First strike in a Dutch TikTok class action on privacy violation: court accepts international jurisdiction

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Introduction

On 9 November 2022 the District Court Amsterdam accepted international jurisdiction in an interim judgment in a collective action brought against TikTok (DC Amsterdam, 9 November 2022, ECLI:NL:RBAMS:2022:6488; *in Dutch*). The claim is brought by three Dutch-based representative organisations; the Foundation for Market Information Research (*Stichting Onderzoek Marktinformatie*, SOMI), the Foundation Take Back Your Privacy (TBYP) and the *Stichting Massaschade en Consument* (Foundation on Mass Damage and Consumers). It concerns a collective action brought under the Dutch collective action act (WAMCA) for the infringement of privacy rights of children (all foundations) and adults and children (Foundation on Mass Damage and Consumers). In total, seven TikTok entities are sued, located in Ireland, the United Kingdom, California, Singapore, the Cayman Islands and China. The claims are for the court to order that an effective system is implemented for age registration, parental permission and control, and measures to ensure that commercial communication can be identified and that TikTok complies with the Code of Conduct of the Dutch Media Act and the GDPR.

After an overview of the application of the WAMCA, which has been introduced in a different context on this blog earlier, we will discuss how the Court assessed the question of international jurisdiction.

The class action under the Dutch WAMCA

Following case law of the Dutch Supreme Court in the 1980s concerning legal standing of representative organisations, the possibility to start a collective action was laid down in Article 3:305a of the Dutch Civil Code (DCC) in 1994. However, this was limited to declaratory and injunctive relief. Redress for compensation in mass damage cases was only introduced in 2005 with the enactment of the Collective Settlement of Mass Claims Act (*Wet collectieve afwikkeling massaschade*, WCAM). This collective settlement scheme enables parties to jointly request the Amsterdam Court of Appeal to declare a settlement agreement binding on an opt-out basis. The legislative gap remained as a collective action for compensation was not possible and such mass settlement agreement relies on the willingness of an allegedly liable party to settle.

This gap was closed when in 2019, after a lengthy legislative process, the Act on Redress of Mass Damages in a Collective Action (*Wet afwikkeling massaschade in collectieve actie*, WAMCA) was adopted. The WAMCA entered into force on 1 January 2020 and applies to mass events that occurred on or after 15 November 2016. The WAMCA expanded the collective action contained in Article 3:305a DCC to include actions for compensation of damage (Tillema, 2022; Tzankova and Kramer, 2021). While the WAMCA Act generally operates on an opt-out basis for beneficiaries represented by the representative organisation(s), there are exemptions, including for parties domiciled or habitually resident outside the Netherlands. In addition, the standing and admissibility requirements are relatively strict, and also include a scope rule requiring a close connection to the Netherlands. Collective actions are registered in a central register (the WAMCA register) and from the time of registration a three-months period starts to run (to be extended to maximum six months), enabling other claim organisations to bring a claim, as only one representative action can be brought for the same event(s). If no settlement is reached, an exclusive representative will be appointed by the court. Since its applicability as of 1 January 2020, 61 collective actions have been registered out of which 8 cases have been concluded to date; only a very few cases have been successful so far. These collective actions involve different cases, including consumer cases, privacy violations, environmental and human rights cases, intellectual property rights, and cases against the government. Over one-third of the cases are cross-border cases and thus raise questions of international jurisdiction and the applicable law.

As mentioned above, in the TikTok case eventually three Dutch representative

foundations initiated a collective action against, in total, seven TikTok entities, including parent company Bytedance Ltd. (in the first action, the claim is only brought against the Irish entity; in the other two actions, respectively, six and seven entities are defendants). These are TikTok Technology Limited (Ireland), TikTok Information Technology Limited (UK), TikTok Inc. (California), TikTok PTE Limited (Singapore), Bytedance Ltd. (Cayman Islands), Beijng Bytedance Technology Co. Ltd. (China) and TikTok Ltd. (also Cayman Islands). The claim is, in essence, that these entities are responsible for the violation of fundamental rights of children and adults. The way in which the personal data of TikTok users is processed and shared with third parties violates the GDPR as well as the Dutch Telecommunications Act and Media Act. It is also claimed that TikTok's terms and conditions violate the Unfair Contract Terms Directive (UCTD – 93/13/EEC) and the relevant provisions of the Dutch Civil Code.

International jurisdiction of the Amsterdam District Court

The first stage of the proceedings, leading up to this interim judgment, deals with the international jurisdiction of the District Court of Amsterdam, as the TikTok entities challenge its international jurisdiction. TikTok requested the Court to refer preliminary questions to the CJEU but the Court refused this request, stating that the questions on (a) how the GDPR and Brussels I-bis Regulation regimes interact and (b) the applicability of Article 79(2) GDPR were deemed resolved.

Relevant jurisdiction rules

Considering the domicile of the defendant(s) and the alleged violation of the GDPR, both EU and Dutch domestic jurisdiction rules come into the picture. TikTok alleges that the Dutch courts do not have jurisdiction over this case under Article 79(2) GDPR. Moreover, TikTok alleges that, since Article 79(2) GDPR is a *lex specialis* in relation to the Brussels I-bis Regulation, the latter cannot be applied to override the jurisdictional rules set out in the GDPR. The three representative organisations argue that the Dutch courts have jurisdiction under both EU private international law rules and the Dutch Code of Civil Procedure (DCCP). Before delving into how the District Court of Amsterdam construed the interaction between the legislations concerned, we will describe the applicable rules on international jurisdiction for privacy violations. The alleged violations occurred, or the claims relate to violations occurring, after 25 May 2018, that is,

after the entry into force of the GDPR. TikTok Ireland is a data controller subject to the GDPR. Under Article 79(2) GDPR the "data subjects" (those whose rights are protected by the GDPR) shall bring an action for the violation of their rights in either the courts of the Member State in which the data controller or processor is established or of the Member State in which the data subject has its habitual residence. Furthermore, Article 80(1) GDPR provides for the possibility of data subjects to mandate a representative body which has been properly constituted under the law of that Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms to file actions on their behalf under Article 79 GDPR.

The case also deals with non-GDPR-related claims, which triggers the application of the Brussels I-bis Regulation, at least as far as the entities domiciled in the EU are concerned. Article 7(1)(a) Brussels I-bis states that, for contractual matters, jurisdiction is vested in the Member State in which the contract is to be performed. More importantly for this case, with regards to torts, Article 7(2) provides jurisdiction for the courts of the place where the harmful event occurred or may occur. Finally, in relation to the TikTok entities that are not domiciled in the EU, the international jurisdiction rules of the Dutch Code of Civil Procedure (Articles 1-14 DCCP) apply. This is the case regarding both GDPR and non-GDPR-related claims. These Dutch rules are largely based on those of the Brussels I-bis Regulation and also include a rule on multiple defendants in Article 7 DCCP.

The claims against TikTok Ireland

The Amsterdam District Court starts its reasoning by addressing whether it has jurisdiction over TikTok Technology Limited, domiciled in Ireland, the entity that is sued by all three representative organisations. The Court states that Article 80(1) GDPR does not distinguish between substantive and procedural rights in granting the possibility for data subjects to mandate a representative body to file actions on their behalf under Article 79 GDPR. Therefore, actions brought under Article 80(1) GDPR can rely on the jurisdictional rule set out in Article 79(2) GDPR which allows for the bringing of actions before the courts of the Member State in which the data subject has its habitual residence. The Court further reasons that the word 'choice' enshrined in Recital 145 GDPR, when mentioning actions for redress, allows for the interpretation that it is up to the data subject to decide where she prefers to file her claim. In the case at hand, since the data subjects concerned reside in the Netherlands, they can mandate a representative

body to file claims before the Dutch courts.

As to the non-GDPR-related claims and GDPR violations that also qualify as tortious conduct, the District Court considered first whether the case concerned contractual matters, to decide whether Article 7(1) or Article 7(2) Brussels I-bis Regulation applies. For this purpose, the District Court relied on the rule established by the CJEU in *Wikingerhof* v. *Booking.com* (Case C-59/19, ECLI:EU*:C:*2020:95), according to which a claim comes under Article 7(2) when contractual terms as such and their interpretation are not at stake, but rather the application of legal rules triggered by the commercial practices concerned – or, in other words, contractual "interpretation being necessary, at most, in order to establish that those practices actually occur". Given that, in this case, the question is whether TikTok's terms and conditions are abusive under both the UCTD and the DCC, the claim was deemed to fall under Article 7(2) Brussels I-bis Regulation.

Next, the District Court assesses whether the criteria for establishing jurisdiction under Article 7(2) are met. For this purpose it refers to the CJEU ruling in *eDate Advertising and Others* (Case C-509/09, ECLI:EU:C:2011:685). In this case the CJEU ruled that, when it comes to "publication of information on the internet" that triggers an "adverse effect on personality rights", the habitual residence of the victim being his centre of interests can be regarded as the place in which the damage occurred. The District Court rightfully ruled that since the rights of TikTok users that have their habitual residence in the Netherlands had been violated through online means, the Netherlands can be regarded as the place in which the damage occurred.

The Court confronts TikTok's argument that, since Article 79(2) GDPR is a *lex specialis* in relation to the Brussels I-bis Regulation, the latter cannot be applied to override the jurisdictional rules set out in the GDPR. As per the Court, the rules on conflict of jurisdiction established by the Brussels I-bis Regulation are general in nature and, as such, cannot be derogated from other than by explicit rules. Hence, the Court interprets Recital 147 GDPR – which states that the application of the Brussels I-bis Regulation should be without prejudice to the application of the GDPR – as being unable to strip away the applicability of the Brussels I-bis Regulation. In the Court's understanding, Recital 147 GDPR points to the complementarity of the GDPR in relation to the Brussels I-bis Regulation, and both regimes coexist without hierarchy. Therefore, according to the Court, the

GDPR is not a *lex specialis* in relation to the Brussels I-bis Regulation. Furthermore, the Court notes that, under Article 67 Brussels I-bis Regulation, its regime is without prejudice to specific jurisdictional rules contained in EU legislation on specific matters. While the relationship between the jurisdiction rules of the GDPR and the Brussels I-bis Regulation is not wholly undisputed, in the present case the provisions do not contradict each other, while at the same time in this case also non-GDPR issues are at stake.

The claims against non-EU based TikTok entities

Having established international jurisdiction in the case against TikTok Ireland, the Amsterdam District Court rules on its international jurisdiction in relation to the other TikTok entities sued by two of the foundations. As no EU rules or international convention applies, the Dutch jurisdiction rules laid down in Articles 1-14 DCCP apply. Article 7(1) DCCP contains a rule for multiple defendants and connected claims similar to that in Article 8(1) Brussels I-bis. The Court considers that both legal and factual aspects are closely intertwined in this case. The claims concern several different services, not only the processing of data, and all defendants are involved in the provision of these services. The claims are therefore so closely connected that it is expedient that they are dealt with in the same proceedings.

Outlook

TikTok attempted to appeal this interim judgment on international jurisdiction. Under Article 337(2) DCCP, it is at the court's discretion to grant leave to appeal interim decisions when the appeal is not filed against the final judgment at the same time. In this case, the Court did not find sufficient reasons to allow for such appeal. The case will now proceed on other preliminary matters, including the admissibility of the claim under the WAMCA, and (if admissible) the appointment of the exclusive representative. For this purpose, at the end of its judgment the Court orders parties to provide security as to the financing of the case, which requires submitting to the Court a finance agreement with the third-party financer. After that, assuming that no settlement will be reached, the case will proceed on the merits. It may well be that either of the parties will appeal the final judgment, and that on that occasion TikTok will raise the jurisdictional question again.

To be continued.

Online Seminar BEUC Judges & Collective Redress

Judges & collective redress:

new perspectives and opportunities for judiciary

Thursday 12 May 2022, 15:00 to 17:30 CEST

This online event will be held in English and is reserved for judges and members of judiciaries.

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Judges may play an important role in collective redress actions following mass harm situations. Mass harm situations refer to cases where a number of persons are harmed by the same illegal practices relating to the violation of their rights by one or more traders or other persons. Collective redress actions may seek the cessation of such practices and/or compensation. The fact that such disputes concern large numbers of persons raises specific procedural challenges but also offers opportunities in terms of efficient administration of justice.

In the context of the EU's Representative Actions Directive, which will come into application in June 2023, judges will be called upon to undertake specific tasks.

Depending on the national rules transposing the Directive, they may be required to assess the admissibility and merits of the actions, to ensure that consumers are appropriately represented and informed, to verify that the interests of all represented parties are well-protected, etc. The objective of this workshop is to raise awareness on collective redress and to exchange on the roles of judges in collective redress actions.

During a panel discussion, three judges with recognised expertise in the field of collective redress will share their insight and experience:

Mr. Fabian Reuschle (judge at the *Stuttgart Regional court – Landgericht – Germany*). Fabian Reuschle actively participated in the adoption of the German Capital Markets Model Case Act (*KapMuG*) establishing a lead case procedure for the collective handling of capital market-related actions.

Sir Peter Roth (judge at the *London High Court & UK Competition Appeal Tribunal*). Sir Peter presided over a collective litigation against MasterCard lodged on behalf of 46 million consumers.

Mr. Jeroen Chorus (*retired judge, formerly at the Amsterdam Court of Appeal, the Netherlands*). Jeroen Chorus was notably in charge of the Dexia and Shell mass settlement with consequences on consumers in multiple European jurisdictions.

Programme:

15:00-15:05	Welcome
15:05-15:15	Setting the scene: *What does collective redress mean for judges*? (*Stefaan Voet, KU Leuven University*)
15:15 – 16:30	Panel discussion with: • Judge Roth • Judge Chorus • Judge Reuschle Panel moderated by Maria José Azar-Baud (*University of Paris-Saclay, France*) & Ianika Tzankova (*University of Tilburg, the Netherlands*)

16:30-17:15	Questions & Answers session with the audience (moderated by Magdalena Tulibacka, *Oxford University, UK/Emory University – United States* and with the participation of the representatives of the Directorate-General for Justice & Consumers of the European Commission
17:15-17:30	Concluding remarks

This project is funded by the European Union.

Attendance to the event is free but registration is mandatory. The number of registrations is limited. Therefore, please register as soon as possible via the following link.

For questions, please contact us.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2022: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

H.-P Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2021: The Challenge of Digital Transformation**

This article provides an overview of developments in Brussels in the field of

judicial cooperation in civil and commercial matters from January 2021 until December 2021. It gives information on newly adopted legal instruments and summarizes current projects that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

H. Wais: **The Applicable Law in Cases of Collective Redress**

Both the European and the German legislator have recently passed legislation aimed at establishing access to collective redress for consumers. As European conflict of law rules do not contain any specific rules on the applicable law in cases of collective redress, the existing rules should be applied in a way that enables consumers to effectively pursue collective actions. To that aim, Art. 4 (3) 1st S. Rome II-Regulation provides for the possibility to rely on the place of the event that has given rise to the damages as a connecting-factor for collective redress cases in which mass damages have occurred in different states. As a consequence of its application, all claims are governed by the same applicable law, thereby fostering the effectiveness of collective redress.

M. Lehmann: **Locating Financial Loss and Collective Actions in Case of Defective Investor Information: The CJEU's Judgment in VEB v BP**

For the first time, the CJEU has ruled in VEB v BP on the court competent for deciding liability suits regarding misinformation on the secondary securities market. The judgment is also of utmost importance for the jurisdiction over collective actions. This contribution analyses the decision, puts it into larger context, and discusses its repercussions for future cases.

M. Pika: **Letters of Comfort and Alternative Obligations under the Brussels I and Rome I Regulations**

In its judgment of 25 November 2020 (7 U 147/19), the Higher Regional Court of Brandenburg ruled on special jurisdiction regarding letters of comfort under Article 7 No. 1 Brussels I Regulation. While the court left the decision between lit. a and lit. b of that Article open, it ruled that either way, the courts at the domicile of the creditor of the letter of comfort (in this case: the subsidiary) have no special jurisdiction. This article supports the court's final conclusion. In addition, it assesses that Article 7 No. 1 lit. b Brussels I Regulation on services may apply to letters of comforts given the CJEU's decision in Kareda (C-249/16).

B. Hess/A.J. Wille: **Russian default interests before the District Court of Frankfort**

In its judgment of February 2021, the Landgericht Frankfurt a.M., applying Russian law, awarded a three-month interest rate of 37% to a defendant domiciled in Germany. When examining public policy, the regional court assumed that there was little domestic connection (Inlandsbezug), as the case was about the repayment of a loan issued in Moscow for an investment in Russia. However, the authors point out that the debtor's registered office in Hesse established a clear domestic connection. In addition, the case law of German courts interpreting public policy under Article 6 EGBGB should not be directly applied to the interpretation of Articles 9 and 21 of the Rome I Regulation.

D. Looschelders: **Implied choice of law under the EU Succession Regulation – not just a transitional problem in connection with joint wills**

The decision of the German Federal Supreme Court focuses on the question, under which conditions an implied choice of law may be assumed within the framework of the EU Succession Regulation (Regulation No 650/2012). In this particular case, an implied choice of German law as the law governing the binding effect of the joint will drawn up by the German testator and her predeceased Austrian husband was affirmed by reference to recital 39(2) of the EU Succession Regulation. Actually, the joint will of the spouses stipulated the binding effect as

intended by German law. As the spouses had drawn up their will before the Regulation became applicable, the question of an implied choice of law arose in the context of transition. However, the decision of the German Federal Supreme Court will gain fundamental importance regarding future cases of implied choices of law for all types of dispositions of property upon death, too. Nevertheless, since the solution of the interpretation problem is not clear and unambiguous, a submission to the ECJ would have been necessary.

M. Reimann: **Human Rights Litigation Beyond the Alien Tort Claims Act: The Crucial Role of the Act of State Doctrine**

The Kashef case currently before the federal courts in New York shows that human rights litigation against corporate defendants in the United States is alive and well. Even after the Supreme Court's dismantling of the Alien Tort Claims Act jurisdiction remains possible, though everything depends on the circumstances. And even after the Supreme Court's virtual elimination of federal common law causes of action claims under state or foreign law remain possible, though they may entail complex choice-of-law issues.

Yet, so far, the most momentous decision in this litigation is the Court of Appeals' rejection of the defendants' potentially most powerful argument: the Court denied them shelter under the act of state doctrine. It did so most importantly because the alleged human rights abuses amounted to violations of jus cogens.

Coming from one of the most influential courts in the United States, the Second Circuit's Kashef decision adds significant weight to the jus cogens argument against the act of state doctrine. As long as the Supreme Court remains silent on the issue, Kashef will stand as a prominent reference point for future cases. This is bad news for corporate defendants, good news for plaintiffs, and excellent news for the enforcement of human rights through civil litigation.

J. Samtleben: **Paraguay: Choice of Law in international contracts**

To date, Paraguay is the only country to have implemented into its national law the Hague Principles on Choice of Law in International Commercial Contracts.

Law No. 5393 of 2015, which closely follows the Hague model, owes its creation primarily to the fact that the Paraguayan delegate to the Hague was actively involved in drafting the Principles. Unlike the Principles, however, Law No. 5393 also regulates the law governing the contract in the absence of a choice of law, following the 1994 Inter-American Convention on the Law Applicable to International Contracts of Mexico. Contrary to the traditional rejection of party autonomy in Latin America, several Latin American countries have recently permitted choice of law in their international contract law. Paraguay has joined this trend with its new law, but it continues to maintain in procedural law that the jurisdiction of Paraguayan courts cannot be waived by party agreement.

Giustizia consensuale No 2/2021: Abstracts

The second issue of 2021 of *Giustizia Consensuale* (published by Editoriale Scientifica) has just been released and it features:

Silvia Barona Vilar (Professor at the University of València) *Sfide e pericoli delle ADR nella società digitale e algoritmica del secolo XXI* (*Challenges and Pitfalls of ADR in the Digital and Algorithmic Society of the XXI Century*; in Italian)

> In the XX century, dispute resolution was characterized by the leading role played by State courts: however, this situation has begun to change. With modernity and globalization has come the search of ways to ensure the 'deconflictualisation' of social and economic relations and solve conflicts

arising out of them. In this context, ADR – and now ODR – have had a decisive impulse in the last decades and are now enshrined in the digital society of the XXI century. ADR mechanisms are, in fact, approached as means to ensure access to justice, favouring at the same time social peace and citizens' satisfaction. Nevertheless, some uncertainties remain and may affect ADR's impulse and future consolidation: among such uncertainties are the to-date scarce negotiation culture for conflict resolution, the need for training in negotiation tools, the need for State involvement in these new scenarios, as well as the attentive look at artificial intelligence, both in its 'soft' version (welfare) and its 'hard' version (replacement of human beings with machine intelligence).

Amy J. Schmitz (Professor at the Ohio State University), **Lola Akin Ojelabi** (Associate Professor at La Trobe University, Melbourne) and **John Zeleznikow** (Professor at La Trobe University, Melbourne), *Researching Online Dispute Resolution to Expand Access to Justice*

In this paper, the authors argue that Online Dispute Resolution (ODR) may expand Access to Justice (A2J) if properly designed, implemented, and continually improved. The article sets the stage for this argument by providing background on ODR research, as well as theory, to date. However, the authors note how the empirical research has been lacking and argue for more robust and expansion of studies. Moreover, they propose that research must include consideration of culture, as well as measures to address the needs of self-represented litigants and the most vulnerable. It is one thing to argue that ODR should be accessible, appropriate, equitable, efficient, and effective. However, ongoing research is necessary to ensure that these ideals remain core to ODR design and implementation.

Marco Gradi (Associate Professor at the University of Messina), *Teoria dell'accertamento consensuale: storia di un'incomprensione* (*The Doctrine of 'Negotiation of Ascertainment': Story of a Misunderstanding*; in Italian)

This article examines the Italian doctrine of 'negotiation of ascertainment' (*negozio di accertamento*), by means of which the parties put an end to a legal dispute by determining the content of their relationship by mutual consent. Notably, by characterizing legal ascertainment as a binding judgment vis-à-vis the parties' pre-existing legal relationship, the author

contributes to overcoming the misunderstandings that have always denoted the debate in legal scholarship, thus laying down the foundations towards a complete theory on consensual ascertainment.

Cristina M. Mariottini (Senior Research Fellow at the Max Planck Institute Luxembourg for Procedural Law), *The Singapore Convention on International Mediated Settlement Agreements: A New Status for Party Autonomy in the Non-Adjudicative Process*

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention'), adopted in 2018 and entered into force in 2020, is designed to facilitate cross-border trade and commerce, in particular by enabling disputing parties to enforce and invoke settlement agreements in the cross-border setting without going through the cumbersome and potentially uncertain conversion of the settlement into a court judgment or an arbitral award. Against this background, the Convention frames a new status for mediated settlements: namely, on the one hand it converts agreements that would otherwise amount to a private contractual act into an instrument eligible for cross-border circulation in Contracting States and, on the other hand, it sets up an international, legally binding and partly harmonized system for such circulation. After providing an overview of the defining features of this new international treaty, this article contextualizes the Singapore Convention in the realm of international consent-based dispute resolution mechanisms.

Observatory on Legislation and Regulations

Ivan Cardillo (Senior Lecturer at the Zhongnan University of Economics and Law in Wuhan)**,** *Recenti sviluppi della mediazione in Cina* (*Recent developments in mediation in China*; in Italian)

This article examines the most recent developments on mediation in China. The analysis revolves around, in particular, two prominent documents: namely, the '14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035' and the 'Guiding Opinions of the Supreme People's Court on Accelerating Steps to Motivate the Mediation Platforms of the People's Courts to Enter Villages, Residential

Communities and Community Grids.' In particular, the so-called 'Fengqiao experience' ? which developed as of the 1960s in the Fengqiao community and has become a model of proximity justice ? remains the benchmark practice for the development of a model based on the three principles of self-government, government by law, and government by virtue. In this framework, mediation is increasingly identified as the main echanism for dispute resolution and social management: in this respect, the increasing use of technology proves to be crucial for the development of mediation platforms and the efficiency of the entire judicial system. Against this background, the complex relationship becomes apparent between popular and judicial mediation, their coordination and their importance for governance and social stability: arguably, such a relationship will carry with it in the future the need to balance the swift dispute resolution with the protection of fundamental rights.

Angela D'Errico (Fellow at the University of Macerata), *Le* Alternative Dispute Resolution *nelle controversie pubblicistiche: verso una minore indisponibilità degli interessi legittimi?* (*Alternative Dispute Resolution in Public Sector Disputes: Towards an Abridged Non-Availability of Legitimate Interests?*; in Italian)

This work analyzes the theme of ADR in publicity disputes and, in particular, it's understood to deepen the concepts of the availability of administrative power and legitimate interests that hinder the current applicability of ADRs in public matters. After having taken into consideration the different types of ADR in the Italian legal system with related peculiarities and criticalities, it's understood, in the final part of the work, to propose a new opening to the recognition of these alternative instruments to litigation for a better optimization of justice.

Observatory on Jurisprudence

Domenico Dalfino (Professor at the University 'Aldo Moro' in Bari), *Mediazione e opposizione a decreto ingiuntivo, tra vizi di fondo e ipocrisia del legislatore* (*Mediation and Opposition to an Injunction: Between Underlying Flaws and Hypocrisy of the Legislator*; in Italian)

In 2020, the plenary session of the Italian Court of Cassation, deciding a question of particular significance, ruled that the burden of initiating the mandatory mediation procedure in proceedings opposing an injunction lies with the creditor. This principle sheds the light on further pending questions surrounding mandatory mediation.

Observatory on Practices

Andrea Marighetto (Visiting Lecturer at the Federal University of Rio Grande do Sul) and **Luca Dal Pubel** (Lecturer at the San Diego State University), *Consumer Protection and Online Dispute Resolution in Brazil*

With the advent of the 4th Industrial Revolution (4IR), Information and Communication Technology (ICT) including the internet, computers, digital technology, and electronic services have become absolute protagonists of our lives, without which even the exercise of basic rights can be harmed. The Covid-19 pandemic has increased and further emphasized the demand to boost the use of ICT to ensure access to basic services including access to justice. Specifically, at a time when consumer relations represent the majority of mass legal relations, the demand for a system of speedy access to justice has become necessary. Since the early ’90s, Brazil has been at the forefront of consumer protection. In the last decade, it has taken additional steps to enhance consumer protection by adopting *Consumidor.gov*, a public Online Dispute Resolution (ODR) platform for consumer disputes. This article looks at consumer protection in Brazil in the context of the 4IR and examines the role that ODR and specifically the *Consumidor.gov* platform play in improving consumer protection and providing consumers with an additional instrument to access justice.

In addition to the foregoing, this issue features the following book review by *Maria Rosaria Ferrarese* (Professor at the University of Cagliari): Antoine Garapon and Jean Lassègue, *Giustizia digitale. Determinismo tecnologico e libertà* (Italian version, edited by M.R. Ferrarese), Bologna, Il Mulino, 2021, 1-264.

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)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

C. Wendehorst: **Digital Assets in Private International Law**

Rights with third party effect (erga omnes rights, rights in rem) in digital assets may exist at four levels: (a) the level of physical manifestation of data on a medium; (b) the level of data as encoded information; (c) the functional level of data as digital content or services; and (d) the level of data as representation of rival assets. As yet, recognized conflict-of-law rules exist only for level (c), which has always been dealt with under international intellectual property law.

As to rights in physical manifestations of data, these may be dealt with under Art. 43 EGBGB where data is stored and accessed only locally. In the case of remote access to data, especially in the case of data stored in the cloud, the law of the state where the controller is located should apply. In the case of two or more controllers located in different states, the location of the server operator (cloud provider) may decide instead, but neither of these connecting factors applies if the facts of the case indicate a closer connection with the law of another state.

Data as encoded information is a non-rival resource. Should a foreign jurisdiction recognise exclusive data ownership rights, these would have to be dealt with under international intellectual property law. For data access rights, portability

rights and similar rights the rules on the territorial scope of the GDPR may provide some helpful indications as to the applicable law. However, where such rights arise within a contractual relationship or other specific framework the law applicable to this framework may prevail.

As to crypto assets, uniform conflict-of-law rules would be highly desirable. Subject to further integration of crypto assets into the existing system for intermediated securities, rights in tokens should primarily be governed by the law referred to by conflict-of-law rules specifically addressing crypto assets, including appropriate analogies to such rules. Where no such rules exist, the closest connection must be ascertained by a connecting factor that is sufficiently certain and clearly visible to third parties, such as the law that has visibly been chosen as the applicable law for the whole ledger (elective situs), the location of the issuer (LIMA), or the place of the central administrator (PROPA) or of the sole holder of a private master key (PREMA).

R. de Barros Fritz: **The new legal tech business model of mass action litigation from the choice of law perspective**

In recent years, courts had to increasingly deal with questions of substantive law concerning a new, but in practice already well-established business model of mass action litigation, which is offered by companies such as Financialright Claims and Myright. These are often cases that have links to foreign countries. The present article has therefore taken this opportunity to examine the question of the law applicable to this business model in more detail.

P. Hay: **Forum Selection Clauses – Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law**

German and American law differ methodologically in treating exclusive forum selection clauses. German law permits parties, subject to limitations, to derogate the jurisdiction of courts and, in the interest of predictability, to select a specific court for any future disputes. The German Supreme Court emphasized in 2019 that, as a contract provision, the clause also gives rise to damages in case of

breach. American law historically does not permit parties to "oust" the jurisdiction a court has by law. But the parties' wishes may be given effect by granting a party's motion to dismiss for forum non conveniens (FNC) when sued in a different court in breach of the agreement. FNC dismissals are granted upon a "weighing of interests" and in the court's discretion. The clause, even when otherwise valid, is therefore not the kind of binding obligation, enforced by contract remedies, as in German law. The case law does not give effect to its "dual nature," as characterized by the German Supreme Court. The latter's decision correctly awarded attorneys' fees for expenses incurred by the plaintiff when the defendant had sued (and lost) in the United States in breach of a forum selection clause, especially since German jurisdiction and German law had been stipulated. Application of the "American Rule" of costs most probably would not have shifted fees to the losing party had American law been applied, although the rule is far less stringent today than often assumed.

A. Stadler/C. Krüger: **International jurisdiction and the place where the damage occurred in VW dieselgate cases**

Once again the European Court of Justice had to deal with the question of where to locate the place where the harm or damage occurred ("Erfolgsort", Article 7 no. 2 Brussels Ibis Regulation) which is particularly difficult to define in case of pure economic loss tort cases. Previous case law of the ECJ resulted in a series of very specific judgments and a high unpredictability of the international jurisdiction. In the Austrian "Dieselgate" case the referring court had doubts whether the Austrian car purchasers who had bought and received their cars in Austria suffered a "primary loss" or only an irrelevant "secondary loss". The ECJ rightly rejects the idea of a secondary loss and concludes that the place where the (primary) damage occurred is to be located in Austria. The authors criticise that the ECJ – without an obvious reason – emphasises that the case at hand is not about pure economic loss. Although they agree with the court's finding that the place where the damage occurred was in Austria as the place of acquisition of the cars, they discuss whether in future cases one might have to distinguish between the place where the sales contract was entered into or the place where the defective object became part of the purchasers' property. The authors reject any detailed approach and advocate in favour of abandoning the principle of ubiquity in cases of pure economic loss. Alternatively, the only acceptable solution is an

entire consideration of all relevant facts of the individual case.

P.F. Schlosser: **Jurisdiction agreements binding also third beneficiaries in contracts?**

Even in the context of jurisdiction agreements, the European Court applies the rules protecting the policy holder for the benefit of the "insured". In this respect the Court's methodology and result must be approved of. The restriction of the holding as to the consent of the insured and the qualification of the insured as an insurance company are of no practical impact and due to the narrow question referred to the Court. The holding may, however, not be transferred by a reverse argumentation to assignments of rights against consumers or employees to commercial entities.

B. Heiderhoff: **Article 15 Brussels IIbis Regulation, the Child's best interests, and the recast**

Article 15 Brussels IIbis Regulation provides that the court competent under Article 8 et seq Brussels IIbis Regulation may, under certain prerequisites, transfer the case to a court in another Member State. In the matter of EP./. FO (ECJ C-530/18) the ECJ once more explains the central notion of this rule, being the best interest of the child. The ECJ holds that the competent court must not initiate the transfer on the basis that the substantive law applied by the foreign court is more child friendly – which is, by the way, a rather unrealistic scenario for various reasons. Concerning procedural law, the ECJ points out that different rules may only be taken into account if they "provide added value to the resolution of the case in the interests of the child". Notwithstanding the ECJ's fundamental and recurrent statement that the transfer is never mandatory, it still seems reasonable for the competent court to apply a well-balanced, comprehensive approach towards the transfer. Should it deny the transfer to a court that is "better placed to hear the case" on the grounds that the foreign law is "different" or maybe that it even seems to be less in the interest of the child? According to the principle of mutual trust, the author suggests to use the public policy standard and to ignore any differences in the substantive and procedural law, as long as they do not threaten to add up to a public policy infringement. The

paper also points out some changes in the new Articles 12 and 13 Brussels IIbis Recast which aim at further specifying the transfer mechanism. The resulting deletion of the comprehensive evaluation of the child's best interests by the transferring court in para 1 seems unintentional. Thus, the author recommends to keep up the current handling.

F. Koechel: **Article 26 of the Brussels Ibis Regulation as a Subsidiary Ground of Jurisdiction and Submission to Jurisdiction Through Eloquent Silence**

According to the CJEU's decision, a court may assume jurisdiction based on the entering of an appearance of the defendant only if Articles 4 ff. of the Brussels Ibis Regulation do not already provide for a concurrent ground of jurisdiction in the forum state. This restrictive interpretation complicates the assessment of jurisdiction and limits the scope of the Brussels Ibis Regulation without any substantial justification. On the contrary, a subsidiary application of Article 26 of the Brussels Ibis Regulation is systematically inconsistent with Article 25, which generally privileges the jurisdiction agreed by the parties over any concurrent ground of jurisdiction. In this decision, the CJEU confirms its previous interpretation according to which Article 26 Brussels Ibis Regulation may not be employed as a ground of jurisdiction vis-à-vis a defendant who chooses not to enter an appearance. However, the CJEU does not sufficiently take into account that in the main proceedings the court had requested the defendant to state whether or not he wanted to challenge jurisdiction. The question therefore was not simply if a defendant submits to a court's jurisdiction by not reacting at all after having been served with the claim. Rather, the CJEU would have had to answer whether a defendant enters an appearance within the sense of Article 26 of the Brussels Ibis Regulation if he does not comply with the court's express request to accept or challenge jurisdiction. The article argues that the passivity of the defendant may only exceptionally be qualified as a submission to jurisdiction if he can be deemed to have implicitly accepted the court's jurisdiction.

C. Lasthaus: **The Transitional Provisions of Article 83 of the European Commission's Succession Regulation**

The European Commission's Succession Regulation 650/2012 aims to facilitate cross-border successions and intends to enable European citizens to easily organise their succession in advance. In order to achieve this goal, the regulation – inter alia – facilitates the establishment of bilateral agreements as to succession. This is the case not only for agreements made after 17/8/2015 but – under the condition that the testator dies after this date – according to the transitional provisions in Article 83 also for those made prior. Due to these transitional provisions, some formerly invalid agreements made prior to the effective date of the regulation turned valid once the regulation applied. In its judgment, the German Federal Court of Justice ("BGH") ruled on the legal validity of a formerly invalid bilateral agreement as to succession between a German testator and her Italian partner. This legal review inter alia deals with the distinction between Article 83 para. 2 and Article 83 para. 3 of the Regulation as well as legal aspects concerning the retroactive effect of the transitional provisions.

P. Kindler: **The obligation to restore or account for gifts and advancements under Italian inheritance law: questions of applicable law and international civil procedure, including jurisdiction and the law applicable to pre-judgment interest**

The present decision of the Higher Regional Court of Munich deals with the obligation to restore or account for gifts and advancements when determining the shares of different heirs under Italian law (Article 724 of the Italian Civil Code). Specifically, it addresses a direct debit from the bank account held by husband and wife and payed to the wife alone a few days before the husband's death. The husband was succeeded on intestacy by his wife and three descendants one of which sued the deceased's wife in order to obtain a declaratory judgment establishing that half of the amount payed to the wife by the bank is an advancement, received from the deceased during his lifetime, and that such advancement has to be adjusted in the partitioning between the heirs. The article presents the related questions of applicable law under both the European Succession Regulation and the previous conflict rules in Germany and Italy. Side aspects regard, inter alia, the law applicable to interest relating to the judicial proceedings (Prozesszinsen) and how the Court determined the content of the foreign substantive law.

P. Mankowski: **Securing mortgages and the system of direct enforcement under the Brussels Ibis Regulation**

On paper, the Brussels Ibis Regulation's turn away from exequatur to a system of direct enforcement in the Member State addressed was a revolution. In practice, its consequences have still to transpire to their full extent. The interface between that system and every-day enforcement practice is about to become a fascinating area. As so often, the devil might be in the detail, and in the minute detail at that. The Sicherungshypothek (securing mortgage) of German law now stars amongst the first test cases.

E. Jayme: **Registration of cultural goods as stolen art: Tensions between property rights and claims of restitution – effects in the field of international jurisdiction and private international law**

In 1999, the plaintiff, a German art collector had acquired a painting by the German painter Andreas Achenbach in London. In 2016 the painting was registered in the Madgeburg Lost Art Database according to the request of the defendant, a (probably) Canadian foundation. The painting was owned, between 1931 and 1937, by a German art dealer who had to leave Germany and was forced to close his art gallery in Düsseldorf. The plaintiff based his action on a violation of his property rights. The court dismissed the action: the registration, according to the court, did not violate the plaintiff's property rights. The case, at first, involves questions of international civil procedure. The court based jurisdiction, according to para. 32 of the German Code of Civil Procedure, on the place of the pretended violation of property, i.e. the seat of the German foundation, which had registered the painting in its lost art register. The European rules were not applicable to a defendant having its seat outside the European community. The author follows the Magdeburg court as to the question of jurisdiction, but criticises the outcome of the case and the arguments of the court for generally excluding the violation of property rights. A painting registered as lost art loses its value on the art market, it cannot be sold. In addition, the registration of a painting as lost art may perhaps violate property rights of the German plaintiff in situations where there has been, after the Second World War, a compensation

according to German public law, or where the persons asking for the registration did not sufficiently prove the legal basis of their claim. However, the Magdeburg registration board has developed some rules for cancelling registration based on objective arguments. Thus, the question is still open.

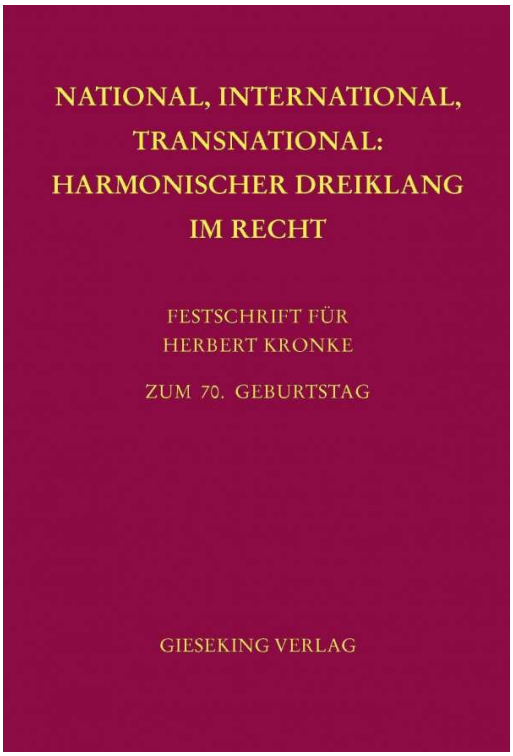
I. Bach/H. Tippner: The penalty payment of § 89 FamFG: a wanderer between two worlds

For the second time within only a few years, the German Federal Supreme Court (BGH) had to decide on a German court's jurisdiction for the enforcement of a (German) judgment regarding parental visitation rights. In 2015, the BGH held that under German law the rule regarding the main proceedings (§ 99 FamFG) is to be applied, because of the factual and procedural proximity between main and enforcement proceedings. Now, in 2019, the BGH held that under European law the opposite is true: The provisions in Articles 3 et seq. Brussels IIbis Regulation are not applicable to enforcement proceedings. Therefore, the question of jurisdiction for enforcement proceedings is to be answered according to the national rules, i.e. in the present case: according to § 99 FamFG.

D.P. Fernández Arroyo:**Flaws and Uncer tain Effectiveness of an Anti-Arbitration Injunction *à l'argentine***

This article deals with a decision issued by an Argentine court in the course of a dispute between an Argentine subsidiary of a foreign company and an Argentine governmental agency. The court ordered the Argentine company to refrain from initiating investment treaty arbitration against Argentina. This article addresses the conformity of the decision with the current legal framework, as well as its potential impact on the ongoing local dispute. Additionally, it briefly introduces some contextual data related to the evolution of Argentine policies concerning arbitration and foreign investment legal regime.

Out now: Festschrift for Herbert Kronke on the Occasion of his 70th Birthday: „National, International, Transnational: Harmonischer Dreiklang im Recht“



On the occasion of the 70th birthday of Herbert Kronke, Professor emeritus of the University of Heidelberg, President of the German Institution of Arbitration and Arbitrator (Chairman, Chamber Three) at the Iran US Claims Tribunal at The Hague, Former Secretary-General of UNIDROIT, a large number of friends and colleagues gathered to honour a truly outstanding scholar with essays, edited by Christoph Benicke, Professor at the University of Gießen, Germany, and Stefan Huber, Professor at the University of Tübingen, in an impressive volume of nearly 2000 pages with more than 150 contributions from all over the world, many of them in English – highly recommended to browse through state of the art thinking and research on national, international and transnational law:

I. Internationales Privat- und Verfahrensrecht sowie Völkerrecht

Moritz BRINKMANN und *Thomas VOGT GEISSE*

Qualifikation und Anknüpfung von Instrumenten der prozessvorbereitenden Aufklärung

Eckart BRÖDERMANN

Vom Drachen-steigen-Lassen – Ein internationales Jura-Märchen zum IPR/IZVR

Hannah L. BUXBAUM

Capital Markets and Conflict of Laws: from Mutual Recognition to Substituted Compliance

Dagmar COESTER-WALTJEN

Der gewöhnliche Aufenthalt eines Neugeborenen im Internationalen Familienrecht

Anatol DUTTA

Gleichlauf von forum und ius – ein legitimes Ziel des internationalen Privatrechts?

Dorothee EINSELE

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Private International Law and the

outbreak of Covid-19: Some initial thoughts and lessons to face in daily life

Written by Inez Lopes (Universidade de Brasília) and Fabrício Polido (Universidade Federal de Minas Gerais)

Following the successful repercussion of the **Webinar PIL & Covid-19: Mobility of Persons, Commerce and Challenges in the Global Order,** which took place between 11 and 22nd May 2020, the Scientific Committee headed by Prof. Dr Inez Lopes (Universidade de Brasília), Prof. Dr Valesca R. Moschen (Universidade Federal do Espírito Santo), Prof. Dr Fabricio B. Pasquot Polido (Universidade Federal de Minas Gerais), Prof. Dr Thiago Paluma (Universidade Federal de Uberlandia) and Prof. Dr Renata Gaspar (Universidade Federal de Uberlandia) is pleased to announce that the Webinar´s videos are already available online (links below). The committee thanks all those professors, staff and students who enthusiastically joined the initiative. A special thank is also given to the University of Minas Gerais and the Brazilian Centre for Transnational and Comparative Studies for the online transmissions. The sessions were attainable to both participants and the audience.

On the occasion of the Webinar, scholars and specialists from Argentina, Brazil, Uruguay, Mexico, Portugal, Spain and the United Kingdom shared their preliminary views on Private International Law (PIL) related issues to the existing challenges posed by Covid-19 outbreak in Europe and the Americas. The main objective of the Webinar was to focus on the discussions on three main multidisciplinary clusters for PIL/Covid-19 research agenda: *(I) Private International Law, International Institutions and Global Governance in times of Covid-19*; (*II) Protection of persons in mobility and Covid-19: human rights, families, migrants, workers and consumers; (III) International Commerce and Covid-19: Global supply chains, investments, civil aviation, labour and new technologies*.

The initiative brought together the ongoing collaborative research partnerships

among peers from the University of Brasília-UnB, Federal University of Minas Gerais-UFMG, Federal University of Uberlândia-UFU, Federal University of Espírito Santo-UFES, State University of Rio de Janeiro, Federal Rural University of Rio de Janeiro, FGV Law/São Paulo, Federal University of Paraná, Federal University of Rio Grande do Sul, Universidad Nacional del Litoral/Argentina, Universidad de la República/Uruguay, CIDE/Mexico, University of Coimbra/Portugal, University of Minho/Portugal, Universidad de València/Spain, University of Edinburgh/UK, and besides to members of the American Association of Private International Law – ASADIP, the Latin American Society of International Law, the Latin American Research Network of International Civil Procedure Law and the Brazilian Association of International Law.

The proposal for e-gathering specialists was made in line with the intense academic engagement to explore potential critical views related to current and future avenues for Private International Law during a pandemic crisis. One could remark the strong narratives about "global" and "domestic" health crises and their interactions with the practical operation of PIL lawmaking and decision-making processes. More generally, participants raised several issues on how PIL framework, norm-setting and dispute resolution mechanisms would be intertwined with global health emergencies, national public health interests, social isolation and distancing, inequalities, poverty, the demise of social protection on global scale and restrictions on the mobility of families, groups, individuals, companies and organizations during a pandemic crisis.

The Webinar participants also talked about an expedite PIL agenda on core issues related to state and non-state actors' practices during Covid-19 health crisis, challenges to international commerce, investment, labour and technologies and enforcement of human rights in cross-border cases. In view of the three clusters and specific topics, the Webinar sessions went into the analysis of the actual and potential impacts of Covid-19 outbreak on PIL related areas, its methodologies and policy issues. Participants highlighted that the PIL sectors on applicable law, jurisdiction, international legal (administrative and judicial) cooperation and recognition of foreign judgments will remain attached to the objective of resolving urgent cases, such as in the field of family and migration law (e.g. cases of international abduction, family reunion vs. family dispersion), consumer law, labour law, international business law and overall in cross-border litigation (e.g. reported cases involving state immunity, bankruptcy, disruption of global supply

chains).

Likewise, there was a converging view amongst participants that PIL and its overarching principles of cooperation, recognition and systemic coordination will be of a genuine practical meaning for what is coming next in Covid-19 pandemic. Also, values on cosmopolitanism, tolerance and integration going back to the roots and veins of the Inter-American scholarship to PIL studies (since the end of 19th century!) may help to improve institutions dealing with local, regional and global. Likely those principles and values could provide PIL community with 'cautionary tales' in relation to existing trends of opportunistic nationalism, refusal of cooperation and threats with foreign law bans (for example, with regard to specific states, migrants and even businesses). As to policy level and to State practices (connected to international politics and public international law), participants have raised various concerns about the mobility of persons, sanitary barriers and national campaigns perniciously devoted to spreading xenophobia, marginalising groups, minorities and migrants. Some participants have also referred to the dangers of unilateral practices of those States advocating a sort of international isolation of countries and regions affected by Covid-19 without engaging in cooperation and dialogues. Even in those extreme cases, there will be harmful consequences to PIL development and its daily operation.

Inevitably, the tragedies and lost lives in times of Coronavirus have made participants reflect upon the transformative potentials for international scholarship and policy in a multidisciplinary fashion. For example, as remarked in some panels, in order to engage in a constructive and policy-oriented approach, PIL scholarship could refrain from any sort of 'black-letter' reading or absenteeism concerning Covid-19. At this stage, a sort of 'political awareness' should be encouraged for studies in public and private international law. Issues on economic reconstruction (rather than simply 'economic recovery'), access to public health, disruptive technologies, generational environmental concerns, labour markets, access to credit will be highlighted in global governance talks during Covid-19 pandemic and beyond. Some participants conceive the moment as "reality shock" rather than "mindset change" in facing good/bad sides of the pandemic.

As a preliminary matter of housekeeping method, participants shared some conceptual and normative questions in advance to the Webinar as a kick-off stage.

A first teaser was initially to generate discussions about the interplay between state actors, international institutions, International Health Law and PIL. One of the departing points was the impact of the global sanitary emergency on individuals, families, organizations and companies and overlapping goals of state powers, public ordering and transnational private regulation. In addition, participants raised further concerns on the current international institutional design and PIL roles. Covid-19 accelerated and openly exposed the weakness of international institutions in guiding States and recalling their obligations concerning the protection of citizens during national emergencies or providing aid to most states affected by the outbreak of a pandemic disease. That scenario reveals existing gaps and bottlenecks between international, regional and national coordination during health emergencies (for example, the World Health Organization, Organization of American States and the European Union in relation to Member States). Participants also proposed further questions whether a global health emergence would change current views on jurisdiction (prescriptive, adjudicatory and executive), particularly in cases where cooperation and jurisdictional dialogues are refused by states in times of constraints and ambivalent behaviours in global politics.

Interdisciplinary PIL approaches also allowed participants to draw preliminary lines on the intersectionality between global health, national policies and jurisdictional issues, particularly because of the distinct regulatory frameworks on health safety and their interplay with cross-border civil, commercial and labour matters. The Coronavirus outbreak across the globe paves the way to rethink roles and new opportunities for international organizations, such as the United Nations, WHO, WTO, the Hague Conference of Private International Law, European Union, ASEAN, Mercosur and Organization of American States. One of the proposals would be a proper articulation between governance and policy matters in those international institutions for a constructive and reactive approach to the existing and future hardship affecting individuals, families and companies in their international affairs during pandemics and global crises. Since Private International Law has been functionally (also in historical and socio-legal dimensions) related to “the international life” of individuals, families, companies, organizations, cross-border dealings, a more engaged policy-oriented approach would be desirable for the PIL/global health crisis interplay. To what extent would it be possible to seek convergence between PIL revised goals, health emergencies, new technologies, governance and “neo-federalism” of

organizations for advanced roles, new approaches, new cultures?

Some panels have directly referred to the opportunities and challenges posed ahead to PIL research agenda as well as to international, transnational and comparative studies. Both the Covid-19 outbreak and the global crisis require a study to continuously commit with inter- and multidisciplinary research and even strategically to recover some overarching values for a global order to be rebuilt. Reinforced and restorative cooperation, cosmopolitanism, ethics of care, solidarity and the entitlement of human rights (for instance, new proposed formulations for the right to development under the UN 2030 Agenda) are inevitably related to practical solutions for global health crises and emergencies. Humankind has been in a never-ending learning process no matter where in the globe we live. In a certain fashion, the despicable speech and behaviour of certain governments and global corporations' representatives during the fight against the coronavirus generated endurable feelings in scholarly circles worldwide. Besides, political agents' disdain regarding lost lives will never be forgotten.

How could PIL resist and respond to global challenges involving politics, international affairs and global health while at the same time it will be confronted with upcoming events and processes associated to extremist discourses and hatred, disinformation, historical revisionism, 'junk science' or everything else that disregards principles of global justice, international cooperation and protection of the rights of the person in mobility? Perhaps it is too early to reach consensus or a moral judgment on that. Nevertheless, the fight against Coronavirus/Covid-19 seems to extoll the powerful narratives of alterity, care, social protection, equalities, science, access to knowledge and education. Private International Law may play an important and critical role during forthcoming 'austerity projects' that may come during these dark sides and days of our History. As recalled by participants, the present requires our communities to engage in new proposals to support people, enterprises, consumers, workers and governments in their aspirations and endeavours for improving 'social contracts' or creating new ones. A pandemic crisis would not be the last stop or challenge.

For the sake of a peaceful and safe global community, PIL has 'tools and minds' to raise awareness about a balanced, fairly and universally oriented compromise to keep global, regional and national legal regimes operating in favour of the mobility of persons, the recognition of foreign situations, enforcement of human rights, allocation of distributive international trade, as well as engaging in

environmental and human development goals. For example, recent academic writings on hardship or 'force majeure' theories could indeed focus on technical solutions for international contracts and liability rules, which are suitable for accommodating certain interests (the 'zero-sum' game?) among public and/or private parties during Covid-19 and after that. Yet those reflections could not isolate themselves from a broader discussion on major social and economic hurdles associated to business environments worldwide, such as unequal access to finance, trade imbalance, precarious work, digital dispossession by new technologies and multi-territorial and massive violation of human rights. From now on, global fairness and solidarity appear to be crucial for a common talk and shared feeling for countries during their socioeconomic reconstruction. Cooperation remains a cornerstone to pursue equilibrium strategies and surely PIL and its academic community will remain a great place for an authentic and constructive exchange between ideas beyond PIL itself. Stay with your beloved, stay safe!

Inez Lopes *(Universidade de Brasília)*
Fabrício Polido *(Universidade Federal de Minas Gerais)*

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International Law, International Relations and Institutions: narratives on Covid-19 & challenges for Private International Law

05/11 – Monday – 10:30

Raphael Vasconcelos – State University of Rio de Janeiro; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Renata Gaspar – Federal University of Uberlândia

Video here

PIL, Global Governance, mobility of persons and Covid-19: enforcement of sanitary measures, international public policy and critical debates

05/12 – Tuesday – 16:30

Paula All – National University of Litoral/ Argentina; Rosa Zaia – Federal University of Uberlândia; Renata Gaspar – Federal University of Uberlândia

Video here

PIL, state immunity, international organizations and cross-border civil/commercial litigation in Covid-19

05/13 – Wednesday – 10:30

Valesca R. Borges Moschen – Federal University of Espírito Santo; Martha Olivar Jimenez – Federal University of Rio Grande do Sul; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Tatiana Cardoso Squeff – Federal University of Uberlândia

Video here

Emerging issues for international protection of consumer tourist and Covid-19

05/14 – Thursday – 10:30

Guillermo Palao Moreno – University of València/Spain; Tatiana Cardoso Squeff – Federal University of Uberlândia; Valesca R. Borges Moschen – Federal University of Espírito Santo

Video here

Covid-19, persons in mobility, social and sexual rights at transnational level: violence, vulnerability, xenophobia and discrimination

05/15 – Friday – 10:30

Tatyana Friedrich – Federal University of Paraná; Mariah Brochado – Federal University of Minas Gerais; Francisco Gomez – University of València / Spain; Raphael Vasconcelos – State University of Rio de Janeiro

Video here

Global digital economy, data protection, online misinformation and cybersecurity in times of Covid-19: jurisdictional and international legal cooperation

05/18 – Monday – 10:30

Anabela Susana Gonçalves – University of Minho / Portugal; Alexandre Pacheco – Getúlio Vargas Foundation – FGV / Direito-SP; Fabrício B.P. Polido – Federal University of Minas Gerais; Inez Lopes – University of Brasília – UnB

Video here

Civil aviation and Covid-19: current landscape for transportation of passengers and international commercial transactions

05/19 – Tuesday – 10:30

Inez Lopes – GDIP-Aéreo-Espacial / University of Brasília; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Marcelo Queiroz – GDIP-Aéreo-Espacial / UnB and GETRA / UnB; Fernando Feitosa – GDIP-Aero-Espacial / UnB and GETRA / UnB

Video here

Covid-19, foreign investments, integrated markets and PIL goals: regulatory choices, critical infrastructure and litigation

05/20 – Wednesday – 10:30

Laura Capalbo – University of the Republic / Uruguay; Veronica Ruiz Abou-Nigm – University of Edinburgh / UK; Ely Caetano Xavier Junior- ICHS – Federal Rural University of Rio de Janeiro

Video here

Covid-19 & future of work in the global order: aspects of DIP, employment contracts, outsourcing and worker protection

05/21 – Thursday – 10:30

Marcia Leonora Orlandini – Federal University of Uberlândia; Marcel Zernikow – State University of Rio de Janeiro; Maurício Brito – GDIP-Transnational Justice / UnB

Full video here.

Covid-19, International commerce, global supply chains, WTO and beyond

05/22 – Friday – 16:30

María Mercedes Albornoz – CIDE / Mexico; Rui Dias – University of Coimbra / Portugal; Fabio Morosini – Federal University of Rio Grande do Sul; Renata Gaspar – Federal University of Uberlândia

Full video here

Covid-19, PIL and new technologies: research opportunities for Ph.D Students 05/19 – Tuesday – 19:00

Cecília Lopes – Master's Student / UFMG; Fernanda Amaral – Master's Student / UFMG

Full video here

Covid-19, PIL and protection of vulnerable communities: research opportunities for Ph.D Students

05/22, Friday – 10:30 – Márcia Trivellato – Doctoral candidate/ UFMG; Thaísa Franco de Moura – Doctoral candidate/ UFMG; Diogo Álvares – Master student/UFMG;

Full video here

Private international law requirements for the effective enforcement of human rights

Written by Tanja Domej, University of Zurich

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. It is essential for the effective enforcement of human and workers' rights to create effective local institutions and procedures. This encompasses functioning, trustworthy and accessible civil courts, but also other public, private and criminal institutions and mechanisms (e.g. permission, licencing or inspection procedures to ensure safety in the workplace; accident insurance; trade unions). Civil litigation cannot be a substitute for such mechanisms – particularly if it takes place far away from the place where the relevant events occurred.

2. This, however, is not a reason against ensuring effective enforcement mechanisms, including judicial mechanisms, for private law claims arising from violations of human rights or claims aiming to prevent or to terminate such violations. Such judicial proceedings can also help to promote the establishment

of effective local mechanisms for preventing and remedying violations.

3. The usual difficulties arising in cross-border litigation tend to be aggravated in cases concerning human rights violations in developing countries. In addition to issues of jurisdiction and choice of law, there are often considerable challenges particularly with respect to litigation funding, fact-finding and establishing the content of foreign law, if required.

4. Legal aid alone usually is not a viable financial basis for corporate human rights litigation. The funding of such claims largely depends on market mechanisms, particularly on success-based lawyers' fees or commercial litigation funding. Because of the moral hazard that may arise in this context, it is desirable to promote the establishment of public-interest litigation funders. Nevertheless, "entrepreneurial litigating" in the field of corporate human rights cases cannot be considered as per se abusive. There seems to be a need, however, to monitor practices in this field closely to assess whether further regulation is required.

5. Where cross-border judicial cooperation is not functioning, taking of evidence located in a foreign state without involving authorities of the state where such evidence is located becomes increasingly important. A generous approach should be adopted in cases where "direct" taking of evidence neither violates legitimate third-party interests nor involves the use or threat of compulsion in the territory of a foreign state.

6. In cases where liability for damage inflicted by the violation of human rights standards depends on a business's internal operations, it is essential for an effective access to remedy that either the burden of proof with respect to the relevant facts is on the business or that there is a disclosure obligation that ensures access to relevant information. Where such disclosure could endanger legitimate confidentiality interests (particularly with respect to trade secrets), appropriate mechanisms to protect such interests should be put in place.

7. Collective redress mechanisms can improve access to justice with respect to corporate human rights claims. Meanwhile, reducing an excessive burden on the courts that could result from a large number of parallel proceedings currently does not seem to be as important a consideration in practice in the field of corporate human rights litigation as it can be in other fields of mass tort litigation. Appropriate safeguards have to be put in place to protect both the

legitimate interests of defendants and those of the members of the claimant group. When designing such safeguards, it is important to ensure that they do not lead to the obstruction of legitimate claims. Particularly in collective redress proceedings, the court should have strong case management and control powers, both during the proceedings and in the case of a settlement.

8. In addition to claims aiming at remedies for victims of violations, private law claims brought by non-government organisations, by public bodies or by individuals can at least indirectly contribute to the enforcement of human rights standards. Possible examples are claims on the basis of unfair competition, and possibly also contractual claims, because of false statements about production standards. Actions by associations or popular actions for injunctive or declaratory relief could also contribute to private enforcement of human rights standards. It remains to be seen whether litigation among businesses concerning contractual obligations to comply with human rights standards will play a meaningful role in this field in the future as well.

9. Soft law mechanisms and alternative dispute resolution can supplement judicial law enforcement mechanisms, but they are not a substitute for judicial mechanisms. In particular, human rights arbitration depends on a voluntary submission. Its practical effectiveness therefore requires the cooperation of the parties to the dispute. It would, however, be possible to create incentives for such cooperation.

Full (German) version: *Tanja Domej,* Zivilrechtliche Rechtsdurchsetzungsmechanismen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 229 et seq.

The Volkswagen (VW) emissions scandal – The saga continues: Now it's the turn of the Netherlands, France and Belgium

Thanks to the entering into force of the Dutch Collective Redress of Mass Damages Act (*Wet afwikkeling massaschade in collectieve actie*, WAMCA) on 1 January 2020, there has been an increase in prospective litigation against Volkswagen in the Netherlands and other countries in Europe involving the Volkswagen emissions scandal (also known as Dieselgate). We have previously reported on this law here and also on ongoing litigation against Volkswagen here (CJEU) and here (UK).

One of the institutes / organisations taking advantage of this opportunity is the Diesel Emissions Justice Foundation (DEJF), which was founded in the Netherlands, and which is seeking to be the exclusive representative in a collective redress action against Volkswagen. The DEJF is currently acting in the Netherlands, Belgium and France and has recently extended its activities to the rest of Europe provided that certain conditions are fulfilled (*e.g.* customers have not yet been compensated – one cannot be compensated twice and has to choose one representative – see more information here).

As indicated on its website, on 13 March 2020, DEJF summoned Volkswagen *et al.* to appear before the Amsterdam District Court under new WAMCA proceedings. DEJF requested to be appointed as the Exclusive Representative Organisation ("Lead Plaintiff"). A summary in English is available here and the full text in Dutch is available here. See a summary of the progress here.

Undoubtedly, the ongoing litigation in other parts of the world and its final outcome will have an impact on this action. We will keep you informed.