Brace yourself: The US Supreme Court has granted certiorari in the firearms case of Smith & Wesson Brands, Inc., et al. v. Estados Unidos Mexicanos (Mexico)

This month the US Supreme Court granted certiorari in the case of Smith & Wesson Brands, Inc., et al. v. Estados Unidos Mexicanos (Mexico). For more information, click here. For some Private International Law implications, click here.

The petitioners are: Smith & Wesson Brands, Inc.; Barrett Firearms Manufacturing, Inc.; Beretta U.S.A. Corp; Glock, Inc.; Sturm, Ruger & Company, Inc.; Witmer Public Safety Group, Inc., d/b/a Interstate Arms; Century International Arms, Inc.; and Colt's Manufacturing Company, LLC.

As previously reported, this is a much-politicized case initiated by Mexico against US gun manufacturers. Mexico alleges *inter alia* that defendants actively assist and facilitate trafficking of their guns to drug cartels in Mexico. Among the claims for relief are: Negligence, public nuisance, defective condition – unreasonably dangerous, negligence per se, gross negligence, unjust enrichment and restitution, violation of CUTPA [Connecticut Unfair Trade Practices Act], Violation of Mass. G.L. c. 93A [Massachusetts Consumer Protection Act], punitive damages.

At first, a US District Court dismissed the case, which we reported here. However, the Court of Appeals for the First Circuit reversed. See a recent official statement from the Mexican government here (in Spanish).

Some of the arguments of the Court of Appeals are (for the full judgment, click here):

[…] p. 38 *et seq.*

- "Instead, defendants contend that even for pleading purposes the

complaint fails to allege facts plausibly supporting the theory that defendants have aided and abetted such unlawful sales.

- "We disagree, finding instead that Mexico's complaint adequately alleges that defendants have been aiding and abetting the sale of firearms by dealers in knowing violation of relevant state and federal laws. "[T]he essence of aiding and abetting" is "participation in another's wrongdoing that is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor." Twitter, Inc. v. Taamneh, 598 U.S. 471, 504 (2023).

[…]

- "It is therefore not implausible that, as the complaint alleges, defendants engage in all this conduct in order to maintain the unlawful market in Mexico, and not merely in spite of it.

[…]

- "We think it clear that by passing along guns knowing that the purchasers include unlawful buyers, and making design and marketing decisions targeted towards those exact individuals, the manufacturer is aiding and abetting illegal sales. And this scenario, in substance, is fairly analogous to what Mexico alleges."

The Court of Appeals concludes:

- In sum, **we conclude that the complaint adequately alleges that defendants aided and abetted the knowingly unlawful downstream trafficking of their guns into Mexico**. Defendants' arguments to the contrary are premised either on an inaccurate reading of the complaint or on a misapplication of the standard of review on a motion to dismiss under Rule 12(b)(6). Whether plaintiffs will be able to support those allegations with evidence at summary judgment or at trial remains to be seen. At this stage, though, we must "accept all well-pleaded allegations of [Mexico] as true and afford all inferences in [Mexico's] favor." […]

As expected, Smith & Wesson Brands, Inc. et al. were unsatisfied with the judgment and filed for certiorari before the US Supreme Court. The questions presented are:

1. **Whether the production and sale of firearms in the United States is the "proximate cause" of alleged injuries to the Mexican government stemming from violence committed by drug cartels in Mexico.**
2. **Whether the production and sale of firearms in the United States amounts to "aiding and abetting" illegal firearms trafficking because firearms companies allegedly know that some of their products are unlawfully trafficked.**

In particular, and among other allegations, Smith & Wesson argues that: "Mexico's theory of liability reduces to this: 'A manufacturer of a dangerous product is an accessory or co-conspirator to illicit conduct by downstream actors where it continues to supply, support, or assist the downstream parties and has knowledge—actual or constructive—of the illicit conduct.'" However, Smith & Wesson contends that that theory of aiding and abetting has been rejected in case law and emphasizes the distinction between active complicity and passive conduct. It alleges that even if a company has extensive commercial activity, it is a not an active participant in downstream criminal acts unless the company engages in some other "affirmative misconduct" in promoting those acts (p. 29 *et seq.* of the petition).

Amicus briefs have been filed by:

- Washington Legal Foundation
- Atlantic Legal Foundation
- Landmark Legal Foundation
- Montana
- National Shooting Sports Foundation, Inc.
- National Association of Manufacturers et al.
- The American Constitutional Rights Union et al.
- National Rifle Association of America and Independence Institute
- Firearms Policy Coalition, Inc. and FPC Action Foundation
- The Buckeye Institute and Mountain States Legal Foundation's Center to Keep and Bear Arms
- Michigan Coalition for Responsible Gun Owners
- National Association for Gun Rights and the National Foundation for Gun Rights
- S. Senator Ted Cruz, U.S. Representative Darrell Issa, and 25 Other

Members of Congress
- The Second Amendment Foundation

If the Supreme Court affirms the Court of Appeals' judgment, this is only the beginning of a long and complex litigation. As stated by the Court of Appeals, it remains to be seen whether Mexico's allegations can be proven at summary judgment or at trial. Any updates will be reported here.

Global Value Chains and Transnational Private Law Workshop at Edinburgh Law School – Report

By Zihao Fan (Ph.D. Candidate in Law, Peking University Law School)

The 'Global Value Chains and Transnational Private Law' workshop was successfully held at Edinburgh Law School in a hybrid format from June 23 to 25, 2024. This project is funded by the Law Schools Global League (LSGL), convened by Prof. Verónica Ruiz Abou-Nigm (Edinburgh Law School) and Prof. Michael Nietsch (EBS Law School). The workshop attracted scholars and researchers from 15 universities and institutions worldwide. Over two days, participants shared inspiring work in progress and engaged in discussions on how transnational private law influences and shapes global supply chains. During the workshop plans for the upcoming publication and dissemination were discussed. This

overview aims to briefly summarise the research outcomes presented during the workshop (following the sequence of the presentations).

Morning Session on 24 June

Dr. Catherine Pedamon (Westminster Law School) and Dr. Simone Lamont-Black (Edinburgh Law School) first introduced a previous related workshop held in Edinburgh Law School on 'Sustainability in the Food Supply Chain: Challenges and the Role of Law & Policy'. This project consists of contributions from a variety of legal and policy areas at the UK, EU, and international levels, focusing on the role of law (including commercial law, contract law, competition law, and corporate law) in resolving regulatory difficulties and opportunities in food supply chains, with a particular emphasis on sustainability and food security, therefore highly connected to the current project.

Afterwards, Dr. Pedamon and Dr. Lamont-Black also presented their research titled 'Responsible Contracting in Agri-Food Supply Chains: Mitigating Power Asymmetries on the Road Towards Sustainability'. They pointed out that recent events like the Covid-19 pandemic, the war in Ukraine, climate-related price instability, and inflation have severely impacted the global economy, creating an unprecedented food crisis. Complex food supply chains reveal power imbalances, with larger trading partners often imposing unfair practices on less powerful suppliers. This research aims to shed light on the issues surrounding governance gaps and the various challenges and opportunities that arise from private international law, examining UK domestic law pertaining to food supply relationships, taking the EU level regulation into account, and providing potential examples of its implementation.

Dr. Francesca Farrington (School of Law, University of Aberdeen) and Dr. Nevena Jevremovic (School of Law, University of Aberdeen) then presented their work titled 'Private International Law and the Race to the Bottom in Labour Standards: The Case of *Begum v Maran*', discussed the recent Court of Appeal case, *Begum v Maran*. They noted that the literature has generally focused on the unique arguments relating to duty of care, and the Court of Appeal's conclusion that the claim was not fanciful – it illustrates that the Rome II Regulation does little to prevent a 'race to the bottom' in labour standards especially given that corporate liability was a rapidly expanding field of law. They also discussed the different

results when courts adopting different characterization methods on business-related human rights (BHR) claims.

Dr. Sara Sanchez Fernandez (IE Law School, Spain) shared her research on 'Civil Liability under the CS3D: International Jurisdiction Rules and Access to an Effective Legal Remedy'. She first introduced the background: the EU recently enacted the Corporate Sustainability Due Diligence Directive (CS3D), which establishes due diligence responsibilities and civil consequences for violations of such obligations. The CS3D establishes rules for organizations' risk-based due diligence requirements across their entire value chain. Her research centred on the assurance of access to Member State courts for CS3D-related issues, scrutinizing the interaction between CS3D, international jurisdiction in the Brussels I bis Regulation, and the foreign jurisdiction rules of Member States. She also explored the potential solutions for cases where entities are non-EU domiciled.

First Afternoon Session on 24 June

Prof. Toshiyuki Kono (Faculty of Law, Kyushu University) and Prof. Ren Yatsunami (Faculty of Law, Kyushu University) presented their work on 'The Global Value Chain & Network Responsibility: The New Possibilities of Private Ordering'. They pointed it out that in recent years, policymakers and scholars from numerous disciplines have concentrated on mapping the outlines of the modern global value chain, with the concept of 'network' emerging as a repeating theme. They investigate the relevance of viewing networks as lenses through which better understand the GVC and its regulation, particularly in terms of human rights and environmental issues. Besides, they also examine the failure of the network and related legal responses, suggesting that a mixture of public and private norms, hard laws and soft laws should be considered as alternatives.

Prof. Carlos Vasquez (Georgetown Law School, US) then discussed his research on 'Applicable Law in BHR Cases'. He focused on the applicable substantive law in BHR suits brought in developed countries (usually the home state of the defendant corporation) for injuries suffered in developing countries (the host state). He centred on both vertical and horizontal choice-of-law inquiries: 'vertical' refers to the decision-making process that involves choosing between international law and national (or subnational) law as the primary source of relevant law, while 'horizontal' refers to the decision between applying the legal

system of the host country or the legal system of the home State.

Dr. David Capper (School of Law, Queen's University Belfast) presented his research next, on 'Procedural Aspects of Transnational BHR-Litigation'. Continuing with BHR cases he discussed how victims of tortious conduct by multinational corporations are seeking remedy against the latter in a Global North jurisdiction, with a focus on the UK. He illustrated the procedural mechanisms in the UK that are available for mass tort litigation of this kind and suggested that the Group Litigation Order (GLO) would be the appropriate mechanism in the majority of cases of mass tort litigation. Then he elaborated on several aspects of GLO, including group registers, case management, and costs. Finally, he suggested examining the *Okpabi* case to see how GLOs work.

Second Afternoon Session on 24 June

Prof. Irene-Marie Esser (School of Law, University of Glasgow) and Dr. Christopher Riley (Durham Law School) presented their research on 'Groups and Outsiders in the Context of Tort and Human Rights Violations', examining the challenges that arise in protecting the interests of 'outsiders' from corporate groups' misbehaviour. They argued that regulations applied to individual 'stand-alone' companies suffer weaknesses when applied to corporate groups. By using the UK's experience of enforcing human rights norms against groups and of applying tort law, they demonstrate the implications of an 'enterprise approach' for regulation.

Dr. Catherine Pedamon (Westminster Law School) shared her work in progress on the French duty of vigilance. The French *Loi de Vigilance* has been enacted for seven years, yet its first decision was rendered on 5th December 2023. It still appears to be in the initial stages of development, not only due to its groundbreaking nature but also the obstacles to enforcement. She then shared some key preconditions on the applicability, the public availability of a vigilance liability plan, compensation for damages due to the companies' failure to comply, etc. She also introduced the recent developments in the related cases in France.

Prof. Michael Nietsch discussed his research, 'Corporate Accountability of Multinational Enterprises for Human Rights Abuses – Navigating Separate Legal Entity and Attribution under Delict', elaborating the growing interest in corporate accountability for human rights violations in the German judicial system. In

contrast to the UK, Germany has seen few incidents of damages lawsuit with the implementation of statutory due diligence procedures under the Supply Chain Due Diligence Act 2021 (*Lieferkettensorgfaltspflichtengesetz*, LkSG). Nonetheless, legal academics continue to discuss the basis for corporate liability for human rights violations under German private law, as well as the proper standards of care that arise as a result. This is a fundamental issue in German delict law and the separation of legal entities. He argued that the LkSG has ruled out private liability based on a violation of the Act's due diligence criteria while allowing such liability on other grounds, which adds to the complexity.

At the end of the day, Dr. Juan Manuel Amaya Castro (Faculty of Law, University of the Andes, Colombia) presented his work on 'Global Value Chains with a Human Face'. He discussed the definition of social traceability from a legal perspective and its requirements, purpose, and reasons for tracing a particular good in the supply chain. He then explained how traceability is mandated in due diligence and reporting legislation, pointing out that practices including auditing and certification, feedback loops, administrative guidelines, and civil liability standards should be considered.

Morning Session on 25 June

Dr. Biset Sena Güne? (Max Planck Institute for Comparative and International Private Law, Hamburg, Germany) started the day with her research, 'Harmonisation of Private International Law Rules to Promote Sustainability in Global Value Chains?'. She elaborated that the role of private international law is frequently constrained concerning sustainability. In most cases, the ability to reach a truly sustainable outcome is dependent on the applicable private legislation. When this is the case, it is difficult to justify the need for harmonisation of current private international law standards without simultaneously focusing on uniform private law regulatory remedies. Nonetheless, she suggested that the need for harmonisation of private international law standards governing corporate social responsibility should be explored further and proposed a comparative approach for that further research.

The morning session on 25 June also discussed the plans for the upcoming publication and the dissemination conference to be held in Germany in 2025.

In summary, the workshop enabled fruitful discussion of work-in-progress and

shared insights on the complexities of global value chains and the role of transnational private law. Key topics included sustainability, corporate accountability, and legal frameworks affecting global supply chains. The project successfully fosters international collaboration amongst and beyond LSGL researchers, nurturing comparative and interdisciplinary approaches. Participants gained a deeper understanding and ideas to take the research forward to address regulatory and coordination challenges in furthering sustainability in global commerce.

Book and webinar Financing Collective Actions

Collective actions and the financing of complex mass damage cases have been among the most debated and controversial topics in civil justice in Europe over the past decade. It doesn't need much explanation that oftentimes these complex cases involving a multiplicity of parties and events or consequences taking place in different countries trigger private international law questions, as for instance the ongoing evaluation of the Brussels I-bis Regulation evidences (see among others the 2023 Study in support of the evaluation; a 2021 Working Paper by Burkhard Hess; a 2022 report by BEUC on PIL and Cross-border Collective Redress). Another key issue is the funding of these inherently costly litigations. The Representative Action Directive, applicable since June 2023, and the European Parliament Resolution on Responsible private funding of litigation, adopted in 2022, have proliferated discussions on the funding of collective actions. With the entry into force of the Dutch collective damages procedure (WAMCA) in 2020, enabling compensatory actions, the Netherlands has re-confirmed its reputation as one of the frontrunners in having a well-developed framework for collective actions and settlements in Europe. High stake cases involving privacy, environmental law, human rights and consumer law have found their way to the courts and have benefitted from third party funding.

These developments have triggered the Dutch Research and Documentation

Centre of the Ministry of Justice and Security to commission a Study on the need for a procedural fund for collective actions, published in 2023 (in Dutch). The book *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?*, based on this study and including updates, has just been published (Eleven International Publishing 2024) and is available open access. The book is authored by Xandra Kramer (Erasmus University Rotterdam/Utrecht University), Ianika Tzankova (Tilburg University), Jos Hoevenaars (Erasmus University Rotterdam, researcher Vici team) and Karlijn van Doorn (Tilburg University). It discusses developments in Dutch collective actions from a regulatory perspective, including the implementation of the RAD, and contains a quantitative and qualitative analysis of cases that have been brought under the WAMCA. It then examines funding aspects of collective actions from a regulatory, empirical and comparative perspective. It delves into different funding modes, including market developments in third party litigation funding, and addresses the question of the necessity, feasibility, and design of a (revolving) litigation fund for collective actions.

The hardcover version of the book can be ordered from the publisher's website, which also provides access to the free digital open access version through the publisher's portal.

A **launch event and webinar** on 'Financing Collective Actions: Current Debates in Europe and Beyond' will take place on 3 July from 15-17.15 CET. Confirmed speakers include Jasminka Kalajdzic (University of Windsor) and Rachael Mulheron (Queen Mary University London). Registration for free here.

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

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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.