Mbatha v. Cutting: Implications for Litigants of Indian Origin

Guest Post by Chytanya S. Agarwal*

I. Introduction

Rising cross-border migration of people and concomitant increase in lawsuits relating to matrimonial disputes between couples brings to the forefront the issue of conflict of jurisdictional laws (219th Law Commission Report, ¶1.1-¶1.2). *Mbatha* v. *Cutting* is one such recent case that grapples with conflict of laws pertaining to divorce and division of matrimonial property when the spouses are domiciled in separate jurisdictions. In this case, the Georgian Court of Appeal dealt with competing claims from a couple who married in New York and had their matrimonial domicile in South Africa. The wife, domiciled in Georgia, USA, argued for the application of the matrimonial property regime of South Africa – their only (though temporary) common matrimonial domicile. In determining the applicable law, the Court upheld the traditional approach, which favours *lex situs* for real property and *lex domicilii* for personal property.

In this article, I contextualise *Mbatha* in the context of Indian litigants, particularly foreign-domiciled Non-Resident Indians (**'NRIs'**) married under Indian personal laws and having their property located both within India and in foreign territory. ***Firstly***, I analyse *Mbatha* by comparing it with the prevalent approaches in private international law. ***Secondly***, I examine the Indian jurisprudence on the applicability of foreign judgements concerning matrimonial disputes. ***Thirdly***, I submit that *Mbatha* complies with the Indian *lex situs* rule insofar as real property is concerned. However, by determining its subject-matter jurisdiction by solely considering Georgian law, *Mbatha* sets itself on a collision course with the Indian approach on the subject-matter jurisdiction of foreign courts. ***Lastly***, I analyse the implications of this uncertainty regarding enforceability of foreign judgements on matrimonial property. In conclusion, I propose a solution that draws on public international law to resolve the challenge presented by conflicting rules on choice of law.

II. Traditional Approach vs. Modern Approaches to Conflict of Laws

The primary source of private international law are municipal laws of nations. Their divergence in the face of potential applicability is the root cause of conflict of laws. In this section, I examine the approaches to conflict of laws from the perspective of mutability i.e., change in applicable personal laws of spouses during their marriage. It has three main approaches under private international law – the doctrines of immutability, mutability, and the partial mutability. The *lex situs* approach upheld in *Mbatha* falls under the "partial mutability" rule.

Under the "doctrine of immutability", the personal law during marriage governs the property relations of spouses forever (Schuz, p.12). Once determined, this law stands 'immutable'/unalterable. Strict immutability approach is favoured for predictability of applicable laws (p.45). It is also supported on the ground of legitimate expectations of the parties. In short, the parties can expect the personal law of their marriage to govern their relations unless they determine their choice of law through a separate agreement (p.29-30).

In "doctrine of mutability," the applicable law never remains fixed. It can change depending on changes in forum, changes in religion, nationality, domicile, etc. For instance, under the *lex fori* approach followed in American states, the courts partition the entire matrimonial property by applying the law of the forum, regardless of where and when the said property was acquired (Wasserman, p.23). This approach is justified on the grounds of state interest because the greatest interest of the forum state in matrimonial cases is to ensure the application of its laws (Schuz, p.38). However, this approach poses the risk of "forum shopping" or the practice of filing claims in jurisdictions where *lex fori* favours the petitioner's case.

The third approach is the "partial mutability" approach which finds an echo in *Mbatha*. As mentioned, the traditional approach in *Mbatha* favoured *lex situs* (i.e., the law of the jurisdiction where the real property is located) and *lex domicilii* (i.e., the law of the owner's domicile at the time the personal property was acquired). In the doctrine of "partial mutability", a change in matrimonial domicile would trigger a change in the governing laws without having any retroactive effect on already acquired property (Schuz, p.12). For instance, if a

married couple buys property in Country X, then the laws of country X alone would govern this property. However, this does not prevent them from applying the laws of Country Y to a property situated in Country Y. Thus, the applicable matrimonial property law changes depending upon the location in which the spouses buy the matrimonial property without prejudicing vested rights. Its underlying rationale is protecting both state interests and legitimate expectations of the parties. This is because the state where the relevant property is situated has the greatest interest in ensuring that it is governed by its own laws. Additionally, parties have the reasonable expectation that the law governing the property should always be that at the time of the acquisition of that asset (Schuz, p.32).

III. Indian Jurisprudence on Foreign Judgements Concerning Personal Laws

While private international law has undeveloped jurisprudence in India, it has a growing trend due to the import of foreign laws and foreign judgements by NRIs who have emigrated from India (219th Law Commission Report, ¶2.1-¶2.2). In this section, I analyse the Indian judgements dealing under three issues concerning foreign verdicts on matrimonial relations recognised by the 65th Law Commission Report (¶3.2). These issues, equally pertinent in the context of matrimonial property relations, are (i) grounds for jurisdiction, (ii) choice of law, and (iii) law on recognition.

1. Jurisdiction

Indian law has generally opposed the application of foreign judgements on the ground that the foreign forum did not possess sufficient jurisdiction under the personal law governing the parties. A plain reading of the text of the Indian Succession Act and the Hindu Succession Act shows that they only govern the devolution of immovable property *situated in India* irrespective of the domicile of the person who owned the property. The Acts extend only to the Indian territory and do not have extra-territorial application. As per the Code of Civil Procedure (**'CPC'**), any suit for the partition of immovable property must be filed in the court within whose local jurisdiction the property is located.

Case laws have also supported this position consistently. In *Duggamma v.*

Ganesha Keshayya (¶5-¶7, ¶14), it was held that the decision of a foreign court concerning title to Indian property would be devoid of legal effects. *Harmindar Singh v. Balbir Singh* held that disputes concerning any immovable property have to be decided not just by the *laws* of the country where the land is situated, "*but also by the courts of that country*." Even if the parties had submitted to the jurisdiction of the foreign court, the foreign verdict is enforceable only to the extent it applies to property situated outside India. Conversely, Indian courts have upheld the disposition of overseas family property by foreign courts. Even in cases concerning other matrimonial disputes such as divorce, the Supreme court has held that the forum must have jurisdiction as per the law under which the parties married. For instance, foreign courts have been barred from annulling marriages between Indians. To summarise, Indian courts have generally disfavoured the adjudication of matrimonial disputes by foreign courts on the ground of lack of jurisdiction.

2. Application of Indian Law

In the absence of legislative guidance, this sphere of private international law is heavily reliant on case laws (219th Law Commission Report, ¶3.2). A perusal of judgements (*see* here and here) shows that real property located in India can be governed only by Indian law (i.e., *lex situs*). At the same time, Indian courts have ruled that Indian law is inapplicable in foreign jurisdictions. In *Ratanshaw v. Dhanjibhai*, the Bombay High court upheld the English rule of *lex situs* for the succession of property situated in India. At the same time, Indian courts recognising *lex situs* have respected foreign judgements concerning overseas property, and have observed that foreign forums should also reciprocate by recognising Indian judgements concerning immovable property in India. In *Y. Narasimha Rao v. Y. Venkata Lakshmi*, the Supreme Court ruled that per Section 13(c) of the CPC, even if the parties submit to the jurisdiction of the foreign forum, the only law applicable in matrimonial disputes is the one under which the parties married. However, in *Nachiappa Chettiar v. Muthukaruppan Chettiar*, the Indian law was held inapplicable in the case of properties situated outside India. Per *Nachiappa Chettiar*, the family property cannot be deemed partible under the Hindu Succession Act since it was located outside the jurisdiction of Indian courts. In *Dhanalakshmi v. Gonzaga* (¶34-¶43), the Hindu joint family system was held inapplicable in Pondicherry due to the invalidity of the Hindu Succession Act's extraterritorial application. So, Indian courts have also respected foreign *lex*

situs with respect to foreign property.

3. Recognition: Other preconditions

In addition to satisfying the requirements of jurisdiction and *lex situs*, there also exist procedural safeguards under CPC that must be satisfied for the foreign verdict to have a conclusive effect. Respect for principles of natural justice is one such prerequisite, entailing that judgements passed by forum *non-conveniens* are unenforceable in India. Additionally, fraud by one of the parties can also be a vitiating factor. For instance, in *Satya*, the husband "successfully tricked" a Nevada court to grant a divorce decree on the ground that hehad obtained the domicile of Nevada due to residence of 6 months. Here, the Chandrachud, J. held that the husband had no intention of permanently residing in Nevada and, this, the foreign verdict was unenforceable due to fraud. The need for procedural safeguards for the protection of the weaker party was also emphasised in *Neeraja Saraph v. Jayant V. Saraph*.

IV. *Mbatha*'s Implications on NRIs

The *Mbatha* approach of *lex* situs is compatible with Indian law. However, I argue that by determining its overall jurisdiction based on the domicile of one of the spouses,[1] *Mbatha* erroneously conflated the jurisdiction to determine divorce with the jurisdiction to determine the partition of matrimonial property. As per Georgian law, the court had both the subject-matter jurisdiction and personal jurisdiction to decide the divorce petition since one of the spouses had resided in Georgia for more than 6 months.[2] However, the court cited no authority regarding the validity of its jurisdiction to adjudicate on the division of overseas matrimonial property. The effect of *Mbatha* is that the court would apply the domestic law of the place where the property is situated, even if such a place is beyond the court's local limits. For example, the Court in Georgia may apply the laws of a foreign jurisdiction to partition the foreign matrimonial property. This principle, called *renvoi* in private international law, has limited application in the Indian context (the only case where it was invoked yet not applied is *Jose Paul Coutinho v. Maria Luiza Valentina Pereira*).

Additionally, the Court determined its subject-matter jurisdiction based on Georgian law. However, as mentioned earlier, the forum should have competent jurisdiction as per the law governing the parties. A foreign forum applying Indian

law on Indian property lacks the jurisdiction to do so as per Indian law. Hypothetically, if a Georgian court were to apply the Indian Succession Act to properties situated in India, it lacks the jurisdiction to do so since neither the Act nor CPC confers any jurisdiction on foreign forums to partition Indian property. However, *Mbatha* nevertheless compels it to apply foreign law even if the foreign law does not grant it requisite jurisdiction.

Another issue is created by the absence of any matrimonial property regime in Indian personal laws. This might lead to rejection of Indian law in the foreign forum since it might consider the lack of rights in the matrimonial property as opposed to their public policy since it is discriminatory towards women. By combining *renvoi* with this public policy argument, courts can effectively nullify Indian lex situs. Such instances have happened in Israel, where courts have abstained from applying Islamic law on couples migrating from Islamic countries on the ground that the Islamic matrimonial property regime violates gender equality and is thus opposed to Israeli public policy.[3]

V. A Public International Law Solution to Conflict of Laws?

As explained, while *Mbatha*'s *lex situs* rule protects state interests, it has the potential of frustrating parties' legitimate expectations by subjecting NRIs to matrimonial property regimes of foreign forums, even when Indian personal laws do not contain the concept of matrimonial property. In this regard, public international law gives the solution of making the rules on choice of laws uniform through an overarching treaty like the Hague Conventions (*see* here and here). The enactment of a composite legislation on private international law along the lines of the 1978 Hague Convention on Matrimonial property regimes to prevent the misapplication of foreign law (219th Law Commission Report, ¶5.2) can go a long way in preventing future conflicts between matrimonial legal systems. This harmonising principles on choice of laws is also more feasible, and has less costs than the alternative of uniformising matrimonial property regimes altogether since such family law regimes are intrinsic to the cultural backdrop of specific legal systems. As shown by Mills (pp.7-10), private disputes are becoming increasingly enmeshed with public international law considerations. The adoption of such treaty is also consistent with the growing view on the intersection of public and private international law to resolve pitfalls in existing legal systems

(Maier, pp.303-316).

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[1] Restatement of the Law, Conflict of Laws (2nd), ss70-72.

[2] *Mbatha*, pp.746-747.

[3] Also see *Nafisi v Nafisi* ACH (1996) PD 50(3) 573; *Azugi v Azugi* (1979) (III) 33 PD 1. Here, despite the "doctrine of immutability" endorsed by Israeli law, the court applied *lex fori* on an Iranian couple on the grounds, inter alia, of public policy and gender parity.

Report from the 2022 Hague Academy Summer Course in PIL

Written by Martina Ticic, University of Rijeka, Faculty of Law; Croatian Science Foundation (HRZZ) doctoral student

For anyone interested in the area of private international law, the Hague Academy of International Law and its Summer Courses on Private International Law have been one of the must-do's ever since the Academy opened its doors in 1923. Each year, hundreds of students, academics and practitioners attend the courses given by renowned lecturers, while the Academy also offers multiple social and embassy visits, an access to the famous Peace Palace Library, as well

as ample opportunities for discussion between the attendees who all come from different backgrounds. It seems that this report comes in quite timely as the programme for the 2023 Summer Course has just been announced.

The 2022 edition once again proved the immense value that the Summer Courses offer. From 1 to 19 August, the Academy hosted the attendees of over 60 different nationalities, providing them with lectures and seminars on various relevant topics, some time for research and visits to many of the Hague's international organisations, but also an opportunity for exchange of ideas, networking and creating friendships. As such, the Academy was truly a place to be this summer for everyone wanting to learn more on the matters of private international law, as well as to connect with others who share the same or similar interests.

After the welcome speech by prof. **Jean-Marc Thouvenin**, Secretary-General of the Academy, this year's inaugural lecture was given by Dominique Hascher, judge at the Supreme Judicial Court of France. Judge Hascher opened the Summer Courses with the lecture on 'The Role of International Law in the Review of Awards'.

The General Course was given by **Louis d'Avout**, a professor of private international law at the Université Paris II Panthéon-Assas. Titled 'Towards Worldwide Law Consistency', the course provided the attendees with an overview of the core idea on which the discipline of conflict of laws was built upon: the coherence of rules of individual conduct on the global level. By analysing the sole definition of private international law, coordination mechanisms, the concept of legal relativity, connecting rules and factors, transnational cooperation and vertical disciplines in the regional context, prof. d'Avout offered a holistic view on the discipline of private international law itself, making the course a necessity for anyone wishing to excel in this area of law, either as a practitioner or as an academic. Through his lecture, prof. d'Avout invited all of the participants, particularly the younger generation of lawyers, to work towards the global coherence of law, as the desirable state of the system of law in general is that of a 'social construction' which guarantees predictability and security for its subjects that are faced with various sources of law and modes of conflict resolution. The course lasted for two weeks, which meant that there was plenty of time for participants to acquaint themselves with the matter at hand. Two of the seminars on the chosen topics were also held in the course of the two weeks.

Prof. **Arnaud Nuyts**, from the Université Libre de Bruxelles, held a Special Course on 'The Forum for Cyber-Torts', which is an excellent topic in today's day and age. He highlighted the diversity of civil cyber-torts, as well as the challenges of locating the torts that are committed on-line. The course also touched particularly upon European legal framework and the guiding principles of its case law, while also analysing the 'trichotomy' of the forum for cyber-torts: the forum for the place of the causal event, the forum for the place of accessibility of the website and the forum for the centre of interests of the victim.

Prof. **Ulla Liukkunen**, from the University of Helsinki, presented her Special Course on 'Mandatory Rules in International Labour Law', another important topic considering the rising number of cross-border workers. As labour law is often connected to domestic rules, it is interesting to observe more closely the relationship between labour law and private international law. Throughout the course, the special nature of cross-border employment was acknowledged and the participants were acquainted with the concepts of triangular contracts, weaker-party protection, International Labour Organisation, the 'decent work' objective, etc. Prof. Liukkunen particularly highlighted the pluralism of regulatory sources in international labour law, and pointed to the fact that labour rights-based approach to decent work in developing regulatory private international law would advance the necessary protection for workers and ensure decent work for all.

Prof. **Tiong Min Yeo**, from the Singapore Management University, held a Special Course titled 'Common Law, Equity, and Statute: Effect of Juridical Sources on Choice of Law Methodology'. The course offered insight into the topic of choice of law methodology and the analysis that must be done in order to select the applicable law rules. It presented three juridical sources in hierarchy: statute, equity and common law. The analysis of various case law served to explain the effects that these sources have on the choice of law methodology.

Prof. **Kermit Roosevelt III**, from the University of Pennsylvania Carey Law School, presented the topic of 'The Third Restatement of Conflict of Laws'. Throughout this Special Course, the history of American choice of law was examined so as to better understand the context of the Third Restatement of Conflict of Laws, a current project of the American Law Institute. From the beginnings of American choice of law characterised by territorialist approach in the First Restatement and the Second Restatement as a 'transitional document', to the goals and framework of the Third Restatement, the course portrayed the

full picture of the American choice of law rules. One of the core ideas that prof. Roosevelt developed throughout the course is that there are two different sets of values that a choice of law system should promote: so-called 'right answer' values and 'systemic' values. While the former one relates to selecting the law of the state with the best claim to regulatory authority, the latter relates to the certainty, predictability, uniformity and ease of application of the system.

Prof. **João Bosco Lee**, from the Universidade Positivo Brazil, presented an arbitration-related topic titled 'The Application of International Conventions by Arbitrators in International Trade Disputes'. On the one hand, this Special Course examined the application of international conventions pertaining to the law applicable to the merits of the dispute in international commercial arbitration, either according to the choice of the parties or by the effect of determination of the lex cause by the arbitrator(s). On the other hand, the participants got the chance to study the cases in which international conventions could intervene in the resolution of international commercial arbitration without being the applicable law on the merits.

Prof. **Marco Frigessi di Rattalma**, from the Brescia University, held a Special Course on the 'New Trends in the Private International Law of Insurance Contracts'. By focusing on the specific cases that emerged in the recent years in the field of private insurance, the attendees of the course were immersed in diversity of topics relating to jurisdiction and applicable law in the matters of insurance contracts, the specific types of insurance contracts, compulsory insurance against civil liability in respect of the use of motor vehicles, as well as the impact of fundamental rights on such matters. Prof. Frigessi di Rattalma posed various important questions during his analysis of the relevant issues, e.g. what can characterise as an insurance contract; whether EU law may permit derogation from the equal treatment of men and women provided by insurance contracts in accordance with the applicable national law to persist indefinitely; what exactly falls under the notion of 'use of vehicles' in regards to Directive 2009/103 on the insurance against civil liability in respect of the use of motor vehicles; etc.

Additionally, *special lectures were given in tribute to the late Professor Emmanuel Gaillard* who was originally meant to hold the General Course at the 2022 Summer Courses. These lectures were held by **Yas Banifatemi**, **Diego P. Fernandez Arroyo**, **Dominique Hascher**, **Horatia Muir Watt** and **Luca**

Radicati di Brozolo respectively, each of them focusing on a particular issue related to arbitration, the topic most dear to prof. Gaillard, as well as familiarising the attendees with the persona of Emmanuel Gaillard.

In the afternoons, participants could attend seminars and some of the lectures on specific topics which were organised each week, e.g. Lecture on the Permanent Court of Arbitration by Brooks Daly, Lecture on the use of the Library by Candice Alihusain, Lecture on the International Court of Justice by Florence Zaoui, Lecture on 'Fighting Human Trafficking: the Dutch Approach' by Warner ten Kate, Lecture on the Hague Conference on Private International Law by Philippe Lortie, and 'International Commercial Arbitration: the Role of Private International Law in the Lifespan of an Arbitral Procedure' by Gerard Meijer and Camilla Perera-de Wit. For those eager to learn more, two extra short courses were held in addition: one on the law of the European Union held in the span of the first week and given by dr. Thomas Vandamme, and the other on the matters of Comparative Law, held on Saturday of the first week and given by dr. Brooke Marshall.

The participants were also given an opportunity of visiting some of the international organisations that are stationed in the Hague. For this year's session, the Academy planned visits to the Hague Conference on Private International Law, the International Criminal Court, the Kosovo Specialist Chambers, the Organisation for the Prohibition of Chemical Weapons and the Residual Special Court for Sierra Leone. By visiting various organisations that deal with such variety of matters, the attendees got a truly immersive experience. Besides the international organisations, visits to multiple embassies were organised, so the participants also got the feel of diplomacy. Various other activities were also held, e.g. a reception at the City Hall, Beach Party, Grotius Peace Palace Library Tour and a visit of the extraordinary Peace Palace itself.

During the Courses, the most advanced attendees had the opportunity to attend the Directed Studies sessions which delved deep into many intricate questions of private international law. An even smaller fraction of those students in the end got the chance to participate in the prestigious Diploma Exam of the Academy. In this year's Private International Law session, one Diploma by the Academy was awarded to Ms. Madeleine Elisabeth Petersen Weiner.

As it is obvious from the overview presented above, the 2022 Summer Courses on

Private International Law were, as always, a huge success. Over 200 participants from all over the world and from various professional backgrounds got the experience of a lifetime thanks to the Academy, its Summer Courses and all the additional benefits that come with it. For anyone still doubting whether the Summer Courses, or perhaps the newer addition of the Winter Courses, are worth to attend, this post can serve as a clear answer and affirmative one at that.

Out now: RabelsZ 86 (2022), Issue 4

The fourth issue of RabelsZ 2022 has just been released. It contains the following articles:

Moritz Renner / Torsten Kindt: Internationales Gesellschaftsrecht und Investitionsschutzrecht, pp. 787–840, DOI: 10.1628/rabelsz-2022-0078

> *Conflict of Corporate Laws and International Investment Law. – The withdrawal of the United Kingdom from the EU has revived the debate on the conflict of corporate laws. Much attention has recently been given to the new generation of EU free trade agreements, such as the EU-UK Trade and Cooperation Agreement, but their impact on conflicts in the field of corporate law remains unclear. This article proposes that the conflict-of-law effects of these agreements can be fully understood only in the light of their common*

background in international investment law. Building upon an analysis of the role of treaties in Germany's conflict-of-law system and of the multiple intersections between the conflict of corporate laws and international investment law in general, the article demonstrates that the newest EU free trade agreements imply in particular the application of a restricted conflict-of-law theory of incorporation on foreign corporations originating from the respective signatory states. While the agreements' effects on conflicts in the corporate law arena are not as far reaching as those of the EU's freedom of establishment, they nevertheless further narrow the remaining scope of application of the traditional seat theory underlying Germany's autonomous rules on conflicts vis-à-vis corporate law.

Tobias Lutzi / Felix M. Wilke: Brüssel Ia extendenda est? – Zur Zukunft der internationalen Zuständigkeit deutscher Gerichte in Zivil- und Handelssachen nach Ausweitung der EuGVVO, pp. 841–875, DOI: 10.1628/rabelsz-2022-0079

Brussels I bis extendenda est? On the Future of the International Jurisdiction of German Courts in Civil and Commercial Matters after an Extension of the Regulation. – With the expiry of the deadline of art. 79 Brussels I bis, the academic debate on a possible further extension of the Regulation to situations involving non-EU defendants is (again) gaining momentum. The present study aims to contribute to this discussion. It compares the relevant German rules on international jurisdiction over non-EU defendants with those of the Brussels I bis Regulation in order to be able to assess the consequences of a possible extension from a German perspective. The study reveals that even replacing the national rules in their entirety would not amount to a radical change. In particular, the addition of typified places of performance under art. 7 no. 1 lit. b Brussels I bis to the forum contractus and the availability of a common forum for joint defendants under art. 8 no. 1 Brussels I bis would constitute welcome improvements of the current framework. The loss of jurisdiction based on the presence of assets under § 23 ZPO would arguably be a disadvantage if not properly compensated for, e.g. through a forum necessitatis provision. The biggest advantage, though, would most likely be the harmonization of the law of international jurisdiction across the EU – which, from a German perspective, would come at a rather reasonable price.

Ulla Liukkunen: Decent Work and Private International Law, pp. 876–904, DOI: 10.1628/rabelsz-2022-0080 [Open Access]

This article examines the decent work objective set by the ILO and UN Agenda 2030 from the point of view of private international law. It conceptualizes decent work, arguing that inclusivity of protective safeguards and structures in cross-border situations is essential to achieving the objective, and that the need for inclusivity draws attention to the relationship between labour law and private international law. The analysis offered also introduces a migration law-related perspective on decent work and the private international law of employment contracts and labour relations more generally. It is argued that understanding that the idea of inclusivity is embedded in the decent work objective brings up a global dimension which calls for uniform regulatory solutions at the international level. Decent work could be coupled relatively easily with the need for a revival of the private international law of labour relations and for developing a labour rights-based approach in private international law. It also connects private international law's protective normative frameworks to the body of international labour standards.

Adrian Hemler: Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats – Zugleich ein Beitrag zum Verhältnis des Völkerrechts zum Kollisionsrecht, pp. 905–934, DOI: 10.1628/rabelsz-2022-0081

Virtual Participation in Court Proceedings from Abroad and Its Effects on the Sovereignty of the Foreign State of Residence – With Consideration of the Relationship Between Public International Law and the Conflict of Laws. – Most German-speaking scholars and some German courts consider participation in virtual court proceedings from a foreign state of residence to be a violation of foreign sovereignty. This essay stakes out a contrary position. In reaching this conclusion, it focuses on the distinction between the exercise of state power abroad and the exercise of state power regarding foreign facts. Especially with regards to extraterritorial legislation, it is argued that the law's scope of sovereign validity remains territorial even if its scope of application covers facts abroad. The discussion also shows how this distinction is equally applicable to court judgments that concern foreign elements. Furthermore, the article discusses the nature of public international law principles regarding extraterritorial legislation and their relationship to national conflict of laws

provisions. Also considered is how the sovereignty principle ought to be understood in cyberspace. Having established this theoretical foundation, it is concluded that regardless of the procedural role of the respective party, participation in virtual court proceedings from a foreign state of residence does not amount to a violation of foreign sovereignty.

Corinna Coupette / Dirk Hartung: Rechtsstrukturvergleichung, pp. 935–975, DOI: 10.1628/rabelsz-2022-0082 [Open Access]

Structural Comparative Law. – Structural comparative law explores the similarities and differences between the structures of legal systems. Theoretically grounded in systems theory and complexity science, it models legal systems as networks of documents, organizations, and individuals. Using methods from network analysis, structural comparative law measures these networks, assesses how they change over time, and draws quantitative comparisons between multiple legal systems. It differs from other approaches in its assumptions, its methods, and its goals, in that it acknowledges the relevance of dependencies between system entities and borrows more heavily from data science than from econometrics. Structural comparative law constitutes a novel addition to the comparatist's toolbox, and it opens myriad opportunities for further research at the intersection of comparative law and data science.

Arseny Shevelev / Georgy Shevelev: Proprietary Status of the Whole Body of a Living Person, pp. 976–997, DOI: 10.1628/rabelsz-2022-0083

This article is a reaction to the growing economic significance of the living human body as well as its legal status. In this paper, we argue that ownership in the human body most effectively guarantees the autonomy of the human will as to the use and disposal of one's own body, but classical ownership theory is unable to fully ensure the autonomy of the human will, since it risks reviving the institution of slavery. We will demonstrate that theories establishing rights to the body other than ownership rights are limited in content and are inherently inconsistent. At the end of the article, we will propose an abstract ownership theory that allows for the exercise of maximum freedom to dispose of the human body while one is alive and which will be devoid of the flaws of the preceding theories.

Conflict of Laws of Freedom of Speech on Elon Musk's Twitter

Elon Musk's purchase of Twitter has been a divisive event. Commenting on the response on Twitter and elsewhere, Musk tweeted:

> *The extreme antibody reaction from those who fear free speech says it all*
>
> >
>
> *By "free speech", I simply mean that which matches the law.*
>
> *I am against censorship that goes far beyond the law.*
>
> *If people want less free speech, they will ask government to pass laws to that effect.*
>
> *Therefore, going beyond the law is contrary to the will of the people.*

Ralf Michaels quote-tweeted perceptively: 'But which law?'

Twitter and the conflict of laws

By their very nature, digital platforms like Twitter present a variety of conflict of laws issues.

'Twitter' is not a monolithic entity. The functionality of the social media platform with which readers would be familiar is underpinned by a transnational corporate group. Twitter, Inc is incorporated in Delaware, and has various subsidiaries around the world; Twitter International Company, for example, is incorporated in Ireland and responsible as data controller for users that live outside of the United States. The business is headquartered in San Francisco but has offices, assets, and thousands of staff around the world.

The platform is populated by 400 million users from all over the world. After the US, the top 5 countries with the most Twitter users are comprised of Japan, India, the UK and Brazil. The tweets and retweets of those users may be seen all over the world. Users have wielded that functionality for all sorts of ends: to report on Russia's war in real-time; to coordinate an Arab Spring; to rally for an American coup d'état; to share pictures of food, memes, and endless screams; and to share conflict of laws scholarship.

Disputes involving material on Twitter thus naturally include foreign elements. Where disputes crystallise into litigation, a court may be asked to consider what system of law should determine a particular issue. When the issue concerns whether speech is permissible, the answer may be far from simple.

Free speech in the conflict of laws

The treatment of freedom of speech in the conflict of laws depends on the system of private international law one is considering, among other things. (The author is one of those heathens that eschews the globalist understanding of our discipline.)

Alex Mills has written that the balance between free speech and other important interests 'is at the heart of any democratic political order'.[1] Issues involving free speech may thus engage issues of public policy, or *ordre public*,[2] as well as constitutional considerations.

From the US perspective, the 'limits of free speech' on Twitter is likely to be addressed within the framework of the First Amendment, even where foreign elements are involved. As regards private international law, the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 28 USC 4101- 4105 ('SPEECH Act') is demonstrative. It operates in aid of the constitutional right to freedom of expression and provides that a US 'domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that' the relevant foreign law would provide the same protections for freedom of speech as would be afforded by the US Constitution.[3]

Other common law jurisdictions have approached transnational defamation issues differently, and not with explicit reference to any capital-c constitutional rights. In Australia, the High Court has held that the *lex loci delicti* choice-of-law rule

combined with a multiple publication rule means that defamation is determined by the law of the jurisdiction in which a tweet is 'available in comprehensible form': the place or places it is downloaded.[4] In contrast, where a claim concerns a breach of confidence on Twitter, an Australian court is likely to apply the equitable principles of the *lex fori* even if the information was shared into a foreign jurisdiction without authorisation.[5] In either case, constitutional considerations are sidelined.

The balance to be struck between free speech on the one hand, and so-called 'personality rights' on the other, is a controversial issue within a legal system, let alone between legal systems. So for example, the choice-of-law rule for non-contractual obligations provided by the Rome II Regulation does not apply to personality rights, as a consensus could not be reached on point.[6] Similarly, defamation and privacy are excluded from the scope of the HCCH Judgments Convention by Art 2(1)(k)–(l).

There is a diversity of approaches to choice of law for cross-border infringements of personality rights between legal systems.[7] But the 'law applicable to free speech on Twitter' is an issue that goes far broader than personality rights. It touches on as many areas of law as there are aspects of human affairs that are affected by the Twitter platform. For example, among other things, the platform may be used to:

- spread misrepresentation about an election, engaging electoral law;
- influence the price of assets, engaging banking and finance law; or
- promote products, engaging consumer law.

Issues falling into different areas of law may be subject to different choice-of-law rules, and different systems of applicable law. What one system characterises as an issue for the proper law of the contract could be treated as an issue for a forum statute in another.

All of this is to say: determining what 'the law says' about certain content on Twitter is a far more complex issue than Elon Musk has suggested.

The law applicable to online dignity

Key to the divisiveness of Musk's acquisition is his position on content moderation. Critics worry that a laissez-faire approach to removing objectionable content on the platform will lead to a resurgence of hate speech.

Musk's vision for a freer Twitter will be subject to a variety of national laws that seek to protect dignity at the cost of free speech in various ways. For example, in April, the European Parliament agreed on a 'Digital Services Act', while in the UK, at the time of writing, an 'Online Safety Bill' is in the House of Commons. In Australia, an Online Safety Act was passed in 2021, which provided an 'existing Online Content Scheme [with] new powers to regulate illegal and restricted content no matter where it's hosted'. That scheme complements various other national laws, like our Racial Discrimination Act 1975, which outlaws speech that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and was done because of the race, colour or national or ethnic origin of the person or group.

When a person in the United States posts content about an Australian that is permissible under US law, but violates Australian statute, the difficulty of Musk's position on the limits of censorship becomes clear. Diverse legal systems come to diverse positions on the appropriate balance between allowing online freedom and protecting human dignity, which are often struck with mandatory law. When your platform is frequented by millions of users all over the world, there is no single 'will of the people' by which to judge. Perhaps Musk will embrace technological solutions to give effect to national standards on what sort of content must be censored.

A host of other conflicts issues

Musk-era Twitter is likely to pose a smorgasbord of other issues for interrogation by conflict of laws enthusiasts.

For example: legal systems take diverse approaches to the issue of whether a

foreign parent company behind a platform like Twitter can be imposed with liability, or even criminal responsibility, for content that is on the platform. While conservatives in America consider the fate of s 230 of the Communications Decency Act—a provision that means that Twitter is not publisher of content they host—other countries take a very different view of the issue. Litigation involving the companies behind Twitter is likely to engage courts' long-arm jurisdiction.

Perhaps the thorniest conflicts problem that may emerge on Musk's Twitter is the scope of national laws that concern disinformation. In an announcement on 25 April, Musk stated:

> *'Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated'.*

Recent years have shown that the future of humanity is not necessarily benefited by free speech on social media. How many lives were lost as a result of vaccine-scepticism exacerbated by the spread of junk science on social media? How many democracies have been undermined by Russian disinformation campaigns on Twitter? The extraterritorial application of forum statutes to deal with these kinds of issues may pose a recurring challenge for Musk's vision.[8] I look forward to tweeting about it.

Michael Douglas is Senior Lecturer at UWA Law School and a consultant in litigation at Bennett + Co, Perth.

[1] Alex Mills, 'The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' (2015) 7 *Journal of Media Law* 1, 21.

[2] See, eg, International Covenant on Civil and Political Rights, art 19(3).

[3] SPEECH Act s 3; United States Code, title 28, Part VI, § 4102. See generally Lili Levi, 'The Problem of Trans-National Libel' (2012) 60 *American Journal of Comparative Law* 507.

[4] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

[5] But see Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41 *UNSW Law Journal* 490.

[6] Art 4(1); see Andrew Dickinson, *The Rome II Regulation* (Oxford University Press, 2008).

[7] See generally Symeon C Symeonides, *Cross-Border Infringement of Personality Rights via the Internet* (Brill, 2021) ch VI; Tobias Lutzi, *Private International Law Online: Internet and Civil Liability in the EU* (Oxford University Press, 2020) ch 4.

[8] See generally Matthias Lehmann, 'New Challenges of Extraterritoriality: Superposing Laws' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar, 2019) ch 10.

Giustizia consensuale No 2/2021: Abstracts

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

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

Italian)

> In the XX century, dispute resolution was characterized by the leading role played by State courts: however, this situation has begun to change. With modernity and globalization has come the search of ways to ensure the 'deconflictualisation' of social and economic relations and solve conflicts arising out of them. In this context, ADR – and now ODR – have had a decisive impulse in the last decades and are now enshrined in the digital society of the XXI century. ADR mechanisms are, in fact, approached as means to ensure access to justice, favouring at the same time social peace and citizens' satisfaction. Nevertheless, some uncertainties remain and may affect ADR's impulse and future consolidation: among such uncertainties are the to-date scarce negotiation culture for conflict resolution, the need for training in negotiation tools, the need for State involvement in these new scenarios, as well as the attentive look at artificial intelligence, both in its 'soft' version (welfare) and its 'hard' version (replacement of human beings with machine intelligence).

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

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

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

This article examines the Italian doctrine of 'negotiation of ascertainment' (*negozio di accertamento*), by means of which the parties put an end to a legal dispute by determining the content of their relationship by mutual consent. Notably, by characterizing legal ascertainment as a binding judgment vis-à-vis the parties' pre-existing legal relationship, the author contributes to overcoming the misunderstandings that have always denoted the debate in legal scholarship, thus laying down the foundations towards a complete theory on consensual ascertainment.

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

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

Observatory on Legislation and Regulations

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

This article examines the most recent developments on mediation in China.

The analysis revolves around, in particular, two prominent documents: namely, the '14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035' and the 'Guiding Opinions of the Supreme People's Court on Accelerating Steps to Motivate the Mediation Platforms of the People's Courts to Enter Villages, Residential Communities and Community Grids.' In particular, the so-called 'Fengqiao experience' ? which developed as of the 1960s in the Fengqiao community and has become a model of proximity justice ? remains the benchmark practice for the development of a model based on the three principles of self-government, government by law, and government by virtue. In this framework, mediation is increasingly identified as the main echanism for dispute resolution and social management: in this respect, the increasing use of technology proves to be crucial for the development of mediation platforms and the efficiency of the entire judicial system. Against this background, the complex relationship becomes apparent between popular and judicial mediation, their coordination and their importance for governance and social stability: arguably, such a relationship will carry with it in the future the need to balance the swift dispute resolution with the protection of fundamental rights.

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

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

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

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

Observatory on Practices

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

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

In addition to the foregoing, this issue features the following book review by *Maria Rosaria Ferrarese* (Professor at the University of Cagliari): Antoine Garapon and Jean Lassègue, *Giustizia digitale. Determinismo tecnologico e libertà*

(Italian version, edited by M.R. Ferrarese), Bologna, Il Mulino, 2021, 1-264.

EUI Conference on Appellate Review and Rule of Law In International Trade and Investment Law

Tommorow, **20 January 2022**, the Department of Law of the European University Institute organizes a Conference on Appellate Review and Rule of Law In International Trade and Investment Law. The event will take place in a hybrid format that may be attended online via zoom or offline in person at the Badia Fiesolana-Refettorio.

The organizers characterise the purpose of the Conference as follows:

"Do regulatory competition, geopolitical rivalries, climate change, regionalism and plurilateral agreements risk undermining the UN and WTO legal orders and sustainable development objectives? How should the EU respond? This conference aims to create an interactive and targeted discussion on these intricate questions, with presentations by esteemed scholars in international economic law and policy

Why is it that the EU promotes judicialization and appellate review in trade and investment relations while the US government has unilaterally disrupted the appellate review system of the Word Trade Organization and seeks to limit judicial remedies in trade and investment agreements? Is appellate review necessary for protecting rule of law, sustainable development and prevention of trade, investment and climate conflicts? Answers to these questions are influenced by the prevailing conceptions of international economic law. Commercial law conceptions and Anglo-Saxon neo-liberalism often prioritize

private autonomy and business-driven arbitration and market regulation. Authoritarian governments tend to prioritize state sovereignty and intergovernmental dispute settlements. European ordo-liberalism emphasizes the need for embedding economic markets into multilevel human and constitutional rights and judicial remedies.

This conference aims to create an interactive and targeted discussion on these intricate questions, with presentations by esteemed scholars in international economic law and policy. The International Economic Law and Policy Working Group is therefore delighted to invite you to join this discussion on Thursday, 20th January 2022 at 14.30 (CET).

Speakers:

Professor Ernst-Ulrich Petersmann, European University Institute,

Professor Fabrizio Marrella, Ca' Foscari University of Venice,

Dr Maria Laura Marceddu, European University Institute, and

Professor Bernard Hoekman, European University Institute"

This event is open to all. Please register via thefollowing link by Wednesday, 19th January 2022, indicating whether you would like to attend the event in person or online. The Zoom link as well as the participants allowed to attend the event in person will be shared with registered participants prior to the event."

For the programme and further information on the EUI Conference please consult the attached programme as well as the event's website.

Call for Papers and Panels: “Identities on the move – Documents cross borders” Final Conference

by **Paul Patreider**

The European Project “***DXB – Identities on the move – Documents cross borders***” aims at facilitating the dissemination and implementation of Regulation (EU) 2016/1191 in the everyday practice of several EU Member States, improve the knowledge of the links between circulation of public documents, fundamental rights and freedom of movement, ensure a sound implementation of the Regulation for “hard cases” and raise awareness among registrars and legal practitioners. The partnership is supported by a consortium of academic institutions and associations of registrars. More information on the Project and its partners on the official website.

DxB’s Final Conference takes place on **23–24 June 2022** at the premises of A.N.U.S.C.A.’s **Academy in Castel San Pietro Terme, Bologna (Italy)**. The conference will offer a unique opportunity to take stock of the implementation status of Regulation (EU) 2016/1191. The event will also launch the Commentary and the EU-wide comparative survey placing the Regulation in the context of daily national practice.

The Conference will be a truly international event, gathering scholars, registrars, public administrators, political scientists, judges, PhD students and practitioners from all over Europe. Translation services are offered in **English**, **Italian and German**. To ensure wide participation as well as the variety of topics and viewpoints, we are pleased to announce a **Call for Papers & Panels**.

CONFERENCE TOPICS

Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents has so far gone largely unnoticed in scholarly debates and practitioners' discussions. As issues related to the circulation and mutual recognition of authentic instruments in civil status and criminal matters are becoming more and more pressing, the Regulation represents a great opportunity to strengthen the principles and values of the European Union.

Given the strict connection between the scientific and practical dimension of Regulation 2016/1191, authors are invited to examine how this act is currently implemented in the context of national civil status systems and fundamental rights. They should explore the potential positive impact on the freedom of movement of European citizens and on the enjoyment of their fundamental rights as well as focus on critical aspects and deficiencies of the current legal framework.

We encourage applicants to submit proposals for papers and panels related to the Regulation and its context. Possible topics include:

- The creation of a common European civil status framework;
- The **notion of "public document"** under the Regulation and similar instruments (e.g. formal and substantial requirements) and under domestic law;
- The circulation of **criminal records**;
- Problems arising from the lack of standardized definitions shared by all Member States (e.g. **"crime", "sex", "intended parent", "intersex"**);
- The impact of the Regulation on the effective exercise of the **freedom of movement**;
- Connections between **EU citizenship**, national citizenship status, and circulation of public documents;
- Case-law of the Court of Justice influencing the interpretation and implementation of the Regulation, with special regard to the Charter of Fundamental Rights and the ECHR;
- Exercise of **electoral rights** and the circulation of public documents under Article 2.2. of the Regulation;
- Analysis of "**hard cases**" when applying the Regulation (e.g. marriages

celebrated by religious authorities as third-country public documents etc.);

- The Regulation in comparison to the **ICCS Conventions** and other relevant international conventions (e.g. the Hague Apostille Convention (1961));
- **E-Justice Portal tools** (e.g. the multilingual form-filling system) and the efficiency of the Internal Market Information System (IMI) in the event of doubts as to the veracity of the documents, or the authenticity of the authority that signed them;
- The **digitalization of documents** and their circulation; how to ensure the authenticity of digital documents (both native digital size or digital copies of a paper original); forms of electronic signature or seals, with special regard to electronic signatures governed by the **eIDAS Regulation** and country-specific standards;
- Extension of the scope of the Regulation to public documents relating to, among others, the **legal status and representation of a company or other undertakings**, diplomas, certificates and other evidence of formal qualifications, officially recognised disabilities, etc. (see article 23 of the Regulation);
- Critical issues related to **multilingual standard forms** (**regional/local linguistic minorities**; public documents for which multilingual standard forms are not yet established by the Regulation etc.).

WHO SHOULD PARTICIPATE

Participation is not restricted to **lawyers** or to **established scholars**. We welcome **registrars, public administrators, professionals, practitioners, doctoral students**. We welcome proposals that offer multi-disciplinary perspectives from various areas of law (including European, civil, administrative, comparative, international, criminal, and labour law), as well as from scholars in the humanities and the social sciences (e.g. history, economics, political science, sociology) with an interest in the Conference's themes. We also welcome submissions from both senior and junior scholars (including doctoral students) as well as interested practitioners.

PAPER AND PANEL SUBMISSIONS

- Submit your **PAPER proposal** with an **abstract of a maximum of 500 words** and **5 keywords**. The abstract must also contain **Title**, **Name**, **Affiliation** (e.g. university, institution, professional association), **Country** and **E-mail address**.
- Submit your **PANEL proposal** with an **abstract of a maximum of 800 words** and **5 keywords**. We welcome a state-of-the art symposium or a round-table providing on key issues. Fully formed panel proposals should include at least three and no more than five presentations by scholars or practitioners who have agreed in advance to participate. Panel proposals should also identify **one panel chair/moderator**. Include: **title of the panel**, **names of speakers** and of the **chair/moderator** and their **affiliation** (e.g. university, institution, professional association), t**itle of each presentation** (if applicable), e**-mail address** of panel participants, **language**(s) to be used.

We encourage submissions in **English**. However, as part of the vision of a truly European conference, paper and panel proposals will also be **accepted in Italian and German**.

Selected paper authors will receive further information on the publication of the proceedings.

Submission templates for paper & panel proposal are available on the DXB website.

HOW AND WHEN TO SUBMIT

Send proposals to: info@identitiesonthemove.eu. Indicate in the e-mail subject line: "*Conference call – name of the (lead) author (or moderator) – Title of the paper or panel proposal*".

The deadline for submitting the paper or panel abstract proposal is 22 December 2021.

Applicants will be informed about the outcome of the abstract selection process no later than **15 January 2022**. If successfully selected, full papers must be

submitted by **15 April 2022**.

PROGRAMME AND REGISTRATION

The draft of the **Conference Programme** will be published on 1st March 2022. The final Conference Programme with all panel sessions will become available on 25 April 2022.

Registration for the Conference opens on the DXB website on 15 January and **closes on 20 May 2022**.

The event will be held in person, in compliance with the current health safety regulations, and will also be **broadcast online via live streaming with free access**.

Onsite participants will need a **Covid-19 digital certificate** (Green Pass), or equivalent certificate recognized under Italian law, if still so required by the Authorities at the time of the conference.

N.B. All speakers and moderators, including those invited under the call, are required to attend the event in person.

Registration fee: it includes conference materials, shuttle service (see website for details), tea/coffee and lunch refreshments as well as the certificate of attendance.

Ordinary fee: 80 Euros

Reduced student fee (including Ph.D. students): 40 Euros

Check the Project website for updates.

This project was funded by the European Union's Justice Programme (2014–2020). Project number: 101007502. The content of this Call represents the views of the partners only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Mag. Paul Patreider, Institut für Italienisches Recht, Fachbereich Privatrecht,

Extraterritorial Application of Chinese Personal Information Protection Law: A Comparative Study with GDPR

Written by Huiying Zhang, PhD Candidate at the Wuhan University Institute of International Law

China enacted the Personal Information Protection Law (PIPL) at the 30th Session of the Standing Committee of the 13th National People's Congress on August 20, 2021. This is the first comprehensive national law in China concerning personal information protection and regulating the data processing activities of entities and individuals. PIPL, the Cyber Security Law (came into force on June 1, 2017) and Data Security Law (promulgated on September 1, 2021) constitute the three legal pillars of the digital economy era in China.

PIPL includes eight chapters and 74 articles, covering General Provisions, Rules for Processing Personal Information, Rules for Cross-border Provisions of Personal Information, Rights of Individuals in Activities of Processing Personal Information, Obligations of Personal Information Processors, Departments Performing Duties of Personal Information Protection, Legal Liability and Supplementary Provisions. This note focuses on its extraterritorial effect.

1.Territorial Scope

Article 3 of the PIPL provides:

"This Law shall apply to activities conducted by organizations and individuals to

control the personal information of natural persons within the territory of the People's Republic of China.

This Law shall also apply to activities outside territory of the People"s Republic of China to handle the personal information of natural persons within the territory of the People's Republic of China under any of the following circumstances:

a . personal information handling is to serve the purpose of providing products or services for natural persons within the territory of the People's Republic of China;

1. *personal information handling is to serve the purpose of analyzing and evaluating the behaviors of natural persons within the territory of the People' s Republic of China; or*
2. *having other circumstances as stipulated by laws and administrative regulations."*

According to paragraph 1 of Art 3, PIPL applies to all data processing activities of personal information carried out in China. If foreign businesses processes or handles the personal information within the territory of China, in principle, they shall comply with the PIPL. It indicates that this clause focuses on the activities of processing or handling personal information in the territorial of China, especially the physical link between the data processing or handling activities and Chinese territory.

According to paragraph 2 of Art 3, the PIPL shall be applicable to activities outside the territory of China in processing or handling the personal information within China under some circumstances. As provided in Art 53, "personal information handlers outside the borders of the People' s Republic of China shall establish a dedicated entity or appoint a representative within the borders of the People' s Republic of China to be responsible for matters related to the personal information they handle". Notably, this clause focuses on the physical location of the data processors or handlers rather than their nationality or habitual residence.

PIPL has extraterritorial jurisdiction to data processing or handling activities outside the territorial of China under 3 circumstances as provided in paragraph 2 of Art 3 of the PIPL. This is the embodiment of the effect principle, which derives

from the objective territory jurisdiction and emphasizes the influence or effect of the behavior in the domain. If the purpose is to provide products or services to individuals located in China, or to analyze the behaviors of natural person in China, the PIPL shall be applicable. Crucially, the actual "effect" or "influence" of data processing or handling is emphasized here, i.e. when it is necessary to determine what extent or what requirements are met of the damage caused by the above-mentioned data processing or handling activities outside the territorial of China, Chinese courts may reasonably exercise the jurisdiction over the case. Obviously, it reflects the consideration of the element of "brunt of harm". However, if the "effect" or "influence" is not specifically defined and limited, there will be a lot of problems. It is important to figure out exactly whether data processors or handlers outside the territorial of China are aware of the implications of their actions on natural person within China and whether the "effect" or "influence" of the data-processing behaviors are direct, intentional and predictable.

The PIPL explicitly states its purported extraterritorial jurisdiction for the first time and insists on the specific personal jurisdiction and the effect principle. It is mainly because the PIPL is formulated "in order to protect personal information rights and interests, standardize personal information handling activities, and promote the rational use of personal information", but in the process of legal protection of personal information of natural person, there are a lot of challenges, such as the contradiction between the application of traditional jurisdiction, the virtual nature of personal information and so on. In this sense, all jurisdiction of the PIPL, whether territorial jurisdiction or personal jurisdiction or effect principle, are all further supplements for the existing personal information protection regime previously provided.

2.PIPL and GDPR: a Comparative Study

The provisions on jurisdiction of GDPR are mainly concentrated in Art 3 and Art 23, 24, 25, 26, 27 of preambular 2. In Art 3, paragraph 1 and 2 identified "establishment principle" and "targeting principle" and paragraph 3 provides "This regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law".

A. Establishment Principle

Under paragraph 1 of Art 3, GDPR applies to "the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not." It set the "establishment criterion", which has the dual characteristics of territorial jurisdiction and extraterritorial jurisdiction.

Compared with establishment criterion in GDPR, the PIPL indicates that personal information handlers outside the territorial of China shall establish a dedicated entity or appoint a representative within China as previously mentioned. It highlights the significance and necessity of establishing an entity when foreign data handlers process the personal information of national persons outside China under circumstance in paragraph 2 of Art3 of PIPL.

B. Targeting Principle

Compared with targeting criterion in GDPR, PIPL has many differences. Paragraph 2 of Art 3 of the GDPR clearly states that for data processors and controllers that do not have an establishment in the EU, GDPR will apply in two circumstances. Firstly, as stated in Art 3 of GDPR, the processing activities relate to "the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union" (Art 2 GDPR). It seems too abstract to give the definition and processing method of data processor and controller' s behavior intention. Art 23 of the GDPR provides the clarification that "it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union." The key factor to assess whether the processor or controller "targets" the EU is whether the behaviour of the offshore data processors or controllers indicates their apparent intention to provide goods or services to data subjects in the EU. This is an objective subjective test.

In contrast, Art 3 of the PIPL states that the law shall apply when the data processor processes personal information "to serve the purpose of providing products or services for natural persons within the territory of the People' s Republic of China". It indicates that the purpose of data processor or controller outside China is to provide a product or service to a domestic natural person in China. The key to the application is not only about whether it has purpose, but

also about whether they have processed personal information of a natural person in China.

Secondly, the procession activities are in related to "the monitoring of their behaviour as far as their behaviour takes place within the Union". It requires both the data subject and the monitored activity be located within the EU. "Monitoring" shall be defined in accordance with Article 24 of the GDPR preamble. This provision does not require the data processors or controllers to have a corresponding subjective intent in the monitoring activity, but the European Data Protection Board (Hereinafter referred to as EDPB) pointed out that the use of the term "monitoring" implied that the data controllers or processors had a specific purpose, namely to collect and process the data. Similarly, Art 3 of the PIPL also applies to activities outside China dealing with personal information of natural persons within China, if the activities are to analyse and evaluate the acts of natural persons within China. The meaning of "analysis and evaluation" here is very broad and seems to cover "monitoring" activities under the GDPR.

Furthermore, paragraph 3 of Art 3 of the GDPR provides: "This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law." It suggests that the data processor or controller does not have an establishment in the territory of the EU and there is no circumstances under paragraph 2 of Art 3 of the GDPR. Due to that the international law applies EU member state law in the area where the numerical controller is located, this law shall apply. This condition is primarily aimed at resolving the issue of extraterritorial jurisdiction over data processing or controlling that takes place in EU without an establishment. This condition is similar to Directive 95/46 of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The similar condition is not included in the PIPL, which instead shall apply to other circumstances "as stipulated by laws and administrative regulations".

C. Passive personality principle

Under the passive personality principle, a state has prescriptive jurisdiction over anyone anywhere who injures its nationals or residents. As previously mentioned,

paragraph 2 of Art 3 of the GDPR states that although the personal data processors or controllers are not established in the EU, EU still applies the laws of member states in accordance with public international law. Art 25 of the preamble of GDPR provides examples of such situations which may include a Member State's diplomatic mission or consular post.

To some extent, GDPR includes all the personal data processing activities involving natural persons situated in the EU area into its jurisdiction, which is a variation of the passive nationality principle. It is because EU treats the individual data right as a fundamental human right and aims to establish a digital market of the unified level of protection. PIPL adopts the similar practice by adopting the passive nationality principle to protect Chinese citizens and residents.

3.Conclusion

The promulgation of PIPL shows that China recognizes the extraterritorial effect of data protection law. The exploration of legislation not only has the meaning of localization, but also contributes to the formulation of data rules for the international community. It marks an important step towards China' s long-term goal of balancing the preservation of national sovereignty, the protection of individual rights and the free flow of data across borders.

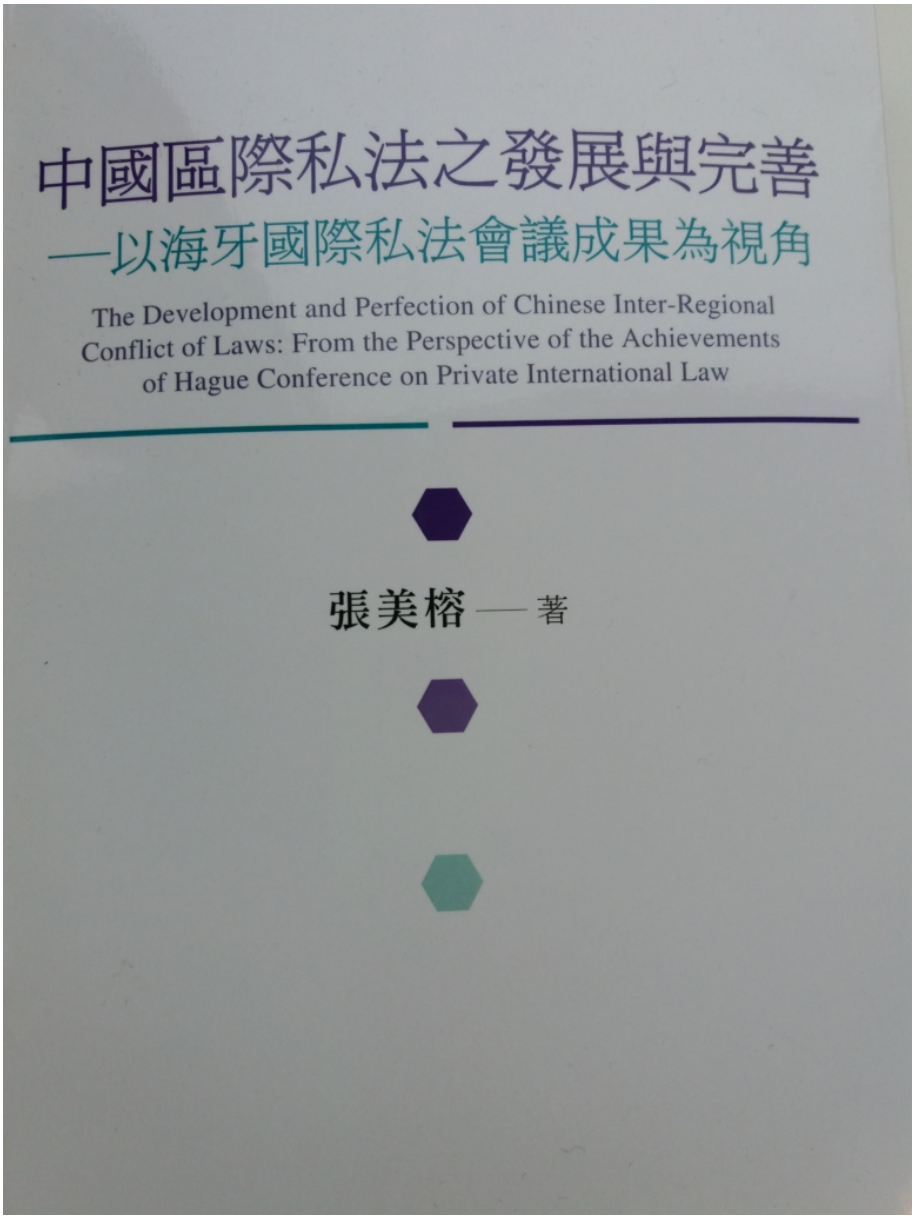
Open Letter Calls upon EU to Allow UK Assession to Lugano Convention

In response to the EU Commission's formal refusal to allow the UK to accede to the Lugano Convention, a coalation between several NGOs and legal scholars, lead by the European Coalition for Corporate Justice (ECCJ) has issued an open letter, calling upon the EU to reverse this decision. In essence, they argue that a full return to the common-law rules on jurisdiction, including the *forum non conveniens* doctrine, will reduce access to the UK courts in cases of corporate

human-rights abuses, which has only recently been rendered much more attractive by the UK Supreme Court's decisions in *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3.

The full letter can be found here. It is still open for signatures (via e-mail to christopher.patz[at]corporatejustice.org).

Book published: The Development and Perfection of Chinese Inter-Regional Conflict of Laws: From the Perspective of the Achievements of Hague Conference on Private International Law



Readers of this blog may be interested in the book (in Chinese) entitled, ***The Development and Perfection of Chinese Inter-Regional Conflict of Laws: From the Perspective of the Achievements of Hague Conference on Private International Law***. click here (angle.com.tw), written by Meirong Zhang, associate professor at UCASS (University of the Chinese Academy of Sciences) Law School, Beijing. It should be noted that this book was published in early 2020.

The book has four Parts: 1. The development of Chinese inter-regional conflict of laws and HCCH achievements, 2. Inter-regional civil and commercial jurisdiction, 3. Interregional choice of law rules, and 4. Inter-regional judicial assistance in civil and commercial matters. *From the preface (in English) by Hans van Loon (former Secretary General of the Hague Conference on Private International Law*

(HCCH)):

"Mainland China, Hong Kong Special Administrative Region (SAR), Macao SAR and Taiwan not only all have their own systems of substantive civil, commercial and procedural law, they also have their own rules of private international law or conflict of laws. As a result, each region has its own rules to determine whether its courts and authorities have jurisdiction to deal with a civil or commercial issue, what law applies to such issues, whether, and under what conditions, a foreign judgment may be recognised and enforced, and how to organize administrative and judicial assistance to foreign jurisdictions. Moreover, these rules apply, in principle, not only in the relations between each region and third States, but also in the relations between the four regions.

In this pioneering work, Meirong Zhang analyses the existing diversity of private international law systems in the four Chinese regions, and explores ways to better coordinate these rules, and improve communication and cooperation among the regions. *In our days of increasing mobility of persons, goods, services, capital and information, both among the Chinese regions and in their relations with third States resulting in multiple and manifold cross-border legal issues, this is a question of eminent practical importance. Central to this study are the daily interests and concerns of individuals, families, companies and other entities in our increasingly interconnected, complex world.*

The author has wisely chosen an approach to her research that is principled and pragmatic at the same time. Her starting point is the Chinese concept of "regional pluralism of legal systems".

She points out that this principle has three dimensions: "first, equality between different legal regions; second, understanding and respect for each legal region's characteristics and its autonomous public policy; third, mutual progress and benefits for all four legal regions based upon cooperation between the people across all four legal regions". Therefore, mutual respect, based on the recognition of equal value of each legal system, and cooperation grounded in mutual respect should govern the future of interregional private international law in China.

Whilst "regional pluralism of legal systems" is the starting point,

Meirong Zhang adds a second pillar to support her proposals: "Chinese inter-regional conflict of laws should also be the carrier of the good values and spirit of mankind"*. It would be a mistake to view this as an expression of naive idealism, and to think that it would suffice to focus on the interregional situation isolated from the rest of the world. Firstly, the increase in interregional cross border contacts among the four Chinese regions is in part the result of increased global interaction. Indeed contemporary globalization blurs the boundaries between local including interregional, and global affairs as never before. Secondly, and in part as a result of globalization, people all over the world are increasingly faced with challenges common to humankind, whether one thinks of the risks to which children around the world are exposed in cross-border situations, the global financial system, or the global climate. Global issues should preferably [be] solved globally. Common global approaches based on sound values are not only desirable but in the end also more effective.*

Basing her proposals on the two pillars "regional pluralism of legal systems" and "a community with a shared future for humanity", the author turns to the work of the Hague Conference on Private International Law for inspiration for the future development of private international law among the four regions of China. *She has good reasons to do so. Firstly, as she points out, to a various extent and in various ways, the private international law systems of all four regions have already been influenced by the work of the Hague Conference. Secondly, as she also reminds us, arrangements have recently been concluded between Chinese regions, namely Mainland China and Hong Kong SAR, which have borrowed provisions and language from Hague Conventions. Thirdly, and most fundamentally, the Hague instruments reflect both the spirit of the Chinese concept of "regional pluralism of legal systems" – mutual respect, based on the recognition of equal value of each legal system, and the need for close cooperation on that basis – and globally accepted values. All Hague instruments are carefully crafted texts, and the result of inclusive negotiations among experts and delegates representing States from all continents, based on sound comparative research and input from stakeholders from across the world.*

Hague Conventions are primarily aimed to provide common legal frameworks for relations between States, and provide expressly that ratifying States are not

bound to apply them to conflicts solely between different legal systems with such States. ***Therefore, when China joins a Hague Convention, the rules of that Convention do not thereby apply to the relations between Mainland China and the other three regions. However, as the arrangements between Mainland China and Hongkong SAR demonstrate, they may provide a model for a private international law regime for interregional relations. A model, not a straightjacket: Hague Conventions have always made room for specific local including regional needs.***

It is on this basis that Meirong Zhang then examines whether and to what extent the work of the Hague Conference could serve as inspiration for a common private international law framework for the four Chinese regions. Successively, she deals with the issue of jurisdiction of the courts and authorities of the four regions (Chapters 2-3), interregional choice of law rules (Chapters 4-7), administrative and judicial cooperation, and recognition and enforcement of foreign judgments (Chapters 8-10). She does not advocate to slavishly copy the content of Hague Conventions into an interregional system. For example, and interestingly, she suggests that the specific characteristics of Chinese family realities may qualify or colour the notion of "the child's best interests" (Conclusion Part II).

Obviously, an innovative work like this can only lay the foundation for more detailed reflections and research. But because the study is both principled and pragmatic, the groundwork it lays is strong. One senses the firm commitment of the author to the good causes of removing outdated and parochial obstacles to cross-border relationships and transactions, of facilitating the life of citizens in a complex mobile world, of safeguarding their civil interest and rights, of protecting weaker parties and vulnerable people and vital public interests and common global goods. Meirong Zhang has written a seminal study that will inspire many readers. It deserves a wide readership." (Our emphasis)