# ‘Legal identity’, statelessness, and private international law

Guest post by Bronwen Manby, Senior Policy Fellow and Guest Teacher, LSE Human Rights, London School of Economics.

In 2014, UNHCR launched a ten-year campaign to end statelessness by 2024. A ten-point global action plan called, among other things, for universal birth registration. One year later, in September 2015, the UN General Assembly adopted the Sustainable Development Goals (SDGs), an ambitious set of objectives for international development to replace and expand upon the 15-year-old Millennium Development Goals. Target 16.9 under Goal 16 requires that states shall, by 2030, ‘provide legal identity for all, including birth registration’. The SDG target reflects a recently consolidated consensus among development professionals on the importance of robust government identification systems.

Birth registration, the protection of identity, and the right to a nationality are already firmly established as rights in international human rights law – with most universal effect by the 1989 Convention on the Rights of the Child, to which every state in the world apart from the USA is a party. Universal birth registration, ‘the continuous, permanent, compulsory and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements’, is already a long-standing objective of UNICEF and other agencies concerned with child welfare. There is extensive international guidance on the implementation of birth registration, within a broader framework of civil registration.

In a recent article published in the *Statelessness and Citizenship Review* I explore the potential impact of SDG ‘legal identity’ target on the resolution of statelessness. Like the UNHCR global action plan to end statelessness, the paper emphasises the important contribution that universal birth registration would make to ensuring respect for the right to a nationality. Although birth registration does not (usually) record nationality or legal status in a country, it is the most authoritative record of the information on the basis of which nationality, and many other rights based on family connections, may be claimed.

The paper also agrees with UNHCR that universal birth registration will not end statelessness without the minimum legal reforms to provide a right to nationality based on place of birth or descent. These will not be effective, however, unless there are simultaneous efforts to address the conflicts of law affecting recognition of civil status and nationality more generally. UNHCR and its allies in the global campaign must also master private international law.

In most legal systems, birth registration must be accompanied by registration of other life events – adoption, marriage, divorce, changes of name, death – for a person to be able to claim rights based on family connections, including nationality. This is the case in principle even in countries where birth registration reaches less than half of all births, and registration of marriages or deaths a small fraction of that number. Fulfilling these obligations for paperwork can be difficult enough even if they all take place in one country, and is fanciful in many states of the global South; but the difficulties are multiplied many times once these civil status events have to be recognised across borders.

Depending on the country, an assortment of official copies of parental birth, death or marriage certificates may be required to register a child's birth. If the child's birth is in a different country from the one where these documents were issued, the official copies must be obtained from the country of origin, presented in a form accepted by the host country and usually transcribed into its national records. Non-recognition of a foreign-registered civil status event means that it lacks legal effect, leaving (for example) marriages invalid in one country or the other, or still in place despite a registered divorce. If a person's civil status documents are not recognised in another jurisdiction, the rights that depend on these documents may also be unrecognised: the same child may therefore be born in wedlock for the authorities of one country and out-of-wedlock for another. On top of these challenges related to registration in the country of birth, consular registration and/or transcription into the records of the state of origin is in many cases necessary if the child's right to the nationality of one or both parents is to be recognised. It is also likely that the parents will need a valid identity document, and if neither is a national of the country where their child is born, a passport with visa showing legal presence in the country. A finding of an error at any stage in these processes can sometimes result in the retroactive loss of nationality apparently held legitimately over many years.  Already exhausting for legal migrants in the formal sector, for refugees and irregular migrants of few

resources (financial or social) these games of paperchase make the recognition of legal identity and nationality ever more fragile.

These challenges of conflicts of law are greatest for refugees and irregular migrants, but have proved difficult to resolve even within the European Union, with the presumption of legal residence that follows from citizenship of another member state. The Hague Conference on Private International Law has a project to consider transnational recognition of parentage (filiation), especially in the context of surrogacy arrangements, but has hardly engaged with the broader issues.

The paper urges greater urgency in seeking harmonisation of civil registration practices, not only by The Hague Conference, but also by the UN as it develops its newly adopted 'Legal Identity Agenda', and by the UN human rights machinery. Finally, the paper highlights the danger that the SDG target will rather encourage short cuts that seek to bypass the often politically sensitive task of determining the nationality of those whose legal status is currently in doubt: new biometric technologies provide a powerful draw to the language of technological fix, as well as the strengthening of surveillance and control rather than empowerment and rights.  These risks – and their mitigation – are further explored in a twinned article in *World Development*.

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# Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs

*Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly*

*provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the first part of his contribution; a second one on corporate social responsibility will follow in the next days.*

On December the 3rd, 2020, the EU commission published a call for applications, with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail "*abusive litigation targeting journalists and civil society*". As defined in the call, strategic lawsuits against public participation (commonly abbreviated as SLAPPs) "*are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants*". As their core objective is to silence critical voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as "*data protection, blasphemy, tax laws, copyright, trade secret breaches*", etc) (p. 1).

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples (For further review of cases throughout the EU see: Greenpeace European Unit [O. Reyes, rapporteur], "Sued into silence – How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff): at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US dollar lawsuit in Arizona filed by Pilatus Bank (Greenpeace European Unit [O. Reyes, rapporteur], pp. 9-12); in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*", identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*". If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for

instance, in Ontario, and certain parts of the US.

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be "*deliberately brought in another jurisdiction and enforced across borders*", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*" (Call for applications, note 1, p. 1) Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

*De lege lata*, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

*De lege ferenda*, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with (allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II (see, amongst other sources: Rome II and Defamation: Online Symposium), several thought-provoking options could be explored, amongst which the following two:

## 1st Option: Reverse mirroring Article 7 Rome II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the

law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

## 2nd option: a post-Brexit conceptual loan from English private international law = double actionability

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process (see A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims"). With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law (*Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws,* 9th ed., Swett & Maxwell, 2016, p. 479), is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre* [*Philips v. Eyre* (1870) L.R. 6 Q.B. 1.] despite

being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

"*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done*" (*Philips v. Eyre*, p. 28-29).

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies (*Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111), to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128). Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*" (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479) to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*" (*Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274). Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective.

Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".

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# Insights into ERA Seminar on Privacy and Data Protection with a Specific Focus on "Balance between Data Retention for Law Enforcement Purposes and Right to Privacy" (Conference Report)

*This report has been prepared by* Priyanka Jain*, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.*

***Introduction:***

On 9-11 December 2020, ERA – the Academy of European Law – organized an online seminar on "Privacy and Data Protection: Recent ECtHR & CJEU Case Law". The core of the seminar was to provide an update on the case law

developed by the European Court of Human Rights (ECtHR) and by the Court of Justice of the European Union (CJEU) with relevance for privacy and data protection law since 2019. The key issues discussed were the distinction between the right to privacy and data protection in the jurisprudence of the ECtHR and CJEU, the impact of the jurisprudence on international data transfers, notions of 'essence of fundamental rights' 'personal data processing', 'valid consent' and so on.

***Day 1: Personal Data Protection and right to privacy***

Gloria González Fuster (Research Professor, Vrije Universiteit Brussel (VUB), Brussels) presented on the essence of the fundamental rights to privacy and data protection in the existing legal framework with a specific focus on the European Convention on Human Rights (Art. 8 of ECHR) and the Charter of Fundamental Rights of the EU (Art. 7, Art. 8)

Article 8 of the Convention (ECHR) guarantees the right to respect private and family life. In contrast, Art 52(1) EU Charter recognizes the respect for the essence of the rights and freedoms guaranteed by the Charter. Both are similar, but not identical. This can be validated from the following points:

- As per Art 8 (2) ECHR – there shall be no interference with the exercise of this right except such as in accordance with the law, whereas Art 52 (1) states that any limitation to the exercise of right and freedoms recognized by the Charter must be provided for by law.
- The Art 8 (2) ECHR stresses the necessity in a democratic society to exercise such an interference, whereas Art 52(1) of the EU Charter is subject to the principle of proportionality.
- Respect for the essence of rights and freedoms is mentioned in Art 52 (1) but not mentioned in Art 8 (2).
- Also, Art 8 (2) states that the interference to the right must be only

> allowed in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. At the same time, Article 52 (1) states that any limitations to rights must meet objectives of general interest recognized by the Union or the need to protect others' rights and freedoms.

In the Joined Cases C?293/12 and C?594/12, *Digital Rights Ireland*; the Court addressed the interferences to the rights guaranteed under Articles 7 and 8 caused by the Data Retention Directive. An assessment was carried out as to whether the interferences to the Charter rights were justified as per Article 52(1) of the Charter. In order to be justified, three conditions under Article 52(1) must be fulfilled. The interference must be provided for by law, and there must be respect for the essence of the rights, and it must be subject to the principle of proportionality. Certain limitations to the exercise of such interference/ infringement must be genuinely necessary to meet objectives of general interest. The Directive does not permit the acquisition of data and requires the Member States to ensure that 'appropriate technical and organizational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of data' and thus, respects the essence of the right to privacy and data protection. The Directive also satisfied the objective of general interest as the main aim of the Directive was to fight against serious crime, and it was also proportional to its aim of need for data retention to fight against serious crimes. However, even though the Directive satisfied these three criteria, it did not set out clear safeguards for protecting the retained data, and therefore it was held to be invalid.

It is pertinent to note here that the ECHR does not contain any express requirement to protect the 'essence' of fundamental rights, whereas the Charter does. However, with regard to Art 8 of the ECHR, it aims to prohibit interference or destruction of any rights or freedoms with respect for private and family life. This can be possibly interpreted so as to protect the essence of the fundamental right of private and family life. This is because a prohibition of the destruction of any right would mean affecting the core of the right or compromising the essence

of the right.

Gloria, also examined Article 7 of the Charter, which guarantees a right to respect for private and family life, home and communications, and Article 8, which not only distinguishes data protection from privacy but also lays down some specific guarantees in paragraphs 2 and 3, namely that personal data must be processed fairly for specified purposes. She analyzed these Charter provisions concerning the Regulation (EU) 2016/679 (GDPR). GDPR creates three-fold provisions by imposing obligations on the data controllers, providing rights to data subjects, and creating provision for supervision by data protection authorities.

She also addressed the balance between the right to privacy and the processing of personal data of an individual on one hand and the right to information of the public on the other. Concerning this, she highlighted the interesting decision in C-131/12, *Google Spain*, wherein it was stated that an interference with a right guaranteed under Article 7 and 8 of the Charter could be justified depending on the nature and sensitivity of the information at issue and with regard to the potential interest of the internet users in having access to that information. A fair balance must be sought between the two rights. This may also depend on the role played by the data subject in public.

It was also discussed in the judgments C-507/17, *Google v CNIL*; and Case C-136/17 that a data subject should have a "right to be forgotten" where the retention of such data infringes the Directive 95/46 and the GDPR. However, the further retention of the personal data shall only be lawful where it is necessary for exercising the right of freedom of expression and information. The ruling was on the geographical reach of a right to be forgotten. It was held that it is not applicable beyond the EU, meaning that Google or other search engine operators are not under an obligation to apply the 'right to be forgotten' globally.

In the next half of the day, Roland Klages, Legal Secretary, Chambers of First Advocate General Szpunar, Court of Justice of the European Union, Luxembourg, presented on the topic: "The concept of consent to the processing of personal data". He started with a brief introduction of GDPR and stated that there is no judgment on GDPR alone as it has been introduced and implemented recently, but

there are judgments based on the interpretation of Directive 95/46 and the GDPR simultaneously.  He commented on the composition of the ECJ, which sits in the panel of 3,5, 15 (Grand Chamber), or 27 (Plenum) judges. The Grand Chamber comprises a President, vice-president, 3 presidents of a 5th chamber, rapporteur, another 9 judges, appointed based on re-established lists (see Article 27 ECJ RP).

He discussed the following cases in detail:

C – 673/17 (*Planet49*): Article 6(1) (a) GDPR states that the processing of data is lawful only if the data subject has given consent to the processing of personal data for one or more specific purposes. "Consent" of the data subject means any freely given, specific, informed, and unambiguous indication of the data subject's wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.[1] This clearly indicates that consent is valid only if it comes from the active behavior of the user as it indicates the wishes of the data subjects. A consent given in the form of a pre-selected checkbox on a website does not amount to active behavior. It also does not fulfill the requirement of unambiguity. Another important aspect of the ruling was that it does not matter if the information stored or retrieved consists of personal data or not. Article 5(3) of Directive 2002/58/ EC (Directive on privacy and electronic communications)protects the user from interference with their private sphere, regardless of whether or not that interference involves personal or other data. Hence, in this case, the storage of cookies at issue amounts to the processing of personal data. Further, it is also important that the user is able to determine the consequence of the consent given and is well informed. However, in this case, the question of whether consent is deemed to be freely given if it is agreed to sell data as consideration for participation in a lottery is left unanswered.

Similarly, in case C -61/19 (Orange Romania), it was held that a data subject must, by active behavior, give his or her consent to the processing of his or her personal data, and it is upto the data controller, i.e., Orange România to prove this. The case concerns contracts containing a clause stating that the data subject

has been informed about the collection and storage of a copy of his or her identification document with the identification function and has consented thereto. He also discussed other cases such as case C-496/17, Deutsche Post, and C- 507/17, Google (discussed earlier), demonstrating that consent is a central concept to GDPR.

***Day 2: "Retention of personal data for law enforcement purposes."***

On the next day, Kirill Belogubets, Magister Juris (Oxford University), case lawyer at the Registry of the European Court of Human Rights (ECtHR), started with a presentation on the topic**:**

**"Retention of personal data for combating crime."**

Kirill Belogubets discussed the case of *PN v. Germany*. No. 74440/17 regarding the processing of personal identification of data in the context of criminal proceedings. In this case, a German citizen was suspected of buying a stolen bicycle. Authorities collected an extensive amount of data such as photographs, fingerprints, palm prints, and suspect descriptions. It must be noted here that with regard to the right to respect for private life under Article 8 of the ECHR, the interference must be justified and fulfill the test of proportionality, legitimacy, and necessity. The authorities expounded on the likelihood that the offender may offend again. Therefore, in the interest of national security, public security, and prevention of disorder and criminal offenses, it is essential to collect and store data to enable tracing of future offenses and protect the rights of future potential victims. Thus, the collection and storage of data in the present case struck a fair balance between the competing public and private interests and therefore fell within the respondent State's margin of appreciation.

With respect to margin of appreciation, the case of *Gaughran v. The United Kingdom*, no. 45245/15was also discussed. This case pertains to the period of retention of DNA profiles, fingerprints, and photographs for use in pending proceedings. The Court considered storing important data such as DNA samples only of those convicted of recordable offences, namely an offense that is punishable by a term of imprisonment. Having said that, there was a need for the State to ensure that certain safeguards were present and effective, especially in the nature of judicial review for the convicted person whose biometric data and photographs were retained indefinitely.

However, it has been highlighted that the legal framework on the retention of DNA material was not very precise. It does not specifically relate to data regarding DNA profiles and there is no specific time limit for the retention of DNA data. Similarly, the applicant has no avenue to seek deletion because of the absence of continued necessity, age, personality, or time elapsed. This has been laid down in the case of *Trajkovski and Chipovski v. North Macedonia*, nos. 53205/13 and 63320/13.

**Mass Collection and Retention of Communications data**

In the next half, Anna Buchta, Head of Unit "Policy & Consultation", European Data Protection Supervisor, Brussels brought the discussion on Article 7 and 8 of the Charter and Article 8 of the Convention along with the concept of 'essence' of fundamental rights, back to the table. With regard to this discussion, she described the case C-362/14 *Maximilian Schrems v DPC*, which highlights that 'any legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.' In this context, EU member states must recognize the confidentiality of communication as a distinct legal right. In this case, it was the first time where a Directive was invalidated due to non-confirmation with the ECHR. It was laid down that the safe harbor principles issued under the Commission Decision 2000/520, **pursuant to** Directive 95/46/EC  does not comply with its Article 25(6), which ensures a level of

protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order. The Decision 2000/520 does not state that the United States, infact, 'ensures' an adequate level of protection by reason of its domestic law or its international commitments.

**Traffic and Location data**

She also commented on the indefinite retention of data, which might lead to a feeling of constant surveillance leading to interference with freedom of expression in light of CJEU cases C-203/15 and C-698/15 *Sverige and Watson*. In these cases, the Court agreed that under Article 15(1) of the Directive 2002/58 / EC, data retention could be justified to combat serious crime, national security, protecting the constitutional, social, economic, or political situation of the country and preventing terrorism. However, this must only be done if it is limited to what is strictly necessary, regarding categories of data, means of communication affected, persons concerned, and retention period. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the transmission of a communication without prejudice to paragraphs 2, 3, and 5 of this Article 6 and Article 15(1) of the Directive. This was reiterated in C-623/17 *Privacy International.* It must be noted here that these data can be retained only if there is evidence that these data constitute an identifiable link, at least an indirect one, to criminal activities. Data with regard to the geographical location again requires objective factors. It must be retained if there exists a risk of criminal activities in such areas. These locations may correspond to places that are vulnerable to the commission of serious offenses, for instance, areas that receive a large number of people, such as airports, train stations, toll-booth areas, etc.

The Court differentiated between generalized and targeted retention of data. Real-time collection and indeterminate storage of **electronic communications surveillance involving** traffic and location data of specific individuals constitute targeted retention. In this context, the case of C?511/18, C?512/18 and C?520/18,

*La Quadrature du Net and Others* were also relied upon, with a focus on the following findings:

Targeted real-time collection of traffic and location data by electronic communication providers that concerns exclusively one or more persons constitutes a serious interference that is allowed where:

- Real-time collection of traffic and location data is limited to persons in respect of whom there is a valid reason to suspect that they are directly or indirectly involved in terrorist activities. With regard to persons falling outside of that category, they may only be the subject of non-real-time access.
- A court or an administrative authority must pass an order after prior review, allowing such real-time collection. This must be authorized only within the limits of what is strictly necessary. In cases of duly justified urgency, the review must take place within a short time.
- A decision authorizing the real-time collection of traffic and location data must be based on objective criteria provided for in the national legislation, which must clearly define the circumstances and conditions under which such collection may be authorized.
- The competent national authorities undertaking real-time collection of traffic and location data must notify the persons concerned, in accordance with the applicable national procedures.

Last but not least, the EU Commission as well as the CJEU have started looking at the national laws of data retention and specifically inclined to define national security in manner so as to increase their own role in the area. However, data retention schemes are divergent across the Member States. It is essential to create clearer and more precise rules at the European level to enable the Courts to develop the best ways to strike a balance between the interactions of privacy rights with the need to tackle serious crime. The different legal rules in the area of data retention restricted cooperation between competent authorities in cross-border cases and affected law enforcement efforts. For instance, some Member States have specified retention periods, whereas some do not, a fact from which

conflict-of-laws problems may arise. While some Member States for example Luxembourg precisely define 'access to data', there are Member States, which do not. This was pointed out by the EU Council in the conclusion of the data retention reflection process in May 2019, wherein it was emphasized that there is a need for a harmonised framework for data retention at EU level to remedy the fragmentation of national data retention practices.

***Day 3: Data Protection in the Global Data Economy***

The discussion of the third day started with a presentation by Professor Herwig Hofmann, Professor of European and Transnational Public Law, the University of Luxembourg on the well-known *Schrems*cases namely, C-362/14, *Schrems I*; C-498/16, *Schrems vs Facebook;* and C-311/18, *Schrems II;*which involves transatlantic data transfer and violation of Article 7 and 8 of the Charter. In the clash between the right to privacy of the EU and surveillance of the US, the CJEU was convinced that *any* privacy agreements could not keep the personal data of EU citizens safe from surveillance in the US, so long as it is processed in the US under the country's current laws. The guidelines in the US for mass surveillance did not fit in the EU. Therefore, privacy shield could not be maintained.

He also highlighted that international trade in today's times involves the operation of standard contractual terms created to transfer data from one point to another. Every company uses a cloud service for the storage of data, which amounts to its processing. It is inevitable to ensure transparency from cloud services. The companies using cloud services must require transparency from cloud services and confirm how the cloud service will use the data, where would the data be stored or transferred.

In the last panel of the seminar Jörg Wimmers, Partner at TaylorWessing, Hamburg, spoke about the balance between **Data protection and copyright.**

The case discussed in detail was C-264/19 *Constantin Film Verleih GmbH***,** which was about the prosecution of the user who unlawfully uploaded a film on

YouTube, i.e., without the copyright holder's permission. In this regard, it was held that the operator of the website is bound only to provide information about the postal address of the infringer and not the IP address, email addresses, and telephone numbers. The usual meaning of the term 'address' under the Directive 2004/48 (Directive on the enforcement of Intellectual Property rights) refers only to the postal address, i.e., the place of a given person's permanent address or habitual residence. In this context, he also commented on the extent of the right to information guaranteed under Article 8 of the said Directive 2004/48. This was done by highlighting various cases, namely, C-580/13, *Coty* and C-516/17, *Spiegel Online*, noting that Article 8 does not refer to that user's email address and phone number, or to the IP address used for uploading those files or that used when the user last accessed his account. However, Article 8 seeks to reconcile the right to information of the rightholder/ intellectual property holder and the user's right to privacy.

***Conclusion:***

To conclude, the online seminar was a total package with regard to providing a compilation of recent cases of the ECtHR and CJEU on data protection and the right to privacy. A plethora of subjects, such as the balance between data protection and intellectual property rights, privacy and data retention, and respect for the essence of fundamental rights to privacy, were discussed in detail. The data retention provision established by the new Directive on Privacy and Electronic Communications may be an exception to the general rule of data protection, but in the current world of Internet Service providers and telecommunication companies, it may not be easy to ensure that these companies store all data of their subscribers. Also, it is important to ensure that data retained for the purpose of crime prevention does not fall into the hands of cybercriminals, thereby making their jobs easier.

[1] Article 4 No.11 GDPR

# Walking Solo – A New Path for the Conflict of Laws in England



*Written by Andrew Dickinson (Fellow, St Catherine's College and Professor of Law, University of Oxford)*

The belated conclusion of the UK-EU Trade and Cooperation Agreement did not dampen the impact of the UK's departure from the European Union on judicial co-operation in civil matters between the UK's three legal systems and those of the 27 remaining Members of the Union. At the turn of the year, the doors to the UK's participation in the Recast Brussels I Regulation and the 2007 Lugano Convention closed. With no signal that the EU-27 will support the UK's swift readmission to the latter, a new era for private international law in England and Wales, Scotland and Northern Ireland beckons.

The path that the United Kingdom has chosen to take allows it, and its constituent legal systems, to shape conflict of laws rules to serve the interests that they consider important and to form new international relationships, unfettered by the EU's legislative and treaty making competences. This liberty will need to be exercised wisely if the UK's legal systems are to maintain their positions in the global market for international dispute resolution, or at least mitigate any adverse impacts of the EU exit and the odour of uncertainty in the years following the 2016 referendum vote.

As the guidance recently issued by the Ministry of Justice makes clear, the UK's detachment from the Brussels-Lugano regime will magnify the significance of the rules of jurisdiction formerly applied in cases falling under Art 4 of the Regulation (Art 2 of the Convention), as well as the common law rules that apply to the recognition and enforcement of judgments in the absence of a treaty relationship.

This is a cause for concern, as those rules are untidy and ill-suited for the 21st century.

If the UK's legal systems are to prosper, it is vital that they should not erase the institutional memory of the three decades spent within the EU's area of justice. They should seek to capture and bottle that experience: to see the advantages of close international co-operation in promoting the effective resolution of disputes, and to identify and, where possible, replicate successful features of the EU's private international law framework, in particular under the Brussels-Lugano regime.

With these considerations in mind, I began the New Year by suggesting on my Twitter account (@Ruritanian) ten desirable steps towards establishing a more effective set of conflict of laws rules in England and Wales for civil and commercial matters. Ralf Michaels (@MichaelsRalf) invited me to write this up for ConflictofLaws.Net. What follows is an edited version of the original thread, with some further explanation and clarification of a kind not possible within the limits of the Twitter platform. This post does not specifically address the law of Scotland or of Northern Ireland, although many of the points made here take a broader, UK-wide view.

First, a stand-alone, freshly formulated set of rules of jurisdiction replacing the antiquated service based model. That model (Civil Procedure Rules 1998, rr

6.36-6.37 (**CPR**) to be read with Practice Direction 6B) dates back to the mid-19th century and has only been lightly patched up, albeit with significant *ad hoc* extensions, since then. The new rules should demand a significant connection between the parties or the subject matter of the claim and the forum of a kind that warrants the exercise of adjudicatory jurisdiction. In this regard, the Brussels-Lugano regime and the rules applied by the Scots courts (Civil Jurisdiction and Judgments Act 1982, Sch 8) provide more suitable starting points than the grounds currently set out in the Practice Direction.

Taking this step would allow the rules on service to focus on the procedural function of ensuring that the recipient of a claim form or other document is adequately informed of the matters raised against it. It would enable the cumbersome requirement to obtain permission to serve a claim form outside England and Wales to be abolished, and with it the complex and costly requirement that the claimant show that England and Wales is the 'proper place' (ie clearly the appropriate forum) for the trial of the action. Instead, the claimant would need to certify that the court has jurisdiction under the new set of rules (as has been the practice when the rules of the Brussels-Lugano apply) and the defendant would need to make an application under CPR, Part 11 if it considers that the English court does not have or should not exercise jurisdiction. The claimant would bear the burden of establishing jurisdiction, but the defendant would bear the burden of persuading the court that it should not be exercised. This brings us to the second point.

Secondly, stronger judicial (or legislative) control of the expensive and resource eating Goffian *forum conveniens* model. Senior judges have repeatedly noted the excesses of the *Spiliada* regime, in terms of the time, expense and judicial resource spent in litigating questions about the appropriate forum (see, most recently, Lord Briggs in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, [6]-[14]), yet they and the rule makers have done little or nothing about it. In many ways, the model is itself to blame with its wide ranging evaluative enquiry and micro-focus on the shape of the trial. Shifting the onus to the defendant in all cases (see above) and an emphasis on the requirement that another forum be 'clearly [ie manifestly] more appropriate' than England would be useful first steps to address the excesses, alongside more pro-active case management through (eg) strict costs capping, a limit in the number of pages of evidence and submissions for each side and a greater willingness to require the losing party to

pay costs on an indemnity basis.

Thirdly, a clipping of the overly active and invasive wings of the anti-suit injunction. English judges have become too willing to see the anti-suit injunction, once a rare beast, as a routine part of the judicial arsenal. They have succumbed to what I have termed the 'interference paradox' ((2020) 136 Law Quarterly Review 569): a willingness to grant anti-suit injunctions to counter interferences with their own exercise of jurisdiction coupled with an overly relaxed attitude to the interferences that their own orders wreak upon foreign legal systems and the exercise of constitutional rights within those systems. Moreover, the grounds for granting anti-suit injunctions are ill defined and confusing – in this regard, the law has travelled backwards rather than forwards in the past century (another Goffian project). Much to be done here.

Fourthly, steps to accede to the Hague Judgments Convention and to persuade others to accede to the Hague Choice of Court Convention. Although the gains from acceding to the Judgments Convention may be small, at least in the short term, it would send a strong signal as to the UK's wish to return to centre stage at the Hague Conference, and in the international community more generally, and may strengthen its hand in discussions for a future Judgments Convention. By contrast, the success of the Hague Choice of Court Convention is of fundamental importance for the UK, given that it wishes to encourage parties to choose its courts as the venue for dispute resolution and to have judgments given by those courts recognised and enforced elsewhere.

Fifthly, a review of the common law rules for the recognition and enforcement of judgments, which are in places both too broad and too narrow. These rules have been little changed since the end of the 19$^{th}$ century. They allow the enforcement of foreign default judgments based only on the defendant's temporary presence in the foreign jurisdiction at the time of service, while treating as irrelevant much more substantial factors such as the place of performance of a contractual obligation or place of commission of a tort (even in personal injury cases). Parliamentary intervention is likely to be needed here if a satisfactory set of rules is to emerge.

Sixthly, engagement with the EU's reviews of the Rome I and II Regulations to test if our choice of law rules require adjustment. The UK has wisely carried forward the rules of applicable law contained in the Rome Regulations. Although

not perfect, those rules are a significant improvement on the local rules that they replaced. The EU's own reviews of the Regulations (Rome II currently underway) will provide a useful trigger for the UK to re-assess its own rules with a view to making appropriate changes, whether keeping in step with or departing from the EU model.

Seventhly, statutory rules governing the law applicable to assignments (outside Rome I) and interests in securities. The UK had already chosen not to participate in the upcoming Regulation on the third party effects of assignments, but will need to keep a close eye on the outcome of discussions and on any future EU initiatives with respect to the law applicable to securities and should consider legislation to introduce a clear and workable set of choice of law rules with respect to these species of intangible property. These matters are too important to be left to the piecemeal solutions of the common law.

Eighthly, a measured response to the challenges presented by new technology, recognising that the existing (choice of law) toolkit is fit for purpose. In December 2020, the UK Law Commission launched a consultation on Smart Contracts with a specific section (ch 7) on conflict of laws issues. This is a welcome development. It is hoped that the Law Commission will seek to build upon existing solutions for offline and online contracts, rather than seeking to draw a sharp distinction between 'smart' and 'backward' contracts.

Ninthly, changes to the CPR to reduce the cost and inconvenience of introducing and ascertaining foreign law. The English civil procedure model treats foreign law with suspicion, and places a number of obstacles in the way of its effective deployment in legal proceedings. The parties and their legal teams are left in control of the presentation of the case, with little or no judicial oversight. This approach can lead to uncertainty at the time of trial, and to the taking of opportunistic points of pleading or evidence. A shift in approach towards more active judicial case management is needed, with a move away from (expensive and often unreliable) expert evidence towards allowing points of foreign law to be dealt with by submissions in the same way as points of English law, especially in less complex cases.

Tenthly, measures to enhance judicial co-operation between the UK's (separate) legal systems, creating a common judicial area. It is a notable feature of the Acts of Union that the UK's constituent legal systems stand apart. In some areas

(notably, the recognition and enforcement of judgments – Civil Jurisdiction and Judgments Act 1982, Sch 6 and 7), the rules operate in a way that allows the recognition of a single judicial area in which barriers to cross-border litigation have been removed. In other respects, however (for example, the service of documents, the taking of evidence and the ascertainment of foreign law), the UK's legal systems lack the tools that would facilitate closer co-operation and the more effective resolution of disputes. The UK's legal systems should consider what has worked for the EU, with its diverse range of legal systems, and for Commonwealth federal States such as Australia and work together to adopt comprehensive legislation on a Single UK Judicial Area.

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# Symeonides' 30th (and last) Annual Survey of Choice of Law

Symeon Symeonides, without doubt the doyen of US conflict of laws, just published what he says is the last of his annual surveys of American Choice of Law. (The series will be continued by John F. Coyle, William S. Dodge, and Aaron D. Simowitz, suggesting it takes three of our most eminent scholars to replace Symeonides.)

As everyone in our discipline knows, reliably, at the end of the year, Symeon has posted his survey of conflict-of-laws decisions rendered over the year, according to Westlaw. He would assemble the most important decisions (of which he finds a lot), organize them around themes, and comment on them, always with (sometimes admirable) restraint from criticism. Anyone who has ever tried to survey the case law of an entire year in a jurisdiction knows how much work that is. (We at Max Planck, with IPRspr, certainly do.)

The service rendered to the discipline is invaluable. Conflict-of-laws opinions are

hard to track, not least because courts themselves do not always announce them as such, and because they cover all areas of the law. Moreover, conflict of laws in the United States remains disorganized, with different states following different methods. (Symeon helpfully provides a table listing each state's methodological approach.)

Incredibly, this is Symeon's 30th survey in 34 years. In this one, he uses the occasion to ruminate about what the 30 years have taught him: reading all the cases, and not missing the forest for the trees, enabled him (and thereby us) to gain a truer view of the conflicts landscape.( Of course, Symeonides also compiled his superb knowledge of the case law in his Hague Lectures on the past, present, and future of the Choice-of-Law Revolution (republished as a book) and his book on (US) choice of law in the series of Oxford Commentaries.) Such surveying shows that some of our assumptions are dated, as he showed in two special surveys on product liability and more generally cross-border torts. And it shows, as he beautifully puts it, that judges are not stupid, just busy.  Which is one of the reasons why the practice of conflicts owes such an amount of gratitude for these surveys.

Our discipline has seen a theoretical revival over the last ten or so years. A discipline once viewed as overly technical, doctrinal and untheoretical (a "dismal swamp", in Dean Prosser's much-cited words) is now being analyzed with newly-found theoretical and interdisciplinary interest – from economic analyses to political theory, philosophy, and even gender theory. The risk of such work is always to disentangle from the actual practice of the discipline, and thereby to lose what is arguably one of conflicts' greatest assets: the concrete case. Symeonides (himself no enemy to methodological and sometimes theoretical discussions) has, with his annual surveys, made sure that such theories could always remain tied to the actual practice. For this, he deserves gratitude not only from practice but also from theory of private international law. His oeuvre is, of course, much much richer than the surveys. But even if he had written nothing beyond the surveys (and truth be told, it is not fully clear how he ever managed to write so much beyond them), his stature would have been earned.

The last twenty of Symeonides' surveys have been compiled in a three volume edition published by Brill, a flyer allows for a 25% discount. While you wait for delivery (or maybe for approval of the loan you need to afford the books), you may want to download his lates survey, read Symeonides' own thirty-year

retrospective in the beginning, and marvel.

*Correction: In the original version of this post I said that Symeonides will be replaced by four scholars. I have now been informed that Melissa Tatum will not join the group of authors for the annual surveys, leaving the list of the other three.*

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# The CJEU Shrems cases – Personal Data Protection and International Trade Regulation

*Carmen Otero García-Castrillón, Complutense University of Madrid, has kindly provided us with her thoughts on personal data protection and international trade regulation. An extended version of this post will appear as a contribution to the results of the Spanish Research Project lead by E. Rodríguez Pineau and E. Torralba Mendiola "Protección transfronteriza de la transmisión de datos personales a la luz del nuevo Reglamento europeo: problemas prácticos de aplicación" (PGC2018-096456-B-I00).*

***The regulatory scenario***

1. In digital commerce times, it seems self-evident that personal data protection and international trade in goods and services are intrinsically connected. Within this internet related environment personal data can be accessed, retrieved, processed and stored in a number of different countries. In this context, the legal certainty for economic actors, and even the materialisation or continuation of commercial transactions requires taking into consideration both, the international jurisdiction and

the applicable law issues on the one hand, and the international trade regulations covering these commercial transactions on the other hand.

Too much personal data protection can excessively restrict international trade, especially in countries with less developed economies for which the internet is considered an essential sustainable development tool. Little protection can prejudice individual fundamental rights and consumers' trust, negatively affecting international trade also. Hence, some kind of balance is needed between the international personal data flux and the protection of these particular data. It must be acknowledged that, summarising, whilst in a number of States personal data and their protection are fundamental rights (expressly in art. 8 CFREU, and as a part of the right to private and family life in art. 8 ECHR), in others, though placed in the individual's privacy sphere (in the light of art. 12 UDHR), it is basically associated to consumer's rights.

2. The only general international treaty specifically dealing with personal data protection is the Convention 108 + of the Council of Europe, for the protection of individuals with regard to the processing of personal data. The Convention defines personal data as any information relating to an identified or identifiable individual (art. 2.a) without an express and formal recognition of its fundamental right character. The Convention, whose *raison d'etre* was justified for need to avoid that the personal data protection controls interfere with the free international flow of information (Explanatory Report, para. 9), "should not be interpreted as a means to erect non-tariff barriers to international trade" (Explanatory Report, para. 25). Its rules recognise the individual's rights to receive information on the obtaining and the treatment of their data, to be consulted and oppose that treatment, to get the data rectified or eliminated and to count, for all this, with the support of a supervisory authority and judicial and non-judicial mechanisms (arts. 8, 9 and 12). On the basis of these common standards, member States agree not to prohibit or subject to special authorisations the personal data flows as long as the transfer does not imply a serious risk of circumventing them (art. 14). Moreover, the agreed rules can be exempted when it is a "necessary and proportionate" measure "in a democratic society" to protect individual rights and "the rights and fundamental freedoms of

others", particularly "freedom of expression" (art. 11). Presently, 55 States are parties to this Convention, including the EU but not the US, that have an observer status.

Along these lines, together with other Recommendations, the OECD produced a set of *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (11.7.2013; revising the 1980 version). After establishing general principles of action as minimum standards, it was concluded that the international jurisdiction and the applicable law issues could not be addressed "at that stage" provided the "discussion of different strategies and proposed principles", the "advent of such rapid changes in technology, and given the non-binding nature of the Guidelines" (Explanatory Memorandum, pp. 63-64).

On another side, the World Trade Organisation (WTO) administers different Agreements multilaterally liberalising international trade in goods and services that count with its own dispute settlement mechanism. In addition, States and, of course, the EU and the US, follow the trade bilateralism trend in which data protection and privacy has begun to be incorporated. Recently, this issue has also been incorporated into the WTO multilateral trade negotiations on e-commerce.

### *CJEU Schrems' cases*

3. Last 16 July, in *Schrems II* (C-311/18), the CJEU declared the invalidity of the Commission Decision 2016/1250 on the adequacy of the protection provided by the Privacy Shield EU–US, aimed at allowing the personal data transfer to this country according to the EU requirements, then established by Directive 95/46 and, from 25 May 2018, by the Regulation 2016/679 (GDPR). On the contrary, Commission Decision 2010/87 (2016/2297 version) on the authorisation of those transfers through contractual clauses compromising data controllers established in third countries is considered to be in conformity with EU law.

In a nutshell, in order to avoid personal data flows to "data heavens" countries, transfers from the EU to third States are only allowed when there are guarantees of compliance with what the EU considers to be an adequate protective standard. The foreign standard is considered to be adequate if it shows to be substantially equivalent to the EU's one, as interpreted in the light of the EUCFR (*Schrems II* paras. 94 and 105). To this end, there are two major options. One is obtaining an express Commission adequacy statement (after analysing foreign law or reaching an agreement with the foreign country; art. 45 GDPR). The other is resorting to approved model clauses to be incorporated in contracts with personal data importers, as long as effective legal remedies for data subjects are available (art. 46.1 and 2.c GDPR). According to the Commission, this second option is the most commonly used (COM/2020/264 final, p. 15).

4. In *Schrems II* the CJEU confirms that, contrary to the Privacy Shield Decision, the US data protection regime is not equivalent to EU's one because it allows public authorities to access and use those data without being subject to the proportionality principle (para. 183; at least in some surveillance programs) and, moreover, without recognising data owners their possibility to act judicially against them (para. 187). It never rains but what it pours since, in 2015, a similar reasoning led to the same conclusion in *Schrems I* (C-362/14, 5.6.15) on the Safe Harbour Decision (2000/520), preceding the Privacy Shield one. Along these lines, another preliminary question on the Privacy Shield Decision is pending in the case *La cuadrature du net,* where, differing from *Schrems II*, its compatibility with the CFREU is expressly questioned (T-738/16). In this realm, it seems relevant noting that the CJEU has recently resolved the *Privacy International* case, where, the non-discriminated capture of personal data and its access by national intelligence and security agencies for security reasons, has been considered contrary to the CFREU unless it is done exceptionally, in extraordinary cases and in a limited way (C-623/17, para. 72). Given the nature of the issue at hand, a similar Decision could be expected in the *La cuadrature du net* case; providing additional reasons on the nullity of the Privacy Shield Decision, since it would also contravene the CFREU. Moreover, all this could eventually have a cascading effect on the Commission's adequacy Decisions regarding other

third States (Switzerland, Canada, Argentina, Guernsey, Isle of Man, Jersey, Faeroe Islands, Andorra, Israel, Uruguay, New Zealand and Japan).

5. As to the contractual clauses, beyond confirming the Commission analysis on their adequacy in this case, the CJEU states that it is necessary to evaluate the data access possibilities for the transferred country public authorities according to that country national law (para. 134). At the end of the day, EU Data Protection authorities have to control the risks of those authorities' actions not conforming with EU standards, as much as the capability of the contractual parties to comply with the contractual clause as such. If the risk exists, the transfers have to be prohibited or suspended (para.135).

6. The EU personal data protection norms are imperative and apply territorially (art. 3 GDPR; Guidelines 3/18 EDPB version 2.1, 7.1.2020 and CJEU C-240/14, *Weltimmo*). Therefore, data "imports" are not regulated and the "exports" are subject to the condition of being done to a country where they receive EU equivalent protection. In the light of CJEU case law, the measures to watch over the preservation of the EU standard are profoundly protective, as could be expected provided the fundamental rights character of personal data protection in the EU (nonetheless, many transfers have already taken place under a Decision now declared to be void).

Hence, once a third country legislation allows its public authorities to access to personal data -even for public or national security interests- without reaching the EU safeguards level, EU Decisions on the adequacy of data transfers to those countries would be contrary to EU law. In similar terms, and despite the recent EDPB Recommendations (01 and 02/20, 10.11.2020), one may wonder how the contracts including those authorised clauses could scape the prohibition since, whatever the efforts the importing parties may do to adapt to the EU requirements (as Microsoft has recently announced regarding transfers to the US;

19.11.2020), they cannot (it is not in their hands) modify nor fully avoid the application of the corresponding national legislation in its own territory.

As a result, the companies aiming to do business in or with the EU, do not only have to adapt to the GRDP, but not to export data and treat and store them in the EU (local facilities). This entails that, beyond the declared personal data international transferability (de-localisation), *de facto*, it seems almost inevitable to "localise" them in the EU to ensure their protection. To illustrate the confusion created for operators (that have started to see cases been filed against them), it seems enough to point to the EDPB initial reaction that, whilst implementing the *Strategy for EU institutions to comply with "Schrems II" Ruling*, "strongly encourages … to avoid transfers of personal data towards the United States for new processing operations or new contracts with service providers" (Press Release 29.10.2020).

***Personal data localisation and international trade regulation***

7. There is a number of national systems that, one way or another, require personal data (in general or in especially sensitive areas) localisation. These kinds of measures clearly constitute trade barriers hampering, particularly, international services' trade. Their international conformity relies on the international commitments that, in this case, are to be found in the WTO Agreements as much as in the bilateral trade agreements if existing. The study of this conformity merits attention.

8. From the EU perspective, as an initial general approach it must be acknowledged that, within the WTO, the EU has acquired a number of commitments including specific compromises in trans-border trade services in the data process, telecommunication and (with many singularities) financial sectors. Beyond the possibility of resorting to the allowed exceptions, the "localisation" requirement could eventually be infringing these compromises (particularly, arts. XVI and/or XVII GATS).

Regarding EU bilateral trade agreements, some of the already existing ones and others under negotiation include personal data protection rules, basically in the e-commerce chapters (sometimes also including trade in services and investment). Together with the general free trade endeavour, the agreements recognise the importance of adopting and maintaining measures conforming to the parties' respective laws on personal data protection without agreeing any substantive standard (i.e. Japan, Singapore). At most, parties agree to maintain a dialog and exchange information and experiences (i.e. Canada; in the financial services area expressly states that personal data transfers have to be in conformity with the law of the State of origin). For the time being, only the Australian and New Zealand negotiating texts expressly recognise the fundamental character of privacy and data protection along with the freedom of the parties to adopt protective measures (international transfers included) with the only obligation to inform each other.

### *Concluding remarks*

9. As the GDPR acknowledges "(F)lows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data." (Recital 101). In facing this challenge, *Schrems II* confirms the unilaterally asserted extraterritoriality of EU personal data protection standards that, beyond its hard and fully realistic enforcement for operators abroad, constitute a trade barrier that could be eventually infringing its WTO Agreements' compromises. Hence, in a digitalised and globally intercommunicated world, the EU personal data protection standards contribute to feeding the debate on trade protectionism. While both the EU and the US try to expand their respective protective models through bilateral trade agreements, multilaterally -among other initiatives involving States and stakeholders, without forgetting the role of technology (*privacy by design*)- it will be very interesting to see how the on-going WTO negotiations on e-commerce cover privacy and personal data protection in international trade data flows.

# The Global struggle towards affordable access to justice

**The Global struggle towards affordable access to justice: Dutch baby steps towards a more open legal market**

*Written by Jos Hoevenaars, Erasmus University Rotterdam (postdoc researcher ERC project Building EU Civil Justice)*

In a global context of civil justice in crisis (Zuckerman) and a legal professional under pressure to adjust to the rapidly changing legal landscape (Susskind), experiments, adjustments and transformations in the way justice is done are an almost daily occurrence. Last week, the Dutch Bar Association announced an experiment to (slightly) open up the legal market in the Netherlands.

**Effective yet affordable legal representation**

The administration of (civil) justice remains an expensive practice, both in terms of public spending on the courts and publicly funded legal aid, as well as for those seeking justice. In most jurisdictions, access to justice remains a far cry from reality for large sections of society. Effective yet affordable legal representation has long been one of the most important stumbling blocks, and it goes without saying that in cross-border cases these costs only increase, while self-presentation – even if allowed – is often illusory.[1] With high and unpredictable lawyer fees as one of the most prevalent impediments to access, there have been many attempts at transforming the market for legal representation.

On the side of the legal system, we have seen moves away from strict legal representation requirements by a lawyer towards more self-representation and 'do-it-yourself-justice', taking lawyers out of the equation altogether (a practice leading to some disastrous results in some places). And, in response to the

resulting challenges faced by litigants in person, we see movements in the direction of permitting for different forms legal representation, such as the so-called 'McKenzie friends' in UK courts, or the 'Lay Assistant Scheme' in Singapore, that allow for non-lawyers to be present in court to assist self-representing litigants (to a limited extent).

If we add to this the growing market of private dispute resolution as well as the tectonic shifts that are to be expected from the technological innovations (in both legal aid provisions and the digitalization of court procedures) we can see how such moves are likely small steps on a long and winding road of radical transformations of the legal profession, and likely of legal markets and the justice system as a whole. In the Dutch context, we witnessed one of those small steps last week.

**Burgeoning shifts in the Dutch legal market**

On December 3rd the Dutch Bar Association (NOvA) announced an experiment to give more leeway to lawyers from legal assistance insurers and claims settlement offices, by letting lawyers not employed by a law firm represent clients in court. As in many other legal systems, the legal market in the Netherlands has long been a hermetically sealed bulwark. While in large parts of the Dutch legal system assistance by a lawyer is mandatory, litigation with the use of a lawyer is only allowed if that lawyer is employed firm that is owned by layers. Legal departments of service providers such as accountancy organizations and claims settlement offices are therefore sidelined in court. In this recent move, however, the bar association gave the green light to the Hague legal aid provider SRK, a company that is not owned by lawyers, to offer lawyers' services to people who are uninsured – a practice that up until now was restricted. This move is heralded as a crucial first step to break open the strictly regulated legal market in the Netherlands.

**Bar under pressure**

The move does not come as a complete surprise, NOvA has been under growing pressure by the Dutch Authority for Consumers and Markets (ACM) to adjust its professional rules because they may frustrate market forces. In February of this year, rather than taking action directly, the ACM gave the bar association a last chance to adjust its rules itself, while emphasizing that it could still conduct an

investigation if there was reason to do so.

This pressure resulted from a request by legal aid provider SRK. The company wants to have its lawyers provide services to clients without legal expenses insurance through its subsidiary company BrandMR. However, this would go directly against NOvA rules, which stipulate, among other things, that lawyers may provide their services only while employed by an office that is owned by lawyers. This rule is meant to prevent lawyers from being guided by business interests rather than those of their clients.

There is one exception to this rule: lawyers may be employed by a (non-lawyer owned) legal expenses insurer, provided they work exclusively for insured persons, which is the practice of SRK. However, by also catering to non-insured persons SRK would violate that principle. With BrandMR, SRK targets the market of people who earn too much for subsidized legal aid yet have no legal aid insurance. According to the legal aid provider, about 25% of the Dutch population, especially young people, avoid legal assistance because they are not insured and consider the costs of a lawyer too high and unpredictable.

Since October of this year, and in defiance of the Bar's rules, people without insurance can turn to SRK if they have a conflict. Under the BrandMR label, SRK offers them legal assistance at a fixed price, instead of the hourly rate that law firms charge. SRK director Peter Leermakers says he 'supports' all the rules of the legal profession, but not this one. 'Our lawyers have been allowed to work for people with legal expenses insurance for over 15 years. Then why not for people without insurance? Why should they suddenly no longer be independent? ' He argues that the independence of the lawyers at SRK is guaranteed by an internal committee, which is assisted by two lawyers who previously were acting deputies of NOvA.

**Political support**

There has been political support for for SRK's attempt to stretch the rules for the legal profession in the Netherlands. Minister Sander Dekker of Legal Protection (VVD) has submitted a bill to allow experiments in the Dutch legal system. He wants to offer citizens more flexible access to justice and reduce the costs of justice through a wide range of potential changes to and shifts in the Dutch justice landscape. He has already indicated several times that he welcomes

initiatives such as those of SRK, and also hinted in the House of possible measures if the bar does not seriously consider how it can help foster new business models in the legal profession.

As described here in an earlier blogpost, the Minister previously clashed with the legal profession about legal aid funding. The government pays lawyers for people who cannot afford it themselves. Lawyers will then receive compensation based on a system of fixed rates for each type of court case. According to many lawyers, these are too low, but Dekker refused to make more money available, eventually leading to a strike by lawyers at the end of 2019.

**A five-year experiment**

The bar association thus yields to heavy pressure from politics, cartel watchdog ACM and non-industry service providers eager to enter the legal market. Although, rather than a full-fledged rule change that would open up the legal market to a host of providers, for the time being the admission of SRK is 'an experiment' with a maximum duration of five years. Service providers other than SRK may also participate, under the watchful eye of the Bar. The experiment is part of a broader investigation into a possible new system of regulations around permitting alternative business structures for lawyers.

The experiment announced by the NOvA must therefore be viewed in that light. "There needs to be movement on this subject somewhere, either by the NOvA, either by the ministry or the ACM," said General Dean of the Dutch Bar Frans Knüppe. "We think it is wise to start the experiment now, and thus gain knowledge and experience on this fundamental issue. We expect that the Minister and ACM will not have to take any steps for the time being." Knüppe emphasized that the NOvA is open to new initiatives, as long as the core values – in this case lawyers' independence – ??are guaranteed.

**International shifts in the legal market**

While the move by the NOvA is only a small step towards rule changes, in terms of corporate structures it could potentially lead to a significant shift in the character of the Dutch legal market. The opening up of commercial opportunities for legal service providers could be part of the solution for the segment of the population that earn too much for subsidized legal aid but are not wealthy enough to employ costly and often unpredictable services of a lawyer without legal aid

insurance.

The changes in the Dutch context do not stand on their own, as we have seen considerable volatility in legal market globally. In the United Kingdom and the United States, established law firms have been facing competition for much longer. The 2011 Legal Services Act in England has made it possible for parties other than lawyers to become co-owners of a law firm. As a result, law firms can collect money from outside the company, at the stock exchange for example. The new law opened the door for non-lawyers such as accountants and bailiffs, as well as supermarkets, to enter the legal market.

It remains to be seen what the impact of this temporary rule change will be on the Dutch legal market. The board of representatives of the NOvA expressed concern that the experiment could potentially lead to shifts in the legal landscape that prove to be irreversible after the five-year experiment. On the other hand, the ACM has applauded the move by the NOvA, yet also questions whether the relaxing of the rules goes far enough.

On request of the Ministry of Justice and Security and the NOvA, the WODC (Research and Documentation Centre) of the Ministry is currently conducting research into the consequences of the admission of alternative business structures in the legal profession.

*[1] Hoevenaars, J. & Kramer, X.E. (2020). Improving Access to Information in European Civil Justice: A Mission (Im)Possible? In Informed Choices in Cross-Border Enforcement. Cambridge: Intersentia*

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# Report on Annual Conference on

# Consumer Law organized by ERA with specific highlights of the recent Representative Actions Directive

*This report has been prepared by* Priyanka Jain*, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.*

**Introduction:**

On 8-9 October 2020, ERA – the Academy of European Law – organized its Annual Conference on European Consumer Law 2020. It provided an insight into the main priorities of the new Consumer Agenda and remarks on key topics such as the impact of Covid-19 on consumer protection, the new Digital Services Act package, and the Collective redress framework in the EU with a specific focus on the new EU Directive on representative actions for the protection of collective interests of consumers. This report starts with an introduction to several presentations given by renowned scholars, followed by an overview of the recent Representative Actions Directive.

**Day 1: The New Consumer Law Updates, digital transition, and green transition**

The New Consumer Agenda, which presents a vision for the EU consumer policy from 2020 to 2025, builds on the 2012 Consumer Agenda (which expires in 2020) was the focus of the first panel. Massimo Serpieri (Deputy Head of Unit, DG Justice and Consumers, European Commission, Brussels) spoke about the action

plan for the next five years to empower European consumers to play an active role in the green and digital transitions. She mentioned how the Agenda also addresses the need to increase consumer protection and resilience during and after the COVID-19 pandemic, which brought significant challenges affecting the daily lives of consumers.

Ursula Pachl (Deputy Director-General, BEUC – The European Consumer Organisation, Brussels) then expanded on the challenges of the COVID-19 outbreak and the need for drawing lessons from the crisis to reshape consumer protection and accelerate the digital and green transition. The core of her presentation was the inevitability of a powerful Competition Law framework for consumer choice, higher quality, and more investments, as well as the need for protecting consumers and ensuring that they have the right to object to decisions made by machines in the arena of automated decision-making.

Teresa Rodríguez de las Heras Ballell (Associate Professor, Carlos III University, Madrid) started the second panel of the discussion by giving a brief background on the new Digital Services Act package, a comprehensive set of rules comprising of the Digital Services Act and Digital Markets Act. They will create a safer and more open digital space, with European values at its core. With this, she addressed the need for updating the E-commerce Directive of the year 2000. The manner in which the E-commerce Directive has been implemented across the EU varies greatly, and national jurisprudence on online liability today remains very fragmented. This fragmentation has created uncertainty in the implementation regime, and it is, therefore, essential to revise the EU liability regime for online intermediaries.

Jan Penfrat (Senior Policy Advisor, EDRi – European Digital Rights, Brussels) proceeded then by highlighting the key issues raised by dominant platforms ahead of the adoption of the new Digital Services Act package. He addressed the main problems with centralized platforms, which dominate the online space, and work on the business model of providing free services in exchange of highly confidential personal data by analyzing Regulation (EU) 2019/1150 on promoting transparency for business users of online intermediation services.

The second half of the first day was dedicated to a discussion on the Green

Transition and how to achieve sustainable consumption. Emmanuelle Maire (Head of Unit, DG Environment, European Commission, Brussels) started the discussion with a comprehensive overview of the European Commission's New Circular Economy Action Plan with a focus on main proposals concerning consumers.

Guaranteeing sustainability at the pre-contractual stage was the focus of the presentation of Petra Weingerl (Assistant Professor, University of Maribor), in which she analyzed the Guidance on implementation of the Unfair Commercial Practices Directive. This was followed by the presentation of Evelyne Terryn (Professor, Catholic University of Leuven), which focused on the topic of promoting sustainable choices at the contractual stage and the "right to repair" under the Sale of Goods Directive.

A discussion was then convened on best practices of the transition to the Circular Economy, in the Member States in Belgium and France by Evelyne Terryn, Slovenia by Petra Weingerl and Sweden by Carl Dalhammar (Associate Professor, International Institute for Industrial Environmental Economics, Lund University) on the need for minimization of waste to achieve a circular economy. The following round table discussion that ensued between Eva Dalenstam (Policy Officer, Circular Economy, DG Environment, European Commission, Brussels), Carl Dalhammar, Margreeth Pape (Programme Manager, Sustainability and Logistics, Thuiswinkel.org) offered an insight into the main challenges posed in the real world while bringing the green and digital transitions together and explained ways to achieve more sustainable e-commerce.

**Day 2: Recent Case Law Update of CJEU and Collective Redress**

The next day's first panel began with a presentation from Massimiliano Puglia (Legal Secretary, Court of Justice of the European Union, Luxembourg), who provided a comprehensive overview of cases involving consumer protection at the CJEU in the past year. He spoke about several important cases involving judicial cooperation in civil matters under Regulation (EU) No. 1215/2012 (C-213/18, easyJet; C-343/19, Verein für Konsumenteninformation ) and protection of consumers against unfair contract terms C?511/17, Lintner; C?260/18, Dziubak; C?125/18, Gómez del Moral Guasch; C-779/18, Mikrokasa and Revenue; C-81/19,

Banca Transilvania).

Christine Riefa (Reader in Law, Brunel University, London) proceeded then with an interesting discussion on the concept of 'vulnerable consumer' and the lack of access to justice to such a consumer who is a weaker party in the justice system.

Stefaan Voet (Associate Professor, Catholic University of Leuven) was then handed the floor to reflect on the final text of the proposed Directive on representative actions for the protection of the collective interests of consumers, which is a part of the 2018 New Deal for Consumers. After providing some brief background, Stefaan Voet focused on four points of the Directive – scope of application, the cross-border element of representative actions, application of private international law, funding, and financing. He analyzed the standing of qualified entities and criteria for recognizing such qualified entities to bring a cross border action under the said draft directive. The Representative Actions Directive (Directive 2020/1828) has now been finalized and published on 25 November 2020.

**Highlights of the Representative Actions Directive**

The recent Directive on representative actions for protecting the collective interests of consumers repeals the earlier Injunctions Directive 2009/22/EC (hereinafter referred to as the Directive) and creates provisions for qualified representative entities, private or public entities to lodge cross-border claims. As per the said Directive, three types of representative entities shall have the standing to bring representative actions on behalf of consumers. These are private representative entities designated in advance by the Member States and placed in a publicly available list, representative bodies designated on an ad hoc basis for a specific action or particular consumer organization, and independent public bodies.

For domestic actions, Member States have to set out proper criteria consistent

with the objectives of the Directive. Accordingly, all entities complying with the requirements of the Directive would have the right to benefit from its regime. The EU legislator offers some flexibility to the Member States regarding the possibility to designate entities on an ad hoc basis for bringing specific representative actions. The proposed Directive allows 'qualified entities' to bring actions against the infringement by traders before the competent court or administrative bodies in other Member Nations. This means that 'qualified entities' have standing before the competent courts or other administrative bodies in all Member Nations to file a representative action. In other words, Member States are bound to accept the legal standing of foreign 'qualified entities' who fulfil the requirements established by their national laws in order to take action, in case an infringement of the collective interests of consumers has a cross-border dimension. Article 4 of the Directive states that cross-border cases can be brought by entities that comply with the following criteria. It must at least have 12 months of activity in protecting consumer's interests; it must be of a non-profit character; its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests. Additionally, it must be independent of third parties whose interests oppose the consumer interest, it must not be subject to an insolvency procedure or declared insolvent, and it must make public disclosure of the information demonstrating compliance of the above.

Additionally, qualified entities from different Member States can also join hands to file a claim before a single court having jurisdiction under relevant EU and national law. It is important to mention here that the requirements of the Directive entail that the statutory purpose of qualified entities demonstrates that they have a legitimate interest in protecting consumer interests. They must demonstrate that they have been functioning in the field of protection of consumer interests for about one year. At the same time, they must be able to bear the costs of the representative proceedings on their own and disclose that they are capable of doing so. The Member States, which designate qualified entities, shall verify whether they continue to fulfil these criteria every five years. If they fail to comply with these criteria, the Member States have the power to revoke their designation. Thus, the standard for determining the capacity of the qualified entity is now the 'economic capability' and not based on the litigant's rights or moral agency. The display of economic capability will require the qualified entities to thrive in the field of consumer protection continuously, and it will not be long before collective redress actions become a means of survival of

these entities.

Further, in the context of cross-border cases, Member States may also designate entities representing consumers from the different Member States. Article 6 of the said Directive allows mutual recognition of legal standing of qualified entities designated in advance in one Member State as per Article 4(1) to seek representative action in another Member State. However, it is important to note that it is yet to be seen how the Directive will be implemented in the Member States.

Finally, in the last presentation of the second day, Alexia Pato (Postdoc Research Fellow, University of McGill, Montreal) addressed the interplay between collective redress and general data protection regulation(GDPR) with a focus on the representation of data subjects under its Article 80. The said provision allows consumer associations to litigate on behalf of data subjects.  She also spoke about the said Representative Actions Directive and that data protection has been added into the scope of the Directive. She pointed out that it will be interesting to see how the Directive will be implemented in the Member States.

To sum up, this two-day event provided an up-to-date insight into the latest policy developments, legislative initiatives, and case law in the field of consumer protection, including related conflict-of-laws issues. The detailed presentations from renowned experts in this field generated a good understanding of several challenges faced by the consumer in the real world and the future consumer agenda to ensure effective consumer protection.

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# Brexit: The Spectre of Reciprocity

# Evoked Before German Courts

*The following post has been written by Ennio Piovesani, PhD Candidate at the Universities of Turin and Cologne.*

While negotiations for an agreement on the future partnership between the EU and the UK are pending, a spectre haunts Europe: reciprocity.

**I. The Residual Role of the Requirement of Reciprocity**

In some EU Member States, provisions of national-autonomous aliens law enshrine the requirement of reciprocity. Those provisions are largely superseded by exceptions established in international law, including international treaties (so-called "diplomatic reciprocity"). EU (primary and secondary) law establishes broad exceptions concerning EU citizens and legal persons based in the EU.

In the context of EU / UK relations, the Withdrawal Agreement relieves UK nationals and legal persons from the requirement of reciprocity in the EU Member States. However, the scope of the exception established by the Withdrawal Agreement is limited in (personal and temporal) scope. An agreement on the future partnership between the EU and the UK could establish "full reciprocity" (Cf. points 29 and 49 of the Political Declaration accompanying the Withdrawal Agreement). Instead, if new arrangements will not be made, at the end of the transition period, in cases not covered by the Withdrawal Agreement, the method of reciprocity might once more play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States.

**II. German Case-Law on Reciprocity with the UK and Civil Procedure**

The spectre of reciprocity, in relations with the UK, was evoked in three recent cases brought before the German courts. The three cases concern provisions of German-autonomous aliens law in the field of civil procedure, which enshrine the requirement of reciprocity.

**1. § 110 ZPO (Security for Court Costs)**

In particular, two of the mentioned cases concern § 110 ZPO. Pursuant to § 110(1) ZPO claimants not (habitually) residing in the EU (or in the EEA) must provide security for court costs (if the defendant requests so). § 110(2) ZPO provides

exceptions to that duty. The claimant is relieved from the duty to provide security if an international treaty so provides (See § 110(2) no 1 ZPO) or if a treaty ensures the enforcement of the decision on court costs (see § 110(2) no 2 ZPO; see also the other exceptions listed in § 110(2), nos 3–5 ZPO).

In 2018 – before the UK's withdrawal from the EU –, in a case brought before the Düsseldorf Regional Court, a German defendant sought a decision ordering the UK claimant to provide security under § 110 ZPO (Düsseldorf Regional Court, interim judgment of 27 Sept 2018 – 4c O 28/12). The Regional Court dismissed the defendant's application, since (at that time) the UK was still an EU Member State. The German court thus shun an investigation as to "whether other international treaties might relieve the claimant from the obligation of providing security for costs after the [UK's] withdrawal".

Subsequently, in 2019 – after the UK's withdrawal from the EU, during the transition period –, a German defendant sought from the Dortmund Regional Court a decision ordering the claimant seated in London to provide security under § 110 ZPO (Dortmund Regional Court, interim judgment of 15 July 2020 – 10 O 27/20). The Regional Court dismissed the defendant's application, noting that – in the light of the legal fiction created by the Withdrawal Agreement – the UK must be considered as an EU Member State until the end of 2020. The German court – like the Düsseldorf Regional Court – shun an investigation as to whether treaties other than the Withdrawal Agreement relieve UK claimants – not habitually residing in the EU (or in the EEA) – from the duty of providing security under § 110 ZPO.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity for the purposes of § 110(2) no 1 ZPO does not exist yet (cf. ECJ, judgment 20 Mar 1997 – C-323/95).

*Addendum: As mentioned above, § 110 ZPO does not apply to claimants habitually residing in the EU or EEA. It is important to underline that this holds true even in the case of UK nationals (habitually) residing in Germany (or in any other EU Member State or in an EEA Member State). It is also important to underline that, if the German-British Convention of 20 Mar 1928 on the conduct of legal proceedings will "revive" in relations between Germany and the UK after the transition period, Art. 14 of that Convention will establish diplomatic reciprocity for the purposes of § 110 ZPO with respect to UK nationals having their*

*"Wohnsitz" (domicile) in Germany. On the latter point see the ECJ's judgment referred to above.*

**2. § 917(2) ZPO (Writ for Pre-Judgment Seizure)**

The third case brought before the German courts concerns § 917(2) ZPO. Pursuant to the first sentence of § 917(2) ZPO, a writ for pre-judgment seizure can be issued if the prospective judgment will have to be enforced abroad and if "reciprocity is not granted" (*i.e.* if an international treaty does not grant that the judgment will be eligible for enforcement in the given foreign country).

In 2019 – before the UK's withdrawal from the EU –, in a case brought before the Frankfurt Higher Regional Court, a German claimant applied for a writ under § 917 ZPO against a UK defendant (Frankfurt Higher Regional Court, judgment of 3 May 2019 – 2 U 1/19). The Higher Regional Court noted that reciprocity under § 917(2) first period ZPO could have been lacking if, after the UK's withdrawal from the EU, the Brussels Ia Regulation would have not been replaced by new arrangements granting the enforcement of (German) judgments in the UK. This notwithstanding, the German court decided not to issue the writ under § 917(2) first period ZPO, since failure to conclude new agreements replacing the Brussels Ia Regulation was (at that time) unlikely. In fact, the court pointed to the then ongoing negotiations between the EU and UK, namely to Art. 67(II) of the draft Withdrawal Agreement (today's Art. 67(1)(a) Withdrawal Agreement), providing for the continued application of the Brussels Ia Regulation in the UK.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity with the UK, for the purposes of § 917(2) ZPO, does not exist yet (unless the 1960 Convention between the UK and Germany for reciprocal recognition and enforcement of judgments – or even the 1968 Brussels Convention – will "revive"). An (albeit limited) exception concerns cases covered by exclusive choice-of-court agreements in favour of German courts falling under the 2005 Hague Convention (in fact, on 28 Sept 2020, the UK has deposited its instrument of accession to the 2005 Hague Convention, which should grant continuity in the application of the same Convention in the UK after the transition period).

**III. Conclusion**

In conclusion, at the end of the transition period, in cases not covered by the

Withdrawal Agreement, unless new arrangements are made, the requirement of reciprocity might play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States, such as Germany.

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# The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector —What Role has Private International Law Played?



**The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector**

**—What Role has Private International Law Played?**

By Zhengxin Huo, Professor of Law, China University of Polit'l Science and Law; Associate Member of International Academy of Comparative Law; Observer of the UNESCO 1970 Convention. Email: zhengxinh@cupl.edu.cn. The author would like to thank Dr. Meng YU for valuable comments.

1. **Introduction**

On 4 December 2020, the Sanming Intermediate People's Court of China's southeastern Province of Fujian rendered a judgment ordering the Dutch defendants to return a stolen 1,000-year-old Buddhist mummy, known as the statue of Zhanggong-zushi, to its original owner: two village committees in the Province within 30 days after the verdict comes into effect. [1]

This is the first time in history that a Chinese court seized jurisdiction over a case

filed by Chinese plaintiffs to repatriate a stolen cultural property illicitly exported. Once published, the judgment has aroused immediate attention both at home and abroad. Given the enormous quantity of Chinese cultural property stolen and illegally exported overseas, the potential influence of the judgment can hardly be overstated. This note focuses on the major legal issues that the Chinese judgment dealt with and attempts to analyse the role of private international law that has played.

## 2. Summary of Facts

Oscar Van Overeem, a Dutch architect, purchased a Buddhist statue for 40,000 Dutch guilders (US $20,500) in 1996 from a collector in Amsterdam who had acquired it in Hong Kong. In 1996, Van Overeem contacted a restorer to repair some chips and cracks in the exterior. When the restorer opened the bottom of the statue, he found two small pillows, and resting on the pillows, the body of a mummified monk. Initial radiocarbon testing found that the body was approximately 900-1000 years old. The statue was taken to the Meander Medical Center in Amersfoort, where a full CT scan was performed and samples taken through endoscopy. The investigative team found scraps of paper on which Chinese characters were written, placed inside the body in the cavities normally containing organs. These identified the Buddhist mummy as the mummy of a monk known as “Zhanggong-zushi”.

In 2014, Van Overeem loaned the statue to the Drents Museum in Assen for an exhibition, “Mummy World,” which traveled to the Hungarian Natural History Museum in the spring of 2015. Press reporting on the Hungarian exhibition alerted the Chinese villagers. Based on photographs from Hungary and archival materials in China, the Chinese villagers believe the statue is the one that have held the mummy of the village’s patriarch, Zhanggong Zushi. The statue was enshrined in the Puzhao Temple, jointly owned by the two villages named “Yunchun” and “Dongpu”, and worshiped by the local residents, for over 1,000 years until it went missing in December 1995.

After an unsuccessful negotiation, the Committee of Yunchun Village and the Committee Dongpu Village sued Van Overeem to demand the statue's return both in Fujian Province of China and in Amsterdam of the Netherlands at the end of 2015,[2] fearing that a statute of limitation might bar their case. Three years later, the Amsterdam District Court made a decision on 12 December 12, 2018, [3] ending one chapter in the legal battle over the statue of Zhanggong-zushi, but failed to resolve a controversial situation or illuminate the path forward for the parties, as the Dutch court did not decide anything about the ownership of the parties.[4] It simply determined not to hear the case, based on its finding that the two village committees did not have standing to sue in the Dutch court.[5]

Against this background, the lawsuit before the Chinese court is more important in terms of legal analysis. According to the information released by the Sanming Intermediate People's Court (the Court), it formally filed the case on 11 December 2015, which then served the Dutch defendants by international judicial cooperation. The Court, thereafter, held the hearings on 26 July and 12 October of 2018 respectively, and publicly pronounced the judgement on 4 December 2020.[6] Lawyers of both sides were present both at the hearings and the pronouncement of the judgement. From the perspective of private international law, the following two issues, among others, are particularly worth of concern:

(1) Jurisdiction: The Court exercised the jurisdiction over the dispute because the Dutch defendants did not raise an objection to its jurisdiction who responded to the action timely.[7]

(2) Application of Law: Based on the interpretation of "the *lex rei sitae* at the time that the legal fact occurred" in Article 37 of the Private International Law Act, the Court held that Chinese law, rather than Dutch law, shall govern the ownership of the statue.[8]

### 3. The Jurisdiction of the Chinese Court: Prorogated Jurisdiction

Jurisdiction is the first issue that the Court had to consider when it dealt with the

dispute. Under the Civil Procedure Law of China (CPL), the general rule of territorial jurisdiction is that a civil action shall be brought in the People's Court of the place in which the defendant is domiciled subject to various exceptions grouped together under the title of "special jurisdictions".[9] As the defendants in the present case are domiciled in the Netherlands,[10] the jurisdiction of the Court depended on "special jurisdictions" among which the jurisdiction on actions on contractual disputes or disputes over property rights is most relevant.

In international civil litigation, many cases involve a foreign defendant not domiciled or residing within China. Given the importance of some of such cases, the CPL empowers Chinese courts the jurisdiction over actions involving contract disputes or disputes over property rights against a non-resident defendant if certain conditions are satisfied. Article 265 of the CPL prescribes the following:[11]

*In the case of an action concerning a contract dispute or other disputes over property rights and interests, brought against a defendant who has no domicile within the territory of the People's Republic of China, if the contract is signed or performed within the territory of the People's Republic of China, or if the object of the action is located within the territory of the People's Republic of China, or if the defendant has distrainable property within the territory of the People's Republic of China, or if the defendant has its representative office within the territory of the People's Republic of China, the People's Court of the place where the contract is signed or performed, or where the object of the action is, or where the defendant's distrainable property is located, or where the torts are committed, or where the defendant's representative office is located, shall have jurisdiction.*

Therefore, for actions concerning a dispute over property rights brought against a defendant who has no domicile in China, a Chinese Court may exercise jurisdiction if one of the following conditions are satisfied: (1) the property is located in China; (2) the defendant has distrainable property in China; (3) the tort was committed in China; (4)the defendant has its representative office in China.

In the case at hand, one can hardly argue that the Court has the jurisdiction under Article 265 of the CPL, as the statue is not located in China when the action was filed, nor did the defendants steal it or purchase it in China, nor do they have distrainable property or representative office in China. However, the Court ruled that its jurisdiction over the case was established pursuant to the prorogated jurisdiction under the CPL regime.

Prorogated jurisdiction under the CPL refers to situations where a party institutes proceedings in a court, and the other party implicitly acquiesces to the jurisdiction of that court by responding to the action and not raising an objection to the jurisdiction. That is to say, the defendant's failure to object is understood as defendant's consent to the Chinese court's jurisdiction. Article 127 of the CPL provides as follows:[12]

*Where a party raises any objection to jurisdiction after a case is accepted by a people's court, the party shall file the objection with the people's court during the period of submitting a written statement of defense. The people's court shall examine the objection. If the objection is supported, the people's court shall issue a ruling to transfer the case to the people's court having jurisdiction; or if the objection is not supported, the people's court shall issue a ruling to dismiss the objection. Where a party raises no objection to jurisdiction and responds to the action by submitting a written statement of defense, the people's court accepting the action shall be deemed to have jurisdiction, unless the provisions regarding tier jurisdiction and exclusive jurisdiction are violated.*

Since the defendant's failure to object constitutes consent to jurisdiction, it is imperative that defendants, foreign defendants in particular, raise a timely jurisdictional objection. Under Article 127 of the CPL, if a party to a civil action objects to the jurisdiction of a People's Court, the objection must be raised within the time period prescribed for the filing of answers. According to Articles 125 and 268, defendant shall have fifteen days, or thirty days if residing outside the territory of China, to file his answer upon receipt of plaintiff's complaint. Thus, if a defendant wants to challenge the People's Court's jurisdiction, he must do so within this statutory fifteen-day or thirty-day period.[13]

It should be noted that the Dutch defendants in the present case did not raise objection to the jurisdiction of the Court; instead, they had responded to the lawsuit by submitting a written statement of defense represented by two Chinese lawyers, to the surprise of many observers. Hence, jurisdiction of the Court over this case was established under the prorogated jurisdiction of the CPL in an unexpected manner.

### 4. Choice of Law Issue: *Lex Rei Sitae = Lex Furti*?

One of the most widely accepted and significant rules of private international law today is that, in determining property rights, a court applies *lex rei sitae*. This rule has been accepted by Chinese private international law, though party autonomy is placed before *lex rei sitae* by Article 37 of the Private International Law Act. Given that it is very rare that the parties reach agreement on the applicable law after the dispute over the property has occurred, the *lex rei sitae* plays a *de facto* decisive role.

However, the question of application of the *lex rei sitae* in specific cases remains open out of diverse possible interpretations of the rule. From the perspective of comparative law, it can be found that many jurisdictions, say England, prefer to apply the law of the place of last transaction,[14] while others, say France, apply the law of place where goods are located at the time of the litigation.[15] As far as China is concerned, its courts has never clarified the meaning of the *lex rei sitae* in Article 37 of the Private International Law Act; therefore, the outcome of the present action was entirely dependent on the interpretation of this article.

The Chinese plaintiffs commenced the action for recover of the stolen statue by arguing, among other things, that they are its owners because *bona fide* acquisition does not apply to stolen cultural property under the Property Law of China. The Dutch defendants took the stand, claiming to have purchased the statue on good title under Dutch Civil Code. Thus, it had to be decided which of

the two laws shall be used in the present case: whether Chinses law or Dutch law shall govern the ownership of the statue. The Court, by resorting to Article 37 of the Private International Law Act, held that title was to be determined by Chinese law.

However, the Court acknowledged that the statue was stolen and illicitly exported before the implementation of the Private International Law Act, therefore, it had to decide in the very beginning whether the Act is applicable to the present dispute. To determine the issue, the Court referred to Article 2 of the Judicial Interpretation on the the Private International Law Act issued by the Supreme People's Court,[16] which states that:

*As to a civil relationship involving foreign elements which occurred before the implementation of the Private International Law Act, People's Court shall determine the governing law according to the choice-of-law rules effective at the time of the occurrence of such relationship. In case no choice-of-law rules existed at that time, the Private International Law Act may be resorted to in order to determine the applicable law.*

Given the General Principles of Civil Law, the most significant and primary legislation on private international law in China before 2010, is silent on the law applicable to property right,[17] the Court decided it is proper to invoke the Private International Law Act to fill the lacunae pursuant to the above article. The Court then referred to Article 37 of the Private International Law Act of China which provides that "the parties may choose the law applicable to the real rights in movable property; in the absence of such choice, the *lex rei sitae* at the time when the legal fact occurred applies".[18] As the parties in the case failed to reach agreement on the applicable law, the Court decided that the ownership of the statue shall be governed by the *lex rei sitae* at the time when the legal fact occurred.

With regard to the meaning of "the time when the legal fact occurred", the Court stated that it pointed to the time when the statue was stolen, rather than the time

when Oscar Van Overeem purchased it in Amsterdam. Summarising the conclusion, the judge stressed that the statue is a cultural property of great historic and religious significance, instead of an ordinary property. As the illicit traffic of cultural property usually creates a number of legal facts which inevitably leads to the proliferation of the *lex rei sitae*, including the law of the location of a cultural property had been stolen (*lex furti*), the law of the place of first transaction, the law of the place of last transaction, the law of the place of exhibition, the law of the location of a cultural property at the time of litigation, *etc*., the judge emphasised the need to spell out the *lex rei sitae* at the time when the legal fact occurred for the cases of recovering cultural property.

The Court stressed that when interpreting the *lex rei sitae* in a cultural property repatriation case, the object and purpose of international conventions of cultural property should be taken into consideration. It went on to highlight two conventions to which China is a contracting party: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 Convention") and Convention on Stolen or Illegally Exported Cultural Objects ("the 1995 Convention"). As both those conventions are devoting to prohibiting the illicit trafficking of cultural property and facilitating the return of cultural property to its origin nations, the Court concluded that it should interpret the *lex rei sitae* at the time when the legal fact occurred in the light of their object and purpose.

Hence, the Court decided that the *lex rei sitae* at the time when the legal fact occurred should be understood as the *lex furti*, *i.e*., law of the location of a cultural property had been stolen, insofar as such interpretation favours the protection of cultural heritage and facilitates the return of cultural property illicitly trafficked, whereas the place of transaction not only favours the laundering of stolen cultural property but also adds considerable uncertainty to the question of title.

The Court then referred to the Property Law of China under which *bona fide* acquisition does not apply to stolen cultural property. Consequently, the Court

ruled that the Chinese village committees retain the title of the statue and demanded the defendants to return it to plaintiffs.

### 5. Concluding Remarks

Under the CPL, judicial proceedings in China occur in two instances, namely, trial and appeal. Therefore, the Dutch defendants are entitled to appeal to the Higher People's Court of Fujian Province within 30 days. If they do not appeal within the time limit, the judgment will become effective.

At the present stage, it is not clear whether the defendants will comply with the judgment or appeal, or simply ignore it. Though as a Chinese, I do hope that the Dutch defendants will return the statue as ordered by the Court; nevertheless, I am afraid that ignoring the Chinese judgment may be one of their reasonable options because of serious obstacles to recognize and enforce this Chinese judgment in the Netherlands.

In spite of the uncertainty ahead, one cannot overestimate the significance of this judgment. First of all, as noted in the very beginning, this is the first time that a Chinese court exercises the jurisdiction over case to recover a Chinese cultural property stolen and illicitly exported. Therefore, it is a historic judgment, no matter it will be enforced or not in the future.

Second, the Court in the judgement clarified for the first time that "*lex rei sitae* at the time when the legal fact occurred" in Article 37 of the Private International Law should be interpreted in the light of the object and purpose of the 1970 Convention and the 1995 Convention, so that the *lex furti*, i.e., Chinese law, shall govern the ownership of cultural property lost overseas. Given the huge number of Chinese cultural property stolen and illicitly exported abroad, the author believes the impact of the judgment is tremendous.

[1] The Committee of Yunchun Village and the Committee Dongpu Village v.

Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V., the Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, Date of judgment: 4 December 2020.

[2] China villagers launch Dutch court bid to retrieve mummy, https://www.bbc.co.uk/news/world-europe-40606593, last visited on 8 December 2020.

[3] C/13/609408 / HA ZA 16-558, Court of Amsterdam, 12 December 2018, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:8919, last visited on 8 December 2020.

[4] Chinese villagers disappointed about Dutch rejection of mummy Buddha repatriation case, http://www.xinhuanet.com/english/2018-12/14/c_137672368.htm, last visited on 8 December 2020.

[5] Uncertain Future for Golden Statue Holding Buddhist Mummy, https://culturalpropertynews.org/uncertain-future-for-golden-statue-holding-buddhist-mummy/, last visited on 8 December 2020.

[6] http://fjfy.chinacourt.gov.cn/article/detail/2020/12/id/5647265.shtml, last visited on 8 December 2020.

[7] The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V., the Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, Date of judgment: 4 December 2020, p.21.

[8] *Id*,. at pp. 24-35.

[9] Zhengxin Huo, Private International Law (2017), pp.148-151.

[10] The defendants are Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V.

[11] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] art. 265 (1991, revised in 2017) (PRC).

[12] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] art. 127 (1991, revised in 2017)(PRC).

[13] Zhengxin Huo, Private International Law (2017), p.157.

[14] E.g., Winkworth v. Christie's Ltd.[1980] 1 Ch. 496.

[15] Stroganoff-Scerbatoff v. Bensimon, 56 Rev. crit. De dr. int. privé(1967).

[16] See Zhengxin Huo, 'Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China' (2013) 43 HKLJ 685, 710.

[17] The General Principles of Civil Law was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, coming into force on January 1, 1987. It was abolished on January 1, 2021 when the Civil Code of the PRC took effect. For a quite a long period, the GPCL was the most important source of Chinese private international law. Structurally, the GPCL has devoted an entire chapter to regulating the conflict of laws (i.e., Chapter Eight, Application of Laws to Civil Matters Involving Foreign Elements), where nine conflict rules can be found.

[18] Zhonghua Renmin Gongheguo Shewai Minshi Falvguanxi Shiyongfa [Act on the Application of Laws over Foreign-related Civil Relationships] art. 37 (2010) (PRC).