Declaration of the Institute of International Law on aggression in Ukraine

Yesterday (1 March 2022) the Institute of International Law approved a declaration on the aggression in Ukraine. The declaration is available by clicking the following links:

Declaration of the Institute of International Law on Aggression in Ukraine – 1 March 2022 (EN)-1

Déclaration de l'Institut de Droit international sur l'agression en Ukraine – 1 mars 2022 (FR)

The current developments in Ukraine and the measures and sanctions currently in place have undoubtedly an impact across all areas, including private international law. See for example the measures adopted by the European Union here.

I include an excerpt of the declaration below:

> *The Institute recalls that the ongoing military operations call ipso facto for the application of international humanitarian law, including the rules relating to occupation, as well as all the other rules applicable in times of armed conflict. It recalls also that persons responsible for international crimes as defined by international law may be prosecuted and sentenced in accordance with the law in force.*
>
> *Faithful to its mission, the Institute remains convinced that, while international law alone cannot prevent the outbreak of violence, it must remain the compass by which States are guided, and it is more than ever determined to strengthen its work to promote "the progress of international law". The Institute adds its voice to that of other actors in the international community, including the learned societies acting in defense of the rule of law, who call for an end to the war in Ukraine and the settlement in good faith of disputes between the States concerned through all appropriate means of peaceful settlement.*

The Characterization and Applicable Law of Cultural Objects in Conflicts of Laws: Is a Mummy a Person or a Property?



Willem 1, Buddhist mummy. Statue (L), CT scan (R). (Photos: Drents Museum)

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In *Buddha Mummy Statue* case, the Chinese village committees sued the Dutch defendants for the return of a stolen golden statue which contains a 1000-year old mummified buddhist. The parties had different opinions on the legal nature of the mummy contained in the statue. The Chinese court classified the statue as a cultural property and applied the choice of law over movable properties provided

in Article 37 of Chinese Private International Law (*lex rei sitae)*. Based on a comparative study, this article argues that a mummy does not fall within the traditional dichotomy between a person and a property. Instead, a mummy should be classified as a transitional existence between a person and a property. If the classification of a mummy has to be confined to the traditional dichotomy, a mummy can be regarded as a quasi-person, or a special kind of property. Following this new classification, a new choice of law rule should be established. In this regard, the Belgian Private International Law Act, which adopts the *lex originis* rule supplement by the *lex rei sitae*, is a forerunner. This article advocates that the adoption of the *lex originis* rule may help to stop the vicious circle of illegal possession and to facilitate the return of stolen cultural objects, especially those containing human remains, to their country of origin.

1. Gold or God?

As to the legal nature of the Buddha Mummy Statue in dispute, from the Chinese villagers' perspective, the mummy contained in the golden statute is a person or God, instead of a property. Specifically, the mummified buddhist Master Zhanggong was their ancestor, who used to live in their village and has been worshipped as their spiritual and religious God for over 1000 years. Master Zhanggong was preserved in a statue moulded with gold to prevent decomposition and to maintain his immortality. The villagers celebrated Master Zhanggong's birthday every year with feast, music and dance performance, which has become their collective memory and shared belief.

In contrast, from the Dutch art collector' perspective, the golden statute containing a mummy is a property not a person. It is merely a cultural property with great economic value and worthy of collection or investment. Thus, it is not surprising that the Dutch collector asked for a compensation of 20 million Euro, of which the Chinese villagers whose annual income was around 1000 Euro could not afford it.

The Chinese village committees sued the Dutch art collector both in China and in the Netherlands. The Chinese village committees asserted that the mummified Master Zhanggong contained in the statue was a corpse within the meaning of the Dutch Liability Decree, and the ownership thereof was excluded under the Dutch

law.[2] The claimants as the trustees or the agents had the right of disposal.[3] The Dutch art collector argued that the mummified monk contained in the golden statue was not a corpse, as the organs of the monk were missing. The Dutch court did not touch upon the issue of classification of the Buddha Mummy Statue, as the case was dismissed on the basis that the Chinese village committees had no legal standing nor legal personality in the legal proceedings.[4]

2. The *lex situs* under Article 37 Chinese Private International Law Act

The Chinese court classified the Buddha Mummy Statue as a cultural property and applied the law of the country where the theft occurred, namely Chinese law, by virtue of Article 37 Chinese Private International Law Act. Such classification is not satisfactory, as the mummy in dispute was essentially considered as a property. Chinese law was applied because the place of theft was in China and the *lex situs* was construed by the Chinese court as the *lex furti*. However, what if the mummy was stolen in a third country during the transportation or an exhibition? The *lex furti* does not necessarily happen to be the *lex originis* in all cases involving stolen cultural objects.

Moreover, cultural objects containing human remains are special in comparison with other cultural objects without, as human remains contain biological information of a person. The application of the traditional *lex rei sitae* rule to all cultural objects, including those containing human remains, is far from satisfactory. In general, the law on dead human bodies precedes over the sale of corpses, and no person, including a good faith purchaser can own somebody else's corpse both in civil law and common law systems.[5] A corpse must not be downgraded to the status of a property.[6] The characterization of human remains as properties objectifies human remains and thus may violate human dignity.[7] Therefore, it is necessary to distinguish cultural objects containing human remains from other types of cultural objects. The question is how to draw a distinction and what is the legal nature of a cultural object containing human remains, such as a mummy. If a mummy does not fall within the scope of traditional category of a person nor a property, does it mean a new category need to be created? In this regard, the classification of the legal nature of a fertilized

embryo in *Shen v. Liu* may be relevant,[8] since the judge addressed the issue by thinking out of the box and provided a new solution.

3. Is a Fertilized Embryo a Property or a Person?

Shen v. Liu was the first case in China that involved the ownership of frozen embryos. Specifically, Shen and Liu, who got married in 2010 and died in 2013 in a car accident, left four frozen fertilized embryos in a local hospital. The parents of Shen (Mr and Mrs Shen), sued the parents of Liu (Mr and Mrs Liu), who also lost their only child, claiming the inheritance of the four frozen fertilized embryos of the deceased young couple.[9] The local hospital where the embryos were preserved was a third party in this case.

3.1 A property, a special property, or 'a transitional existence between person and property'?

The third party Gulou Hospital argued that the frozen embryos do not have the nature of a property. Since Mr. and Mrs. Shen had passed away, the expired embryos should be discarded. Neither the plaintiffs nor the defendants should inherit the embryos.[10] The first-instance court held that fertilized embryos had the potential to develop into life, and thus are special properties that contain biological characteristics of a future life. Unlike normal properties, fertilized embryos can not be the subject of succession, nor be bought or sold.[11]

Nevertheless, the appellate court took the view that embryos were 'a transitional existence between people and properties'. Therefore, embryos have a higher moral status than non-living properties and deserve special respect and protection. The embryo ethically contains the genetic information of the two families and is closely related to the parents of the deceased couple. Emotionally speaking, the embryo carries personal rights and interests, such as the grief and spiritual comfort for the elderly. The court held that the supervision and disposal of the embryos by the parents from these two families was in line with human ethics and can also relieve the pain of bereavement for both parties.[12] Clearly,

the court did not classify the fertilized embryos as people or properties. Instead, the embargo was considered as ‘a transitional existence between a person and a property’, since it is not biotic nor abiotic but a third type in-between.

3.2 A mummy as ‘a continuum between a person and a property’

With regard to the distinction between a person and a property, the judgment of *Shen v. Liu* shows that the Chinese court was not confined to the traditional dichotomy between a person and a property. The same should be applicable to mummies. Embryos and mummies have something in common, as they are two different kinds of life forms. Whereas the embryo in *Shen v. Liu* is the form of life which exists before the birth of a human being, the mummy in *Buddha Mummy Statue* case is another form of life which exists after the death of a human being.

Embryos and mummies, as the pre-birth transition and after-death extension of life forms of a human being, involve morality and ‘human dignity’.[13] Such transitional existence or continuum of life forms contains personal rights and interests for related parties, which may justify the adoption of a new classification. As a special form of life, embryos and mummies should not be considered as merely a property nor a person. The strict distinction between people and properties does not apply well in embryos and mummies. Instead, they should be regarded as ‘a transitional existence between a person and a property’ or ‘a continuum between a person and a property’. If it is not plausible to create a third type for the purpose of classification, they should be regarded, at least, as a quasi-person, or a special property with personal rights and interests. An embryo and a mummy cannot be owned by someone as a property. Rather, a person can be a custodian of an embryo and a mummy. This is also the reason why cultural objects containing human remains should be treated differently.

4. A New Classification Requires a New Choice of Law Rule

In order to distinguish cultural objects containing human remains from other cultural objects, or more generally to distinguish cultural properties from other properties in the field of private international law, a new choice of law rule needs to be established. In this regard, the 2004 Belgian Private International Law Act

might be the forerunner and serve as a model for not only other EU countries but also non-EU countries.[14]

4.1 The *lex originis* overrides the *lex situs*

The traditional *lex situs* rule is based on the location of a property and does not take cultural property protection into consideration. Courts resolving cultural object disputes consistently fail to swiftly and fairly administer justice, and much of the blame can be put on the predominant *lex situs* rule.[15] The *lex situs* rule allows parties to choose more favorable countries and strongly weakens attempts to protect cultural objects.[16]

In Belgium, as a general rule, the restitution of illicitly-exported cultural objects is subject to the *lex originis,* rather than the *lex rei sitae*. Article 90 of 2004 Belgian Private International Law Act stipulated that if one object that has been recorded in a national list of cultural heritage is delivered outside this country in a way that against its law, the lawsuit filed in this country for the return of that particular object shall apply the law of the requesting country. This provision designates the law of the country of origin, also known as the *lex originis* rule. In comparison with the *lex rei sitae* or the *lex furti* rule*,* the *lex originis* rule is more favorable to the original owners

4.2 Facilitating the return of human remains to their country of origin

The establishment of a new choice of law rule for cultural relics containing human remains or cultural objects in general is in line with the national and international efforts of facilitating the return of stolen or illicitly cultural objects to their country of origin. Mummies exist not only in China, but also in many other countries, such as as Japan, Egypt, Germany, Hungary, USA, Russia, and Italy. The adoption of the *lex originis* rule could facilitate the return of stolen or illicitly exported cultural objects which contain human remains to their country of origin or culturally-affiliated place. This objective is shared in many international conventions and national legislations.

5. Concluding remarks

The mummy Master Zhanggong has not been returned to the Chinese village committees yet, since the Dutch defendants have lodged an appeal. This article argues that, in the light of the classification of frozen embryos in *Shen v. Liu,* mummies should be classified as 'a transitional existence between a person and a property'. A new classification calls for a new choice of law rule. In this regard, the 2004 Belgian Private International Law Act might serve as a model, according to which the *lex originis* rule prevails over the traditional *lex situs* rule, unless the original owner chooses the application of the traditional *lex situs* or the *lex originis* rule does not provide protection to the good faith purchaser. The Chinese Private International Law should embrace such approach, since the application of the *lex originis* may facilitate the return of cultural relics, including but not limited to those containing human remains such as mummies, to their culturally affiliated community, ethnic or religious groups.

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[1] This is a shortened version of the article published in the Chinese Journal of Comparative Law with open access https://doi.org/10.1093/cjcl/cxac006. Related blogposts are Buddha Mummy Statue case and Conflict of Laws of Cultural Property.

[2] *Chinese Village Committees v. Oscar Van Overeem,* ECLI:NL:RBAMS:2018:8919, point 3.1.

[3] *Ibid.*

[4] *Ibid.*, point 4.2.5.

[5] J. Huang, 'Protecting Non-indigenous Human Remains under Cultural Heritage Law', 14 *Chinese Journal of International Law* 2015, p. 724.

[6] E.H. Ayau and H. Keeler, Injustice, Human Rights, and Intellectual Savagery, in Human Remains in Museums and Collections, DOI: https://doi.org/10.18452/19383, p. 91.

[7] Ibid.

[8] *Mr and Mrs Shen v. Mr and Mrs Liu*, Jiangsu Province Yixing Municipality People's Court, (2013) Yi Min Chu Zi No 2729; Jiangsu Province Wuxi Municipality Intermediate People's Court, (2014) Xi Min Zhong Zi No 01235.

[9] *Ibid*.

[10] *Ibid*. The third party also stated that after the embryos are taken out, the only way to keep the embryos alive is surrogacy, which is illegal in China, thus both parties have no right to dispose the embryos.

[11] *Ibid*. Since the first-instance court held that embryos cannot be transferred or inherited, the case was dismissed in accordance with Article 5 of the General Principle of Civil Law and Article 3 of the Inheritance Law of the PRC.

[12] *Ibid*. The appellate court analyzed that after the death of Shen and Liu, their parents were the only subjects and most-related parties that care about the fate of embryos. Thus, it was appropriate to rule that the parents of Shen and Liu have the right to supervise and dispose the embryos. However, such supervision and disposal should abide by the law, and must not violate public order and good morals nor infringe the interests of other people.

[13] While birth means a definite initiation into human society, death indicates a final termination of a natural person, which both involve the dignity of an individual human or even humankind. H.G. Koch, 'The Legal Status of the Human Embryo', in E. Hildt and D. Mieth (eds.), *Vitro Fertilisation in the 1990s,* Routledge 1998, p. 3.

[14] T. Szabados, 'In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications', 27 *International Journal of Cultural Property* 2020, p. 335.

[15] D. Fincham, 'How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property', 32 *Columbia Journal of Law & the Arts* 2008, p.116.

[16] Ibid, p.130.

Pilar Jiménez Blanco on Cross-Border Matrimonial Property Regimes

Written by Pilar Jiménez Blanco about her book:

Pilar Jiménez Blanco, *Regímenes económicos matrimoniales transfronterizos [Un estudio del Reglamento (UE) nº 2016/1103]*, Tirant lo Blanch, 2021, 407 p., ISBN 978-84-1355-876-9

The Regulation (EU) No 2016/1103 is the reference Regulation in matters of cross-border matrimonial property regimes. This book carries out an exhaustive analysis of the Regulation, overcoming its complexity and technical difficulties.

The book is divided in two parts. The first is related to the applicable law, including the legal matrimonial regime and the matrimonial property agreement and the scope of the applicable law. The second part is related to litigation, including the rules of jurisdiction and the system for the recognition of decisions. The study of the jurisdiction rules is ordered according to the type of litigation and the moment in which it arises, depending on whether the marriage is in force or has been dissolved by divorce or death. **Three guiding principles** of the Regulation are identified: 1) The need of **coordination with the EU Regulations** on family matters (divorce and maintenance) and succession. This coordination can be achieved through the choice of law by the spouses to ensure the application of the same law to divorce, to the liquidation of the matrimonial regime, to maintenance and even to agreements as to succession. In addition, a broad interpretation of “maintenance” that includes figures such as compensatory pension (known, for example, in Spanish law) allows that one of the spouses

objects to the application of the law of the habitual residence of the creditor and the law of another State has a closer connection with the marriage, based on art. 5 of the 2007 Hague Protocol. In such a case, the governing law of the matrimonial property regime could be considered as the closest law.

In the field of international jurisdiction, the coordination between EU Regulations is intended to be ensured with exclusive jurisdiction by ancillary linked to succession proceedings or linked to matrimonial proceedings pending before the courts of other Member States. Although the ancillary jurisdiction of the proceedings on the matrimonial property regime with respect to maintenance claims is not foreseen, the possibility of accumulation of these claims is possible through a choice of court to the competent court to matrimonial matters.

2) The **unitary treatment of the matrimonial property regime**. The general rule is that only one law is applicable and only one court is competent to matrimonial property regimes, regardless of the location of the assets. The exceptions derived from the registry rules of the real estate situation and the effect to third parties are analysed.

3) The **legal certainty and predictability**. The general criterion is the immutability and stability of the matrimonial property regime, so that the connections are fixed at the beginning of married life and mobile conflict does not operate, as a rule. The changes allowed will always be without opposition from any spouse and safe from the rights of third parties. The commitment to legal certainty and predictability of the matrimonial property regime governing law prevails over the proximity current relationship of the spouses with another State law.

Related to **applicable law**, the following contents can be highlighted:

-The **importance of choosing the governing law** of the matrimonial property regime. The choice of law has undoubted advantages for the spouses to coordinate the law applicable to the matrimonial property regime with the competent courts and with the governing law of related issues related to divorce, maintenance and succession law. The choice of law is especially recommended if matrimonial property agreements are granted in case of spouses' different nationalities and different habitual residence, since it avoids uncertainty in

determining the law of the closest connection established in art. 26.1.c). Of particular importance is the question of form and consent in the choice of law, given the ambiguity of the Regulation on the need for this consent to be express.

-The interest in conclude **matrimonial property agreements and, specially, the prenuptial agreements**. Its initial validity requires checking the content of each agreement to verify which is the applicable law and which is included within the scope of the Regulation (EU) No 2016/1103. The enforceability of these agreements poses problems when new unforeseeable circumstances have appeared for the spouses, which will require an assessment of the effectiveness of the agreements in a global manner – not fragmented according to each agreement – to verify the minimum necessary protection of each spouse.

-The **singularities of the scope of application of the governing matrimonial property regime law**. The issues included in the governing law require prior consultation with said law to identify any specialty in the matrimonial property regime relations between the spouses or in relation to third parties. This has consequences related to special capacity rules to conclude matrimonial property agreements, limitations to dispose of certain assets, limitations for contracts between spouses or with respect to third parties or the relationship between the matrimonial property regimes and the civil liability of the spouses. Of particular importance is the regime of the family home, which is analysed from the perspective of the limitations for its disposal and from the perspective of the rules of assignment of use to one of the spouses.

-The **balance between the protection of spouses and the protection of third parties**. From art. 28 of the Regulation, derives the recommendation for the spouses to register their matrimonial property regime, whenever possible, in the registry of their residence and in the property registry of the real estate situation. The recommendation for third parties is to consult the matrimonial property regime in the registries of their residence and real estate. As an alternative, it is recommended to choose – as the governing law of the contract – the same law that governs the matrimonial property regime.

– **The effects on the registries law**. Although the registration of rights falls outside the scope of the Regulation, for the purposes of guaranteeing correct publicity in the registry of the matrimonial property regimes of foreign spouses, it would be advisable to eventually adapt the registry law of the Member States to

the Regulation (EU) No 2016/1103. A solution consistent with the Regulation would be to allow the matrimonial property regime registry access when the first habitual residence of the couple is established in that State.

Related to **jurisdiction,** the following contents can be highlighted:

-The keys of the rules of jurisdiction. The rules of jurisdiction only regulate international jurisdiction, respecting the organization of jurisdiction among the "courts" within each State. It will be the procedural rules of the Member States that determine the type of intervening authority (judicial or notarial), as well as the territorial and functional jurisdiction.

The rules of jurisdiction are classified into two groups: 1) litigation with a marriage in force, referred to in the general forums of arts. 6 et seq.); 2) litigation in case of dissolution of the marriage, due to death or marital crisis. These are subject to two types of rules: if the link (spatial, temporal and material) with the divorce or succession court is fulfilled, this court has exclusive jurisdiction, in accordance with arts. 4 and 5; failing that, it goes back to the general forums of the Regulation.

Jurisdiction related to succession proceedings (based on art. 4) poses a problem of lack of proximity of the court with the surviving spouse, especially when the criterion of jurisdiction for the succession established by Regulation (EU) No 650/2012 has little connection with that State. This will be the case especially when the jurisdiction for succession is based on the location of an asset in that State (art. 10.2) or on the *forum necessitatis* (art. 11).

Jurisdiction related to matrimonial proceedings (based on art. 5) poses some problems such as the one derived from a lack of temporary fixation of the incidental nature. The problem is to determine how long this court has jurisdiction.

-The interest of the choice of court. The choice of court is especially useful to reinforce the choice of law. Submission may also be convenient, especially to the State of the celebration, for marriages that are at risk of not being recognized in any Member State by virtue of art. 9 (for example, same-sex marriages).

The inclusion of a submission in a prenuptial agreement or in a matrimonial property agreement does not avoid the uncertainty of the competent court. There is a clear preference for the concentration of the jurisdiction of arts. 4 and 5 apart from the pact of submission made between the spouses. In any case, the choice of court can be operative if the proceedings on the matrimonial issue has been raised before courts with the minimum connection referred to in art. 5.2.

Problems arise due to the dependence of the jurisdiction on the applicable law established in art. 22 of the Regulation, since it requires anticipating the determination of the law applicable to the matrimonial property regime in order to control international jurisdiction.

Related to **recognition,** the following contents can be highlighted:

-The **delimitation between court decision and authentic instrument** does not depend on the intervening authority – judicial or notarial –, but on the exercise of the jurisdictional function, which implies the exercise of a decision-making activity by the intervening authority. This allows notarial divorces to be included and notoriety acts of the matrimonial property regime to be excluded.

The recognition system follows the classic model of the European Regulations, taking as a reference the Regulation (EU) No 650/2012 on succession. Therefore, the need for exequatur to enforceability of court decisions is maintained.

The obligation to apply the grounds for refusal of recognition with **respect to the fundamental rights recognised in the EU Charter** and, in particular, in art. 21 thereof on the principle of non-discrimination. This supposes an express incorporation of the European public policy to the normative body of a Regulation. Specially, the prohibition of discrimination based on sexual orientation means the impossibility of using the public policy ground to deny recognition of a decision issued by the courts of another Member State relative to the matrimonial property regime of a marriage between spouses of the same sex.

The study merges the rigorous interpretation of EU rules with practical reality and includes case examples for each problem area. The book is completed with

many references on comparative law, which show the different systems for dealing with matters of the matrimonial property regime applied in the Member States. It is, therefore, an essential reference book for judges, notaries, lawyers or any other professional who performs legal advice in matrimonial affairs.

Are the Chapter 2 General Protections in the Australian Consumer Law Mandatory Laws?

Neerav Srivastava, a Ph.D. candidate at Monash University offers an analysis on whether the Chapter 2 general protections in the Australia's Competition and Consumer Act 2010 are mandatory laws.

Online Australian consumer transactions on multinational platforms have grown rapidly. Online Australian consumers contract typically include exclusive jurisdiction clauses (EJC) and foreign choice of law clauses (FCL). The EJC and FCL, respectively, are often in favour of a US jurisdiction. Particularly when an Australian consumer is involved, the EJC might be void or an Australian court may refuse to enforce it.[1] And the 'consumer guarantees' in Chap 3 of the *Australian Consumer Law* (*'ACL'*) are explicitly 'mandatory laws'[2] that the contract cannot exclude. It is less clear whether the general protections at Chap 2 of the *ACL* are non-excludable. Unlike the consumer guarantees, it is not stated that the Chap 2 protections are mandatory. As Davies et al and Douglas[3] rightly point out that *may* imply they are not mandatory. In 'Indie Law For Youtubers: Youtube And The Legality Of Demonetisation' (2021) 42 *Adelaide Law Review*503, I argue that the Chap 2 protections are mandatory laws.

The Chap 2 protections, which are not limited to consumers, are against:

- misleading or deceptive conduct under s 18
- unconscionable conduct under s 21
- unfair contract terms under s 23

I. PRACTICALLY SIGNIFICANT

If the Chap 2 protections are mandatory laws, that is practically significant. Australian consumers and others can rely on the protections, and multinational platforms need to calibrate their approach accordingly. Australia places a greater emphasis on consumer protection,[4] whereas the US gives primacy to freedom of contract.[5] Part 2 may give a different answer to US law. For example, the YouTube business model is built on advertising revenue generated from content uploaded by YouTubers. Under the YouTube contract, advertising revenue is split between a YouTuber (55%) and YouTube (45%). When a YouTuber does not meet the minimum threshold hours, or YouTube deems content as inappropriate, a YouTuber cannot monetise that content. This is known as demonetisation. On the assumption that the Chap 2 protections apply, the article argues that

- not providing reasons to a Youtuber for demonetisation is unconscionable
- in the US, it has been held that clauses that allow YouTube to unilaterally vary its terms, eg changing its demonetisation policy, are enforceable. Under Chap 2 of the *ACL*, such a clause is probably void.

If that is correct, it is relevant to Australian YouTubers. It may also affect the tactical landscape globally regarding the demonetisation dispute.

II. WHETHER MANDATORY

As to why the Chap 2 protections are mandatory laws, first, the *ACL* does not state that they are not mandatory. The Chap 2 protections have been characterised as rights that cannot be excluded.[6]

The objects of the *ACL*, namely to enhance the welfare of Australians and consumer protection, suggest[7] that Chap 2 is mandatory. A FCL, sometimes combined with an EJC, may alienate Australian consumers, the weaker party, from legal remedies.[8] Allowing this to proliferate would be inconsistent with the *ACL*'s objects. If Chap 2 is not mandatory, all businesses — Australian and international — could start using FCLs to avoid Chap 2 and render it otiose.

Further there is a public dimension to the Chap 2 protections,[9] in that they are subject to regulatory enforcement. It can be ordered that pecuniary penalties be paid to the government and compensation be awarded to non-parties. In this respect, Chap 3 is similar to criminal laws, which are generally understood to have a strict territorial application.[10]

As for policy being 'particularly' important where there is an inequality of bargaining power, both ss 21[11] and 23 are specifically directed at redressing inequality.[12]

Regarding the specific provisions:

- Authority on, at least, s 18 suggests that it is mandatory.[13]
- Section 21 on unconscionable conduct has been held to be a mandatory law, although that conclusion was not a detailed judicial consideration.[14] In any event, it is arguable that 'conduct' is broader than a contract, and parties cannot exclude 'conduct' provisions.[15] Unconscionability is determined by reference to 'norms' of Australian society and is, therefore, not an issue exclusively between the parties.[16]
- Whether s 23 on unfair contract terms is a mandatory law is debatable.[17] At common law, the proper law governs all aspects of a contractual obligation, including its validity. The counterargument is that s 23 is a statutory regime that supersedes the common law. As a matter of policy, Australia is one of the few jurisdictions to extend unfair terms protection to small businesses expressly, for example, a YouTuber. An interpretation that s 23 can be disapplied by a FCL would be problematic. A FCL designed to evade the operation of ss 21 or 23 might itself be unconscionable or unfair.[18] If s 23 is not mandatory, Australian consumers may not have the benefit of an important protection. Section 23 also has a public interest element, in that under s 250 the regulator can apply to have a term declared unfair. On balance, it is more likely than not that s 21 is a mandatory law.

The Chap 2 protections are an integral part of the Australian legal landscape and the market culture. This piece argues that the Chap 2 protections *are* mandatory laws. Whether or not that is correct, as a matter of policy, they should be.

FOOTNOTES

[1] A possibility implicitly left open by *Epic Games Inc v Apple Inc* [2021] FCA 338, [17]. See too *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861, [32]–[36] (Master Malpass); *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362, [46] (Nicholson J), *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[2] 'laws the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organization) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied'. See Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 248.

[3] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 492 [19.48], Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation After *Valve*' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 201, 226-7.

[4] Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 570, 599.

[5] *Sweet v Google Inc* (ND Cal, Case No 17-cv-03953-EMC, 7 March 2018).

[6] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[7] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10].

[8] See, eg, *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98) [2000] ECR I-4963.

[9] *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [23] (Middleton, Jagot and Moshinsky JJ).

[10] John Goldring, 'Globalisation and Consumer Protection Laws' (2008) 8(1) *Macquarie Law Journal* 79, 87-8

[11] Historically, the essence of unconscionability is the exploitation of a weaker party. *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J) (‘*ASIC v Kobelt*’).

[12] M Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10], 492 [19.48].

[13] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[14] *Epic Games Inc v Apple Inc* [2021] FCA 338, [19] (Perram J). On appeal, the Full Court of the Federal Court of Australia exercised its discretion afresh and refused the stay: *Epic Games Inc v Apple Inc* (2021) 392 ALR 66. That said, Perram J’s conclusion that s 21 was a mandatory law was not challenged on appeal.

[15] Analogical support for a ‘conduct’ analysis can be found from cases on s 18 like *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647 (Edelman J, at first instance). In *Valve* it was reiterated that the test for s 18 was objective. See 689 [212]–[213]. A contractual term might neutralise the misleading or deceptive conduct, but it cannot be contracted out of. See *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J, Moore J agreeing at 4 [1], Mansfield J agreeing at 11 [17]); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, 29–30 [83] (Keane JA, Williams JA agreeing at [1], Atkinson J agreeing at [145]).

[16] *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) [No 2]* [2017] FCA 709, [60]–[62] (Beach J).

[17] M Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 463 [19.1], 492 [19.48].

[18] M Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10]. While a consumer might be able to challenge a proper law of contract clause on the grounds of unconscionability, it would be harder for a commercial party to do so.

A Boost in the Number of European Small Claims Procedures before Spanish Courts: A Collateral Effect of the Massive Number of Applications for European Payment Orders?

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis of the Spanish statistics on the European Small Claims Procedure.

Until 2017, the annual number of European Small Claims Proceedings ("ESCP") in Spain was relatively small, with an average of 50 ESCPs per year. With some exceptions, this minimal use of the ESCP fits the general trend across Europe (Deloitte Report). However, from 2017 to 2018 the number of ESCPs in Spain increased 286,6%. Against the 60 ESCPs issued in 2017, 172 were issued in 2020. In 2019, the number of ESCPs continued climbing to 492 ESCPs. This trend reversed in 2020, when there were just 179 ESCPs.

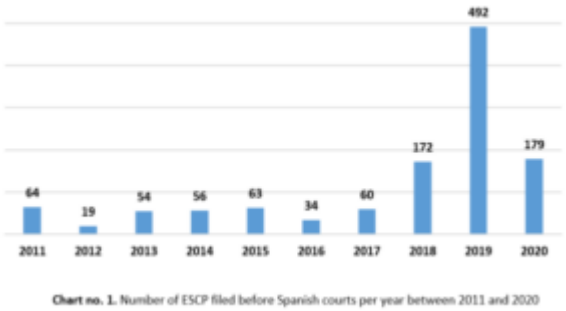

Chart no. 1. Number of ESCP filed before Spanish courts per year between 2011 and 2020

The use of the Regulation establishing the European Payment Order ("EPO

Regulation") experienced a similar fluctuation between 2018 and 2020. Since its entry into force, the EPO Regulation was significantly more prevalent among Spanish creditors than the ESCP Regulation. Between 2011 to 2020, there were an average of 940 EPO applications per year. Nonetheless, from 2017 to 2019, the number of EPO applications increased 4.451%: just in 2019, 29,151 EPOs were issued in Spain. In 2020, the number of EPOs decreased to 21,636. the massive boost in EPO applications results from creditors' attempts to circumvent EU consumer protection standards under the Spanish domestic payment order.

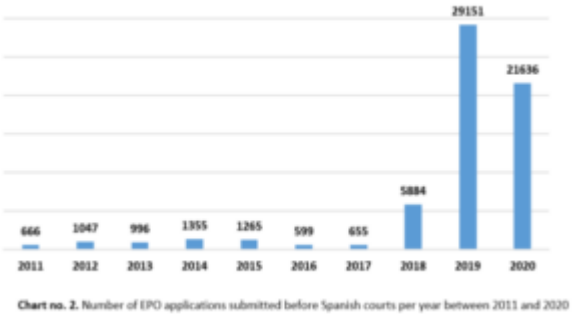

Chart no. 2. Number of EPO applications submitted before Spanish courts per year between 2011 and 2020

From *Banco Español de Crédito* to *Bondora*

After the CJEU judgment C-618/10, *Banco Español de Crédito*, the Spanish legislator amended the Spanish Code of Civil Procedure to impose on courts a mandatory review of the fairness of the contractual terms in a request for a domestic payment order. Creditors noticed that they could circumvent such control through the EPO. Unlike the Spanish payment order, the EPO is a non-documentary type payment order. For an EPO, standard form creditors only have to indicate "the cause of the action, including a description of the circumstances invoked as the basis of the claim" as well as "a description of evidence supporting the claim" (Article 7(2) EPO Regulation). Moreover, the Spanish legislation implementing the EPO states that courts have to reject any other documentation beyond the EPO application standard form. Creditors realized that in this manner there was no possible way for the court to examine the fairness of the contratual terms in EPOs against consumers. Consequently, the number of EPO applications between 2017 and 2019 increased remarkably.

In some cases, a claim's cross-border dimension was even fabricated to access the EPO Regulation. The EPO, like the ESCP, is only applicable in cross-border claims, which means that "at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court

seised”(Article 3 EPO Regulation). Against this background, creditors assigned the debt to a creditor abroad (in many cases, vulture funds and companies specialized in debt recovery) in order to transform a purely internal claim into a cross-border one.

The abnormal increase in the number of EPOs did not go unnoticed among Spanish judges. Three Spanish courts decided to submit preliminary references to the CJEU, asking, precisely, whether it is possible to examine the fairness of the contractual terms in an EPO application requested against a consumer. Two of these preliminary references led to the judgment Joined Cases C?453/18 and C?494/18, *Bondora*, where the CJEU replied positively, acknowledging that courts can examine the fairness of the contractual terms (on this judgment, see this previous post). The judgment was rendered in December 2019. In 2020, the number of EPOs started to decrease. It appears that after *Bondora* the EPO became less attractive to creditors.

The connection between the EPO and the ESCP Regulation

At this point one needs to ask how the increase in the use of the EPO Regulation has had an impact on the use of the ESCP Regulation. The answer is likely found in the 2015 joint reform of the EPO and ESCP Regulations (Regulation (EU) 2015/2421). Among other changes, this reform introduced an amendment in the EPO Regulation which allows, once the creditor lodges a statement of opposition against an EPO, for an automatic continuation of proceedings under the ESCP (Article 17(1)(a) EPO Regulation). For this to happen, creditors simply need to state their intention by making use of a code in the EPO application standard form. It appears that, in Spain, many of those creditors who applied for an EPO in order to circumvent consumer protection standards under the domestic payment order found in the ESCP a subsdiary proceeding if debtors opposed the EPO.

An isolated Spanish phenomenon?

Statistics in Spain show that, at least in this Member State, the connection between the EPO and ESCP Regulations functions and gives more visibility to the ESCP. The lack of awareness about the ESCP Regulation was one of the issues that the Commission aimed to tackle with the 2015 reform. One might wonder if a similar increase in the use of the ESCP could be appreciated in other Member States. Available public statistics in Portugal, Lithuania, and Luxembourg do not

reveal any significant change in the use of the ESCP after 2017, the year the amendment entered into force. In Lithuania, the number of ESCPs even decreased from 2018 to 2019.

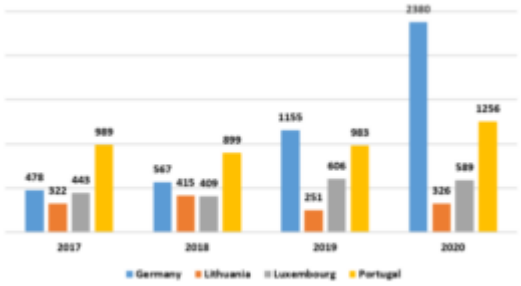

Chart no. 3. Number of ESCPs initiated in Germany, Lithuania, Luxembourg and Portugal per year between 2017 and 2020

Conversely, in Germany, statistics reveal a steady growth over those years. Against the 478 ESCPs issued in Germany in 2017, 2380 ESCP were issued in 2020, standing for an increase of 498%. Perhaps, after an unsuccessful start, the ESCP Regulation is finally bearing fruit.

ECJ, judgment of 10 February 2022, Case 522/20 – OE ./. VY, on the validity of the connecting factor „nationality“ in the Brussels IIbis Regulation (2201/2003) in light of Article 18 TFEU.

Today, in the case of OE ./. VY, C-522/20 (no Opinion was delivered in these proceedings), the ECJ decided on a fundamental point: whether nationality as a

(supplemental) connecting factor for jurisdiction according to Article 3 lit. a indent 6 of the Brussels IIbis Regulation (2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility is in conformity with the principal prohibition of discrimination against nationality in the primary law of the European Union (Art. 18 TFEU).

Article 18 TFEU reads: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. …".

Art. 3 lit. a Brussels IIbis Regulation reads: "In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with with the courts of the Member State:"; indent 5 reads: "in whose territory the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or", according to indent 6: "the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question …".

The case emerged from a request in proceedings between OE and his wife, VY, concerning an application for dissolution of their marriage brought before the Austrian courts (paras. 9 et seq.):

"On 9 November 2011, OE, an Italian national, and VY, a German national, were married in Dublin (Ireland). According to the information provided by the referring court, OE left the habitual residence the couple shared in Ireland in May 2018 and has lived in Austria since August 2019. On 28 February 2020, that is, after residing in Austria for more than six months, OE applied to the Bezirksgericht Döbling (District Court, Döbling, Austria) for the dissolution of his marriage with VY. OE submits that a national of a Member State other than the State of the forum is entitled to invoke the jurisdiction of the courts of that latter State under the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, on the basis of observance of the principle of non-discrimination on grounds of nationality, after having resided in the territory of that latter State for only six months immediately before making the application for divorce, which is tantamount to disregarding the application of the fifth indent of that provision, which requires a period of residence of at least a year immediately before the application for divorce is made. By order of 20 April 2020, the Bezirksgericht

Döbling (District Court, Döbling) dismissed OE's application, taking the view that it lacked jurisdiction to hear it. According to that court, the distinction made on the basis of nationality in the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 is intended to prevent the applicant from forum shopping. By order of 29 June 2020, the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria), hearing the case on appeal, upheld the order of the Bezirksgericht Döbling (District Court, Döbling). OE brought an appeal on a point of law against that order before the referring court, the Oberster Gerichtshof (Supreme Court, Austria)."

The Court reiterated, inter alia, that (paras. 18 et seq.) the principle of non-discrimination and equal treatment require that comparable situations must not be treated differently and different situations must not be treated in the same way, "unless such treatment is objectively justified", further that the comparability of different situations must be assessed having regard to all the elements which characterise them, and thirdly that the (EU) legislature has a broad discretion in this respect. "Thus, only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected".

Against this background the Court held (paras 25 et seq.) that, first, Article 3 meets "the need for rules that address the specific requirements of conflicts relating to the dissolution of matrimonial ties", secondly that while the first to fourth indents of Article 3(1)(a) of Regulation expressly refer to the habitual residence of the spouses and of the respondent as criteria, the fifth and sixth indents of Article 3(1)(a) permit the application of the jurisdiction rules of the *forum actoris*, and thirdly that "it is apparent from the Court's case-law that the rules on jurisdiction laid down in Article 3 of Regulation No 2201/2003, including those laid down in the fifth and sixth indents of paragraph 1(a) of that article, seek to ensure a balance between, on the one hand, the mobility of individuals within the European Union, in particular by protecting the rights of the spouse who, after the marriage has broken down, has left the Member State where the couple had their shared residence and, on the other hand, legal certainty, in particular that of the other spouse, by ensuring that there is a real link between the applicant and the Member State whose courts have jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned (see, to that effect,

judgments of 13 October 2016, *Mikolajczyk*, C-294/15, EU:C:2016:772, paragraphs 33, 49 and 50, and of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraphs 35, 44 and 56)." And the fact that typically there is such a real link if there is nationality sufficed to justify distinguishing between indent 5 and indent 6, all the more as this cannot be a surprise to the other spouse.

Therefore the Court came to the conclusion:

"The principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth indent of Article 3(1)(a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State."

The most important take away seems to be that PIL legislation using nationality as a supplemental connnecting factor is still in conformity with Article 18 TFEU as long as it appears "not manifestly inappropriate" (para. 36). Therefore, and reconnecting to older case law (para. 39), legislation is still valid "with regard to a criterion based on the nationality of the person concerned, … although in borderline cases occasional problems must arise from the introduction of any general and abstract system of rules" so that "there are no grounds for taking exception to the fact that the EU legislature has resorted to categorisation, provided that it is not in essence discriminatory having regard to the objective which it pursues (see, by analogy, judgments of 16 October 1980, *Hochstrass* v *Court of Justice*, 147/79, EU:C:1980:238, paragraph 14, and of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 81)."

A Reform of French Law Inspired by an Inaccurate Interpretation of the EAPO Regulation?

Carlos Santaló Goris, Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis on the recently approved reform of the French Manual on Tax Procedures ("Livre des procédures fiscales") influenced by Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation"). The EAPO Regulation and other EU civil procedural instruments are the object of study in the ongoing EFFORTS project, with the financial support of the European Commission.

FICOBA ("Fichier national des comptes bancaires et assimilés") is the French national register containing information about all the bank accounts in France. French bailiffs ("huissiers") can rely on FICOBA to to facilitate the enforcement of an enforceable title or upon a request for information in the context of an EAPO proceeding (Article L151 A of the French Manual on Tax Procedures). In January 2021, the Paris Court of Appeal found discriminatory the fact that creditors could obtain FICOBA information in the context of an EAPO proceeding but not in the context of the equivalent French domestic provisional attachment order, the "saisie conservatoire" (for a more extended analysis of the judgment, see here). While an enforceable title is not a necessary precondition to access FICOBA in the context of an EAPO, under French domestic law it is. Against this background, the French court found that creditors who could apply for an EAPO were in a more advantageous position than those who could not. Consequently, it decided to extend access to FICOBA to creditors without an enforceable title who apply for a *saisie conservatoire*.

In December 2021, the judgment rendered by the Paris Court of Appeals was transposed into French law. In fact, the French legislator introduced an amendment to the French Manual on Tax Procedures, allowing bailiffs to collect

information about the debtors' bank accounts from FICOBA based on a *saisie conservatoire* (Art. 58 LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire).

In is nevertheless noteworthy that the judgment of the Paris Court of Appeal that inspired such reform is based on a misinterpretation of the EAPO Regulation**. Access to the EAPO Regulation's information mechanism is limited to creditors with a title (either enforceable or not enforceable)**. Creditors without a title are barred from accessing the EAPO's information mechanism. From the reasoning of the Paris Court of Appeal, **it appears that the Court interpreted the EAPO Regulation as granting access to the EAPO's information mechanism to all creditors, even to those without a title**. Such an interpretation would have been in accordance with the EAPO Commission Proposal, which gave all creditors access to the information mechanism regardless of whether they had a title or not. However, the Commission's open approach was received with scepticism by the Council and some Member States. Notably, France was the most vocal advocate of limiting the possibilities of relying on the EAPO information mechanism. It considered that only creditors with an enforceable title should have access to it. In particular, the French delegation argued that, under French law, only creditors with an enforceable title could access such sensitive data about the debtor. Eventually the European legislator decided to adopt a mid-way solution between the French position and the EAPO Commission Proposal: namely, in accordance with the Regulation creditors are required to have a title, though this does not have to be enforceable.

The following is an interesting paradox. Whereas France tried to adjust the EAPO's information mechanism to the standards of French law, it was ultimately French law that was amended due to the influence of the EAPO Regulation. An additional paradox is that the imbalance between creditors who can access the EAPO Regulation and those who cannot (as emphasized and criticised by the Paris Court of Appeal) will continue to exist but with the order reversed. Once the French reform enters into force, creditors without a title who apply for a French *saisie conservatoire* of a bank account will be given access to FICOBA. Conversely, creditors who apply for an EAPO will continue to be required to have a title in order to access FICOBA. Only an amendment of the EAPO Regulation can change this.

The moment for considering a reform of the EAPO Regulation is approaching. In

accordance with Article 53 of the EAPO Regulation, the European Commission should have sent to the European Parliament and the European Economic and Social Committee “a report on the application of this Regulation” by 18 January 2022. These reports should serve as a foundation to decide whether amendments to the EAPO Regulation are desirable. Perhaps, as a result of the experience offered with the judgment of the Paris Court of Appeal, the European legislator may consider extending the EAPO’s information mechanism beyond creditors with a title.

AG Maciej Szpunar on the interpretation of the ESR in relation to cross-border declarations of waiver of succession and on substitution and characterisation, Opinion of 20 January 2022, C-617/20 – T.N. et al. ./. E.G.

Yesterday, AG Maciej Szpunar delivered an Opinion (a French version is available, a German as well, not yet, however, an English one) that is of high relevance both to the practical application of the European Succession Regulation (ESR) as well as to issues of European choice of law methodology in relation to substitution and characterisation.

The case emerged from a preliminary reference by the German Higher Regional

Court (Oberlandesgericht) Bremen of 11 November 2020 and involved the following facts:

The deceased person, a Dutch national, died in Bremen (habitual residence) on 21 May 2018. He left behind his widow (E.G.) and two descendants (T.N. and N.N.) of his formerly deceased brother. His widow applied by notarial deed of 21 January 2019 for the issuance of a joint certificate of inheritance to the Local Court of Bremen, attributing to her ¾ of the estate and 1/8 to each of T.N. and N.N. The two descendants, however, having their habitual residence in the Netherlands, declared their waiver of succession before the Rechtbank Den Haag on 30 September 2019. In the proceedings before the Local Court of Bremen, T.N. and N.N. were heard, and by letter of 13 December 2019 in Dutch language they submitted copies of their declarations of waiver (as well in Dutch). The German court answered that it would not be able to take notice of these documents as long as it would not receive a translation into German. The two descendants thereupon declared in German to the court by letter of 15 January 2020 that they had waived, properly registered with the Dutch court, and that under European law there would be no need for translation. By decision of 27 February 2020, the Local Court issued the certificate as applied for by the applicant, i.e. certifying T.N. and N.N. as co-heirs. The latters appealed against this decision and, on 30 June 2020 submitted colour copies of the deeds they had used in the Netherlands as well as German translations, on 17 August 2020 they submitted the original deeds. The Local Court referred the case to the Higher Regional Court Bremen and stated that it considers the time limit for waiver under section 1944 (1) German Civil Code of six weeks after gaining knowledge about the inheritance elapsed, as a declaration of waiver would have required timely submission of the original deeds.

Thereupon, the Higher Regional Court of Bremen, in essence, referred the question to the ECJ whether a waiver in the Member State of habitual residence of the heir other than the Member State of habitual residence of the deceased would be capable of replacing the waiver required by the applicable succession law by way of substitution or whether additional requirements exist, such as that the waiving heir informs, with a view to Recital 32 Sentence 2, the competent court in the Member State of habitual residence of the deceased and if so whether the official language of that court must be used and whether the original deeds must be used in order to comply with time limits under the applicable law.

AG Maciej Szpunar reframed this question (para. 34): According to his subtle analysis, the question should be whether Articles 13 and 28 ESR are, of course autonomously (see para. 50), to be interpreted to the effect that the requirement to declare a waiver before the competent court („*Nachlassgericht*“) must be characterised as a question of form rather than substance which would lead to the application of the law of the Member State of the waiving heirs on this point of form under Article 28 lit. b ESR. Whereas only if this question were to be characterised as a matter of substance, the question of substitution could at all be posed. It will not come as a surprise that with this point made, the result of the – careful and comprehensive – analysis of this issue of characterisation (paras. 45 – 69), including considerations on the effet utile of the ESR (para. 64), was that indeed the point must be considered as one of form. The consequence is that since the local form was complied with in the Netherlands, the waiver must be held valid as of 30 September 2019 and as such still in time under the applicable succession law – a result that indeed facilitates cross-border succession cases in an important aspect as it is the overall objective of the ESR.

Remains the problem of how to ensure that the competent court takes notice of such a waiver (paras. 70 et seq.). This is the issue of Recital 32 Sentence 2: „Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.“ However, as in the concrete case at hand the court definitively had knowledge about the waiver, the question was not relevant and thus remained expressly left open (para. 77). As it was expressly left open as irrelevant in the concrete case we may at least conclude that any kind of gaining knowledge must suffice. Then the only remaining question is what happens if the court did not gain any knowledge. From a practical point of view a party interested in bringing its waiver to the attention of the competent court, it seems that a letter (or even an email) to that court should suffice.

One last question. Could we not say: either it is “substance”, then Article 13 refers to the lex causae (German law) or it is “form”, then Article 28 refers to the same law (German law) under lit. a and then substitution comes up, or, alternatively, under lit. b, to the law for formal issues (Dutch law). And when further proceeding sub lit. a of Article 28, could not substitution provide for the

same result, at least in this concrete case, than applying lit. b? If so, we might be tempted to add that two parallel avenues to the same result indicate quite reliably that the result must be the right one. It might have been for reasons of simplifying things that AG Maciej Szpunar did not fully map out these two avenues, all the more because substitution is a technique that is little explored on the level of the EU's PIL. However, if even the referring national court directly asks about substitution, the ECJ should take the opportunity to give us a bit more insights on this classical concept of the general part of any PIL from the perspective of the EU's conflicts of law methodology.

Let's hope that the ECJ takes up the ball and discusses the theoretical connotations of this case on methodical questions of characterisation and substitution as precisely and subtly as it was done in the Opinion. The CoL community will certainly await the judgment with excitement.

Relevant provisions of the ESR

Article 13: Acceptance or waiver of the succession, of a legacy or of a reserved share

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

Article 28: Validity as to form of a declaration concerning acceptance or waiver

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of: (a) the law applicable to the succession pursuant to Article 21 or Article 22; or (b) the law of the State in which the person making the declaration has his habitual residence.

Recital 32:

In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession

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South African court issues interdict against Shell concerning seismic survey

The High Court of the Eastern Cape in Makhanda (Grahamstown), South Africa, on 28 December 2021 issued an interim interdict to stop Shell from commencing seismic activity off the south-eastern coast of South Africa. The full judgment is available on Saflii.

From a conflict-of-laws perspective, the interdict raises some points of interest.

First, it provides two examples of the application of non-State law. In considering whether Shell has adequately informed the local communities of its plans, the

judge took into account not only the South African legislation, but also of the local communities' modes of communication and of seeking consensus. In this sense, even though Shell had published its intentions in newspapers, these have not reached the communities in which people were not necessarily able to read English and Afrikaans (the languages of the newspapers). The judge found that "the approach that was followed to consult was inconsistent with the communities' custom of seeking consensus." (para 25). The judgment implicitly recognise this custom as law. This approach is in line with the South African Constitution (sec. 211(3) states: *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*).

The next example of the application of non-State law is the Rio Declaration on Environment and Development (para 69 of the judgment) to find that where there are threats of serious or irreversible damage, the precautionary approach shall be taken, even in the absence of full scientific certainty (Principle 15 of the Declaration).

The second interesting point is that the judge allowed this civil action even though there was a public law remedy available to the applications, namely an application to the Minister to cancel or suspend the right to explore that was granted. The judge found that the time-consuming nature of that remedy and the unlikeliness of its success made it an unsatisfactory remedy (paras 74-77).

Has the Battle Just Begun for Collective Action against Big Tech Companies?

*Julia Hörnle, Professor of Internet Law, CCLS, Queen Mary University of London****[1]***

It is now well known that internet users are widely tracked and profiled by a range of actors and the advancements in data science mean that such tracking and profiling is increasingly commercially profitable[2]. This raises difficult questions about how to balance the value of data with individual privacy. But since there is no point in having privacy (or data protection) rights if no redress can be found to vindicate them, it is even more important to investigate *how* internet users can obtain justice, if their privacy has been infringed. Given the power of Big Tech Companies, their enormous financial resources, cross-jurisdictional reach and their global impact on users' privacy, there are two main litigation challenges for successfully bringing a privacy claim against Big Tech. One is the jurisdictional challenge of finding a competent court in the same jurisdiction as the individual users.[3] Secondly, the challenge is how to finance mass claims, involving millions of affected users. In privacy claims it is likely that there is significant user detriment, potentially with long-term and latent consequences, which are difficult to measure. This constellation provides a strong argument for facilitating collective redress, as otherwise individual users may not be able to obtain justice for privacy infringements before the courts. In privacy infringement claims these two challenges are intertwined and present a double-whammy for successful redress. Courts in a number of recent cases had to grapple with questions of jurisdiction in consumer collective redress cases in the face of existing provision on consumer jurisdiction and collective redress, which have not (yet) been fully adapted to deal with the privacy challenges stemming from Big Tech in the 21st century.

In Case C-498/16 *Max Schrems v Facebook Ireland****[4]*** the Court of Justice of the EU in 2018 denied the privilege of EU law for consumers to sue in their local court[5] to a representative (ie *Max Schrems*) in a representative privacy litigation against Facebook under Austrian law. By contrast, courts in California and Canada have found a contractual jurisdiction and applicable law clause invalid as a matter of public policy in order to allow a class action privacy claim to proceed against *Facebook*.[6] In England, the dual challenge of jurisdiction and collective actions in a mass privacy infringement claim has presented itself before the English Courts, first in *Vidal-Hall v Google* before the Court of Appeal in 2015[7] and in the Supreme Court judgment of *Google v Lloyd* in November 2021[8]. Both cases concerned preliminary proceedings on the question of whether the English courts had jurisdiction to hear the action, ie whether the claimant was able to serve Google with proceedings in the USA and have

illustrated the limitations of English law for the feasibility of bringing a collective action in mass-privacy infringement claims.

The factual background to *Vidal- Hall* and *Lloyd* is the so-called "Safari workaround" which allowed Google for some time in 2011-2012 to bypass Apple privacy settings by placing DoubleClick Ad cookies on unsuspecting users of Apple devices, even though Safari was trying to block such third party cookies, used for extensive data collection and advertising. The claimants alleged that this enabled Google to collect personal data, including sensitive data, such as users' interests, political affiliations, race or ethnicity, social class, political and religious beliefs, health, sexual interests, age, gender, financial situation and location. Google additionally creates profiles from the aggregated information which it sells. The claim made was that Google as data controller had breached the following data protection principles set out in the Data Protection Act 1998 Schedules 1 and 2: 1st (fair and lawful processing), 2nd (processing only for specified and lawful purposes) and 7th (technical and organizational security measures). In particular, it was alleged that Google had not notified Apple iPhone users of the purposes of processing in breach of Schedule 1, Part II, paragraph 2 and that the data was not processed fairly according to the conditions set out in Schedules 2 and 3.

Vidal-Hall[9] concerned the first challenge of jurisdiction and in particular whether the court should allow the serving of proceedings on the defendant outside the jurisdiction under the Civil Procedure Rules[10]. For privacy infringement, previous actions had been brought under the cause of action of breach of confidence[11], which is a claim in equity and, thus it was unclear whether for such actions jurisdiction lies at the place of where the damage occurs. The Court of Appeal held that misuse of private information and contravention of the statutory data protection requirements was a *tort* and therefore, if damage had been sustained within England, the English courts had jurisdiction and service to the USA (California) was allowed.

The second hurdle for allowing the case to proceed by serving outside the jurisdiction was the question of whether the claimant was limited to claiming financial loss or whether a claim for emotional distress could succeed. The Court of Appeal in *Vidal-Hall* decided that damages are available for distress, even in

the absence of financial loss, to ensure the correct implementation of Article 23 of the (then) Data Protection Directive, and in order to comply with Articles 7 and 8 of the Charter of Fundamental Rights of the EU. The Court therefore found that there was a serious issue to be tried and allowed service abroad to proceed, at which point the case settled.

The more recent English Supreme Court judgment in *Lloyd* concerned the second challenge, collective redress. As pointed out by Lord Leggatt in the judgment, English procedural law provides for three different types of actions: Group Litigation Orders (CPR 19.11), common law representative actions, and statutory collective proceedings under the Competition Act 1998. Their differences are significant for the purposes of litigation financing in two respects: first the requirement to identify and "sign-up" claimants and secondly, the requirement for individualized assessment of damages. Since both these requirements are expensive, they make collective redress in mass privacy infringement cases with large numbers of claimants impractical.

Group actions require all claimants to be identified and entered in a group register ("opt-in") and are therefore expensive to administer, which renders them commercially unviable if each individual claim is small and if the aim is to spread the cost of litigation across a large number of claimants.

English statutory law in the shape of the Competition Act 1998 provides for collective proceedings before the Competition Appeal Tribunal in competition law cases only.[12] Since the reforms by the Consumer Rights Act in 2015, they can be brought under an "opt-in" or "opt-out" mechanism. Opt-out means that a class can be established without the need for affirmative action by each and every member of the class individually. The significance of this is that it is notoriously difficult (and expensive) to motivate a large number of consumers to join a collective redress scheme. Human inertia frequently prevents a representative claimant from joining more than a tiny fraction of those affected. For example, 130 people (out of 1.2-1.5 million) opted into the price-fixing case against JJB Sports concerning replica football shirts.[13] Likewise, barely 10,000 out of about 100,000 of Morrison's employees joined the group action against the supermarket chain for unlawful disclosure of private data on the internet by another employee.[14] Furthermore, s.47C (2) of the Competition Act obviates the need for individual assessment of damages, but limits the requirement to prove damages to the class as a whole, as an aggregate award of damages, as held by

Lord Briggs in *Merricks v Mastercard****[15]***. However no such advanced scheme of collective redress has yet been enacted in relation to mass privacy infringement claims.

While the Supreme Court held that Mr Lloyd's individual claim had real prospect of success, the same could not necessarily be said of everyone in the class he represented. This case was brought as a *representative action* where Mr Lloyd represented the interests of everyone in England and Wales who used an iPhone at the relevant time and who had third party cookies placed by Google on their device. One of the interesting features of representative actions is that they can proceed on an opt-out basis, like the collective actions under the Competition Law Act. *Common law* representative actions have been established for hundreds of years and have now been codified in CPR Rule 19.6: "Where more than one person has the *same interest* in a claim by or against one or more of the persons who have the same interest as representatives of any other person who have that interest". Thus representative actions are based on the *commonality of interest* between claimants. The pivotal issue in *Lloyd* was the degree of commonality of that interest and in particular, whether this commonality must extend to the losses, which claimants have suffered, and proof of damages.

Lord Leggatt in *Lloyd* emphasized the spirit of flexibility of representative actions. Previous caselaw in the Court of Appeal had held that it was possible for claimants to obtain a declaration by representative action, which declares that they have rights which are common to all of them, even though the loss and amount of damages may vary between them.[16] He held that a bifurcated approach was permissible: a representative action can be brought seeking a declaration about the common interests of all claimants, which can then form the basis for individual claims for redress. Lord Leggatt held that, depending on the circumstances, a representative action could even be brought in respect of a claim for damages, if the *total amount of damages could be determined for the class as a whole*, even if the amount for each individual claimant varied, as this was a matter which could be settled between the claimants in a second step. He held that, therefore, a representative action can proceed even if a claim for damages was an element of the representative action, as in *Lloyd*.

Lord Leggatt found that the interpretation of what amounts to the "same interest" was key and that there needed to be (a) common issue(s) so that the "representative can be relied on to conduct the litigation in a way which will

effectively promote and protect the interests of all the members of the represented class."[17] The problem in *Lloyd* was that the total damage done to privacy by the Safari workaround was unknown.

Lord Leggatt saw no reason why a representative action for a declaration that Google was in breach of the Data Protection Act 1998, and that each member was entitled to compensation for the damage suffered as a consequence of the breach, should fail. However, commercial litigation funding in practice cannot fund actions seeking a mere declaration, but need to be built on the recovery of damages, in order to finance costs. In order to avoid the need for individualised damages, the claim for damages was formulated as a claim for *uniform per capita* damages. The problem on the facts of this case was clearly that the Safari workaround did not affect all Apple users in the same manner, as their internet usage, the nature and amount of data collected, as well as the effect of the data processing varied, all of which required individualised assessment of damages.

For this reason, the claimant argued that an infringement of the Data Protection Act 1998 leads to automatic entitlement to compensation without the need to show *specific* financial loss or emotional distress. This argument proved to be ultimately unsuccessful and therefore the claim failed. The Court examined Section 13 of the Data Protection Act 1998, entitling the defendant to compensation for damage, but the court held that each claimant had to prove such damage. The level of distress varied between different members of the represented class, meaning that individual assessment was necessary.

The claimant sought to apply the cases on the tort of misuse of private information by analogy. In this jurisprudence the courts have allowed for an award of damages for wrongful intrusion of privacy as such, without proof of distress in order to compensate for the "loss of control" over formerly private information.[18] Lord Leggatt pointed out that English common law now recognized the right to control access to one's private affairs and infringement of this right itself was a harm for which compensation is available.

However in this particular case the claim had not been framed as the tort of misuse of private information or privacy intrusion, but as a breach of statutory duty and Lord Leggatt held that the same principle, namely the availability of damages for "loss of control" did *not* apply to the statutory scheme. He pointed out that it may be difficult to frame a representative action for misuse of private

information, as it may be difficult to prove reasonable expectations of privacy for the class as a whole. This may well be the reason that the claim in this case was based on breach of statutory duty in relation to the Data Protection Act. Essentially the argument that "damages" in Section 13 (1) included "loss of control" over private data was unsuccessful. Both Article 23 of the Data Protection Directive and Article 13 made a distinction between the unlawful act (breach of data protection requirements) and the damage resulting, and did not conceive the unlawful act itself as the damage. Furthermore, it was not intended by the Directive or the Act that each and every contravention led to an entitlement to damages. He held that "loss of control" of personal data was not the concept underlying the data protection regime, as processing can be justified by consent, but also other factors which made processing lawful, so the control over personal data is not absolute.

Furthermore, it did not follow from the fact that both the tort of misuse of private information and the data protection legislation shared the same purposes of protecting the right to privacy under Article 8 of the European Convention of Human Rights that the same rule in respect of damages should apply in respect of both. There was no reason "why the basis on which damages are awarded for an English domestic tort should be regarded as relevant to the proper interpretation of the term "damage" in a statutory provision intended to implement a European directive".[19] He concluded that a claim for damages under Section 13 required the proof of material damage or distress. He held that the claim had no real prospect of success and that therefore no permission should be given to serve proceedings outside the jurisdiction (on Google in the US).

This outcome of *Lloyd* raises the question in the title of this article, namely whether the cross-border battle on collective actions in mass privacy infringement cases against Big Tech has been lost, or whether on the contrary, it has just begun. One could argue that it has just began for the reason that the facts underlying this case occurred in 2011-2012, and therefore the judgment limited itself to the Data Protection Act 1998 (and the then Data Protection Directive 1995/46/EC). Since then the UK has left the EU, but has retained the General Data Protection Regulation[20] ("the UK GDPR") and implemented further provisions in the form of the Data Protection Act 2018, both of which contain express provisions on collective redress. The GDPR provides for *opt-in* collective redress performed by a not-for-profit body in the field of data protection

established for public interest purposes.[21] This is narrow collective redress as far removed from commercial litigations funders as possible. Because of the challenge of financing cross-border mass-privacy infringements claims, this is unlikely to be a practical option. The GDPR makes it optional for Member States to provide that such public interest bodies are empowered to bring *opt-out* collective actions for compensation before the courts.[22] These provisions unfortunately do not add anything to common law representative actions or group actions under English law. As has been illustrated above, representative actions can be brought on an "opt-out" basis, but have a narrow ambit in that all parties must have the *same interest in the claim* and *Lloyd* has demonstrated that in the case of distress this communality of interest may well defeat a claim. For group actions the bar of communality is lower, as it may encompass "claims which give rise to common or related issues of fact or law"[23]. But clearly the downside of group actions is that they are *opt-in*. Therefore, while English law recognizes collective redress, there are limitations to its effectiveness.

The Data Protection Act 2018 imposes an obligation on the Secretary of State to review the provision on collective redress, and in particular, consider the need for *opt-out* collective redress, and lay a report before Parliament. This may lead to Regulations setting out a statutory opt-out collective redress scheme for data protection in the future.[24] This Review is due in 2023.

Thus, the GDPR and the Data Protection Act 2018 have not yet added anything to the existing collective redress. It can only be hoped that the Secretary of State reviews the collective redress mechanisms in relation to data protection law and the review leads to a new statutory collective redress scheme, similar to that enacted in respect of Competition Law in 2015, thereby addressing the challenge of holding Big Tech to account for privacy infringement.[25]

However the new data protection law has improved the provision of *recoverable heads of damage*. This improvement raises the question, if the issues in *Lloyd* had been raised under the current law, whether the outcome would have been different. The Data Protection Act 2018 now explicitly clarifies that the right to compensation covers *both material and non-material damage* and that *non-material damage includes distress*.[26] Since non-material damage is now included in the Act, the question arises whether this new wording could be interpreted by a future court as including the privacy infringement itself (loss of control over one's data). Some of the arguments made by Lord Leggatt in *Lloyd*

continue to be relevant under the new legislation, for example that the tort of statutory breach is different from the tort of misuse of private information and that not each and every (minor) infringement of a statute should give raise to an entitlement for damages. Nevertheless it is clear from the new Act that non-material damage is included and that non-material damage includes distress, but is wider than distress. This means that claimants should be able to obtain compensation for other heads of non-material damage, which may include the latent consequences of misuse of personal information and digital surveillance. There is much scope for arguing that some of the damage caused by profiling and tracking are the same for all claimants. A future representative action in an equivalent scenario may well be successful. Therefore, the battle for collective action against Big Tech companies' in privacy infringement cases may just have begun.

[1] J.hornle@qmul.ac.uk

[2] Shoshana Zuboff *The Age of Surveillance Capitalism* (2018)

[3] See further J. Hörnle, *Internet Jurisdiction Law & Practice* (OUP 2021)

[4] ECLI:EU:C:2018:37; discussed further in J. Hörnle fn 1 Chapter 8

[5] Ie the courts of the consumer's domicile, if the business directed their activities to that state, Art 17 and Art 18 (1) Brussels Regulation on Jurisdiction (EU) 1215/2021

[6] *In Re Facebook Biometric Information Privacy Litigation* 185 F.Supp.3d 1155 (US District Court N.D. California 2016) and *Douez v Facebook* [2017] SCC 33; discussed further in J. Hörnle fn 1 Chapter 8

[7] [2016] QB 1003

[8] [2021] 3 WLR 1268

[9] [2015] 3 WLR 409 (CA)

[10] CPR PD 6B para.3.1(9)

[11] *Campbell v MGN Ltd* [2004] 2 WLR 1232 (HL)

[12] Section 47B

[13] *The Consumers Association v JJB Sports Plc* [2009] CAT 2

[14] *Various Claimants v WM Morrisons Supermarkets Plc* [2017] EWHC 3113 (QB)

[15] [2021] Bus LR 25, para 76

[16] *David Jones v Cory Bros & Co Ltd* (1921) 56 LJ 302; 152 LT Jo 70

[17] Paras 71-74

[18] by Mann J affirmed in the Court of Appeal *Gulati v MGN Ltd* [2017] QB 149

[19] Para 124

[20] Regulation (EU) 2016/679, L119, 4 May 2016, p. 1–88

[21] Art 80 (1)

[22] Arts 79 and 80 (2) in relation to effective judicial remedies

[23] CPR Part 19- Group Litigation Orders, Rules 19.10, 19.11

[24] ss. 189-190

[25] The current government, however seems to march in the opposite direction, see Consultation on reform of data protection law https://www.gov.uk/government/consultations/data-a-new-direction

[26] S. 168 (1)