Symposium on Reparation for "Crimes of the Past" in Strasbourg (Oct. 19–20)

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

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

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

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

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

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

Ravel d'Esclapon, Mathieu Soula, Jeanne-Marie Tufféry-Andrieu, Patrick Wachsmann

For registration and more information, see here.

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

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

NIPR 2023 issue 1

Editorial

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

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

Abstract

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

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

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

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

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

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

CASE NOTES

A. Attaibi & M.A.G. Bosman, Forumkeuzebeding in algemene voorwaarden: de 'hyperlink-jurisdictieclausule' nader bezien. HvJ EU 24

november 2022, ECLI:EU:C:2022:923, NIPR 2022-549 (Tilman/Unilever) / p. 51-58

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

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

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

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

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

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

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

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

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

Anti-enforcement injunction granted by the New Zealand court

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

Decisions granting an anti-enforcement injunction are "few and far between" (*Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, [118]). Lawrence Collins LJ (as he then was) described it as "a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country" (*Masri v Consolidated*

Contractors International (UK) Ltd (No. 3) [2008] EWCA Civ 625, [2009] QB 503 at [93]). There must be a good reason why the applicant did not take action earlier, to prevent the plaintiff from obtaining the judgment in the first place. The typical scenario is where an applicant seeks to restrain enforcement of a foreign judgment that has been obtained by fraud.

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

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

The judgment is illustrative of the kind of cross-border fraud that private international law struggles to deal with effectively: here, alleged fraudsters using the Kentucky court to obtain an illegitimate judgment and, apparently, frustrate

the plaintiff's own enforcement of an earlier (English) judgment, in circumstances where the Kentucky court is unwilling (or unable?) to intervene because Kea was properly served with the proceeding in BVI.

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

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

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

Giustizia consensuale No 2/2022: Abstracts

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

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

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

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

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

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

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

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

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

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

Observatory on Legislation and Regulations

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

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

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

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

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

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

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

Observatory on Practices

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

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

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

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

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

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

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

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

A Major Amendment to Provisions on Foreign-Related Civil

Procedures Is Planned in China

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

1. Background

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

2. Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Judicial Assistance

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

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

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

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

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

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

Investigation and collection of evidence:

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

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

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

5. Recognition and enforcement of foreign judgments and arbitral awards

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

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

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

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

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

Recognition and enforcement of foreign arbitral awards: If the person

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

6. Conclusion

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

[1] The CPL, Art. 274.

[2] The CPL, Art. 284.

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

1 Wuhan University International Law Review, 92, 97.

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

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

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

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.