

Cross-border Corona mass litigation against the Austrian Federal State of Tyrol and local tourist businesses?

While the Corona Crisis is still alarmingly growing globally, first movers are apparently preparing for mass litigation of ski tourists from all over Europe and beyond against the Austrian Federal State of Tyrol and local businesses. The Austrian Consumer Protection Association (*Österreichischer Verbraucherschutzverein, VSV*, <https://www.verbraucherschutzverein.at/>) is inviting tourists damaged from infections with the Corona virus after passing their ski holidays in Tyrol, in particular in and around the Corona super-hotspot of Ischgl, to enrol for collective redress against Tyrol, its Governor, local authorities as well as against private operators of ski lifts, hotels, bars etc., see <https://www.verbraucherschutzverein.at/Corona-Virus-Tirol/>.

In Austria, no real “class action” is available. Rather, the individual claimants need to assign their claims to a lead claimant, often a special purpose vehicle (in this case the Association) which then institutes joint proceedings for all the claims. For foreign claimants who consider assigning their claims to the Association, the Rome I Regulation will be of relevance.

According to Article 14 (1) Rome I Regulation the relationship between assignor and assignee shall be governed by the law that applies to the contract between the assignor and assignee under the Regulation. So far, however, there seem to be only pre-contractual relationships between the Austrian Association inviting “European Citizens only” (see website) to register for updates by newsletters. These pre-contractual relationships will be governed by Article 12 (1) Rome II Regulation. “[T]he contract” in the sense of that provision will be the one between the Association and the claimant on the latter’s participation in the collective action which may, but does not necessarily, include the contract on the assignment of the claim and its modalities. It is the Association that is the “service provider” in the sense of Article 4 (1) lit. b Rome I Regulation. Its habitual residence is obviously in Austria, therefore the prospective contract as well as the

pre-contractual relations to this contract will be governed (all but surprisingly) by Austrian law. Art. 6 does not come into play, since the service is to be supplied to the consumer exclusively in Austria, Article 6 (4) lit. a Rome I Regulation.

According to Article 14 (2) Rome I Regulation, the law governing the assigned claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. As far as the Rome II Regulation is applicable *ratione materiae*, i.e. for claims against the businesses, its Article 4 will select (again all but surprisingly) Austrian law - no "distance delict" as the potentially delictual act and its harmful effects on the claimant's health both took place in Austria. Follow-up damages in other states are irrelevant for the law-selecting process.

In respect to delictual claims against Tyrol and its public entities and authorities, Recital 9 of the Rome II Regulation reminds us that, with a view to Article 1 (1) Sentence 2 of the Regulation (no applicability to "*acta iure imperii*"), "[c]laims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation." Rather, an autonomous rule of choice of law for liability of Austrian public entities will apply, and this rule will certainly select Austrian law.

There are certain advantages in bundling a multitude of claims in the "Austrian" way: First, the high amount of damages from the collection of claims allows seeking third-party funding. Second, costs for both the court and the lawyers are structured on a diminishing scale. While the collective proceedings are pending, prescription periods do not proceed in respect to claims participating in the joint action. And of course, the "class" of these active claimants has much more weight for negotiations than an individual would have.

On the other hand, the jurisdiction at the consumer's domicile under Art. 18 Brussels Ibis Regulation will no longer be available, once the consumer has assigned his or her claim to another, e.g. a lead claimant. However, this is only relevant in respect to the contractual claims of consumers and only as long as the conditions for directing one's business at the consumer's domicile under Article 17 (1) lit. c Brussels Ibis Regulation are fulfilled. The claims in question here

mainly ground in non-contractual claims against public entities and private businesses, and they seem to be envisaged as independent civil follow-on proceeding after successful criminal proceedings - if these should ever result in convictions.

The allegation is that the respective public agencies and officers did not shut down the area immediately despite having gained knowledge about first Corona infections in the region, in order to let the tourism businesses go on undisturbed. These allegations are extended to local businesses such as ski lifts, hotels and bars etc., once they gained knowledge about the Corona risk. It will be an interesting question (of the applicable Austrian law of public and private liability for torts) amongst many others (such as those on causality) in this setting to what extent there is a responsibility of the tourist to independently react adequately to the risk, of course depending on the time of getting him/herself knowledge about the Corona risk. If there is such responsibility on the part of the damaged, the next question will be whether this could affect or reduce any tortious liability on the part of the potential defendants. Overall, all of that appears to be an uphill battle for the claimants.

Speaking of responsibilities, a more pressing concern these days is certainly how the European states, in particular the EU Member States and the EU itself, might organise a more effective mutual support and solidarity for those regions and states that are most strongly affected by the Corona Pandemic, in particular in Italy, Spain and France, these days. Humanitarian and moral reasons compel us to help, both medically and financially. Some EU Member States have started taking over patients from neighbouring countries while they are still disposing of capacities in their hospitals, but there could perhaps be more support (and there could have perhaps been quicker support). The EU has a number of tools and has already taken some measures such as the Pandemic Epidemic Purchase Programme (PEPP) by the European Central Bank (ECB). The European Stability Mechanism (ESM) could make (better?) use of its precautionary financial assistance via a Precautionary Conditioned Credit Line (PCCL) or via an Enhanced Conditions Credit Line (ECCL). Further, the means of Article 122 TFEU should be explored, likewise the possibilities for ad hoc-funds under Article 175 (3) TFEU. The European Commission should think about loosening restrictions for state aids.

All of these considerations go beyond Conflict of Laws, and this is why they are

not mine but were kindly provided (all mistakes and misunderstandings remain my own) in a quick email by my colleague and expert on European monetary law, Associate Professor Dr. René Repasi, Erasmus University of Rotterdam, <https://www.eur.nl/people/rene-repasi> (thanks!).

However, cross-border solidarity is a concern for all of us, perhaps in particular for CoL experts and readers. Otherwise, a “European Union” does not make sense and will have no future.