Rivista di diritto internazionale privato e processuale (RDIPP) No 4/2023: Abstracts

The fourth issue of 2023 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Cristina Campiglio, Professor at the University of Pavia, **Giurisdizione e legge applicabile in materia di responsabilità medica (ovvero a proposito di conflitti di qualificazioni)** [Jurisdiction and Applicable Law in Matters of Medical Liability (Namely, on the Issue of Conflicts of Characterisation); in Italian]

> An attempt has been made to give an account of the conflicts of qualification that characterise the healthcare sector, starting with the contractual or non-contractual nature of civil liability for malpractice. We then looked at the nature of the healthcare contract to assess whether patients can fall into the category of consumers and consequently enjoy the protection reserved to them. Finally, reference was made to the qualification of the patient's self-determination as an expression of the right to privacy rather than the right to physical integrity. Research on the nature of civil liability in a field – the health sector, as said – where many activities are potentially harmful to the physical integrity of the patient so that the health-care operator might be held accountable of culpable personal injury or even of manslaughter, provided an opportunity to analyse the practice of the Court of Justice relating to the qualification of "contractual matters" and indirectly of the non-contractual matter of culpable "tort"; and to note how the Court, in recent years, on the one hand has openly espoused an extensive interpretation of "contractual matters", and on the other hand has missed the chance to speak out on hypotheses of non-contractual liability in contractual contexts, or of concurrence of contractual and non-contractual liability. It is to be hoped that the European Union will become aware of the need to provide *ad hoc* rules on the liability of healthcare personnel who engage in activities that are intrinsically hazardous to patients' health: if not

substantive rules or guidelines, at least rules on jurisdictional competence and applicable law.

Olivia Lopes Pegna, Professor at the University of Florence, **Continuità interpretativa e novità funzionali alla tutela dell'interesse del minore nel regolamento Bruxelles II-*ter*** (Continuity in Interpretation and Novelties Functional to the Protection of the Interest of the Child in the Brussels II*b* Regulation; in Italian)

This article aims at illustrating the main innovations introduced in the Brussels regime on parental responsibility and protection of children with the Recast: i.e., Regulation (EU) No 2019/1111 ("Brussels II-*ter*"). While, on the one side, interpretation and application of the Recast Regulation mandate continuity with the jurisprudence of the Court of Justice of the European Union, on the other side the novelties introduced with the Recast show an increased penchant towards flexibility in order to achieve the protection of the actual and concrete best interests of the child.

Edoardo Benvenuti, Research Fellow at the University of Milan, ***Climate change litigation* e diritto internazionale privato dell'Unione europea: quale spazio per la tutela collettiva?** (Climate Change Litigation and EU Private International Law: Is There Room for Collective Redress?; in Italian)

With the worsening of the climate crisis, the EU is adopting a number of measures – both in the public and private sector – in order to counter such phenomenon. The layering of substantive norms and standards goes hand in hand with the growing interest towards procedural tools suitable to make the application of such rules effective through private enforcement. Against this background, and given the collective and the ubiquitous dimension of the consequences of climate change, the present article explores the phenomenon of collective redress in the field of climate change litigation. After introducing the definitions and the characteristic features of climate change litigation and collective redress, the article examines the role of Regulations (EU) No 1215/2012 and (CE) No 864/2007, in order to evaluate their ability to address the private international law issues arising from collective and climate change litigation. In doing so, the article focuses on the relevant case-law (both national and of the CJEU), as well as on Directive (EU) 2020/1828 on consumers' representative actions, which provides a

number of propositions that can be applied also in the context of climate change litigation. Once the main critical aspects have been identified, the article puts forth some reform suggestions to strengthen EU private international law mechanisms in the context of environmental mass torts.

This issue also comprises the following comment:

Ginevra Greco, Researcher at the University of Milan, **Il c.d. uso alternativo del rinvio pregiudiziale di interpretazione** (The So-Called Alternative Use of the Referral for a Preliminary Ruling on Interpretation; in Italian)

> This article endeavours to show that, contrary to popular opinion, the interpretative judgments of the Court of Justice of the European Union, which use the terms "precludes" or "does not preclude", are genuine judgments on the conformity of a national act or measure with EU law. This article also aims to illustrate the compatibility of those judgments with the model of Article 267 TFEU. This conclusion is supported not by the fact that such judgments are devoid of application profiles, but because they remain within the scope of the interpretative function of the Court of Justice, understood not as abstract interpretation, but as an interpretation which contributes to the resolution of the concrete case pending before the referring court.

Furthermore, in the *Chronicles* section, this issue includes:

Anna Facchinetti, Researcher at the University of Milan, **Immunità degli Stati ed *exequatur* di sentenze straniere in materia di terrorismo: una recente pronuncia della Corte di Cassazione francese** (State Immunity and Exequatur of Foreign Judgments on Terrorism: A Recent Ruling by the French Court of Cassation; in Italian).

Finally, the following book review by *Fausto Pocar*, Emeritus Professor at the University of Milan, is featured: **Albert Venn DICEY, John Humphrey Carlile MORRIS, Lawrence COLLINS, *Dicey, Morris & Collins on The Conflict of Laws***, 16th ed., Sweet & Maxwell, London, 2022, 2 voll., pp. cdxli-2476-LXXI; Companion vol., *EU Withdrawal Transition Issues*, pp. li-162.

Who can bite the Apple? The CJEU can shape the future of online damages and collective actions

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam), member of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

In the final weeks leading up to Christmas in 2023, the District Court of Amsterdam referred a set of questions to the CJEU (DC Amsterdam, 20 December 2023, ECLI:NL:RBAMS:2023:8330; in Dutch). These questions, if comprehensively addressed, have the potential to bring clarity to longstanding debates regarding jurisdictional conflicts in collective actions. Despite being rooted in competition law with its unique intricacies, the issues surrounding the determination of online damage locations hold the promise of illuminating pertinent questions. Moreover, the forthcoming judgment is expected to provide insights into the centralization of jurisdiction in collective actions within a specific Member State, an aspect currently unclear. Recalling our previous discussion on the Dutch class action under the WAMCA in this blog, it is crucial to emphasize that, under the WAMCA, only one representative action can be allowed to proceed for the same event. In instances where multiple representative foundations seek to bring proceedings for the same event without reaching a settlement up to a certain point during the proceedings, the court will appoint an exclusive representative. This procedural detail adds an additional layer of complexity to the dynamics of collective actions under the WAMCA.

Following a brief overview of the case against Apple, we will delve into the rationale behind the court's decision to refer the questions.

The claim against Apple

The claim revolves around Apple's alleged anticompetitive behavior in the market for the distribution of apps and in-app products on iOS devices, such as iPhones, iPads, and iPod Touch. The foundations argue that Apple holds a monopoly in this market, as users are dependent on the App Store for downloading and using apps.

According to the foundations, Apple's anticompetitive actions include controlling which apps are included in the App Store and imposing conditions for their inclusion. Furthermore, Apple is accused of having a monopoly on payment processing services for apps and digital in-app products, with the App Store payment system being the sole method for transactions.

The foundations argue that Apple charges an excessive commission of 30% for paid apps and digital in-app products, creating an unfair advantage and disrupting competition. They assert that Apple's dominant position in the market and its behavior constitute an abuse of power. Users are said to be harmed by being forced to use the App Store and pay high commissions, leading to the claim that Apple has acted unlawfully. The legal bases of the claim are therefore abuse of economic dominance in the market (Article 102 TFEU) and prohibited vertical price fixing (Article 101 TFEU).

The jurisdictional conundrum

Apple Ireland functions as the subsidiary tasked with representing app suppliers within the EU. The international nature of the dispute stems from the users purportedly affected being located in the Netherlands, while the case is lodged against the subsidiary established in Ireland. The District Court of Amsterdam has opted to scrutinize the jurisdiction of Dutch courts under Article 7(2) Brussels I-bis Regulation. This provision grants jurisdiction to the courts of the place where the harmful event occurred or may occur, encompassing both prongs of the *Bier* paradigm. However, Apple contends that, within the Netherlands, the court would only possess jurisdiction under Article 7(2) Brussels I-bis Regulation with regard to users residing specifically in Amsterdam.

In the court's view, the ascertainment of the *Handlungsort* should pertain only to allegations under Article 102 TFEU. In relation to Article 101 TFEU, the Netherlands was not considered the *Handlungsort*. This is due to the necessity of identifying a specific incident causing harm to ascertain the *Handlungsort*, and

the absence of concrete facts renders it challenging to pinpoint such an event.

The court's jurisdictional analysis commences with a reference to Case C?27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533), in which the CJEU established that the location of the harmful event in cases involving the abuse of a dominant position under Article 102 TFEU is closely linked to the actual implementation of such abuse. In the present case, the court observes that Apple's actions, conducted through the Dutch storefront of the App Store tailored for the Dutch market, involve facilitating app and in-app product purchases. Acting as the exclusive distributor for third-party apps, Apple Ireland exerts control over the offered content.

Applying the criteria from *flyLAL*, the court concludes that the *Handlungsort* is situated in the Netherlands. However, the court agreed that the specific court within the Netherlands responsible for adjudicating the matter remains unspecified.

The court initiated its analysis of the *Erfolgsort* based on the established premise in CJEU case law which posits that there is no distinction between individual and collective actions when determining the location of the damage. The court clarified that the concept of the place where the damage occurs does not encompass any location where the consequences of the event may be felt; rather, only the damage directly resulting from the committed harm should be considered. Moreover, the court emphasized that when determining the *Erfolgsort*, there is no distinction based on whether the legal basis for the accusation of anticompetitive practices is grounded in Article 101 or Article 102 TFEU.

The court reiterated that the App Store with Dutch storefront is a targeted online sales platform for the Dutch market. Functioning as an exclusive distributor, Apple Ireland handles third-party apps and in-app products, contributing to an alleged influence of anticompetitive behavior in the Dutch market. It's acknowledged that the majority of users making purchases reside in the Netherlands, paying through Dutch bank accounts, thus placing the *Erfolgsort* within the Netherlands for this user group. Nevertheless, the court reiterated that the particular court within the Netherlands tasked with adjudicating this case remains unspecified.

The questions referred

Despite the court having its perspective on establishing jurisdiction under Article 7(2) Brussels I-bis Regulation, it opted to seek clarification from the CJEU for the following reasons.

First, the court expresses reservations regarding the complete applicability of the *flyLAL* precedent to the current case. It emphasizes that the *flyLAL* case involved a precise location where the damage could be pinpointed. In contrast, the present case involves anticompetitive practices unfolding through an online platform accessible simultaneously in every location within a particular Member State and globally. The court is uncertain whether the nature of this online distribution makes a significant difference in this context, especially when considering whether the case involves a collective action.

Second, as mentioned above, the WAMCA stipulates that only a single representative action can be allowed to proceed for a given event. In situations where multiple representative foundations aim to commence legal proceedings for the same event without reaching a settlement by a specific stage in the proceedings, the court will designate an exclusive representative. In addition to that, Article 220 Dutch Code of Civil Procedure offers the opportunity to consolidate cases awaiting resolution before judges in various districts and involving identical subject matter and parties, allowing for a unified hearing of these cases.

Nevertheless, the court has reservations about the compatibility of relocating from the *Erfolgsort* within a Member State under the consolidation of proceedings, as Article 7(2) Brussels I-bis Regulation impacts the establishment of jurisdiction within that Member State. In questioning whether such relocation would run contrary to EU law, the court highlights the Brussels I-bis Regulation's overarching objective of preventing parallel proceedings. This triggers a skepticism towards the interpretation that each District Court within the Netherlands would have competence to adjudicate a collective action pertaining to users situated in the specific *Erfolgsort* within their jurisdiction.

However, the court finds it necessary to refer these questions to the CJEU, considering that, in its assessment, the CJEU's rationale in Case C?30/20 *Volvo* (ECLI:EU:C:2021:604) is not easily transposable to the current case. In *Volvo*, the

CJEU permitted the concentration of proceedings in antitrust matters within a specialized court. This is not applicable here, as the consolidation of proceedings under the described framework arises from the efficiency in conducting the proceedings, not from specialization.

These are, in a nutshell, the reasons why the District Court of Amsterdam decided to refer the following questions to the CJEU:

Question 1

1. *What should be considered as the place of the damaging action in a case like this, where the alleged abuse of a dominant position within the meaning of Article 102 TFEU has been implemented in a Member State through sales via an online platform managed by Apple that is aimed at the entire Member State, with Apple Ireland acting as the exclusive distributor and as the developer's commission agent and deducting commission on the purchase price, within the meaning of Article 7, point 2, Brussels I bis? Is it important that the online platform is in principle accessible worldwide?*
2. *Does it matter that in this case it concerns claims that have been instituted on the basis of Article 3:305a of the Dutch Civil Code by a legal entity whose purpose is to represent the collective interests of multiple users who have their seat in different jurisdictions (in the Netherlands: districts) within a Member State under its own right?*
3. *If on the basis of question 1a (and/or 1b) not only one but several internally competent judges in the relevant Member State are designated, does Article 7, point 2, Brussels I bis then oppose the application of national (procedural) law that allows referral to one court within that Member State?*

Question 2

1. *Can in a case like this, where the alleged damage has occurred as a result of purchases of apps and digital in-app products via an online platform managed by Apple (the App Store) where Apple Ireland acts as the exclusive distributor and commission agent of the developers and deducts commission on the purchase price (and where both alleged abuse of a dominant position within the meaning of Article 102 TFEU has taken*

place and an alleged infringement of the cartel prohibition within the meaning of Article 101 TFEU), and where the place where these purchases have taken place cannot be determined, only the seat of the user serve as a reference point for the place where the damage has occurred within the meaning of Article 7, point 2, Brussels I bis? Or are there other points of connection in this situation to designate a competent judge?

2. *Does it matter that in this case it concerns claims that have been instituted on the basis of Article 3:305a of the Dutch Civil Code by a legal entity whose purpose is to represent the collective interests of multiple users who have their seat in different jurisdictions (in the Netherlands: districts) within a Member State under its own right?*
3. *If on the basis of question 2a (and/or 2b) an internally competent judge in the relevant Member State is designated who is only competent for the claims on behalf of a part of the users in that Member State, while for the claims on behalf of another part of the users other judges in the same Member State are competent, does Article 7, point 2, Brussels I bis then oppose the application of national (procedural) law that allows referral to one court within that Member State?*

[Translation from Dutch by the author, with support of ChatGPT]

Discussion

The CJEU possesses case law that could be construed in a manner conducive to allowing the case to proceed in the Netherlands. Notably, Case C?251/20 *Gtflix Tv* (ECLI:EU:C:2021:1036) appears to be most closely aligned with this possibility, wherein the *eDate* rule was applied to a case involving French competition law, albeit the CJEU did not explicitly address this aspect (though AG Hogan did). Viewed from this angle, the Netherlands could be deemed the centre of interests for the affected users, making it a potential *Erfolgsort*.

Regarding the distinction between individual and collective proceedings, the CJEU, in Cases C-352/13 *CDC* (ECLI:EU:C:2015:335) and C-709/19 *VEB* v. *BP* (ECLI:EU:C:2021:377), declined to differentiate for the purpose of determining the locus of damage. We find no compelling reason for the CJEU to deviate from this precedent in the current case.

The truly intricate question centers on the feasibility of consolidating proceedings in a single court. In Case C-381/14 *Sales Sinués* (ECLI:EU:C:2016:252), the CJEU established that national law must not hinder consumers from pursuing individual claims under the Unfair Contract Terms Directive (UCTD – 93/13) by employing rules on the suspension of proceedings during the pendency of parallel collective actions. However, it is unclear whether this rationale can be extrapolated to parallel concurrent collective actions.

Conclusion

This referral arrives at a good time, coinciding with the recent coming into force of the Representative Actions Directive (RAD – 2020/1828) last summer. Seeking clarification on the feasibility of initiating collective actions within the jurisdictions of affected users for damages incurred in the online sphere holds significant added value. Notably, the inclusion of both the Digital Services Act and the Digital Markets Act within the purview of the RAD amplifies the pertinence of these questions.

Moreover, this case may offer insights into potential avenues for collective actions grounded in the GDPR. Such actions, permitted to proceed under Article 7(2) Brussels I-bis Regulation, as exemplified in our earlier analysis of the TikTok case in Amsterdam, share a parallel rationale. The convergence of these legal frameworks could yield valuable precedents and solutions in navigating the complex landscape of online damages and collective redress.

Second Act in Dutch TikTok class action on privacy violation: court assesses Third Party Funding

Agreements

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam), Xandra Kramer (Erasmus University Rotterdam/Utrecht University) & Jos Hoevenaars (Erasmus University Rotterdam), members of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

Third Party Litigation Funding (TPLF) has been one of the key topics of discussion in European civil litigation over the past years, and has been the topic of earlier posts on this forum. Especially in the international practice of collective actions, TPLF has gained popularity for its ability to provide the financial means needed for these typically complex and very costly procedures. The Netherlands is a jurisdiction generally considered one of the frontrunners in having a well-developed framework for collective actions and settlements, particularly since the Mass Damage Settlement in Collective Actions Act (WAMCA) became applicable on 1 January 2020 (see also our earlier blogpost). A recent report commissioned by the Dutch Ministry of Justice and Security found that most collective actions seeking damages brought under the (WAMCA) have an international dimension, and that all of these claims for damages are brought with the help of TPLF.

This blogpost provides an update of the latest developments in the Dutch collective action field focusing on a recent interim judgment by the Amsterdam District Court in a collective action against *TikTok c.s* in which the Dutch court assessed the admissibility of the claimant organisations based, among other criteria, on their funding agreements. This is the second interim judgment in this case, following the first one year ago which dealt with the question of international jurisdiction (see here). After a brief recap of the case and an overview of the WAMCA rules on TPLF, we will discuss how the court assessed the question of compatibility of the TPLF agreements with such rules. Also in view of the EU Representative Action Directive for consumers, which became applicable on 25 June 2023, and ongoing discussions on TPLF in Europe, developments in one of the Member States in this area are of interest.

Recap

In the summer of 2021, three Dutch representative foundations – the Foundation for Market Information Research (*Stichting Onderzoek Marktinformatie*, SOMI), the Foundation Take Back Your Privacy (TBYP) and the Foundation on Mass Damage and Consumers (*Stichting Massaschade en Consument*, SMC) – initiated a collective action against, in total, seven TikTok entities, including parent company Bytedance Ltd. The claims concern the alleged infringement of privacy rights of children (all foundations) and adults and children (Foundation on Mass Damage and Consumers). The claims include, *inter alia,* the compensation of (im)material damages, the destruction of unlawfully obtained personal data, and the claimants request the court to order that an effective system is implemented for age registration, parental permission and control, and measures to ensure that TikTok complies with the Code of Conduct of the Dutch Media Act and the GDPR.

In a its second interim judgment in this case, rendered on 25 October 2023, the District Court of Amsterdam assessed the admissibility of the three representative organisations (DC Amsterdam, 25 October 2023, ECLI:NL:RBAMS:2023:6694; in Dutch), and deemed SOMI admissible and conditioned the admissibility of TBYP and SMC on amendments to their TPLF agreements. This judgment follows the District Court's acceptance of international jurisdiction in this collective action in its first interim judgment, which we discussed on this blog in an earlier blogpost.

TPLF under the WAMCA

The idea of TPLF refers essentially to the practice of financing litigation in which the funder has no direct involvement with the underlying claim, as explained by Adrian Cordina in an earlier post on this blog. The basic TPLF contract entails the funder agreeing to bear the costs of litigation on a non-recourse basis in exchange for a share of the proceeds of the claim. Collective actions tend to attract this type of funding for two reasons. Firstly, these claims are expensive for several reasons such as the need for specialised legal expertise and complex evidence gathering, thereby creating a need for external financing through TPLF. Secondly, considering that these proceedings seek damages for mass harm, the potential return on investment for a funder can be substantial. This makes it an appealing prospect for funders who may be interested in investing with the possibility of sharing in these proceeds.

The WAMCA has put in place some rules on the practice of TPLF in the context of collective actions. These rules are inserted in the revised Article 3:305a Dutch Civil Code (DCC), which concerns the admissibility requirements for representative organisations to file such actions. Among other requirements, these rules stipulate that claimant organisations must provide evidence of their financial capacity to pursue the action while maintaining adequate control over the proceedings. This provision aims to ensure the enforceability of potential adverse cost orders and to prevent conflicts of interest between the funding entity and the claimant organisation (Tzankova and Kramer, 2021). This requirement can be waived if the collective action pursues an "idealistic" public interest and does not seek damages or only a very low amount, commonly referred to as the "light" WAMCA regime (Article 305a, paragraph 6, DCC). However, foll0wing the implementation of the Representative Actions Directive (Directive (EU) 2020/1828, or RAD) in the Netherlands, the stipulations related to financial capacity and procedural control persist when the collective action derives its legal basis from any of the EU legislative instruments enumerated in Annex I of the RAD, irrespectively of whether or not the collective action pursues an "idealistic" public interest.

Additionally, within the framework of the Dutch implementation of the RAD, it is stipulated that the financing for the collective action cannot come from a funder who is in competition with the defendant against whom the action is being pursued (Article 3:305a, paragraph 2, paragraph f, DCC).

Additional rules on TPLF can also be found in the Dutch Claim Code, a soft-law instrument governing the work of *ad hoc* foundations in collective proceedings. The latest version of the Claim Code (2019) mandates organisations to scrutinise both the capitalisation and reputation of the litigation funder. The Claim Code also stipulates that TPLF agreements should adopt Dutch contract law as the governing law and designate the Netherlands as the forum for resolving potential disputes. Most importantly, it emphasises that the control of the litigation should remain exclusively with the claimant organisation. Moreover, it prohibits the funder from withdrawing funding prior to the issuance of a first instance judgment. This Claim Code is non-binding, but plays an important role in Dutch practice.

The District Court's assessment of the TPLF agreements

In the most recent interim judgment, the District Court of Amsterdam assessed the admissibility requirements concerning financial capacity and control over the proceedings for each of the organisations separately. In its first interim judgment the court had determined that, with a view to assessing the admissibility of each of the claimants and also with a view to the appointment of an exclusive representative, the financing agreement the claimants had reached with their respective funders should be submitted to the court.

After the review of these agreements all three organisations were deemed to have sufficient resources and expertise to conduct the proceedings since they are all backed by TPLF agreements (SMC and TBYP) and donation endowments (SOMI). However, the court ordered amendments to the TPLF agreements of both SMC and TBYP due to concerns related to control over the proceedings. The District Court also acknowledged concerns about potential excessiveness in compensation, particularly if calculated as a fixed percentage irrespective of awarded amounts and the number of eligible class members. Notably, the court considered the proportionality of compensation to the invested amount and emphasised the need to align it with the potential risks faced by litigation funders.

In this sense, the court indicated that the acceptable percentage of compensation for litigation funders should be contingent on the awarded amount and the expected number of class members. While a maximum of 25% accepted in case law (for example, in the *Vattenfall* case, DC Amsterdam 25 October 2023) could play a role, the court indicates it will use a five-times-investment maximum as a more practical approach. The court stressed the importance of adjusting compensation rates based on damages to be assessed, ensuring appropriate remuneration for funders without exceeding the established maximum.

In light of these considerations, the District Court also outlined preconditions for future approval of settlement agreements, limiting the amount deducted from the compensation of the class members to a percentage that will be established by the court and capping litigation funder fees.

Assessment of each organisation's control over the proceedings

The three claimant organisations have entered into different financial agreements to pursue this collective action. SOMI is financed by donations from another

organisation, which does not require repayment of the amount invested. The District Court assessed the independence of SOMI's decision-making, given that the sole shareholder of the donating organisation is also the director of SOMI. The court concluded that appropriate safeguards are in place, as the donation agreement contains clauses stipulating that this person should refrain from taking any decisions in case of a conflict of interest. It was also stressed that the donating organisation declared to be independent from SOMI's directors and lawyers, as well as from TikTok.

On the other hand, TBYP and SMC have entered into TPLF agreements. The District Court highlighted some provisions of TPLF agreement of TBYF that were deemed dubious under the WAMCA. One clause required that no actions could be taken that could potentially harm the funder's interests, with an exception made if such actions were legally necessary to protect the interests of the class members. The court decided that this clause compromised TBYP's independence in controlling the claim. Another clause stipulated that TBYP could not make, accept, or reject an offer of partial or full settlement in the proceedings without first receiving advice from the lawyers that such a step was reasonable. The court viewed this clause as further compromising TBYP's control over the proceedings.

Similarly, the District Court had reservations about some clauses in the TPLF agreement SMC had entered into. One clause stipulated that if the lawyers were dismissed, the funder could inform SMC of the replacing lawyers they would like to appoint, subject to SMC's approval. Also, if the funder wanted to dismiss the lawyers and SMC disagreed, the dispute should be resolved by arbitration. The court decided that this gave power to the funder to disproportionately influence the proceedings. Another clause stipulated that if the chance of winning significantly decreased, the parties would need to discuss whether to continue or terminate the agreement. The court rejected this clause, stressing that terminating the TPLF agreement prematurely is unacceptable. Finally, the agreement contained a clause allowing the funder to transfer its rights, benefits, and obligations under the agreement, even without SMC's consent. The court also rejected this clause, emphasising that SMC should not be involuntarily associated with another funder.

In view of all these considerations the District Court decided that these provisions in the TPLF agreements could compromise the independence of TBYP and SMC from their respective litigation funders. In principle, the presence of these

contractual provisions should lead to TBYP and SMC being deemed inadmissible. However, considering the overall intent of the TPLF agreements and the novelty of such agreements being reviewed, the court has given TBYP and SMC the opportunity to amend their TPLF agreements to remove the contentious clauses.

Outlook

In its decision, the District Court repeatedly stressed that it was 'entering new territory' with this detailed assessment of the funding agreements. This is also reflected in the careful consideration the court has for the various, potentially problematic, aspects of TPLF in collective actions and the fact that it chooses to formulate a number of preconditions that it intends to apply when determining what will count as reasonable compensation in the event of future approval of a settlement agreement. It thereby forms the second act in this *TikTok* case, but also the firsts steps in clarifying some uncertainties in the practical implementation of the WAMCA.

The challenges collective actions and TPLF face are not unique to The Netherlands, as for instance also the *PACCAR* judgment by the UK Supreme Court 0f earlier this year showed (see also this recent blogpost by Demarco and Olivares-Caminal on OBLB). In this ruling, the Supreme Court considered whether Litigation Funding Agreements (LFAs) should be regarded as Damages-Based Agreements (DBAs) within the context of 'claims management services'. The court concluded that the natural meaning of 'claims management services' in the Compensation Act 2006 (CA 2006) encompassed LFAs. The court dismissed arguments suggesting a narrower interpretation of 'claims management services', stating it would be contrary to the CA 2006's purpose. As a result of this ruling, these agreements could potentially be deemed unenforceable if they fail to adhere to the regulations applicable to DBAs.

This second interim judgment in the *TikTok* case is a novelty in the Dutch practice of collective actions in terms of the detailed review of funding agreements. While generally being a collective action-friendly jurisdiction, this judgment and other (interim) judgments under the WAMCA so far, show that bringing international collective actions for damages is a long road, or what some may consider to be an uphill battle. The rather stringent requirements of the WAMCA are subject to rigorous judicial review, which has also resulted in the inadmissibility of claimant organisations and their funding agreements in other cases (notably, in the *Airbus*

case, DC The Hague 20 September 2023, ECLI:NL:RBDHA:2023:14036). Almost four years after the WAMCA became applicable no final judgment rewarding damage claims has been rendered yet. But in the *TikTok* case the claimant organisations got a second chance. This open trial-and-error approach is perhaps the only way to further shape the collective action practice both in The Neterlands and other European countries.

To be continued.

How to Criticize U.S. Extraterritorial Jurisdiction (Part I)

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

China has been critical of U.S. extraterritorial jurisdiction. In February, China's Ministry of Foreign Affairs issued a report entitled "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." In the report, the Ministry complained about U.S. secondary sanctions, the discovery of evidence abroad, the Helms-Burton Act, the Foreign Corrupt Practices Act, the Global Magnitsky Human Rights Accountability Act, and the use of extraterritorial jurisdiction in criminal cases. The report claimed that U.S. extraterritorial jurisdiction has caused "severe harm … to the international political and economic order and the international rule of law."

There are better and worse ways to criticize U.S. extraterritorial jurisdiction. The Ministry of Foreign Affairs report pursues some of the worse ways and neglects some better ones. In this post, I discuss a few of the report's shortcoming. In a second post, I discuss stronger arguments that one could make against U.S.

extraterritorial jurisdiction.

Confusing Extraterritorial Jurisdiction with Personal Jurisdiction

One problem with the report is terminology. The report repeatedly uses the phrase "long-arm jurisdiction" to refer to the extraterritorial application of U.S. law. The United States, the report says, has "expand[ed] the scope of its long-arm jurisdiction to exert disproportionate and unwarranted jurisdiction over extraterritorial persons or entities, enforcing U.S. domestic laws on extraterritorial non-US persons or entities, and wantonly penalizing or threatening foreign companies by exploiting their reliance on dollar-denominated businesses, the U.S. market or U.S. technologies."

In the United States, however, "long-arm jurisdiction" refers to the exercise of personal jurisdiction over non-resident defendants based on contacts with the forum state. The report seems to recognize this, referring in its second paragraph to the U.S. Supreme Court's decision in *International Shoe Co. v. Washington* (1945) and the requirement of "minimum contacts." But the report goes on use "long-arm jurisdiction" to refer the extraterritorial application of U.S. law. This is more than an academic quibble. Jurisdiction to prescribe (the authority to make law) and jurisdiction to adjudicate (the authority to apply law) are very different things and are governed by different rules of domestic and international law.

The report's confusion on this score runs deeper than terminology. The Ministry of Foreign Affairs seems to think that the United States uses the concept of "minimum contacts" to expand the extraterritorial application of U.S. law. The United States "exercises long-arm jurisdiction on the basis of the 'minimum contacts' rule, constantly lowering the threshold for application," the report states. "Even the flimsiest connection with the United States, such as having a branch in the United States, using [the] U.S. dollar for clearing or other financial services, or using the U.S. mail system, constitutes 'minimum contacts.'"

In fact, the requirement of "minimum contacts" for personal jurisdiction is quite stringent. Moreover, as I have recently noted, this requirement serves to *limit* the extraterritorial application of U.S. law rather than expand it. When foreign defendants lack minimum contacts with the United States, U.S. courts cannot exercise personal jurisdiction and thus cannot apply U.S. laws extraterritorially

even when Congress wants them to. The Helms-Burton Act (one of the laws about which China's Ministry of Foreign Affairs complains) is an example of this. Congress clearly intended its cause of action for trafficking in confiscated property to discourage non-U.S. companies from investing in Cuba. But U.S. courts have been unable to apply the law to foreign companies because they have concluded that those companies lack "minimum contacts" with the United States.

China's complaint is not against U.S. rules of personal jurisdiction or the requirement of "minimum contacts." It is rather with the extraterritorial application of U.S. law. Using the phrase "long-arm jurisdiction" confuses the two issues.

Criticizing Extraterritorial Jurisdiction that China Exercises Too

The report also criticizes the United States for applying its law extraterritorially based on effects: "the United States has further developed the 'effects doctrine,' meaning that jurisdiction may be exercised whenever an act occurring abroad produces 'effects' in the United States, regardless of whether the actor has U.S. citizenship or residency, and regardless of whether the act complies with the law of the place where it occurred." This is true. For example, the U.S. Supreme Court has held that U.S. antitrust law "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

But China also applies its law extraterritorially based on effects. China's Anti-Monopoly Law provides in Article 2 that it applies not only to monopolistic practices in the mainland territory of the People's Republic of China but also "to monopolistic practices outside the mainland territory of the People's Republic of China that eliminate or restrict competition in China's domestic market." In 2014, China blocked an alliance of three European shipping company because of possible effects on Chinese markets.

China regulates extraterritorially on other bases too. Although the Ministry of Foreign Affairs characterizes the extraterritorial application of U.S. criminal law as "an extreme abuse," China applies its criminal law extraterritorially on all the bases that the United States employs. The Criminal Law of the People's Republic of China asserts jurisdiction based not just on territory (Article 6), but also on effects (Article 6), nationality (Article 7), passive personality (Article 8), the

protective principle (Article 8), and universal jurisdiction (Article 9). Each of these bases for jurisdiction to prescribe is consistent with customary international law, and China has the right to extend its criminal law extraterritorially like this. But so does the United States.

In their excellent article *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, Zhengxin Huo and Man Yip provide a detailed discussion of the extraterritorial application of Chinese law. "China's messaging to the international community is," they note, "somewhat confusing: it opposes the US practice of 'long-arm jurisdiction,' yet it has decided to build its own legal system of extraterritoriality." By criticizing the United States for exercising jurisdiction on the same bases that China itself uses, China opens itself to charges of hypocrisy.

Ignoring Constraints on U.S. Extraterritoriality

The Ministry of Foreign Affairs report also ignores important constraints on the extraterritorial application of U.S. law. It says the United States has "developed a massive, mutually reinforcing and interlocking legal system for long-arm jurisdiction" and has "put in place a whole-of-government system to practice long-arm jurisdiction."

In fact, U.S. courts limit the extraterritorial application of U.S. law in significant ways. First, as noted above, U.S. rules on personal jurisdiction (including "minimum contacts") limit the practical ability of the United States to apply its laws abroad. As I have written before, "Congress cannot effectively extend its laws extraterritorially if courts lack personal jurisdiction to apply those laws."

Second, U.S. courts apply a presumption against extraterritoriality to limit the reach of federal statutes. Most recently, in *Abitron Austria GmbH v. Hectronic International, Inc.* (2023), the Supreme Court held that federal statutes should be presumed to apply only to conduct in the United States unless those statutes clearly indicate that they apply extraterritorially. At issue in *Abitron* was the federal trademark statute, which prohibits use of a U.S. trademark that is likely to cause confusion in the United States. The defendants put U.S. trademarks on products in Europe, some of which were ultimately sold to the United States. The dissent argued that the statute should apply to foreign conduct as long as the focus of Congress's concern—consumer confusion—occurred in the United States.

But the majority disagreed, holding that there must also be conduct in the United States. As I have noted previously, this version of the presumption has the potential to frustrate congressional intent when Congress focuses on something other than conduct.

Third, some lower courts in the United States impose additional limits on the extraterritorial application of U.S. law when foreign conduct is compelled by foreign law. In 2005, U.S. buyers sued Chinese sellers of vitamin C for fixing the prices of vitamins sold to the United States. The U.S. court found the Chinese sellers liable for violating U.S. antitrust law and awarded $147 million in damages. Although the anticompetitive conduct occurred in China, it had effects in the United States because vitamins were sold at higher than market prices in the United States.

The Chinese companies appealed, arguing that they were required by Chinese law to agree on export prices. The case went all the way to the U.S. Supreme Court on the question of how much deference to give the Chinese government's interpretation of its own law. Ultimately, in 2021, the Second Circuit Court of Appeals held that Chinese law did indeed require the anticompetitive conduct and that the case should therefore be dismissed on grounds of international comity because China had a stronger interest in applying its law than the United States did. This is a remarkable decision. Although Congress clearly intended U.S. antitrust law to apply to foreign conduct that causes anticompetitive effects in the United States, and although applying U.S. law based on effects would not violate international law, the U.S. court held that the case should be dismissed in deference to Chinese law.

To be clear, I disagree with these constraints on the extraterritorial application of U.S. laws. I think Congress should have more authority to define rules of personal jurisdiction, particularly when it wants its laws to apply outside the United States. I disagree with *Abitron*'s conduct-based version of the presumption against extraterritoriality. And I filed two separate amicus briefs (with Paul Stephan) urging the Supreme Court to take up the international comity question and make clear that lower courts have no authority to dismiss claims like those in Vitamin C that fall within the scope of U.S. antitrust law. But whether these constraints are wise or not, ignoring them provides a distorted picture of U.S. extraterritorial jurisdiction.

Weak Examples

The Ministry of Foreign Affairs also weakens its case by relying on examples that do not support its arguments. The report singles out the indictment of French executive Frédéric Pierucci for violating the U.S. Foreign Corrupt Practices Act (FCPA), a story he recounts in his 2019 book *The American Trap.* Here is how the report describes what happened:

> *In 2013, in order to beat Alstom in their business competition, the United States applied the Foreign Corrupt Practices Act to arrest and detain Frédéric Pierucci on charges of bribing foreign officials. He was further induced to sign a plea deal and provide more evidence and information against his company, leaving Alstom no choice but to accept General Electric's acquisition, vanishing ever since from the Fortune 500 list. The U.S. long-arm jurisdiction has become a tool for its public power to suppress competitors and meddle in normal international business activities, announcing the United States' complete departure from its long-standing self-proclaimed champion of liberal market economy.*

I have read Pierucci's book, and his story is harrowing. But the book does not show what the report claims.

First, and perhaps most significantly, application of the FCPA in this case was not extraterritorial. Pierucci was indicted for approving bribes paid to Indonesian officials to secure a contract for Alstrom from his office in Windsor, Connecticut (p. 65). He seems to acknowledge that the bribes violated the FCPA but counters that the statute was "very poorly enforced" at the time (p. 67) and that he "received no personal gain whatsoever" (p. 71). These are not valid defenses under U.S. law.

Second, Pierucci was not arrested to facilitate GE's acquisition of Alstom. The U.S. Department of Justice (DOJ) began investigating Alstom's payment of bribes in late 2009 (p. 54), and Pierucci was arrested in April 2013 (p. 1). Alstom's takeover discussions with GE began during the summer of 2013 (p. 162), and the deal was made public in April 2014 (p. 155). Pierucci plausibly claims that GE took advantage of Alstom's weakened position, noting that "Alstom is the fifth company to be swallowed up by GE after being accused of corruption by the DOJ"

(p. 164). But I saw no claim in the book that DOJ's investigation of Alstom was intended to bring about its acquisition by a U.S. competitor.

Finally, it is hard to credit the report's assertion that prosecuting bribery constitutes "meddl[ing] in normal international business activities." China has joined the U.N. Convention Against Corruption. In 2014, China fined British company GlaxoSmithKline 3 billion yuan (U.S.$489 million) for bribing Chinese doctors. Earlier this year, China launched an unprecedented campaign against corruption in its health care industry. And, of course, fighting corruption remains a top priority of President Xi Jinping.

Conclusion

Perhaps it seems unfair to criticize a report from a foreign ministry for making mistakes about law. Perhaps the report should be seen merely as a political document. But the report itself discusses legal matters in detail and charges the United States with "violat[ing] international law." Whether the report is a political document or not, the shortcomings that I have discussed here weaken its credibility and undermine its arguments.

There are better ways to criticize U.S. extraterritorial jurisdiction. In Part II of this post, I will offer some examples.

[This post also appears at Transnational Litigation Blog (TLB)]

Symposium on Reparation for

“Crimes of the Past” in Strasbourg (Oct. 19–20)

Written by Dr. Delphine Porcheron, Associate Professor at the University of Strasbourg Law Faculty

On October 19 and 20, the University of Strasbourg is organizing a symposium on Reparation for “Crimes of the Past”.

Mass crimes, deportations, spoliations, colonial exploitation, slavery… The “crimes of the past” are first known to us as historical facts. Their protagonists have mostly disappeared; they have been documented by historians; almost all of them are mentioned in school textbooks. They have become part of our collective memory as disastrous episodes of a bygone past.

And yet, decades later, claims for reparation are initiated. Individuals and groups who have been materially, socially or psychologically affected by these events are turning to justice. They expect not just symbolic recognition, but genuine reparation for their losses, compensation for their suffering, and restoration of their social status.

But are State courts capable of responding appropriately to these claims? Are the law and litigation practice capable of delivering justice? What other institutional mechanisms can be implemented to this end?

These are the questions that the speakers at this symposium will attempt to answer, combining legal, historical and philosophical approaches by looking successively at “Jurisdictional avenues of reparation” and “Alternative avenues of reparation”.

The list of speakers and chairpersons includes: Magali Bessone, Jean-Sébastien Borghetti, Nicolas Chifflot, Marc Del Grande, Peggy Ducoulombier, Gabriel Eckert, Michel Erpelding, Etienne Farnoux, Samuel Fulli-Lemaire, Antoine Garapon, Bénédicte Girard, Patrick Kinsch, Marc Mignot, Horatia Muir-Watt, Etienne Muller, Dorothée Perrouin-Verbe,, Delphine Porcheron, Thibault de Ravel d’Esclapon, Mathieu Soula, Jeanne-Marie Tufféry-Andrieu, Patrick

Wachsmann

For registration and more information, see here.

Dutch Journal of PIL (NIPR) – issue 2023/1

The latest issue of the Dutch Journal on Private International Law (NIPR) has been published.

NIPR 2023 issue 1

Editorial

M.H. ten Wolde / p. 1-2

A.V.M. Struycken, Arbitrages in Nederland waarop de Nederlandse rechter geen toezicht kan houden / p. 3-8

Abstract
The Code of Civil Procedure contains a chapter on arbitration. Procedures and

awards rendered in the Netherlands are subject to a certain degree of scrutiny by the civil courts. This authority, however, does not extend to arbitration on litigation between private enterprises and a foreign State.
This exception applies to such awards rendered at the Peace Palace under the flag of the Permanent Court of Arbitration. This also applies to awards, if rendered in the Netherlands, based on investment treaties like the Washington Convention of 18 March 1965 which created the International Center for the Settlement of Investment Disputes (ICSID). It was correctly recognized by the Act of 1 November 1980 providing for a special rule.
A 1983 proposal to declare that awards rendered by the Iran-US Tribunal situated in The Hague are Dutch awards was not successful. The proposal was only retracted in 2000.
The Comprehensive Economic and Trade Agreement (CETA) 2016, between the EU and its Member States, on the one side, and Canada, on the other, which was approved for ratification by the Netherlands in July 2022, provides for arbitration in its Articles 27 and 28, within the framework of its investment court system. The recognition and execution of its awards in the Netherlands must still be implemented.
In arbitration based on investment treaties an issue of public international law is involved. This is ignored in Dutch caselaw, however.

N. Touw & I. Tzankova, Parallel actions in cross-border mass claims in the EU: a (comparative) lawyer's paradise? / p. 9-30

Abstract
In the context of cross-border mass harms, collective redress mechanisms aim to offer (better) access to justice for affected parties and to facilitate procedural economy. Even when national collective redress mechanisms seek to group cases together, it is likely that cross-border parallel actions will still be filed. Parallel actions risk producing irreconcilable judgments with conflicting or inconsistent outcomes and the rules of European private international law aim to reduce this risk. This contribution argues that the rules on parallel actions currently run the risk of not achieving their objective in the context of mass claims and collective redress. Given their lack of harmonization, when collective redress mechanisms with different levels of representation are used, the application of the rules on parallel actions can cause procedural chaos. In addition, judges have a great deal of discretion in applying the rules on parallel actions, whilst there is a lack of

guidance on how they should use this discretion and what criteria to apply. They may be unaware of the effects on the access to justice of their decisions to stay or proceed with a parallel collective action. This contribution argues that there should be more awareness about the interaction (and sometimes perhaps even a clash) between the goals of private international law and of collective redress and of how access to justice can come under pressure in the cross-border context when the traditional rules on parallel actions are applied. A stronger focus on the training and education of judges and lawyers in comparative collective redress could be a way forward.

N. Mouttotos, Consent in dispute resolution agreements: The Pechstein case law and the effort to protect weaker parties / p. 31-50

Abstract
The unending Pechstein saga involving the German speed skater and Olympic champion Claudia Pechstein and the International Skating Union has acquired a new interesting turn with the decision of the German Federal Constitutional Court. Among the various interesting questions raised, the issue of party autonomy, especially in instances of inequality in bargaining power, and the resulting compelled consent in dispute resolution agreements is of great relevance for private international law purposes. This article deals with the part of the judgment that focuses on the consensual foundation that underpins arbitration in the sporting context, providing a systematic examination with other areas of the law where other forms of regulation have emerged to remedy the potential lack of consent. This is particularly the case when it involves parties who are regarded as having weaker bargaining power compared to their counterparty. In such cases, procedural requirements have been incorporated in order to ensure the protection of weaker parties. The legal analysis focuses on European private international law, also merging the discussion with substantive contract law and efforts to protect weaker parties by way of providing information. This last aspect is discussed as a remedy to the non-consensual foundation of arbitration in the sporting context.

CASE NOTES

A. Attaibi & M.A.G. Bosman, Forumkeuzebeding in algemene voorwaarden: de 'hyperlink-jurisdictieclausule' nader bezien. HvJ EU 24 november 2022, ECLI:EU:C:2022:923, NIPR 2022-549 (Tilman/Unilever) / p.

51-58

Abstract
Tilman v. Unilever concerns the validity of a jurisdiction clause included in the general terms and conditions contained on a website, in case the general terms and conditions are referenced via a hyperlink in a written B2B contract. The CJEU held that such a jurisdiction clause is valid, provided that the formal requirements of Article 23 Lugano Convention 2007, that ensure the counterparty's consent to the clause, are met. In this annotation the authors discuss and comment on the CJEU judgment, also in the broader context of earlier CJEU judgments on jurisdiction clauses contained in general terms and conditions.

K.J. Saarloos, Arbitrage en de effectiviteit van de EEX-Verordening naar aanleiding van de schipbreuk van de Prestige in 2002. Hof van Justitie EU 20 juni 2022, zaak C-700/20, ECLI:EU:C:2022:488, NIPR 2022-544 (London Steam-Ship Owners' Mutual Insurance Association Ltd/Spanje) / p. 59-74

Abstract
The CJEU's ruling in the Prestige case confirms the rule from the J/H Limited case (2022) that a judgment by a court of a Member State is a judgment within the meaning of Article 2 of the EEX Regulation if the judgment is or could have been the result of adversarial proceedings. The content of the judgment is not relevant for the definition. Judgments recognising judgments by arbitrators or the courts of third countries are therefore judgments within the meaning of the EEX Regulation. The question of the definition of the term judgment must be distinguished from the material scope of the EEX Regulation. A judgment recognising an arbitral award is not covered by the EEX Regulation's rules on recognition and enforcement; however, such a judgment may be relevant for the application of the rule that the recognition of the judgment of a court of a Member State may be refused if the judgment is irreconcilable with a judgment given in the Member State addressed.
The ruling in the Prestige case also makes it clear that a judgment by a Member State court on arbitration cannot impair the effectiveness of the EEX Regulation. If it does, that judgment cannot be opposed to the recognition of an incompatible judgment from the other Member State. The CJEU thus formulates an exception to the rule that a judgment from a Member State may not be recognised if the judgment is irreconcilable with a judgment in the Member State addressed: that ground for refusal is not applied if the irreconcilable judgment in the requested

Member State violates certain rules in the EEX Regulation. The ruling raises questions both in terms of substantiation and implications for the future. It is not convincing to limit a statutory limitation on the effectiveness of the EEX Regulation by invoking the same effectiveness. Moreover, the ruling creates tension with the rule that the New York Convention takes precedence over the EEX Regulation.

Applying Mexican Law in U.S. Courts? Mexico v Smith & Wesson

Dr. León Castellanos-Jankiewicz

Researcher, International Law
T.M.C. Asser Institute for International & European Law, The Hague

Mexico's ongoing transnational litigation against the firearms industry in U.S. courts is raising important questions of private international law, in particular as regards the application of Mexican tort law in U.S. courts. In its civil complaint against seven gun manufacturers and one wholesale arms distributor filed in federal court in 2021, Mexico argues that the defendant companies aid and abet the unlawful trafficking of guns into Mexico through irresponsible manufacturing, marketing and distribution practices. On this basis, Mexico claims that all relevant illegal conduct—resulting in human casualties, as well as material and economic loss—occurs on its territory and that, therefore, Mexican domestic tort law applies to six of its claims following the principle of *lex loci damni*.

Last September, the defendant's motion to dismiss was granted by the District Court for the District of Massachusetts largely on the basis of the Protection of Lawful Commerce in Arms Act (PLCAA, 15 U.S.C. §§ 7901-7903). PLCAA prohibits bringing a "qualified civil liability action" in federal or state court against gun manufacturers and distributors for harm "solely caused by the criminal or unlawful misuse of firearm products" by third parties. On appeal in the U.S. First Circuit, Mexico argues that the district court's application of PLCAA to bar its claims under Mexican tort law was "impermissibly extraterritorial". In particular,

the claims that PLCAA prohibits, avers Mexico, only prohibit damages arising from the "criminal and unlawful misuse" of firearms in the U.S. and in respect to U.S. legislation—not Mexican laws. The high profile nature of the case suggests that the First circuit might address the extent of PLCAA's scope of application, including whether the district court's interpretation was "impermissibly extraterritorial".

For a detailed outline of the litigation history and the transnational issues at stake, including a discussion of two amicus briefs filed by professors of international and transnational law, you are welcome to read my recent post in *Just Security*, available here.

Anti-enforcement injunction granted by the New Zealand court

For litigants embroiled in cross-border litigation, the anti-suit injunction has become a staple in the conflict of laws arsenal of common law courts. Its purpose being to restrain a party from instituting or prosecuting proceedings in a foreign country, it is regularly granted to uphold arbitration or choice of court agreements, to stop vexatious or oppressive proceedings, or to protect the jurisdiction of the forum court. However, what is a party to do if the foreign proceeding has already run its course and resulted in an unfavourable judgment? Enter the anti-enforcement injunction, which, as the name suggests, seeks to restrain a party from enforcing a foreign judgment, including, potentially, in the country of judgment.

Decisions granting an anti-enforcement injunction are "few and far between" (*Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, [118]). Lawrence Collins LJ (as he then was) described it as "a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country" (*Masri v Consolidated Contractors International (UK) Ltd (No. 3)* [2008] EWCA Civ 625, [2009] QB 503

at [93]). There must be a good reason why the applicant did not take action earlier, to prevent the plaintiff from obtaining the judgment in the first place. The typical scenario is where an applicant seeks to restrain enforcement of a foreign judgment that has been obtained by fraud.

This was the scenario facing the New Zealand High Court in the recent case of *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881. The Court granted an (interim) anti-enforcement injunction in relation to a default judgment worth USD136,290,994 obtained in Kentucky (note that the order was made last year but the judgment has only now been released). The decision is noteworthy not only because anti-enforcement injunctions are rarely granted, but also because the injunction was granted in circumstances where the foreign proceeding was not also brought in breach of a jurisdiction agreement. Previously, the only example of a court having granted an injunction in the absence of a breach of a jurisdiction agreement was the case of *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 (see Tiong Min Yeo "Foreign Judgments and Contracts: The Anti-Enforcement Injunction" in Andrew Dickinson and Edwin Peel *A Conflict of Laws Companion – Essays in Honour of Adrian Briggs* (OUP, 2021) 254).

Kea Investments Ltd v Wikeley Family Trustee Limited involves allegations of "a massive global fraud" perpetrated by the defendants – a New Zealand company (Wikeley Family Trustee Ltd), an Australian resident with a long business history in New Zealand (Mr Kenneth Wikeley), and a New Zealand citizen (Mr Eric Watson) – against the plaintiff, Kea Investments Ltd (Kea), a British Virgin Islands company. Kea alleges that the US default judgment is based on fabricated claims intended to defraud Kea. Its substantive proceeding claims tortious conspiracy and a declaration that the Kentucky judgment is not recognised or enforceable in New Zealand. Applying for an interim injunction, the plaintiff argued that "the New Zealand Court should exercise its equitable jurisdiction now to prevent a New Zealand company … from continuing to perpetrate a serious and massive fraud on Kea" (at [27]) by restraining the defendants from enforcing the US judgment.

The judgment is illustrative of the kind of cross-border fraud that private international law struggles to deal with effectively: here, alleged fraudsters using the Kentucky court to obtain an illegitimate judgment and, apparently, frustrate the plaintiff's own enforcement of an earlier (English) judgment, in circumstances

where the Kentucky court is unwilling (or unable?) to intervene because Kea was properly served with the proceeding in BVI.

Gault J considered that the case was "very unusual" (at [68]). Kea had no connection to Kentucky, except for the defendants' allegedly fabricated claim involving an agreement with a US choice of court agreement and a selection of the law of Kentucky. Kea also did not receive actual notice of the Kentucky proceedings until after the default judgement was obtained (at [73]). In these circumstances, the defendants were arguably "abusing the process of the Kentucky Court to perpetuate a fraud", with the result that "the New Zealand Court's intervention to restrain that New Zealand company may even be seen as consistent with the requirement of comity" (at [68]).

One may wonder whether the Kentucky Court agrees with this assessment – that a foreign court's injunction restraining enforcement of its judgment effectively amounts to an act of comity. In fact, Kea had originally advanced a cause of action for abuse of process, claiming that the alleged fraud was an abuse of process of the Kentucky Court. It later dropped the claim, presumably due to a recent English High Court decision (*W Nagel (a firm) v Chaim Pluczenik* [2022] EWHC 1714) concluding that the tort of abuse of process does not extend to foreign proceedings (at [96]). The English Court said that extending the tort to foreign proceedings "would be out of step with [its] ethos", which is "the Court's control of its own powers and resources" (at [97]). It was not for the English court "to police or to second guess the use of courts of or law in foreign jurisdictions" (at [97]).

Since Gault J's decision granting interim relief, the defendants have protested the Court's jurisdiction, arguing that Kea is bound by a US jurisdiction clause and that New Zealand is not the appropriate forum to determine Kea's claims. The Court has set aside the protest to jurisdiction (*Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466). The Court also ordered that the interim orders continue, although the Court was not prepared to make a further order that the defendants consent to the discharge of the default judgment and withdraw their Kentucky proceedings. This, Gault J thought, was "a bridge too far" at this interim stage (at [98]).

Giustizia consensuale No 2/2022: Abstracts

The second issue of 2022 of Giustizia Consensuale (published by Editoriale Scientifica) has just been released, and it features:

Ferruccio Auletta and **Alberto Massera**, ***Giustizia consensuale e p.a.: l'accordo bonario per i lavori, i servizi e le forniture nel quadro degli 'altri rimedi alternativi all'azione giurisdizionale'*** (*Consensual Justice and Public Administration: The Amicable Agreement for Jobs, Services and Supplies in the Framework of 'Other Alternative Remedies to Court Proceedings'*; in Italian)

> The paper examines the present state of the Amicable Agreement. Along with other alternative dispute resolution tools, such as the technical advisory board, arbitration, and negotiated settlements, the Amicable Agreement provides an alternative to litigation in the area of public procurement. Thanks to their experience in the field of public procurement within the Arbitration Chamber of public contracts of the Italian National Anticorruption Authority, the authors incorporate a practitioner's perspective into their analysis of the Amicable Agreement by referring to case law and to a broad range of doctrinal and legal sources.

Paolo Duret, ***Soft law, ADR, sussidiarietà: una triade armonica*** (*Soft Law, ADR, Subsidiarity: A Harmonic Triad*; in Italian)

> The present era is witnessing the simultaneous development of two phenomena: on the one hand, the steady increase in the use of the called soft law, which has expanded from the domain of international law to domestic legal systems; on the other hand, the widespread resort to instruments of dispute resolution that are alternative to litigation (ADR). The paper aims at assessing and examining the connection between soft law and ADR, both in a retrospective and prospective view, focusing in particular on emerging issues such as the recourse to 'nudging' and new technologies, along with forms of Online Dispute Resolution (ODR). The principle of subsidiarity acts as a

common denominator between the two aforementioned phenomena. In particular, it allows shedding light on the meaning and implications of the relationship between soft law and ADR within the framework of a novel understanding of the State and public administration.

Roberto Bartoli, ***Una breve introduzione alla giustizia riparativa nell'ambito della giustizia punitiva*** (*A Brief Introduction to Restorative Justice in the Context of Punitive Justice*; in Italian)

Restorative justice and punitive justice belong to different paradigms. Therefore, understanding this paradigm shift is key to the understanding of restorative justice itself. Through a 'close' comparison between these two paradigms, the author aims to capture the distinctive features of restorative justice in the context of criminal offences, i.e. community justice, dialogic justice, justice that attempts to heal the pain caused by criminal wrongdoing, and non-violent justice. Restorative justice has the potential to foster revolutionary change, especially in instances where restorative justice can provide a procedural tool that is complementary to punitive justice and a material alternative to punishment.

Beatrice Zuffi, *Azione di classe e ADR: un binomio in via di definizione* (*Class Action and ADR: A Pairing in the Making*; in Italian)

The paper provides a comparative review of selected legal systems (namely: the U.S.A., the Netherlands, and Belgium) which are at the forefront of fostering the use of ADR in compensatory class actions through laws and regulations. The author then analyses the Italian legislation on class action introduced by Law No 31 of 2019, focusing in particular on the solutions adopted to promote settlement agreements and assessing the feasibility of other alternative dispute resolution methods, such as mediation, negotiation, and arbitration in connection with or in lieu of the three-phase trial under Art. 840 bis ff. of the Italian Code of Civil Procedure.

Observatory on Legislation and Regulations

Mauro Bove, *I verbali che concludono la mediazione nel d.lgs. n. 149 del 2022* (*Mediation Reports under Legislative Decree No 149 of 2022*; in Italian)

The paper analyses the discipline of mediation reports under Legislative Decree No 149 of 2022, highlighting its conformity to the provisions of Legislative Decree No 28 of 2010. The author outlines the features and scope of the procedures applicable to instances where a mediated settlement is not achieved and instances where mediation results in a settlement agreement to be included in the mediation report. In particular, the author examines the innovative regulation of mediation reports, which requires the use of digital signatures where mediation takes place online.

Alberto M. Tedoldi, *La mediazione civile e commerciale nel quadro della riforma ovvero: omeopatia del processo* (*Civil and Commercial Mediation in the Framework of the Reform: Homeopathy of the Process*; in Italian)

The essay focuses on and looks to expand the knowledge of civil and commercial mediation as regulated by Legislative Decree No 28 of 2010 amended by Legislative Decree No 149 of 2022. The legislative provisions appear to foster the use and development of mediation as a full-fledged dispute resolution process, beyond its function as a tool complementary to litigation. In this, mediation provides an appropriate and comprehensive dispute resolution instrument which addresses the legal relationship in its entirety, rather than the single components of res in judicium deducta, and allows achieving an all-round, durable settlement. 'The civil process is dead, long live the mediation!'.

Pietro Ortolani, *The Resolution of Content Moderation Disputes under the Digital Services Act*

Online content on social media platforms gives rise to a wide range of disputes. Content moderation can thus be understood as a form of online dispute resolution, whereby the platforms often balance legal entitlements against each other. This article looks at content moderation through the lens of procedural law, providing an overview of the different dispute resolution avenues under the Digital Services Act (DSA). First, the article sets the scene by describing the overall architecture of the DSA. Against this background, specific provisions are scrutinized, dealing with notice and action mechanisms, statement of reasons, internal complaint handling, and out-of-court dispute settlement. Furthermore, the article considers the interplay between the DSA and the European regime of cross-border litigation. Finally,

some general conclusions are drawn regarding the DSA'S 'procedure before substance' regulatory approach.

Observatory on Practices

Antonio Briguglio, *Conciliazione e arbitrato. Contaminazioni* (*Conciliation and Arbitration. Cross-fertilization*; in Italian)

In this paper, the author addresses the topic of the interplay between conciliation and arbitration. In spite of the former being a non-adjudicative ADR procedure and the latter a fully adjudicative ADR process, there are some aspects of cross-fertilization between the two. The author pays particular attention to 'conciliatory' elements, whose relevance is greater in arbitral awards than in judicial decisions. In the second part of the paper, the author focuses in detail on the recent Singapore Convention on International Settlement Agreements Resulting from Mediation, which introduces a different element of cross-fertilization between arbitration and conciliation. In particular, the author investigates the meaning and practical implications of the Convention, which basically puts settlement agreements on an equal footing with arbitral awards for purposes of international recognition and enforcement.

Silvana Dalla Bontà, *La (nuova) introduzione e trattazione della causa nel processo di prime cure e i poteri* lato sensu *conciliativi del giudice. Un innesto possibile?* (*The (New) Introduction and Handling of the Case in the First-Instance Proceedings and the Court's Conciliatory Powers* Lato Sensu*. A Possible Graft?*; in Italian)

After providing an overview of the new Italian regulation on pleadings and hearings in civil cases before the courts of first instance as introduced by Legislative Decree No 149 of 2022, the paper focuses on the conciliatory powers of the courts, i.e. court-ordered mediation, judicial conciliation, and judicial offer to settle. In particular, the analysis aims to explore if, when, and how these judicial conciliatory powers could be effectively exercised at the new pleading and hearing stages. While uncovering the weaknesses of the recent reform of Italian civil procedure, the author argues that the development of good practices would provide a solution to most of the issues

raised by the new legislation. To that end, Civil Justice Observatories could play a pivotal role in achieving lasting solutions through a bottom-up approach that fosters the interaction of different civil justice actors.

Carolina Mancuso and **Angela M. Felicetti, *Sistemi di* dispute resolution *per le università: primi spunti di riflessione*** (*Dispute Resolution Systems for Universities: First Considerations*; in Italian)

The paper aims to explore some innovative foreign teaching and research experiences (namely, in Spain and in the United States) concerning the dissemination of mediation, conflict management techniques and, more broadly, the culture of alternative dispute resolution in academia. The analysis intends to connect such initiatives with the vibrant Italian panorama, which is rich in experiential teaching initiatives and infused with its own developing tradition of conflict management through student ombudspersons. The ultimate goal of the investigation is to identify new directions for the dissemination of the ADR culture in Italian high education institutions.

In addition to the foregoing, this issue features the following book review by **Luciana Breggia***:* **Tommaso GRECO**, ***La legge della fiducia. Alle radici del diritto*** *(The Law of Trust. At the Roots of Law*; in Italian*),* Bari-Roma, Editori Laterza, (2021; reprint 2022), VII-XVI, 1-171.

A Major Amendment to Provisions on Foreign-Related Civil

Procedures Is Planned in China

Written by NIE Yuxin and LIU Chang, Wuhan University Institute of International Law

1. Background

The present Civil Procedure Law of China (hereinafter "CPL") was enacted in 1990 and has been amended four times. All amendments made no substantive adjustments to the foreign-related civil procedure proceedings. In contrast with legislative indifference, foreign-related cases in the Chinese judicial system have been growing rapidly and call for modernization of the foreign-related civil procedure law. On 30 December 2022, China's Standing Committee of the National People's Congress issued the "Civil Procedure Law of the People's Republic of China (amendment draft)". Amendments are proposed for 29 articles, 17 of which relate to special provisions on foreign-related civil procedures, including rules on the jurisdiction, service abroad, taking of evidence abroad and recognition and enforcement of judgements.

2. Jurisdiction

Special jurisdiction: Present special jurisdiction rules apply to "disputes concerning contract or other property rights or interests". The literal interpretation may suggest non-contractual or non-propertary disputes are excluded. The amendment draft extends special jurisdiction rules to cover "disputes relating to property right or interest, and right or interest other than property" (Art. 276, para. 1). The amendment draft provides proceedings may be brought before the courts "where the contract is signed or performed, the subject matter of the action is located, the defendant has any distrainable property, the tort or harmful event occurred, or the defendant has any representative office" (Art. 276, para. 1). Furthermore, "the Chinese court may have jurisdiction over the action if the dispute is of other proper connections with China" (Art. 276, para. 2).

Choice of court agreement: A special provision on the choice of court

agreement is inserted in the foreign-related procedure session (Art. 277), which states: “If the place actually connected to dispute is not within the territory of China, and the parties have agreed in written that courts of China are to have jurisdiction, Chinese courts may exercise jurisdiction. The competent court shall be specified according to provisions on hierarchical jurisdiction and exclusive jurisdiction of this law and other laws of China.” In contrast to Art. 35 on choice of court agreement in purely domestic cases, Art. 277 partly partially abolished the constraint prescribed in Art. 35, which requires the chosen forum to have practical connection to the dispute. When the party chose Chinese court to exercise jurisdiction, there will be no requirement for actually connection between the dispute and chosen place. But it does not state whether Chinese court should stay jurisdiction if a foreign court is chosen, and whether the chosen foreign court must have practical connections to the dispute. This is an obvious weakness and uncertainty.

Submission to jurisdiction: Art. 278 inserted a new provision on submission to jurisdiction: “Where the defendant raises no objection to the jurisdiction of the courts of China and responds to the action by submitting a written statement of defence or brings a counterclaim, the court of China accepting the action shall be deemed to have jurisdiction.”

Exclusive jurisdiction: The draft article expands the categories of disputes covered by exclusive jurisdiction (Art. 279), including disputes arising from: “(1) the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures or Chinese-foreign cooperative exploration and exploitation of natural resources in China; (2) the formation, dissolution, liquidation and effect of decisions of legal persons and other organizations established within the territory of China; (3) examining the validity of intellectual property rights which conferred within the territory of China.” Not only matters relating to Chinese-foreign contractual cooperation, but the operation of legal persons and other organizations and the territoriality of intellectual property rights are deemed key issues in China.

Jurisdiction over consumer contracts: The proposal inserts protective jurisdiction rule for consumer contracts (Art. 280). paragraph 1 of this article provides "(w)hen the domicile of consumer is within the territory of China but the domicile of operator or its establishment is not", which permits a Chinese consumer to sue foreign business in China. Paragraph 2 restricts the effect of standard terms on jurisdiction. It imposed the operator the "obligation to inform or explicate reasonably" the choice of court clause, otherwise the consumer may claim the terms are not part of the contract. Furthermore, even if consumers are properly informed of the existence of a choice of court clause, if it is "obviously inconvenient for the consumer" to bring proceedings in the chosen court, the consumer may claim the terms are invalid. In other words, the proposal pays attention to the fairness of a choice of court clause in consumer contracts both in procedure and in substance.

Jurisdiction over cyber torts: With regard to cyber torts, Art. 281 of the draft states: action for cyber torts may be instituted in the Chinese court if: (1) "computer or other information device locates in the territory of China"; (2) "the harmful event occurs in the territory of China"; (3) "the victim domiciles in the territory of China".

3. Conflict of Jurisdiction, Lis pendens and Forum Non Conveniens

Parallel litigation and exclusive jurisdiction agreements: Art. 282 states: "If one party sues before a foreign court and the other party sues before the Chinese court, or if one party sues before a foreign court as well as the Chinese court, for the same dispute, the Chinese court having jurisdiction under this law may exercise jurisdiction. If the parties have agreed in writing on choosing a foreign court to exercise jurisdiction exclusively, and that choice does not violate the provisions on exclusive jurisdiction of this law or involve the sovereignty, security or social public interests of China, the Chinese court may dismiss the action." The first part of this article deals with parallel litigation. It allows the Chinese court to exercise jurisdiction over the same dispute pending in a foreign court. The second part of this article provides exception to exclusive jurisdiction agreements. Although Chinese courts are not obliged to stay jurisdiction in parallel

proceedings, they should stay jurisdiction in favour of a chosen foreign court in an exclusive jurisdiction clause, subject to normal public policy defence.

First-seized court approach: If the same action is already pending before a foreign court, conflict of jurisdiction will happen. First-seized court approach encourages the latter seized court to give up jurisdiction. The draft implements this approach in China. Art. 283 states: "Where a foreign court has accepted action and the judgment of the foreign court may be recognized by Chinese court, the Chinese court may suspend the action with the party's written application, unless: (1) there is choice of court agreement indicating to Chinese court between the parties, or the dispute is covered by exclusive jurisdiction; (2) it is obviously more convenient for the Chinese court to hear the case. Where foreign court fails to take necessary measures to hear the case, or is unable to conclude within due time, the Chinese court may remove the suspension with the party's written application." This provision is the first time that introduces the first-in-time or lis pendens rule in China. But the doctrine is adopted with many limitations. Firstly, the foreign judgment may be recognised in China. Secondly, Chinese court is not the chosen court. Thirdly, Chinese court is not the natural forum. The lis pendens rule is thus fundamentally different from the strict lis pendens rule adopted in the EU jurisdiction regime, especially it incorporates the consideration of forum conveniens. Furthermore, it is also necessary to reconcile the first-in-time provision with the article on parallel proceedings, which states Chinese courts, in principle, can exercise jurisdiction even if the dispute is pending in the foreign court.

Res judicata: Paragraph 3 of Art. 283 state: "Once the foreign judgment has been fully or partially recognized by Chinese court, and the parties institute an action over issues of the recognized content of the judgement, Chinese court shall not accept the action. If the action has been accepted, Chinese court shall dismiss the action."

Forum non conveniens: Even if the conflict of jurisdiction has not actually arisen, the Chinese court may decline jurisdiction in favour of the more

appropriate court of another country. The defendant should plead forum non conveniens or challenge jurisdiction. Applying forum non conveniens should meet four prerequisites. (1) “Since major facts of disputes in a case do not occur within the territory of China, Chinese court has difficulties hearing the case and it is obviously inconvenient for the parties to participate in the proceedings”. (2) “The parties do not have any agreement for choosing Chinese court to exercise jurisdiction”. (3) “The case does not involve the sovereignty, security or social public interests of China”. (4) “It is more convenient for foreign courts to hear the case” (Art. 284, para. 1). This article also provides remedy for the parties if the proceedings on foreign court do not work well. “Where foreign court declined to exercise jurisdiction over the dispute, failed to take necessary measures to hear the case, or is unable to conclude within due time after Chinese court’s dismissal, the Chinese court shall accept the action which the party instituted again.” (Art. 284, para. 2).

4. Judicial Assistance

Service of process on foreign defendants: One of the amendment draft’s main focuses is to improve the effectiveness of foreign-related legal proceedings. In order to achieve this goal, the amendment draft introduces multiple mechanisms to serve process abroad.

Before the draft, the CPL has provided the following multiple service methods: (1) process is served in the manners specified in the international treaty concluded or acceded to by the home country of the person to be served and China; (2) service through diplomatic channels; (3) if the person to be served is a Chinese citizen, service of process may be entrusted to Chinese embassy or consulate stationed in the country where the person to be served resides; (4) process is served on a litigation representative authorized by the person to be served to receive service of process; (5) process is served on the representative office or a branch office or business agent authorized to receive service of process established by the person to be served within the territory of China; (6) service by post; (7) service by electronic means, including fax, email or any other means capable of confirming receipt by the person to be served; (8) if service of process by the above means is not possible, process shall be served by public notice, and process shall be deemed served three months after the date of public notice.[1]

Article 285 of the draft outlines two new methods to serve a foreign natural person not domiciled in China. First, if the person has a cohabiting adult family member in China, the cohabiting adult family member shall be served (Art. 285, para. 1(g)). Second, if the person acts as legal representative, director, supervisor and senior management of his enterprise established in the territory of China, that enterprise shall be served (Art. 285, para. 1(f)). Similarly, a foreign legal person or any other organization may be served on the legal representative or the primary person in charge of the organization if they are located in China (Art. 285, para. 1(h)). It is clear that by penetrating the veil of legal persons, the amendment draft increases the circumstances of alternative service between relevant natural persons and legal persons.

Amongst the amendments to the CPL, there are points relating to service by electronic means that are worthy of note. Compared to traditional ways of service, service by electronic means is usually more convenient and more efficient. The position in respect of service by electronic means, both before and after the amendment to the CPL, is that such service is permitted. A major innovation introduced by the amendment draft is that the service can now be conducted via instant messaging tools and specific electronic systems, if such means are legitimate service methods recognized in the state of destination (Art. 285, para. 1(k)). It meets the urgent demand of both sides in lawsuits by improving the delivery efficiency.

Party autonomy in service abroad is also accepted. The validity of service by other means agreed to by the person served is recognized, provided that it is permitted by the state of the person served (Art. 285, para. 1(l)).

If the above methods fail, the defendant may be served by public notice. The notice should be publicized for 60 days and the defendant is deemed served at the end of the period. Upon the written application of the party, the above methods and the way of service by public notice may be made at the same time provided that the service by public notice is not less than 60 days and the litigation rights of the defendant are not affected (Art. 285, para. 2).

Investigation and collection of evidence:

Prior to the draft, the CPL stipulated that Chinese and foreign courts can each

request the other to provide judicial assistance in acquiring evidence located in the territory of the other country, in accordance with treaty obligations and the principle of reciprocity. Chinese courts can take evidence abroad generally via two channels. First, evidence overseas can be acquired according to treaty provisions. In the absence of treaties, foreign evidence can only be obtained through diplomatic channels based on the principle of reciprocity.[2]

Article 286 of the draft provides more varied methods to collect foreign evidence. Firstly, foreign evidence can be acquired according to the methods specified in the international treaties concluded or acceded to by both the country where the evidence is located and China. Secondly, the evidence can also be obtained through diplomatic channels. Thirdly, for a witness with Chinese nationality, the Chinese embassy or consulate in the country of the witness will be entrusted to take the evidence on behalf of the witness. Fourthly, via instant messenger tools or other means. Access to electronic evidence stored abroad faces the dilemma of inefficient bilateral judicial assistance, controversial unilateral evidence collection and inadequate functioning of multilateral conventions.[3] The application of modern information technology, such as video conferencing and teleconferencing, can overcome the inconvenience of distance, saving time and costs. It is the mainstream of international cooperation to apply modern technology in the field of extraterritorial evidence-taking. For example, in 2020, the EU Parliament and Council revised the EU Evidence Regulation. The most important highlight of the EU Evidence Regulation is the emphasis on the digitalization of evidence-taking and the use of modern information technology in the process of evidence-taking.[4] On this basis, the amendment draft proposes that the court may, with the consent of the parties, obtain evidence through instant messenger tools or other means, unless prohibited by the law of the country where the evidence is collected (Art. 286).

5. Recognition and enforcement of foreign judgments and arbitral awards

Grounds for non-recognition and non-enforcement of foreign judgments: Recognition and enforcement shall not be granted if (1) the foreign court has no jurisdiction over the case in accordance with the provisions of Article 303; (2) the respondent has not been legitimately summoned or has not been given a

reasonable opportunity to be heard or to argue, or the party who is incapable of litigation has not been properly represented; (3) the judgment or ruling has been obtained by fraud; (4) the court of China has issued a judgment or ruling on the same dispute, or has recognized and enforced a judgment or ruling issued by a court of a third country on the same dispute; (5) it violates the Chinese general principles of the law or sovereignty, national security or public interests of China (Art. 302).

After several amendments and official promulgation, the CPL has not significantly changed the requirements for the recognition and enforcement of foreign judgments. In China, reciprocity as a prerequisite for recognition of foreign judgments continues to play a dominating role in China. The difficulty of enforcing foreign judgments is one of the major concerns in the current Chinese conflicts system when applying the principle of reciprocity, impeding the development of international cooperation in trade and commerce. The local judicial review process may become more transparent thanks to this new draft. However, the key concern, the reciprocity principle, is still left unaltered in this draft.

In addition, if the foreign judgment for which recognition and enforcement are sought involves the same dispute as that being heard by a Chinese court, the proceedings conducted by the Chinese court may be stayed. If the dispute is more closely related to China, or if the foreign judgment does not meet the conditions for recognition, the application shall be refused (Art. 304).

Lack of jurisdiction of the foreign court: One of the grounds for non-recognition and non-enforcement of foreign judgments is that the foreign court lacks jurisdiction (See Art. 302). Article 303 provides that the foreign courts shall be found to have no jurisdiction over the case in the following circumstances: (1) The foreign court has no jurisdiction over the case pursuant to its laws; (2) Violation of the provisions of this Law on exclusive jurisdiction; (3) Violation of the agreement on exclusive choice of court for jurisdiction; or (4) The existence of a valid arbitration agreement between the parties (Art. 303).

Recognition and enforcement of foreign arbitral awards: If the person

sought to be enforced is not domiciled in China, an application for recognition and enforcement may be made to the Chinese intermediate court of the place of domicile of the applicant or of the place with which the dispute has an appropriate connection (Art. 306). The inclusion of the applicant's domicile and the court with the appropriate connection to the dispute as the court for judicial review of the arbitration significantly facilitates the enforcement of foreign awards. A major uncertainty, however, is how "appropriate connection" is defined. The amendment draft remains silent on the criterion.

6. Conclusion

The amendment draft presents efforts to actively correspond to the trends in the internationalization of the civil process along with the massive ambition to build a fair, efficient, and convenient civil and commercial litigation system. It offers more comprehensive and detailed rules that apply to all proceedings involving foreign parties. The amendment draft is significant both in terms of its impact on foreign-related civil procedures and the continuing open-door policy. It demonstrates that China is growing increasingly law-oriented to provide more efficient and convenient legal services to foreign litigants and to safeguard the country's sovereignty, security and development interests. On the other hand, the proposal also includes discrepancy and uncertainty, especially whether the practical connection for choice of foreign court is still required, what is the relationship between the first-in-time rule and the rule permitting parallel proceedings, whether reciprocity should be reserved for recognition and enforcement of foreign judgments. It is also noted that although anti-suit injunction is used in Chinese judicial practice, the proposal does not include a provision on this matter. Hopefully, these issues may be addressed in the final version.

[1] The CPL, Art. 274.

[2] The CPL, Art. 284.

[3] Liu Guiqiang, 'China's Judicial Practice on the Taking of Evidence Abroad in Civil and Commercial Matters: Current Situation, Problems and Solutions' (2021)

1 Wuhan University International Law Review, 92, 97.

[4] Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (Taking of Evidence Recast). Official Journal of the European Union [online], L 405, 2 December 2020.