impact of limitation law defence: need for the claimant to issue court proceedings, increase of claimant's legal costs and relevant delay of conclusion of the case**.
- English family of 4 injured in a road traffic accident in Italy brought proceedings in the UK 4 years post-accident (please note that this was a case English lawyers inherited from another law firm in the UK). The Italian insurers argued that the claim was statute barred as proceedings ought to have been commenced within 1 year of the accident. Advice was sought

[6] [Case reported by PEOPIL members]
[7] Case reported by PEOPIL member Avv. Marco Bona, lawyer, partner of MB.O – Bona Oliva e associati, Turin, Italy.

from Italian lawyers who advised that the claim was subject to a 5 year limitation period. The Italian insurers eventually agreed and damages were negotiated. However the stance adopted by the defendant insurers increased costs, caused **further delay and unnecessary stress and worry for the victims**[8].

- Road traffic accident between two vehicles occurred in Sardinia (Italy) in August 2008; one of the drivers domiciled in England was injured. In July 2010 the injured victim, issued judicial proceedings in England against the Italian driver and his insurance company (an Italian company); the defendants objected that under Italian law – Articles 149 and 150 of "Code of Private Insurances" («*Codice delle Assicurazioni Private*») – the correct defendant in this case should have been "*the insurer of the vehicle in which the injured party was driving at the time of the concerned accident*"; therefore the claimant had to seek an expert opinion from an Italian lawyer as to limitation time under Italian law in case it was necessary to join the claimant's own insurers[9]; **impact of limitation law defence: distress for the victim, increase in claimant's legal costs and court proceedings delayed**.
- on 5 June 2005, in Italy a UK national and resident in the UK was driving his vehicle, insured in England; at the time of the accident he was stationary at traffic lights, when a vehicle driven by an Italian citizen (First Defendant) and insured by an Italian company (Second Defendant) collided with the rear of his car; the first defendant's car was pushed into the rear of the claimant's car by a vehicle driven by another Italian citizen insured by another Italian insurance company (Third Defendant); as a consequence of this accident the English citizen sustained personal injury; letters of claim on behalf of the English claimant were sent in July 2005, July 2006, June 2007, January 2008; due to the failure of negotiations the claimant had to

[8] Case reported by PEOPIL member Matthew Tomlinson, solicitor, partner of Russell Jones & Walker Solicitors, Sheffield, UK.
[9] Case reported by PEOPIL member Avv. Marco Bona, lawyer, partner of MB.O – Bona Oliva e associati, Turin, Italy.

start court proceedings, bringing the case before the English Courts in 2010 (the claim form was issued on 26 April 2010); the First and Second Defendants stated that – since under Italian law the limitation period is two years from the date of the accident– the Claimant's claim was time-barred; the Third Defendant supported the view that the claim should be time-barred for the same reasons (2 years limitation period: "*under Italian law, the relevant limitation period for claims such as the present is two years from the date of the accident. The accident occurred on 5 June 2005. The Claim Form was issued on 26 April 2010. The claim is, therefore, time barred*"); the claimant had to seek an expert opinion from an Italian lawyer as to Italian limitation law[10]; **impact of limitation law defence: claimant's need to issue court proceedings, increase in claimant's legal costs and distress for the victim, delay in court proceedings**.

- An English citizen was injured in a RTA accident while on holiday in Greece. Action was brought before an English court against the Greek domiciled liable driver and his Greek based insurer. Greek prescription is five years from the date of the accident and can only be interrupted by proper service of proceedings. The proceedings were filed in England in the period immediately before the expiry of the five year period. English lawyers had to contact a Greek law firm in order to have the Writ of summons translated and served (under the Regulation 1393/2007 on service abroad) before the lapse of the five year period. Furthermore there was uncertainty whether the limitation period under Greek law could be interrupted by the mere issue of the claim before the English court. The English lawyers had to seek an opinion on this issue; **impact of limitation law issues: distress, increase of costs and uncertainty**[11].
- The case concerned a British citizen involved in a road traffic accident in Poland. The man was crossing the street when he was hit by a vehicle

[10] Case reported by PEOPIL member Avv. Marco Bona, lawyer, partner of MB.O – Bona Oliva e associati, Turin, Italy.
[11] Case reported by PEOPIL member Silina Pavlakis, lawyer, partner of Pavlakis • Moschos & Associates Law Offices, Piraeus, Greece.

driven by a Polish driver. As a consequence of the accident the pedestrian suffered severe brain injuries and a guardian (his brother) had to be appointed. The guardian became aware of the identity of the driver of the vehicle over three years after the date of the accident. The English lawyers had to seek an opinion on limitation under Polish law as it was not clear whether the relevant limitation period (3 years under Polish law) had already expired; **impact of limitation law issues: increase in claimant's legal costs and distress for the primary victim and his family, uncertainty**[12].

- Mr B. (UK citizen) is a protected party acting by his father following a serious road accident in which he was involved in Germany in June 2006. He was a soldier serving in Germany and, on the day of the accident, was a passenger in a German registered vehicle insured by a German insurer but driven by a fellow soldier (domiciled in the UK) which collided with a lorry insured by a German insurer. Mr B. sustained serious injuries, including a traumatic brain injury in the accident. Medical evidence confirms that he will never be able to return to paid employment. Pre-issue correspondence took place with the car driver's insurers who made a modest interim payment on account of damages. Whilst the insurer did not formally admit liability, they intimated that liability would not be an issue, there was nothing in the correspondence or otherwise to suggest that they would not settle the claim in full and the correspondence dealt solely with quantum issues. As it was not possible to settle the claim, proceedings were issued in June 2009 against the car driver and his insurers as first and second defendants. When the Defence was eventually served, the driver of the car and his insurers alleged that the accident was caused by the driver of a lorry who had allegedly changed lanes into the car driver's path. As a result, there was no option but to join the insurers of the lorry as a 3rd Defendant. The problem in doing so was that, by this time, the German

[12] Case reported by PEOPIL member Jolanta Budzowska, lawyer, partner of Budzowska Fiutowski and Partners, based in Krakow and Warsaw, Poland.

limitation period had expired. It was accepted by all parties that German law applied to limitation as far as proceedings were concerned against the third defendant. Had English law applied then this would not have been a problem given that Mr B. is a protected party and limitation does not run under English law where protected parties are concerned. The third defendant took the point on limitation and there was a trial on limitation as a preliminary issue. Again this led to considerable delay and expense and involved the parties having to call expert evidence from German lawyers on whether or not it was possible for the Court to exercise discretion on the limitation issue under German law. The Claimant was successful on this point at trial and the Court at a second subsequent trial determined that the lorry driver was not at fault in any event. The raising of the point led to significantly **increased costs and very significant delay and, in particular, meant that the injured victim was not until recently able to obtain sufficient interim payments to fund his rehabilitation. Thus his recovery and quality of life has been significantly prejudiced**[13].

To summarise, the above cases demonstrate important divergences as to when limitation starts to run; whether time starts to run where the Claimant is a protected party; whether criminal proceedings affect limitation, and if so, how; whether it is possible to interrupt limitation, and if so, how, and whether, given a change in circumstances or known facts, the Claimant has suffered prejudice through the expiry of a primary limitation period; in addition to the principle divergence, namely the differing lengths of primary limitation periods under Member State laws for road traffic accidents (between 1 year and 10 years).

[13] Case reported by PEOPIL member Philip Banks of Irwin Mitchell LLP, Birmingham, England.

PRACTICAL DIMENSION OF THE PROBLEM
Negative effects on victims arising from limitation law/prescription defences
Delay and unnecessary distress and upset for the victim and their family
Need to issue court proceedings
Significant increase in victim's legal costs
Victim significantly delayed in obtaining an interim payment to fund his rehabilitation treatment and prejudice to victim's quality of life
Victim's right to compensation denied
Negative effects on insurance companies and Member States
Increase of litigation costs also for insurance companies and compensation bodies
Increase of courts' and judges' case-load, thus with negative impact on national judicial systems

Therefore PEOPIL can confirm that divergent national legislation on limitation periods – a divergence now made possible by Article 4 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[14] – creates a real, concrete (not only theoretical) risk for road traffic accident victims to lose the right to claim compensation for cross-border road traffic accidents.

It should also be considered that limitation defences raised by insurance companies in the course of negotiations may discourage victims from pursuing

[14] Under this Article, as a general rule, the limitation law applicable is the law of the country where the damage occurs.

their claims any further (in respect of what would otherwise be straight forward cases). Domestic lawyers, who are not specialised in cross-border litigation, may be discouraged too, thus suggesting to their clients to discontinue valid claims.
Another important point to be taken into account is the fact that when victims and their lawyers manage to succeed in opposing limitation/prescription defences: the victims have incurred additional costs, and have had their right to access to compensation delayed. In relation to serious injuries, this could affect the access of victims to treatment, rehabilitation and may cause further and potentially permanent prejudice to their health, well-being and quality of life.
Moreover, the present situation of uncertainty increases litigation costs incurred by insurance companies and compensation bodies (thus Member States).
Also the courts and judges have to devote additional and unnecessary resourses in resolving issues concerning limitation/prescription of actions/rights.

Answer to Question 2

In all the cases reported above, the position would have been different if the accident had not happened abroad.
For example, in the Italian case *Folino v. Link Motor Insurance Ltd. and others* decided by Lamezia Terme Court, 29 October 2009, no. 1024[15] the victim would not have lost his right to claim compensation if the accident occurred in Italy instead of England.
It should be noted that in respect to "domestic" road traffic accidents it is very rare that plaintiff lawyers do not understand the limitation/prescription of actions, as they are familiar with the laws of their own country..
Moreover in respect to " domestic" accidents there is no need for domestic lawyers to go through the lengthy steps required in relation to foreign accidents; for example:

[15] See Attachment no. 5.

- waiting for long periods in order to have access to all relevant information on the accident
- translating documents in order to understand the accident circumstances and rights of the victims
- seeking opinions from foreign lawyers as to the appropriate methods of stopping the relevant limitation periods provided by the foreign law applicable to the case.

Had the points raised in the sample of cases set out above been raised in accordance with the law of the Claimant's domicile, the Courts would have given short shrift to the arguments, as being unmeritorious according to the applicable principles of the home legal system. This demonstrates that, rather than being as a consequence of a matter of principle, these divergences create a windfall for the insurers (who would otherwise have to pay out compensation for a valid claim) and a transaction cost for any well advised Claimant, who requires legal certainty by procuring foreign limitation advice whenever a foreign claim is to be pursued.

2.2. POSSIBLE REMEDIES TO THE PROBLEM RELATED TO TIME-LIMITS FOR "ACCIDENT-ABROAD VICTIMS"

Answers to Question 3, 4, 5, 6 and 7

PEOPIL notes that:

- there is a clear, significant and undeniable divergence in respect of limitation periods among Member States: not only national limitation time limits vary considerably between Member States, but there are also significant differences concerning: *a)* the commencement of the running of time; *b)* the concept of the "date of knowledge" of the person injured; *c)* the discretionary power of the courts to extend the commencement of the running of the limitation period beyond the date on which the accident accrued or the "date of knowledge" of the injured person (extension of the limitation period); *d)* the commencement of the running of time in the case of disabled persons and minors; *e)* the capacity to stop or interrupt the running of limitation; *f)* the burden of proof and evidence governing the expiry of limitation defence;
- the existence and extent of such divergences give rise to undesirable consequences for the victims of accidents in cross-border litigation, creating obstacles for injured individuals when exercising their rights both in Member States other than their own, and in cases in their own State when required to rely upon foreign law;
- this situation affects fundamental rights; not only access to justice, but the substantive rights that should be granted by Member States in accordance with the Charter of Fundamental Rights of the European Union: Article 2: "*everyone has the right to life*"; Article 3: "*everyone has the right to respect for his physical and mental integrity*"; Article 35 (Health care): "*a high level of human health protection shall be ensured*"; Article 7: "*everyone has the right to respect for his or her private and family life …*"; Article 9: "*right to found a family*"; Article 33: "*the family shall enjoy legal, economic and social protection*"; it is a matter of fact that whenever a remedy is denied a right is not granted;
- the lack of uniform rules applying to trans-national RTA's leads to under-protection of fundamental rights of injured victims and potentially creates an increased burden on Member State social security systems; moreover, in

this respect also potential defendants, including insurance companies and compensation bodies, are affected by the present situation;

- Article 4 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) does not solve the practical problems outlined above; furthermore it could be argued under Article 26 of this Regulation that the application of the limitation/prescription law of the place of the accident should be refused as being incompatible with the public policy (*ordre public*) of the forum whenever this application affects the fundamental rights mentioned above ; this argument would, however, lead to even more uncertainty;
- Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles does not contain any rule enabling victims and insurance companies, claim representatives, compensation bodies, lawyers and judges to solve the problems arising from such divergences;
- therefore:
    - there is a **real need for legal certainty which is not guaranteed by the laws governing the determination of the applicable foreign law**;
    - there is a practical need for a **common set of minimum standards operating in RTA cross-border litigation claims**, especially for victims of personal injuries and fatal accidents, but also including property damage (as for example damage to vehicles).

Improving information to 'accident-abroad victims' (whether optional[16] or mandatory[17]) or improving general information on limitation and prescription periods[18] are not sufficient measures to solve the problems outlined above.

[16] Option 1.
[17] Option 2.
[18] Option 3.

Furthermore, any of these suggested measures would not be able to avoid the following scenarios:

- different treatment among victims (it is not unusual that one "foreign accident" involves victims from different Member States);
- the uncertainty arising from the application of Article 26 of the Regulation (EC) No 864/2007 by national courts aiming to protect the fundamental rights of their citizens injured abroad.

It should be added that it is inappropriate to expect or to oblige insurance companies to provide information about the applicable limitation and prescription periods available to the victim in case of a cross-border accident. First, this solution would put insurance companies in the position of making choices about the applicable law. Secondly this would give rise to further disputes in relation to the accuracy and adequacy of the information provided by insurance companies thus giving rise to satellite litigation. Thirdly this information, whenever incorrect, would be misleading for victims, thus encouraging some of them to stop pursuing their valid claims.

In the light of all these considerations PEOPIL is in favour of **OPTION 4: New rules harmonising limitation and prescription periods for cross-border traffic accidents**.

Option 4 is fully consistent with the position already adopted by the European Parliament in 2007.

As already mentioned above (see para. 1) in 2005 PEOPIL drafted and promoted a detailed «*Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL CONCERNING LIMITATION IN RESPECT OF PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN CROSS-BORDER LITIGATION*».

This PEOPIL proposal was taken into consideration by the European Parliament in the course of 2006. The European Parliament then passed on 1st February 2007 the «***EUROPEAN PARLIAMENT RESOLUTION WITH RECOMMENDATIONS TO THE COMMISSION ON LIMITATION PERIODS IN CROSS-BORDER DISPUTES***

INVOLVING PERSONAL INJURIES AND FATAL ACCIDENTS» (**2006/2014(INI)**). This Resolution contains detailed recommendations on the content of the proposal requested by the European Parliament to the European Commission.

Accordingly, OPTION 4 is not only a desirable option, but it is the only feasible option, following the recommendations provided by the European Parliament and the PEOPIL proposal.

As to the correct **approaching to implemention of OPTION 4** PEOPIL suggests the following:

- **<u>the basis of legislative intervention by the European legislator and scope of the uniform rules</u>**:
  - presently and given the wide differences existing between European systems in relation to «*limitation law*» (common law countries apply this terminology) or «*prescription*» (this is the expression applied by civil law countries), the direct harmonisation of Member States' limitation/prescription laws by means of a directive or a regulation is not advisable and is, at least to a certain degree, unrealistic; furthermore such a level of approximation is likely to meet the justifiable opposition of some Member States in the light of the principle of subsidiarity;
  - moreover, it should be taken into account that, in the area of cross-border traffic accidents, the only cause of action, already harmonized at the European Union level and available to all claimants irrespective of their residence and of the place of the accident is the one provided by Article 18 («*Direct right of action*») of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles. Following the decision by the European Court of Justice on 13 December 2007 in *FBTO Schadeverzekeringen NV v. Jack Odenbreit*, Case C-463/06, this direct action enables "accident-abroad victims" to seek compensation in their own country of residence;

- therefore PEOPIL recommends that **the scope of harmonisation shall be limited to personal injury/fatal accidents/claims for damage to property arising from cross-border road traffic accidents only** and should not extend to any other tortious claims arising in a cross-border context. Moreover **the intervention according to Option 4 should refer to the cause of action provided in Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009**, which provides the proper framework for such an intervention by the EU;

- **<u>choice of EU legislative instrument</u>**:
  - in consideration of the above needs and the restricted scope that the intervention should have (affecting national laws with a limited impact), PEOPIL recommends **that the Council and the European Parliament enact a regulation** instead of a directive which would leave a residual margin for undesirable divergences;

- **<u>content of the uniform rules</u>**:
  - the uniform rules should be conceived as **minimum standards for the protection of victims' rights**, thus making it possible for the competent legislators to enact or Judges to apply provisions more favourable to the victim;
  - the harmonisation should consider **all relevant aspects** (the length of the limitation period, the commencement and expiration of the period, the grounds and methodology for suspension or interruption of the period);
  - in particular, any legislative initiative should take into account the following requirements:
    - to strike a balance of fairness between litigants in respect of limitation law issues;

- to introduce special rules protecting minors and persons under a disability in respect of limitation law issues;
- to facilitate the interruption and/or suspension of limitation periods in order to avoid the need for the issue and service of formal proceedings for limitation purposes only;
- to introduce a discretionary power permitting the courts to extend the time limit taking into account the reasons for the delay on the part of the foreign injured person, and any prejudice suffered by the Defendant by reason of the failure to issue proceedings within the original limitation period;

o the harmonisation initiative should concern **all pecuniary and non-pecuniary damages arising from cross-border road traffic accidents**.

Finally, having outlined all these points, PEOPIL provides the European Commission with a concrete, and exhaustive «***Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON LIMITATION PERIODS FOR COMPENSATION CLAIMS OF VICTIMS OF CROSS-BORDER ROAD TRAFFIC ACCIDENTS IN THE EUROPEAN UNION***» (see Attachment no. 1).

The PEOPIL experts' proposal, finalized in October 2012[19], is the result of comparative studies and practical experience.

It fully respects the principles and suggestions provided by the European Parliament resolution with recommendations to the commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI)).

2.3. TWO LEGAL REGIMES FOR CLAIMS ARISING FROM CROSS-BORDER ROAD TRAFFIC ACCIDENTS

[19] This proposal is an adataption of the previous PEOPIL proposal dated 2004 (see Attachment no. 3). The 2012 proposal focuses on cross-border road traffic accidents only.

Answer to Question 8

PEOPIL recommends that the real issue to be considered is not whether the law applicable to claims arising out of road traffic accidents differs depending on the court seised of the case which may or may not create problems for victims; instead, it should be taken into consideration that, as already reported above, following the decision by the European Court of Justice on 13 December 2007 in *FBTO Schadeverzekeringen NV v. Jack Odenbreit*, Case C-463/06 and the Fifth Motor Insurance Directive[20], "accident-abroad victims" are enabled and have a right to seek compensation in their own country of residence. Thus, **the real issue is whether these victims are in a position to obtain full and fair compensation before their domestic Courts**.

In particular, Directive 2009/103/EC and *FBTO Schadeverzekeringen NV v. Jack Odenbreit* provide "accident-abroad victims" with the right not only to negotiate but also to judicially pursue their claims in the courts of their domicile, against a relevant insurance undertaking or compensation body. As a consequence of this it is manifestly logical, faster, less expensive and more in line with the specific needs of the victim, if the claim is dealt with under the domestic law of the place of residence of the victim. It should also be noted that otherwise the victim would be treated differently and thus discriminated against in comparison to his neighbour who has sustained the same injuries in a domestic accident.

Unfortunately, Article 4 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations provides that the applicable law is to be the law of the country where the accident occurred, thus preventing victims from being fully and fairly compensated in accordance with the laws of their own country.

[20] See now Whereas no. 32 of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version): «*Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled*».

Therefore PEOPIL recommends that **the best and most appropriate solution to address the shortcomings of the current situation is to amend Article 4 of the Regulation (EC) No 864/2007 (Rome II) in order to enable "accident-abroad victims", who pursue their claims in their own countries under Article 18 («*Direct right of action*») of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, (or to provide a lex specialis for cross-border road traffic accident claims, as foreseen by the Rome II Regulation), to have their national law applied when assessing the award of damages (not the assessment of liability).**

This solution, as previously suggested by PEOPIL in its position paper on Rome II (see Attachment no. 4), would enable the victim on issues of quantification of damages to rely upon the law of the country where he is domiciled. This has the advantage of giving victims the opportunity to receive a level of compensation which is likely to be perceived as fair and just according to the principles of the society where he lives. In this way the amount of compensation, calculated in accordance with the law of damages of the victim's domicile, should enable the victim to properly face the economic consequences of the harmful event in the country where he in fact has sustained the negative effects of the accident; in this respect, such compensation satisfies the primary and basic requirement of the principle of full compensation which is connected to the social and economic circumstances applicable where the victim lives, including the prevailing health, tax and social security systems. It is important to note that, the maxim *restitutio in integrum* is a mechanism by which compensation should fall to be calculated according to the levels perceived as full, fair and just by the victim's society[21].

Finally, as to the scenario of uniform rules on compensation for personal injury and fatal accident damages, PEOPIL strongly oppose this suggestion. **Presently, there does not exist a sufficiently well-established and common legal**

[21] For example in *Heil v. Rankin* [2000] *PIQR Q*187 the English Court of Appeal stated that in determining what compensation for pain and suffering and loss of amenity is fair, reasonable and just the assessment must be made against the background of the society in which the Court makes the award.

background to permit legislative intervention by the European legislature in respect of specific detailed provisions for categories of recoverable loss and damage, methods of assessment (including criteria for medico-legal evaluation) and levels of awards for pecuniary and non pecuniary loss.

In particular, **at this stage, legislative unification of Member States' personal injury laws on damages by the promulgation of E.U. rules is wholly inappropriate**: there are at present no grounds nor any readily identifiable and legitimate need for unified rules in respect of the following aspects: categories of recoverable non-pecuniary damages; medico-legal assessment of personal injuries; methods for the monetary assessment of non-pecuniary losses; levels of awards for non-pecuniary losses; interest; the interaction between the provision of social security and compensation under any system of civil liability.

ATTACHMENTS

1. PEOPIL «*Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON LIMITATION PERIODS FOR COMPENSATION CLAIMS OF VICTIMS OF CROSS-BORDER ROAD TRAFFIC ACCIDENTS IN THE EUROPEAN UNION*».
2. EUROPEAN PARLIAMENT RESOLUTION WITH RECOMMENDATIONS TO THE COMMISSION ON LIMITATION PERIODS IN CROSS-BORDER DISPUTES INVOLVING PERSONAL INJURIES AND FATAL ACCIDENTS" (2006/2014(INI))

3. PEOPIL «*Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL CONCERNING LIMITATION IN RESPECT OF PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN CROSS-BORDER LITIGATION*».
4. PEOPIL RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION PAPER ON «*THE COMPENSATION OF VICTIMS OF CROSS-BORDER ROAD TRAFFIC ACCIDENTS IN THE EUROPEAN UNION*», May 2009.
5. Italian decision: *Folino v. Link Motor Insurance Ltd. and others*, Lamezia Terme Court, 29 October 2009, no. 1024.