The Lessons of *Airfreight Cartel*: Mechanisms of Coordination of Parallel Collective Lawsuits in Several Jurisdictions?

Jorg Sladič

Abstract *Airfreight Cartel* is a regulatory case currently being litigated before the Court of Justice of the EU for infringement of Article 101 of the Treaty on the Functioning of the European Union (Consolidated Version of the Treaty on the Functioning of the European Union, OJ EU C 326, 26.10.2012, pp. 47–390.). While competition litigation in EU law is a topic of interest, the far more interesting issue from the point of view of civil litigation is the coordination of pending class actions in the United States, Canada, Australia, the Netherlands, the United Kingdom and France. The infringement of competition law in the airfreight cartel is challenged by collective redress lawsuits in these different jurisdictions (Sect. 1) (In this study, only European regulatory responses will be assessed. Decisions and rulings of Australian, Korean and US Competition Authorities will not be assessed in depth. At the regulatory level (prosecution by authorities of infringement of competition law, i.e. in Europe, Art. 101 TFEU) there are two European Commission decisions and several judgments annulling the first decision by the General Court of the EU.). This paper assesses the stakes in coordination of parallel lawsuits in collective redress from a European point of view (Sect. 2). Mechanisms of coordination of parallel lawsuits in collective redress are the cornerstone of any successful cross-border collective redress mechanism. There are several mechanisms that can be applied in coordination of collective redress (Sect. 3). These include mechanisms unknown in the EU such as the doctrine of toleration of foreign-related class actions (Sect. 4). A novel approach in coordination would be an international panel on cross-border collective redress (Sect. 5). *Forum non conveniens* and anti-suit injunction will be explored in the class action context (Sects. 6 and 7). The European answer to such mechanisms are described as the *lis pendens* and related actions doctrine (Sects. 8, 10 and 11). *Lis pendens* as a mechanism of coordination of parallel lawsuits in collective redress has already been explored in Quebec (Sect. 9). In conclusion, the possibility of agreements on prorogation of jurisdiction will be assessed within a collective redress framework (Sect. 12).

J. Sladič (✉)
European Faculty of Law, Ljubljana, Slovenia
e-mail: jorg.sladic@epf.nova-uni.si

A. Uzelac, S. Voet (eds.), *Class Actions in Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 89, https://doi.org/10.1007/978-3-030-73036-9_11

1 The Complexity of the International Airfreight Cartel

The international airfreight cartel is the embodiment of the legal imbroglio of the modern "massified" and globalized economy. The cartel is described in detail in the decisions of the European Commission and the General Court of the EU.[1] In short, Air Canada, Air France-KLM, British Airways, Cargolux Airlines International, Cathay Pacific Airways, Deutsche Lufthansa, Japan Airlines, KLM, LAN Cargo, Latam Airlines Group, Lufthansa Cargo, Martinair Holland, Quantas, SAS and SAS Cargo Group, Scandinavian Airlines System Denmark-Norway-Sweden, Singapore Airlines Cargo, Singapore Airlines Limited and Swiss International Air Lines participated in a worldwide cartel to fix the level of fuel and security surcharges. This arrangement originated as a means to tackle rising fuel costs and the security surcharge that had been specially introduced to allegedly address the costs of certain security measures imposed following the terrorist attacks of 11 September 2001 and amounted to a price-fixing cartel spanning a 6-year period, from December 1999 to February 2006, in the airfreight services market covering flights from, to and within the European Economic Area. US authorities found that in addition to a fuel surcharge, a war-risk-insurance surcharge, a security surcharge, and a US customs surcharge were levied. The contacts between the airlines initially began with a view to discussing fuel surcharges. The carriers communicated with each other to ensure that worldwide air cargo carriers imposed a flat rate surcharge per kilo for all shipments. The cartel members extended their cooperation by introducing a security surcharge and refusing to pay a commission on surcharges to their clients (freight forwarders).[2]

In Europe, the international airfreight cartel met with civil litigation as seen, for example, in a 2011 torpedo action (i.e. an action for negative declaration under Art. 27 of the repealed Regulation 44/2001) in the Netherlands lodged by Air France/KLM against Deutsche Bahn, a corporation harmed by the cartel.[3] In 2015, the time was ripe for collective redress, as seen in the Netherlands where *Stichting Cartel*

[1] See the Summary of Commission Decision of 17 March 2017 – Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) (notified under document C(2017) 1742) (Text with EEA relevance, OJ EU C 188, 14. 6. 2017, p. 14); Commission's decisions are available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39258; see also the General Court press release No 147/15.

[2] The aim of these contacts was to ensure that these surcharges were introduced by all of the carriers involved and that increases (or decreases) of the surcharge levels were applied in full without exception. By refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers. Such practices are in breach of the EU competition rules, European Commission Press Report IP/10/1487, Brussels, 9 November 2010, http://europa.eu/rapid/press-release_IP-10-1487_en.htm.

[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ EU L 351, 20. 12. 2012, p. 1 and Council Regulation (EC) No 44/2001 of 22 December

Compensation lodged an Austrian-style class action against the members of the cartel.[4] The pendency of the case before EU authorities (the Commission and the Court of Justice) was one of the reasons (perhaps even the main reason) why the Dutch Court of Cassation refused to rule on a request for clarification on the applicable law. It has not yet been definitively established why the Court did not make a ruling in the case as an infringement of Article 101 TFEU by the members of the cartel.[5] During the pendency of the case, it cannot be argued that the cartel was already proven. Dutch proceedings therefore interact with EU law.

In England, a group action by some 64,000 Chinese companies was dismissed in 2014, at the first instance, and then in 2015 at the appellate instance on a question of procedure.[6]

However, there were also class actions in Canada, Australia and the United States with "global classes".[7] In Australia, a class action was started in 2007 and closed in 2014 when the Federal Court of Australia (a higher Australian court) approved an agreement between the applicants and the members of the cartel, for the settlement of the Australian Air Cargo class action for 38 million Australian dollars. Class proceedings in the United States were commenced in November 2006, and a class action

2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC L 12, 16. 1. 2001, p. 1.

[4]In Austria, collective redress vehicles were developed autonomously (class action Austrian-style) by assignment of claims for collection by a special purpose vehicle that happens at the same time to also be a qualified entity under implementing measures of Directive 2009/22/EC. Collection of claims assigned to an agent has a long tradition in Austria, where the first cases of such litigation by private agents as a special purpose vehicle for collection of assigned claims were reported in 1926 (Klauser 2005, p. 744 with reference to the Austrian Supreme Court [Oberster Gerichtshof] case 3 Ob 479/26, ECLI:AT:OGH0002:1926:RS0037628). The assignment of claims for their enforcement in Austrian law is not conditioned by the fact that the assignee must be the entity qualified to bring a representative action for injunction. As a consequence, one can speak of a semi-private (in cases of assignment to a qualified entity) and of an entirely private and autonomous (in cases of Rechtsverfolgungsgesellschaft) collective redress. The quality to initiate such an action for collection of assigned claims does not lie in § 29(1) KschG, i.e. the national provision on qualified entities implementing Art. 3 of Directive 2009/22/EC. It lies rather in autonomous transactions made vis the special purpose vehicle. The same model as in Austria seems to be applied also in the Netherlands and Slovenia (Tzankova and Kortmann 2010, p. 119). Dutch law was modified in 2019 by a new law on collective redress.

[5]Dutch Supreme Court [Hoge Raad], case ECLI:NL:HR:2018:345, decision No 18/00298 of 16 March 2018, available at https://www.rechtspraak.nl/.

[6]Bao Xiang International Garment Centre & Ors v. British Airways Plc [2015] EWC 3071 (Ch) (27 October 2015).

[7]A global class (also transnational class) is a class in US class action composed of absent class members who are US residents and non-residents. A global class "encompasses a sizeable proportion of non-citizens" of the US (Clopton 2015, p. 1388, Oquendo 2017, p. 72). It could be contended that due to comity reasons global class actions are to be dismissed in common law jurisdictions on *forum non conveniens* grounds. In civil law jurisdictions such classes should operate under the opt-in system. Such class actions can "be filed in courts of more than one country" (see e.g. a recent Canadian decision Leon v Volkswagen AG, 2018 ONSC 4265 (CanLII), http://canlii.ca/t/htjgm. Accessed 16 Oct 2018).

was certified on behalf of persons who purchased airfreight shipping services for shipments directly from or to the country. In other words, a global class was certified, including domestic and foreign purchasers of airfreight services. The US *forum* declared it had jurisdiction for adjudicating the claims for inbound and outbound shipments, but dismissed claims for shipments to, from or within the European Union (excluding from or to the USA), because they were based on alleged violations of European law. The US *forum* declined to exercise jurisdiction over the claims brought under European law on the grounds of *forum non conveniens* and international comity. However, it assumed jurisdiction for claims brought under US law that involved shipments between the European Union and the United States. The US *forum* specifically considered whether plaintiffs who were non-resident in the United States had standing under the applicable US law and concluded that this was the case.[8]

In Canada, a class action against Lufthansa and Swiss International Airlines was settled in 2008 for a "global class". Class actions were lodged in courts in Ontario, Quebec and British Columbia. Class actions achieved settlements without any admission of liability by the defendants also for foreign absent class members who purchased airfreight services on shipments to/from Canada (excluding to/from the United States). Class action settlements for global classes were approved for several Canadian provinces.[9] In the Canadian branch of the case:

> [P]rior to the US certification motion, the defendants in the American proceeding brought a motion to dismiss the claims of the representative plaintiffs on a number of grounds. In an order resulting from that motion, the US court maintained the claims for inbound and outbound shipments, but dismissed claims for shipments to, from, or within the European Union (excluding from or to the United States), because they were based on alleged violations of European law. The US *forum* declined to exercise jurisdiction over the claims brought under European law on the grounds of *forum non conveniens* and international comity. However, it assumed jurisdiction of claims brought under US law that involved shipments between the European Union and the United States.[10]

In Australia, Canada and the United States the defendants pleaded lack of jurisdiction. The US *forum* then rejected the defendants' argument that charging fixed prices for airfreight services occurred outside the United States.

In conclusion, it appears that several courts in several jurisdictions can adjudicate collective redress actions with global classes. Canadian decisions dealing with (international) jurisdiction in class actions explain, on the one hand, that "it is difficult to reconcile class actions that include unidentified claimants with traditional approaches to jurisdiction"[11] and, on the other hand, that "a class action format is not a procedural structure that entitles a court to entertain the litigation of matters not

[8] Airia Brands Inc. v. Air Canada, 2017 ONCA 792, § 17, available at https://www.canlii.org/en/; see also the American case In re Air Cargo Shipping Services Antitrust Litigation, MDL No. 06-1775, 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008).

[9] http://www.aircargosettlement2.com/courtCa.

[10] Airia Brands Inc. v. Air Canada, 2017 ONCA 79, § 17.

[11] Airia Brands Inc. v. Air Canada, 2017 ONCA 792, § 69.

within the jurisdiction or competence of the certifying court".[12] "To allow for jurisdiction, either the members must be identified and present or consent to jurisdiction or there must be another doctrinal mechanism available to anchor jurisdiction."[13] However, an error would be made by "simply anchoring [the] jurisdiction analysis in a negation of the traditional bases for jurisdiction".[14] Special procedural characteristics of collective redress (representativeness) do not mean that traditional rules on allocation and coordination of international jurisdiction have been discarded.

2 Stakes in Coordination of Parallel Collective Lawsuits

From a European point of view, in practice there are only two stakes in coordination of allocation of international jurisdiction in collective redress. The first is: Can European claimants initiate legal action (individual or collective) before a European *forum* while there is a pending US class action litigation with a certified international class including the same non-resident European absent class members? The second stake from the point of view of coordination of lawsuits is: Can the European defendant successfully bar European absent class members from being included in a pending US class action as absent class members of an international class?

In Europe, the international coordination of pending collective lawsuits seems to operate under opt-in mechanisms explicitly providing that non-residents are required to opt-in in a pending lawsuit.[15]

It is clear that European non-resident absent class members can plead the defects in international jurisdiction of a US *forum* deemed contrary to *ordre public* of the European *forum* where *exequatur* is requested.[16] Spanish legislation on recognition of foreign judicial decisions in collective redress (Art. 47(2) of *Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil*[17]) even contains a special provision barring the *exequatur* of foreign judicial decisions in collective redress given where international jurisdiction is based on criteria not foreseen in Spanish legislation (i.e. mirror image assessment of indirect jurisdiction).[18] In the

[12]Walter v. Western Hockey League, 2018 ABCA 188 (CanLII), http://canlii.ca/t/hs196, § 8.

[13]Airia Brands Inc. v. Air Canada, 2017 ONCA 792, § 69.

[14]Airia Brands Inc. v. Air Canada, 2017 ONCA 792, § 103.

[15]See for Canada e.g. Piché and Saumier (2019), p. 255, and for Belgium and Slovenia, Sladič (2017b), pp. 145 and 146 with reference to Art. XVII.38(1, 2) of Belgian Code of Economic Law and Art. 30(3) of Slovenian Law on Collective Actions.

[16]In such a case the class action is not a superior device to individual actions.

[17]BOE-A-2015-8564, https://www.boe.es/eli/es/l/2015/07/30/29.

[18]In collective redresss ... *la resolución extranjera no se reconocerá cuando la competencia del órgano jurisdiccional de origen no se hubiera basado en un foro equivalente a los previstos en la legislación española*.

following analysis, a number of open questions on international class or group will be assessed (Sect. 2.1) and then put in the jurisdictional framework (Sect. 2.2).

2.1 International Class or Group as the Main Issue in Coordination of Parallel Collective Lawsuits

According to US law, where a non-resident can join an international class, a US *forum* also has international adjudicatory jurisdiction over non-resident absent class members in a manner that is not known in other countries. However, a decision given in the United States or Canada including European absent class members for example on assessment (especially in Canada) of a real and substantial connecting factor might not be recognized in European states applying the assessment of mirror image in indirect jurisdiction. On the other hand, the question seems to be also whether there is a *res iudicata* effect (preclusion) of a US class action judgment for foreign class members in their jurisdiction of origin (Johnson 2012, pp. 970 and 971).[19]

The US Federal Rule of Civil Procedure 23 "is silent on the inclusion of foreign plaintiffs in US classes" and "on its geographical scope", "thus leaving courts with little direction on whether or, under what circumstances, to include foreign claimants in a US class action" (Monestier 2011, 5 and 8).[20] "Given a favourable territorial reach of substantive law and an otherwise proper class action, the proposed class might include, in addition to American plaintiffs, some foreigners who dealt with the foreign defendant outside the United States" (Clermont 2015, p. 69).

The "question is whether there is also [international] jurisdiction over absent class members or potential plaintiffs" (Halfmeier 2012, p. 177). If the idea of an absent class member benefiting from the protection of legal order of the domicile or residence against proceedings abroad is to be taken as the underlining guidance in assessing the international jurisdiction over absent class members, then international jurisdiction over absent class members is indeed neither easy to understand nor easy to endorse. Traditionally "there is no such thing as a court lacking personal jurisdiction over a plaintiff" (Andrews 2013, p. 331).

[19]The question of *exequatur* of a US class action from one State in another US State according to the case Ansari v. New York University "is usually not an issue when the class members are United States citizens, as courts in this country recognize the preclusive effect of a fairly noticed class action suit".

[20]Admittedly, in 1966 when Rule 23 was drafted no one could foresee "international" classes in US class actions. US *fora* are nevertheless quite often confronted with class actions comprising class members from several other states or jurisdictions. The Texas Supreme Court had to deal in *Citizens Ins. Co. of America v. Daccach* with a class action "brought by residents of 35 foreign countries who bought securities from defendant, a corporation that had its principal place of business in Texas" (Symeonides 2008, p. 38).

In order to give a decision on the merits in a global class action, a *forum* must also have jurisdiction over all of the international members of the group or class (Glenn 1999, p. 35). It would appear that as far as US law is concerned, a US "court can bind absent class members without having jurisdiction over them" (Winters 1985, p. 182). The international adjudicatory jurisdiction by a US *forum* hearing a class action could be based on the finding that where a US *forum* has jurisdiction in a class action over a resident absent class member, it also has jurisdiction over a non-resident absent class member. Non-resident absent class members are treated as though they were resident absent class members due to commonality of factual and legal issues in a class action applicable to both types of absent class members. Canadian legal writers explain that in Canadian common law "commonality itself [as the main characteristics of class actions] supplies the real and substantial connection sufficient to assert jurisdiction over non-resident class members" (Monestier 2010, p. 538). It is also said that common issues are "to be considered as a presumptive connecting factor in the real and substantial connection test" (Monestier 2010, p. 538). As such, in Canada "The real and substantial connection test has been a dominant, although not exclusive, test governing the issue of jurisdiction" (Monestier 2010, p. 538). Indeed, "commonality itself supplies the real and substantial connection sufficient to assert jurisdiction over non-resident class members" (Monestier 2010, p. 538). However, relying on the sufficient commonality as the real and substantial connection blurs the limits between the merits and the jurisdiction. Jurisdiction depends on the commonality, which itself depends on an early assessment of the merits (Monestier 2010, p. 550).[21] In comparative law of collective redress, Canadian case law, for example, confirmed, in 2015 and 2017, the commonality criterion as the real and substantial connecting factor in a class action with international class in the airfreight cartel.[22]

2.2 *Jurisdictional Stake in Coordination of Parallel Collective Redress*

A study prepared for the European Parliament put the problems in cross-border lawsuits very succinctly:

> The lack of common system of dispute resolution at the transnational level results in uncertainty, furthers the costs of exchanges, and may even deter economic actors from entering into cross-border exchanges (de Miguel Asensio et al. 2018, p. 6).

[21] In other words, the commonality is both the connecting factor in allocating the jurisdiction to adjudicate and the criterion for certification.

[22] *Airia Brands v. Air Canada,* 2015 ONSC 5332 and *Airia Brands Inc. v. Air Canada*, 2017 ONCA 79; see the summary at https://gavclaw.com/2018/01/09/airia-brands-inc-v-air-canada-jurisdiction-and-certification-of-global-classes/.

In assessing collective redress in European competition law, it has been observed that "failure to consolidate an action concerning all victims of the anticompetitive conduct may result in the risk of parallel proceedings. This creates the risk of irreconcilable judgements" (Telfer 2017, p. 70). Parallel proceedings occur when the same parties bring the same or closely related complaint simultaneously before multiple *fora* (Erk-Kubat 2014, p. 17). If this finding is applied *a maiore ad minus* also to collective redress, the logical conclusion is that parallel collective redress refers to at least two collective redress lawsuits pending against the same defendant in at least two different jurisdictions for redressing the same wrongs (George 2002, pp. 500 and 501). In this study, the term "parallel proceedings" refers to proceedings involving the same cause of action and between the same parties brought in the courts of different states.

Collective redress is said to be a technique of regulation through litigation, or, in other words, the state of the *forum* where a collective redress lawsuit is pending has a vested interest in the outcome of such a lawsuit. The *forum* where a collective lawsuit with an international class or group of absent class members is pending will therefore export the *forum*'*s* considerations of what correct regulation should be. However, the existing framework of coordination of individual cross-border lawsuits will also have to be used in international collective redress. Traditionally, the rule *actor sequitur forum rei* applied in civil law Europe gives an advantage to the defendant, for in cross-border lawsuits he will have the advantage of the "home ground", i.e. the language, *usus fori* and knowledge of procedural law of the *forum*. As a consequence, any lack of coordination of pending parallel cross-border collective redress will be used and perhaps even abused by the representatives of the group or class.[23]

Due to the territorial nature of international civil procedure, problems in allocation of international jurisdiction between *fora* of several states will continue to exist (Franzina 2014a, p. 71). The nature of collective redress is related to a multitude of claims, i.e. in jurisdictional terms to the necessity of aggregation and coordination of parallel lawsuits (Hess 2010, p. 119). Due to the "massification" of damages and massive harm events, it is quite possible that there will be a class action pending in the United States and certain European members of the international class will lodge individual or even collective lawsuits against the same defendant before the European *forum* having international jurisdiction by virtue of registered or head office in the given European state (Heß 2000, p. 378). As many European laws of civil procedure provide for an action for negative declaration, there is always a possibility that the defendant may also choose his defence against a pending US class action in lodging an action for negative declaration (i.e. declaration that there is no liability or no fault) before a European *forum* against the international class or even only one plaintiff in the United States (Heß 2000, p. 378).

[23]However, the principle *abusus non tollit usum* shall be applied.

3 Overview of Mechanisms of Coordination of Parallel Cross-Border Lawsuits

In collective redress, there are several techniques of dealing with parallel proceedings that will also have to be applied in international litigation. Techniques of do-nothing, transfer and consolidation, stays, dismissals and anti-suit injunctions are enumerated in US legal writing (George 2002, pp. 502–506, 1999, pp. 777–782). However, such an enumeration does not cover the EU or civil law approach. Transfers and consolidations are fully known in internal (collective) litigation in EU Member States with no *extra muros* effects. Stay is known in *lis pendens* doctrine under the Brussels Ia Regulation. Assessing stay of proceedings as being a separate remedy in international lawsuits outside the *lis pendens* doctrine makes no sense to civil law lawyers. The consequence of *lis pendens* in cross-border lawsuits is namely the stay of proceedings of the later (second or younger) lawsuit. Instead of the US division of tools to coordinate parallel, simultaneous, concurrent and even related actions in collective redress, another division is proposed, namely the do-nothing remedy (toleration), the *forum non conveniens* doctrine, anti-suit injunctions, *lis pendens* and related actions doctrine and the agreements on prorogation. It will, however, be said that agreements on prorogation in consumer-oriented collective redress face an *ex ante* bar in recognition in substantive EU consumer protection law.[24]

The first option is letting parallel, simultaneous or concurrent national and foreign pending proceedings involving the same cause of action and the same parties exist and continue (the do-nothing approach) which seems to be the US approach in cross-border collective redress (George 2002, p. 502 and 503). The opposite approach is the pure and simple interdiction of any parallel proceedings abroad via an anti-suit injunction. This is a technique that seems to be much cherished in common law jurisdictions. However, such a technique suffers from the inconvenience of territoriality, i.e. the limits imposed on such an injunction by international law. It is also not likely that a foreign *forum* will accept an anti-suit injunction under the international *ordre public* assessment in any case (see the development on anti-anti-suit injunctions in European jurisdictions).

Another option is the application of the *lis pendens* rule based on the chronological principle of priority, or to be more exact, seniority based on the tradition of Roman law (*prior tempore, potior iure*) (Egea 2014, p. 148). Such a rule is sometimes described by common law lawyers as a first-to-file rule. Closely connected to *lis pendens* is the doctrine of related actions combined with consolidation of similar proceedings. Yet another option of coordination appears to be prorogation by virtue of an agreement (prorogation of jurisdiction). The final option is the judicial discretion to decline jurisdiction (*forum non conveniens*) (McLachlan 2008, pp. 243–253; Wautelet 2002, pp. 56–399). Provided that there is a conclusion

[24]CJEU, Sales Sinués and Drame Ba, C-381/14 and C-385/14, ECLI:EU:C:2016:252.

of a corresponding treaty or convention, the allocation of jurisdiction in collective redress could also be solved by having recourse to the upgraded and modified international multi-district litigation process.

The doctrines of toleration, *lis pendens*, anti-suit injunctions and *forum non conveniens* are used to coordinate parallel proceedings also in collective redress. *Lis pendens* and *forum non conveniens* are assessed in the 2008 International Law Association Resolution on Transnational Group Actions, adopted in Rio de Janeiro at the 73rd conference (§§ 54 and 57) as mechanisms of coordination of parallel lawsuits in collective redress. Recent case law on the application of the *forum non conveniens* doctrine in class actions is to be found in Canada.[25] Case law on anti-suit injunctions in class actions is to be found in antipodean common law.[26]

4 Toleration of Foreign Proceedings and "Related Class Actions"

Toleration will be understood in the framework of international civil procedure as a doctrine according to which there can be several simultaneous proceedings concerning the same parties and having the same cause of action pending before *fora* of several states. Any individual proceedings are not a bar to each other proceedings. In collective redress, a branch of the doctrine of toleration of parallel cross-border class actions—not necessarily involving the same plaintiff or the same absent class members—was largely discussed and developed by practitioners in common law jurisdictions in order to facilitate the management of multi-jurisdictional class actions who even speak of informal collaboration (Clopton 2018, p. 134).

A development in cross-border US-Canadian class actions will be mentioned and highlighted. The US and Canadian IMAX case paved the way for the new development of cross-border collective redress and related class actions (Clopton 2015, p. 1421).[27] Concurrent[28] Canadian and US securities fraud class actions against the corporation IMAX for alleged misrepresentations to the secondary market in respect

[25]Kaynes v. BP P.L.C, 2016 ONCA 601 and Paniccia v. MDC Partners Inc., 2017 ONSC 7298 (CanLII), https://www.canlii.org/en/.

[26]Federal Court of Australia, Jones v. Treasury Wine Estates Limited [2016] FCAFC 59, https://www.austlii.edu.au.

[27]See In re IMAX Sec. Litig., 283 F.R.D. 178 (S.D.N.Y. 2012), In re IMAX Sec. Litig., 272 F.R.D. 138, 142 - 44 (S.D.N.Y. 2010), In re IMAX Sec. Litig., 587 F. Supp. 2D 471, 474 - 78 (S.D.N.Y. 2008), Silver v. IMAX Corp., 2013 ONSC 1667 (Can.); Silver v. IMAX Corp., (2012) 110 O.R. 3d 425 (Can. Ont. Sup. Ct. J.); Silver v. IMAX Corp., (2011) 105 O.R. 3d 212 (Can. Ont. Sup. Ct. J.); Silver v. IMAX Corp., 2009 O.J. No. 5585 (Can. Ont. Sup. Ct. J.) (QL).

[28]Overlapping class proceedings according to a Canadian *forum*, Silver v. IMAX, 2013 ONSC 1667.

of financial reporting were initiated in 2006.[29] The certification in the Canadian class action comprised "a global class and included all persons that had acquired IMAX securities on the Toronto Stock Exchange and the NASDAQ regardless of where they lived".[30] The class in the US class action "consisted of all persons that had acquired IMAX securities on the NASDAQ during the relevant class period".[31] "Motions practice, discovery, and settlement negotiations proceeded in parallel until parties to the U.S.-side of the litigation reached a settlement" (Clopton 2015, p. 1421). The US *forum* approved the settlement with the condition that the Canadian *forum* adopt "an order amending the class definition in the related Canadian proceedings to carve out the class members who were included in the US settlement".[32] The Canadian *forum* approved the US settlement and only then did the US *forum* issue a consent decree (Clopton 2015, p. 1421).

Such an approach will be regarded both as an upgrade of traditional international legal assistance (*auxiulium iuris*) and as a development of the phenomenon of negotiations between courts in two sovereign nations (Westbrook 2003, p. 567).

The test field in toleration in cross-border collective redress is the multi-jurisdictional class action litigation between Canada and the United States. Both countries have their own approach to class actions. Canada applies a derivative of Rule 23 FRCP. However, cross-border class actions are deemed extremely complicated in both legal systems.[33] This is the case since:

> Courts in both countries have thus far been adept and adaptable in developing *ad hoc* procedures to deal with these types of issues. ... Here the settlement is global in scope crossing provincial and international boundaries and the jurisdictions in which the underlying proceedings have been commenced include two countries and several provinces. It would be useful if more formal protocols were developed to facilitate the courts and the parties in dealing with these types of cases.[34]

In 2011, the American Bar Association adopted a Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and a Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings. In 2011, the Canadian Bar Association adopted and then later in 2018, modernized

[29]The shares of the defendant IMAX had traded on both the Toronto Stock Exchange and the NASDAQ.

[30]https://www.internationallawoffice.com/Newsletters/Litigation/Canada/Dentons/Silver-v-IMAX-avoiding-war-on-two-fronts.

[31]https://www.internationallawoffice.com/Newsletters/Litigation/Canada/Dentons/Silver-v-IMAX-avoiding-war-on-two-fronts.

[32]https://www.internationallawoffice.com/Newsletters/Litigation/Canada/Dentons/Silver-v-IMAX-avoiding-war-on-two-fronts.

[33]*Frohlinger v. Nortel Networks Corporation*, 2007 CanLII 696 at §30 (Ont. S.C.J.), see also "Cross-border class actions raise due process and litigation preclusion issues of significance to United States counsel seeking to either implement multi-jurisdictional settlements or to select the most favourable venue for trial." http://blg.com/en/News-And-Publications/Documents/publication_1932.pdf, p.1.

[34]*Frohlinger v. Nortel Networks Corporation*, 2007 CanLII 696 at §30 (Ont. S.C.J.).

similar Canadian Class Actions Judicial Protocols. All of these protocols also deal in the coordination of tolerated, concurrently pending "related class actions" in the United States and Canada. Such protocols appear to be a modern development in "contractual" international legal assistance (Segovia González 2018, p. 315). "The Protocols set out "best practices" to assist in litigation of cross-border cases involving United States federal courts and Canadian courts."[35] It has been noted that, "However, adoption of this protocol by any court remains the decision of that court, absent legislative or regulatory direction."[36] In addition, "The Protocols are not intended to (and do not) interfere with or limit any court's authority or discretion, or supersede rules of procedure or other governing law, or adversely affect any rights of any parties or class members."[37]

The negotiations and coordination by virtue of the said protocols between two courts in two states are based on the idea of managerial judges in collective redress requiring information exchange. The essence of both protocols is contained in the class action management conferences. As noted by a Canadian *forum* in the event of a parallel US-Canadian class action, "It would seem ... that the various class proceedings would benefit from cooperation and coordination—using the three Cs of the Commercial List (communication, cooperation and common sense). Otherwise, they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and thereof susceptible to being conquered."[38]

Such applications of the doctrine of toleration are unknown in Europe and are rather an unexplored research field on the other side of the Atlantic.

5 Coordination by a Special Panel Allocating (International) Jurisdiction

In the United States, civil actions pending before different federal *fora* involving one or more common questions of fact can be transferred to any federal *forum* of first instance for coordinated or consolidated pretrial proceedings (George 1999, p. 815; Nagareda et al. 2013, p. 404). Therefore, "In practical terms, much of the action surrounding the MDL panel concern the selection of the district court in which a given body of related litigation is to be concerned" (Nagareda et al. 2013, p. 405).

[35]Report on Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and a Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings, p. 1.

[36]Resolution 18-03-A - Annex 1, Canadian Judicial Protocol for the Management of Multi Jurisdictional Class Actions and the Provision of Class Action Notice.

[37]Report on Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and a Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings, p. 1.

[38]Grace Canada Inc. (Re) (2005), 17 C.B.R. (5 th) 275 (Ont. Sup. Ct.).

The aim of such a referral is the promotion of just and efficient conduct of such actions. Such coordinated or consolidated pretrial proceedings will be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. Proceedings for the transfer of an action may be initiated by the judicial panel on multidistrict litigation of its own initiative or following a motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings may be appropriate.[39] The MDL litigation has taken extreme proportions in the US massified economy and one US legal writer reported that Apple, Google, Facebook and corporate leviathans alike are heavily involved in massive class actions and face MDL litigation (Dodge 2014, p. 331).

In the United States, the Judicial Panel on Multidistrict Litigation is a chamber composed of seven judges having jurisdiction to aggregate civil actions pending in federal district courts into a single, transferee district court for coordinated or consolidated pretrial proceedings. The purposes of this transfer also referred to as the "centralization process" are to avoid duplication of discovery, to prevent inconsistent pretrial rulings and to conserve the resources of the parties, their counsel and the judiciary. Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel at or before the conclusion of centralized pretrial proceedings.[40] The crucial ruling "the Panel has to make is the selection of the judge to whom an MDL case is transferred" (Sherman 2008, p. 10). As far as the selection, i.e. the allocation of the appropriate courts, is concerned, "Formally, the law permits the MDL Panel to select any federal district court for this purpose. In practice, the Panel's choice of transferee fora appears to be strongly influenced by the location of the filed cases and the defendant's *forum* preference" (Nagareda et al. 2013, p. 405), and "it is often availability and experience that leads to the transfer to a particular judge" (Sherman 2008, p. 10).

A very interesting proposal on international coordination is the setting-up or instituting of an international version of the judicial panel for international MDL. However, the US Judicial Panel on Multidistrict Litigation operates within one nation alone. From an international point of view, it is a US *forum* much the same way as the US Supreme Court is. It is a judicial authority of the United States. On the international level, this finding means that such a coordination of litigation is feasible only where a corresponding treaty or convention is adopted and incorporated in the national laws of contracting states.[41] It is the contention of this section that there is no such treaty and that the nearest equivalent of such a coordination is found in the European Brussels Ia regime. It is also contended that continental Europe will not accept any other solution than a foreseeable and perhaps strict and clear allocation of international jurisdiction. For a civil law-trained lawyer, on the other hand, multidistrict litigation operates on the basis of the assessment of the class action

[39] 28 U.S. Code § 1407 – Multidistrict litigation.

[40] http://www.jpml.uscourts.gov/overview-panel-0.

[41] See e.g. on failure of setting up a Canadian body coordinating multi-jurisdictional class procedure in Chabrny (2019), p. 137 and 138.

on the *forum non conveniens* doctrine and not on clear and foreseeable criteria. Consideration of equity and even perhaps efficiency found in the *forum non conveniens* doctrine are deemed offensive to the continental doctrine of the natural judge (*le juge naturel*) or legal judge (*gesetzlicher Richter*).

6 Coordination by the Doctrine of *Forum Non Conveniens*

In short, *forum non conveniens* is a common law doctrine originating in Scotland allowing courts to refuse "to hear cases when the ends of justice would best be served by trial in another *forum*" (Barrett 1947, p. 387).[42] In legal orders belonging to civil law legal systems some effects of the *forum non conveniens* doctrine can be achieved by application of the jurisdictional norm of *forum necessitatis* (Hess and Mantovani 2019, p. 5). However, it is too early to say whether the *forum* of necessity can be used to coordinate parallel collective lawsuits in several nations.

In the *Lernout and Hauspie* class action, US courts applied the *forum non conveniens* doctrine for the European (i.e. Belgian) share owners harmed who had bought the shares on EASDAQ (the Brussels stock exchange) (Kafi-Cherrat 2018, § 29). A Belgian *forum*—the Court of Appeal of Ghent [Hof van Beroep Gent]—recognized, by a judgment of 23 March 2017, the L&H class action approved settlement in Belgium.[43] Lernout & Hauspie Speech Products, N.V. was a Belgian IT enterprise specialized in speech recognition software. At the peak of its commercial activities, it was listed both on the NASDAQ and on the EASDAQ exchanges. L&H had its US executive offices in Massachusetts and as a consequence the international jurisdiction and venue in the US class action was vested in the US District Court for the District of Massachusetts.[44] European (i.e. Belgian) victims of

[42]On the introduction of that doctrine in English case law, see Beaumont (2018), p. 449, see on introduction of that doctrine in English case-law in Beaumont (2018), p. 449, see on two exceptions in civil law jurisdictions Goldstein (2016), pp. 51–83.

[43]The Dutch text is available at https://www.rechtbanken-tribunaux.be/sites/default/files/public/content/lh_-_geanonimiseerd.pdf.

[44]L&H went bankrupt on 25 October 2001 due to a securities fraud scheme. A Belgian criminal investigation was opened and concomitantly several class actions proceedings in the United States were lodged before US courts either by US or by Belgian prejudiced investors. The US *forum* in Massachusetts and the Belgian Court of Appeal of Ghent refer to 16 class actions. On 8 August 2000, *The Wall Street Journal* published a critical article about L&H. Based on that article a first US class action was lodged already on 9 August 2000. The first L&H class action in the USA was lodged only one day after the report of financial fraud in *The Wall Street Journal*. The Belgian criminal case with the civil private tort litigation annexed as an accessory to a criminal case appears to have started at a later time in 2001. The L&H class action ended with a negotiated settlement approved by the US *forum*. The defendants used the US-approved settlement in Belgium as a defence against the judgment to pay compensation to civil parties in Belgian criminal proceedings. As a consequence of the objection by the civil parties, the Belgian *forum* had to deal with the plea that the US class judgment approving the settlement was not binding on the civil parties in Belgian proceedings. The Court of Appeal of Ghent acknowledged the modernized legal landscape in

the wrongdoing, having bought their shares and other equity on the European EASDAQ market (i.e. European stock exchanges), could not initiate or join the class action in the United States. US class actions remained available only for shares bought on US stock exchanges. The result of the L&H class action seems to confirm the practice established already in the Dutch *Converium* case.[45] In that Dutch case, a certain number of shareholders harmed by the Swiss *Converium* had bought shares on the SWX Swiss Exchange. They were excluded from the US class action settlement approved by the US *forum* because it lacked jurisdiction over shareholders who bought shares on the SWX Swiss Exchange. *Forum non conveniens* doctrine is slowly becoming, if not an insurmountable, then at least quite an important obstacle for European lead plaintiffs and absent class members in the EU.

An interesting, newer case on the application of the *forum non conveniens* doctrine is to be found in Canadian class action case law.[46] As far as class actions are concerned, according to both cases, "the principle of comity underlies the *forum non conveniens* analysis".[47] From the point of view of a lawyer educated in the spirit of the Brussels Ia Regulation applying the *lis pendens* doctrine, there is indeed a real problem in conciliating the judicial comity doctrine with the *forum non conveniens* doctrine: "In the *forum non conveniens* analysis, juridical advantage is a problematic factor because ... assessing the merits of rival jurisdictions is inconsistent with the principles of comity."[48] Where a *forum non conveniens* is to be applied in a class action, a common law court will consider a list of discretionary factors

Belgium (collective redress in Book XVII of the CdE/WER) and concluded that US judicial decisions and the settlement approved by the US *forum* in the L&H class action are foreign enforceable judicial decisions within the meaning of the Belgian *lex fori* (Art. 22 of the Belgian Code of Private International Law). The plea according to which a class action settlement is solely a contract with *inter partes* effect was rejected as a judicial decision in a US class action confirms the settlement between the plaintiffs and the defendant(s). As a consequence, such a decision can be opposed to all the absent class members who did not duly opt-out (Court of Appeal of Ghent [Hof van Beroep Gent], judgment of 23 March 2017, § 66). Investors who effectively participated in the settlement are bound by it; the investors who timely opted out are not bound by the settlement. A class action judgment and settlement will be recognized *de plano* if they are not contrary to Belgian international *ordre public*. In comparing the Belgian collective redress under Book VII CdE/WER and the US class action, the Belgian *forum* concluded that US law guarantees more rights to absent class members than the Belgian legislation. The opt-out system is justified by reason of sound administration of justice. The fact that not all individual absent class members were personally informed does not vitiate the class action settlement (ibid. § 93.). The rights of the defence of the non-resident absent class members in the US class action were not violated. The salient point of the recognition refers to a certain lack of finality.

[45]Court of Appeal of Amsterdam [Gerechtshof Amsterdam], 12 November 2010, NJ 2010/683, LJN: BO3908 ECLI:NL:GHAMS:2010:BO3908.

[46]*Kaynes v. BP P.L.C*, 2016 ONCA 601 and *Paniccia v. MDC Partners Inc.,* 2017 ONSC 7298 (CanLII).

[47]*Paniccia v. MDC Partners Inc.,* 2017 ONSC 7298 (CanLII), §41 and also §42.

[48]*Paniccia v. MDC Partners Inc.,* 2017 ONSC 7298 (CanLII), §44.

> in determining the most appropriate forum for an action; including: (a) the location of the majority of the parties; (b) the location of the key witnesses and evidence; (c) contractual provisions that specify applicable law or accord jurisdiction; (d) the avoidance of multiplicity of proceedings; (e) the applicable law and its weight in comparison to the factual questions to be decided; (f) geographical factors suggesting the natural forum; (g) juridical advantage; i.e., whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court; and (h) the existence of a judgement in the competing forum.[49]

In the EU, the *forum non conveniens* doctrine is deemed incompatible with European international *ordre public* and the Brussels Ia Regulation. The *forum non conveniens* doctrine is expressly deemed incompatible with the doctrine of the natural judge or legal judge according to which the court having jurisdiction to hear a case must be known in advance (*ex ante* predictability much cherished in civil law legal systems) (Picardi 2010, pp. 27–73). This fallacy of the *forum non conveniens* doctrine is sometimes also acknowledged in class actions in common law jurisdictions. As such, "If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as *forum* shopping."[50]

The judicial rejection of the *forum non conveniens* doctrine by the Court of Justice of the EU in the case *Owusu* (C-281/02) was a surprise only for lawyers in common law legal systems.[51] It is contended that the *Owusu* case is the natural and foreseeable end of the doctrines of the natural judge or legal judge (Schack 2017, pp. 217–219; Briggs 2013, p. 101). The essence of that doctrine is a general and abstract and perhaps rigid predictability in the allocation of jurisdiction.

However, the *forum non conveniens* doctrine is applied in cross-border collective redress in common law legal orders. The Canadian case *Kaynes v. BP* refers to a Canadian securities class action against British Petroleum. An "Ontario class action, claiming damages for alleged misrepresentations made to shareholders by the respondent BP" was lodged; and, "The moving party purchased his BP securities on the New York Stock Exchange and the proposed Ontario class includes worldwide purchasers of BP securities." The Canadian *forum* first stayed proceedings against BP by virtue of a pending US class action in the District Court, Southern District of Texas. In addition, "The class in that proceeding includes the moving party and other Canadian investors who purchased BP securities on the" New York Stock Exchange. Later on, the Canadian *forum* lifted the stay and resumed the case against BP.[52] Much in the same way, in 2017 the Canadian Ontario Superior Court of Justice in the case *Yip v. HSBC Holdings plc* also applied the *forum non conveniens* doctrine in a securities class action.

[49] *Kaynes v. BP P.L.C*, 2016 ONCA 601, §39.

[50] *Paniccia v. MDC Partners Inc.,* 2017 ONSC 7298 (CanLII), §44.

[51] CJEU, *Owusu*, C-281/02, ECLI:EU:C:2005:120.

[52] *Kaynes v. BP P.L.C*, 2016 ONCA 601.

7 Coordination by Anti-Suit Injunctions

In short, an anti-suit injunction is a judicial decision ordering a party not to litigate before a different jurisdiction (Dowers 2013, p. 960). Anti-suit injunctions are usually an unknown legal figure in civil law jurisdictions. From a European point of view, a minority opinion states that such an injunction could be compatible with the Brussels Ia Regulation (Michaels 2006, pp. 1063 and 1064). However, as far as anti-suit injunctions in civil law legal orders are concerned, Germany appears to be an exception. German case law, since the *Reichsgericht* in the times of the Third Reich, developed an action on injunction to cease proceedings abroad (*Klage auf Unterlassung ausländischer Prozessführung*) (Schütze 2009, p. 52).[53] There is a possibility of the application of anti-suit injunctions under § 826 BGB (prohibition of causing damages by an act *contra bonos mores*) by a German defendant in a US class action (Heß 2000, p. 378.).

However, modern anti-suit injunctions are definitely a child of common law. A common law anti-suit injunction is directed to the defendant in a pending proceeding before a common law forum. Even though not directly directed at the foreign *forum*, it represents an indirect infringement of the jurisdiction of the foreign court, causing incompatibility with the international *ordre public* of the *forum* where the second case is pending (Nagel and Gottwald 2013, p. 365). The incompatibility with EU law and scope *ratione materiae* of licit anti-suit injunctions in parallel judicial proceedings was cleared by the CJEU in the cases *Turner*, *West-Tankers* and *Gazprom*.[54]

US class action litigation can encounter some anti-suit measures typical for civil procedure in common law jurisdictions. This development in common law legal systems refers to antipodean common law.[55] In 2016, the Federal Court of Australia in the case *Jones v. Treasury Wine Estates Limited* granted an anti-suit injunction addressed at group members in a class action pending in the United States where they sought to invoke the power of a US *forum* to obtain compulsory oral discovery. The case referred to a US class action pending against Treasury Wine Estates Limited before the US District Court, Southern District of New York. The Australian *forum* ordered several parties in the class action pending before a US *forum* to refrain from participating in the US proceedings.

In continental Europe, anti-suit injunctions are deemed not to be compatible with Article 6(1) ECHR, i.e. with fair trial requirements. Effective access to court is the essence of the fair trial requirement and will not pertain in the country where the second case was initiated. Continental courts usually declare such an injunction

[53]For the reason of such development (so-called Latvian divorces), see Coester-Waltjen (2017), pp. 1073 and 1074.

[54]CJEU, Turner, C-159/02, ECLI:EU:C:2004:228, Allianz, C-185/07, ECLI:EU:C:2009:69, Gazprom, C-536/13, ECLI:EU:C:2015:316.

[55]*Federal Court of Australia, Jones v. Treasury Wine Estates Limited* [2016] FCAFC 59, https://www.austlii.edu.au.

incompatible with Article 6(1) ECHR. Under the case law developed by the ECtHR, there might indeed be a latent incompatibility of anti-suit injunctions with Article 6 (1) ECHR. The Court

> reiterates that, according to its well-established case-law, Art. 6 §1 of the Convention may be relied on by individuals who consider that an interference with the exercise of one of their (civil) rights is unlawful and complain that they have not had the possibility of submitting that claim to a court meeting the requirements of Art. 6 § 1. In the words of the Court's Golder judgement, Art. 6§1 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect.[56]

There is also the fully practical problem that a foreign *forum* will not easily enforce and give extra-territorial effect to an anti-suit injunction where there is no agreement on prorogation or arbitration clause. In civil law legal systems, traditionally an anti-suit injunction is viewed contrary to international law.

8 Coordination by the Rule of *Lis Pendens*

In national proceedings the *lis pendens* and its effects are clear. The *lis pendens* as a mechanism of protection against parallel and concurrent lawsuits is a bar to proceedings and a negative condition of admissibility barring a new lawsuit between the same parties involving the same cause of action during the pendency of the first lawsuit (Sladič 2017a, p. 222). The second court seized will decline jurisdiction where there are the same parties in both actions which are based on the same cause of action (object and cause). In the absence of the same law binding the *fora* of several states (such as e.g. the Brussels Ia Regulation), the *lis pendens* is determined by the *lex fori* of the state where the action was lodged. The virtue of the European doctrine of *lis pendens* is the simple *ex ante* avoidance of clash of parallel civil proceedings. The UNIDROIT Principles of Transnational Civil Procedure consider the *lis pendens* together with *res iudicata*. Both rules are designed to avoid repetitive litigation, whether concurrent (*lis pendens*) or successive (*res iudicata*) (Rule 28). In Europe the *lis pendens* doctrine is considered to be characteristic of the Brussels Regulations (Ballarino et al. 2016, p. 48), i.e. it is typical for civil law jurisdictions.

Even though *lis pendens* appears to be characteristic of EU private international law, EU law nevertheless appears to treat the said doctrine in the case of conflicts of individual and collective lawsuits in consumer collective redress in a negative way (Stürner and Wendelstein 2018, p. 1083). In collective redress under national *lex fori*, a European *forum* where the *lis pendens* defence is made will have to assess the mutual effects of an individual lawsuit and collective lawsuits. Whereas national laws might apply the technique of stay of national individual lawsuits in cases of national collective redress, the issue at the European and international stage is quite

[56]ECHR, *Golder v. United Kingdom*, ECLI:CE:ECHR:1975:0221JUD000445170, § 36, and Athanassoglou a.o. v. Switzerland, ECLI:CE:ECHR:2000:0406JUD002764495, § 43.

different (Voet 2017, pp. 270–272). In the EU (already at the national stage), Article 7 of Directive 93/13 precludes a provision of national law which requires a court—before which an individual action has been brought by a consumer seeking a declaration that a contractual term binding him to a seller or supplier is unfair—automatically to suspend such an action pending a final judgment concerning an ongoing collective action brought by a consumer association seeking to prevent the continued use, in contracts of the same type, of terms similar to those at issue in that individual action.[57] Where a national *forum* of the EU Member State court is required by virtue of a national Code of Civil Procedure to stay the individual action brought before it, pending a final judgment concluding the collective action, the outcome of which is likely also to be applied in the individual action and, on that basis, such a situation is liable to undermine the effectiveness of the protection intended by that directive, in view of the differences in the purpose and nature of the consumer-protection mechanisms given specific expression by individual action and collective redress.[58] The *Sales Sinués* case might be linked to national specifics of Spanish law of civil procedure (Voet 2017, p. 263);[59] however, in the EU at the international level the coordination of individual redress and collective redress makes the application of the *lis pendens* doctrine a very uncertain matter. *A simili ad simile*, an argument that the staying of individual lawsuits in a pending collective redress infringes EU consumer protection legislation will have to be extended to *lis pendens*. It could indeed be argued that the recognition of the effects of a pending US class action under the *lis pendens* doctrine goes against the *effet utile* of EU consumer protection law. Where substantive law, as in cases of EU consumer protection directives, bars the application of collective redress, then *lis pendens* will only be a one-way instrument. A defendant will be able to claim that the individual lawsuit brought by a consumer constitutes a *lis pendens*. However, there will be no *lis pendens* in case of a lawsuit brought by a qualified entity (i.e. the European lead plaintiff or collective or ideological party under Directive 2009/22/EC).[60]

A truly international *lis pendens* means that there is a lawsuit pending outside the EU involving the same cause of action as a lawsuit pending before the European *forum* (Virgós Soriano and Garcimartín Alférez 2007, p. 361; Kastanidis 2015, p. 579). In other words, the international *lis pendens* involves a parallel lawsuit pending between the same parties with the same cause of action (cause and object) in a third country outside the EU. However, parallel "proceedings involving a court in a third country raise substantially different issues from those raised by intra-European

[57]CJEU, Sales Sinués and Drame Ba, C-381/14 and C-385/14, ECLI:EU:C:2016:252, §43.

[58]CJEU, Sales Sinués and Drame Ba, C-381/14 and C-385/14, ECLI:EU:C:2016:252, §§35 and 36.

[59]CJEU, Sales Sinués and Drame Ba, C-381/14 and C-385/14, ECLI:EU:C:2016:252.

[60]Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), OJ EU L 110, 1.5.2009, p. 30. This Directive was repealed by the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC,OJ EU L 409, 4.12.2020, p. 1.

cases" (Franzina 2014b, p. 24). If under the horizontality principle the import of judicial proceedings abroad is to be considered to be based on the principle of equality (i.e. every *forum* is equal, there is no superiority of the *fora* of one state over the *fora* of another state), then the proceedings pending abroad are entitled to be acknowledged also in the *forum* of the title import state (Schack 2017, p. 315; McLachlan 2008, p. 229).

However, there is a latent mistrust of proceedings abroad, with the main reason being the unknown compliance with minimum procedural requirements in civil justice set by Article 6(1) ECHR. In addition, "In modern civil procedure fundamental rights must be respected also cases where such a procedure is regulated by EU regulations" (Sladič 2013, p. 337). Procedural guarantees offered in Europe under Article 6(1) ECHR or Article 47 of the Charter of Fundamental Rights of the EU might not be identical in third countries. In order to give a pending US class action the effects of *lis pendens*, the right to a fair trial under Article 6(1) ECHR must have roughly the same contents as the due process clause of the US Constitution.

The enormous advantage and advancement in international civil procedure in the EU since the entry into force of the Brussels Ia Regulation is a clear and uniform set of rules on *lis pendens* where an earlier lawsuit with the same cause of action is pending between the same parties in a third state that is not an EU member state (Kastanidis 2015, p. 579). In other words, where a lawsuit in a third country, e.g. the United States, will be deemed to fall within the scope of application *ratione materiae* of the Brussels Ia Regulation (i.e. a US class action will have to be a civil and commercial matter), uniform rules on *lis pendens* will apply in the EU (with the exception of Denmark). Private international law in the EU is no longer entirely closed solely within European dimensions (Franzina 2014a, p. 39).

The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters indirectly applies the international *lis pendens* doctrine in Article 7(2).[61]

Even before the entry into force of the Brussels Ia Regulation, issues of *lis pendens* of parallel European lawsuits in the case of a Canadian class action were already discussed in the Dutch case law. In October 2013 the court of first instance (Rechtbank Amsterdam) declined jurisdiction to hear a case against a Canadian defendant based on allegations of financial fraud (a Ponzi scheme) as there was already a class action pending.[62] The declining of jurisdiction was also based on the *res alibi pendens* as a subsidiary criterion.

Judges in Quebec, Canada already had experience with the *lis pendens* doctrine in class actions also in Canadian intra-provincial class actions requiring the application of private international law (i.e. inter-regional private law) and the law of international civil procedure. However, as long as Europe has recourse to qualified entities in the sense of Directive 2009/22/EC or Directive 2020/1828 in representative collective redress, the Canadian solution will have only partial interest in Europe.

[61] See https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

[62] Rechtbank Amsterdam, ECLI:NL:RBAMS:2013:7936, § 4.5.

Case law in Quebec principally deals with questions of *lis pendens* at the stage of certification in a single nation.[63] Where there are qualified entities such Canadian case law is indeed solely information of comparative importance. A *lis pendens*, i.e. a subsequent lawsuit before a European *forum*, while the first lawsuit is pending before a court of a third state can only be seen after the expiry of the opt-out period.[64]

From the US or Canadian point of view (or from the point of view of any collective redress operating under opt-out systems), the lodging of a parallel lawsuit in Europe will have to be assessed as implied opt-out. Where the second lawsuit in Europe was initiated by the absent European class members during the notice period for opting-out, there is indeed a direct opt-out. Not acknowledging such an opt-out would certainly lead to the bar to recognition of the US class action judgment or approved settlement. The manner for requesting exclusion is to be understood broadly. The direct manner is indeed the sending of information in compliance with the opt-out notice. However, lodging a lawsuit before a European *forum* is also an implied request for exclusion of any class action proceedings before the US *forum*. The lead plaintiff and the US *forum* are probably not aware of the pending European lawsuit. However, the defendant is only too well aware of a pending lawsuit before the European *forum*. It is argued that a lack of information by the defendant on pending European lawsuits where the certification order includes absent European class members amounts to infringement of the procedural duty imposed on parties to cooperate with the court hearing the case. Assuming that the period of time for opting-out has expired, the crucial provision in the EU is undoubtedly Article 33(1) of the Brussels Ia Regulation (Hess 2010, p. 119). Under Article 33(1), in cases where the international jurisdiction of the non-EU *forum* is based on the general rule of *actor sequitur forum rei* (Art. 4) or on the rules on special jurisdiction (Arts. 7, 8 or 9) and proceedings are pending before a court of a third state at the time when a court in a Member State is seized of an action involving the same cause of action and between the same parties as the proceedings in the court of the third state, the court of the Member State may stay the proceedings if:

- it is expected that the court of the third state will give a judgement capable of recognition and, where applicable, of enforcement in that Member State; and
- the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. Legal writers speak of the application of the traditional triple identity in *lis pendens* doctrine (same object, same cause and same parties) (Kastanidis 2015, pp. 582 and 583).

Several other questions remain open in recognition of a pending US class action under the *lis pendens* doctrine in EU Member States (Romy 1999, p. 792):

[63]See e.g. Superior Court of Quebec, in case *Labrecque v. General Motors of Canada Ltd.,* 2011 QCCS 266, JG1876.

[64]See for a different solution in Quebec, in case *Hotte v. Servier Canada Inc.* [1999] R.J.Q. 2598 (C.A.).

– identity of parties (the same parties),
– the same cause of action (subject-matter of a civil lawsuit, i.e. object and the cause),
– capacity of recognition in the EU (the avoidance of irreconcilable final judicial decisions),
– discretionary power in the interest of proper administration of justice.

The question of the same *causa petendi* (cause of action) between a pending US class action and a consequent European lawsuit opens new horizons of international civil lawsuits. Under the current doctrine of the CJEU, "The cause of action comprises the facts and the rule of law relied on as the basis of the action."[65] While "most parallel proceedings will involve the same mass damage event giving rise to proceedings" (van Lith 2010, p. 56), it cannot be definitely said that the second part of the cause of action, the legal basis, is always identical. The identity in *lis pendens* in traditional lawsuits is not the same as the requirement of commonality in US class actions. The identity also requires the *idem ius* postulate; such a postulate could be given where subclasses are certified. Systems of collective redress operating under the opt-out system offer a striking similarity to the *litisconsortium necessarium*, a type of joinder in civil law legal systems where the principle *idem factum, idem ius* is applied. A ruling on the merits cannot be given to the members of the group in application of different substantive laws; there can solely be a split in subgroups requiring the application of similar law. Where the legal basis (the *lex causae*) and the facts are identical as in the pending US class action, one condition for international *lis pendens* is complied with. However, even if one condition is met, other conditions are not necessarily met.

Could there be cases where a partially same cause of action could also trigger a defence of *lis pendens*, as far as the same facts and the same rule of law relied on as the basis of the action are concerned? Where either the law or the facts are not identical, there is no *lis pendens*. A case could easily be construed. There is a pending consumer class action in the United States based on liability for defective products for personal injury. However, a single European international class member of a certified international class not having opted out lodged a civil lawsuit before an EU *forum* for material damages in his apartment due to defective product. There is no identity of facts or of legal basis (different damages). The assessment of the same cause of action in the defence of *lis pendens* under Article 33(1) of the Brussels Ia Regulation will therefore require a very detailed assessment of the US class action. The US certification order will have to be a very detailed one. Where an international class is certified, with e.g. subclasses of Europeans, the legal basis will also be explained if there is to be no relitigating of the case in the EU Member States.

The importance of the definition of parties in US class actions will certainly be raised in assessing the *lis pendens* of US class actions and European individual or collective redress. The situation is complicated in systems of collective redress

[65]CJEU, Tatry, C-406/92, ECLI:EU:C:1994:400, § 38.

operating under the opt-out system, as there is no express consent by the represented parties (implied consent by virtue of silence and not opting-out) (Hess 2010, p. 119). Under Article 33(1), there can be recognition of *lis pendens* solely where a lawsuit is pending between the same parties. The essence of any doctrine of *lis pendens* is the identity of the *causa petendi* and the parties.

In collective redress, the condition of same parties seems not to be complied with in any case. It has been noted that, "This is because class actions create a new type of claimant—one that did not exist when the traditional" rules on *exequatur* were created and developed (Brown 2008, p. 222). Which entity capable of bringing proceedings is a party to legal proceedings is determined by the *lex fori* of the European *forum*. The said *lex fori* also compromises the Brussels Ia Regulation. In Switzerland, the consequence of the *lex fori* approach to the *lis pendens* leads to the finding that the Swiss *forum* hearing the individual action, initiated by an individual who is a member of the certified international class against the defendant in a pending US class action, will have to determine in application of the *lex fori* whether the US class action and the individual action are litigated by the same parties (Romy 1999, p. 792).

As far as the defendant in a consumer-initiated international action is concerned, there are usually no problems. The defendant is for example one multinational corporation. However, the plaintiff seems to be in a completely different position. In an opt-in system of collective redress, even the absent class members express their intent to be parties to a collective redress lawsuit. Therefore, where the international representative collective redress operates under the opt-in system it would be difficult to deny the *lis pendens* effect in case of a second individual lawsuit by a class member having opted in.

However, the representative collective redress like a US class action operates under an opt-out system. In such systems, three types of plaintiffs will have to be distinguished: the lead plaintiff (named), members of the class having opted out in time and the absent and passive group members. Members of the class having opted out are not bound by the US class action judgment or approved settlement. In other words, they are not a party to the US class action lawsuit. No *lis pendens* defence can be used against them. The certified class is to be treated under the entity model as a litigant, i.e. a collective party to pending class action proceedings in the United States.[66] Therefore, the certification of collective party will also be capable of triggering the defence of *lis pendens*. However, if the *lex fori* of the requested EU Member State does not recognize the standing of a collective party, i.e. where the

[66]See for the doctrine of collective party e.g. Cappelletti 1975, pp. 591–593. In class actions, the class is "the litigant and the client" (Shapiro 1998, p. 919; Piché 2016, p. 299; Romy 1999, p. 796). The merit of such an approach is a very simple compatibility with the subjective *res iudicata* effect (*res iudicata ius facit inter partes*). In other words, in the USA a class action by a lead plaintiff representing a class is the result of the legislature's preference for class members as a collective party (Piché 2016, p. 299). As a consequence, there is a distinction between the traditional party in binary proceedings, on the one hand, and the ideological or collective party, on the other (Cappelletti 1975, pp. 587–593).

certified class—including the absent class members—is not accepted as a party to a pending US class action, there will be no identity of parties and consequentially no risk of *lis pendens*. Traditionally the "*lis pendens* rule applies to situations in which parties are themselves participants to proceedings" (van Lith 2010, p. 57; Romy 1999, p. 793). In other words, an active party's role is required. The said required active role for triggering the *lis pendens* defence in US class actions is indeed given solely to the representatives, i.e. lead plaintiffs. The lead plaintiff is named in the pending US class action lawsuit. Were the European lead plaintiff to initiate an individual lawsuit against the same defendant in the EU, the condition of same parties would be complied with. If the idea of collective party, i.e. the litigative entity, is pursued, an assessment of the term of party in civil procedure under the *lex fori* of the *forum* where *exequatur* is sought will have to be performed. The preferred option in Europe nevertheless seems to be a very traditional one. The party is solely the subject suing or being sued (Braun 2014, pp. 334 and 335).

As far as the absent and passive class members of a certified international class are concerned, the *lis pendens* defence will have to be denied to the defendant. In the Netherlands the question of identity of the parties was asked in the framework of the now repealed WCAM opt-out collective redress settlements. The question is indeed "whether applicants requesting a binding declaration of a WCAM group settlement are the "same parties" as an interested person instituting individual proceedings or requesting a declaratory judgement against the alleged responsible party, or even whether they are the same parties as class members against the alleged responsible party" (van Lith 2010, p. 57). As already mentioned, the traditional answer given is that, "the standard *lis pendens* rule applies to situations in which parties are themselves participants to proceedings" (van Lith 2010, p. 57; Romy 1999, p. 793). *A contrario*, therefore absent and passive class members do not even fall within the scope *ratione personae* of the pending US class action proceedings (Romy 1999, p. 793).

As far as the first condition of *lis pendens*, namely the "same parties", is concerned, there might be a problem with the definition of a party. It has been noted that, "The current differences among group litigation . . . suggest that foreign courts may hesitate before concluding that a class action and a follow-up action by an individual absent class member against the same defendant involve the "same parties" for purposes of claim preclusion" (Wasserman 2011, p. 380). While the statement in US legal writing is naturally not made in the framework of *lis pendens*, the idea used by US legal writing is indeed correct. The defence of *lis pendens* is an early and prior stage to the *res iudicata* defence. Both defences are used in different stages of a lawsuit and are based on the rule *bis de eadem re ne sit actio* (Štempihar 1953, p. 30; Romy 1999, pp. 792 and 794). Further:

> While American constitutional law and preclusion law permit absent class members to be bound by judgements against the class even if they never were afforded an affirmative opportunity to opt in, a review of the European class action and collective action vehicles reveals a deep reluctance to bind those who neither commence litigation in their own name nor affirmatively choose to opt in." [Wasserman 2011, p. 380]

The CJEU recalled in the *Tatry*[67] and *Drouot* assurances[68] on the *lis pendens* that the "terms used ... in order to determine whether a situation of *lis pendens* arises must be regarded as independent". A possibility of extending the *lis pendens* also to intra-EU collective redress is envisaged in the Brussels Ia Regulation (van Lith 2010, pp. 56 and 57). Such an opinion is rather to be considered acknowledging the scope (also *ratione loci*) of the autonomous meaning of legal terms in the EU. The CJEU recalled, in the recent *Axa Belgium* case

> that it follows from the need for a uniform application of EU law, and the principle of equality, that the terms of a provision of EU law, which make no express reference to the law of the Member States for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of the provision and the objective pursued by the legislation in question.[69]

Therefore, the extension of the *lis pendens* via the autonomous interpretation by the CJEU also to US class actions would also require the acknowledgement on the *Henkel* and *Schrems* case law.[70] The non-recognition of the status of a consumer to an assignee of the rights of a private final consumer without itself being party to a contract between a professional and a private individual, even where the assignee is a qualified entity under the repealed Directive 2009/22/EC or now Directive 2020/1828, clearly shows the limits of the autonomous interpretation as a means of extension of (now) Brussels Ia Regulation to US class actions. The conclusion seems to be that under the Brussels Ia Regulation pending US class actions do not fall within the scope of the *lis pendens* under Article 33(1). The argumentation that the concept of party inherent to Brussels Ia Regulation is not adapted to collective redress seems wholly conclusive in the assessment of the Regulation (Perucchi 2008, p. 120).

However, the main objection to the autonomous application of the term party under the Brussels Ia Regulation is the finding in the case law of the US Supreme Court according to which it is not clear which class members have the status of party to a US class action lawsuit (Perucchi 2008, p. 120). The case referred to the capacity of bringing an appeal by an absent class member in a class action lawsuit. In US law, absent class members are not parties to the litigation; however, they are bound by the ruling or settlement (Lahav 2011, p. 1943). According to the US Supreme Court, the legal question was "whether petitioner should be considered a "party" for the purposes of appealing the approval of the settlement. ... Only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgement" and "Nonnamed class members, however, may be parties for some purposes and not for others. The label "party" does not indicate an absolute characteristic, but rather a

[67]CJEU, Tatry, C-406/92, ECLI:EU:C:1994:400, § 30.

[68]CJEU, Drouot assurances, C-351/96, ECLI:EU:C:1998:242, § 16.

[69]CJEU, Axa Belgium, C-494/14, ECLI:EU:C:2015:692, § 21.

[70]CJEU, Henkel, C-167/00, ECLI:EU:C:2002:555, §13 and Schrems, C-498/16, ECLI:EU:C:2018:37.

conclusion about the applicability of various procedural rules that may differ based on context".[71] In other words, there is the renewed clash of paradigms: the Brussels Ia Regulation, based on the civil law legal tradition, requires certainty and *ex ante* predictability on the status of a party, while common law legal traditions in US class actions try to acknowledge justice in each individual case. If even US law does not determine the exact status of absent class members, international classes including absent class members from EU Member States in pending US class actions will not be able to trigger the *lis pendens* in parallel European lawsuits. Arguments according to which the US class action does not deal with the status of the party and that therefore any questions in civil law legal systems based on the status of the party cannot stand against US class actions seem to be at odds with the *lis pendens* doctrine, which deals *expressis verbis* with the status of a party (Perucchi 2008, p. 120). In other words, the regulatory nature of a US class action in the framework of the *lis pendens* will have to be made compatible with the purely individual nature of the *lis pendens* rule.

The last condition of the *lis pendens* is the performance of discretionary power in the interest of proper administration of justice, the said uncertainty of status and quality of party of European absent members in a pending US class action involving an international class with European absent members. Such an approach is wholly consistent with the procedural guarantees of Article 6(1) ECHR and Article 47 Charter of Fundamental Rights of the EU (Franzina 2014b, p. 35). The first guidance explaining the interest of proper administration of justice is the Recital (24) of the Brussels Ia Regulation (Franzina 2014b, p. 35). There should be an assessment of "all the circumstances of the case before" the European *forum*. In addition:

> Such circumstances may include connections between the facts of the case and the parties and the third state concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgement within a reasonable time.

The argumentation according to which circumstances are to be taken into account when assessing the position of European absent class members are their passive role and an uneasy status of a party in the pending US class action. This will probably lead to the conclusion that the proper administration of justice is best served by not staying the proceedings pending before the *fora* of EU Member States. The second guidance—in cases of consumer-oriented class action—will have to be the EU consumer protection law. "The general rule (the discretion of the court) seems to work well, no legislative action is needed. Usually, the court makes an individual assessment based on the circumstances concerned. Best to leave the matter to the discretion of the national courts" (Voet 2017, p. 279).

[71] US Supreme Court, *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

9 *Lis Pendens* in Collective Redress: A Quebec Experience

It would appear that Quebec, a Canadian province said to be under civil law influence in Canada, is also applying by virtue of Article 3137 Civil Code of Quebec[72] the *lis pendens* doctrine with the discretionary power of the *forum* to stay the subsequent lawsuit in collective redress where there is a lawsuit pending in other jurisdictions. Yet such a discretionary stay is nevertheless repugnant to purely internal situations of the *forum* state. Discretionary stay is to be applied solely in international cases. A very interesting finding can be drawn from Quebec law and case law in *lis pendens* in class actions (Duquette 2003, pp. 88–93).

In 1999, the Quebec Court of Appeal started applying the *lis pendens* provision of Article 3137 of the Civil Code of Quebec to Canadian class action proceedings. The Code requires identity of the parties, identify of the object and identity of the material facts.[73] Basically, the result will be that the first party to file a class proceeding with respect to a particular defendant and proposed class will prevail under the doctrine of prior *tempore, potior iure*. Any subsequent class proceedings will be suspended given the appearance of *lis pendens*.

The question opened in 1999 before the Quebec appellate *forum* was simple: Can the doctrine of *lis pendens* be applied to collective redress in case of parallel class actions (*doit-on rejeter une demande d'autorisation d'exercer un recours collectif pour cause de litispendance lorsque trois requêtes sont présentées à quelques jours d'intervalle*)? The Quebec *forum* started its assessment by a finding according to which "*la litispendance . . . doit être analysée en fonction des règles particulières au recours collectif*". The term "the same parties" refers to every member of the class/group. Indeed,

> c'est l'identité juridique des parties qui est exigée pour l'application de la présomption de la chose jugée. Cela ne signifie pas que les parties doivent être physiquement identiques dans les deux cas. C'est l'identité juridique des parties qui est exigée pour l'application de la présomption de chose jugée, . . . Et par identité des personnes, il faut entendre l'identité juridique et non pas l'identité physique. . . . Pour la chose jugée, il faut l'identité juridique des parties et non leur simple identité physique. L'une peut exister sans l'autre. Il y a identité juridique chaque fois qu'une personne représente une autre personne ou est représentée par elle. . . . À cette étape de la demande d'autorisation, les requérants n'ont pas le statut de représentant du groupe. C'est précisément cette reconnaissance qu'ils recherchent. C'est cependant en leur qualité de membre d'un groupe qu'ils formulent leur requête . . . Cette qualité de «membre d'un groupe» constitue leur véritable identité juridique. Conclure autrement permettrait à chaque membre d'un groupe de présenter sa propre requête sans qu'on puisse lui opposer la litispendance ou la chose jugée pour les requêtes ou les jugements obtenus par les autres membres du groupe. Je conclus donc à l'identité des parties.[74]

---

[72]On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[73]Court of Appeal of Quebec, *Hotte v. Servier Canada Inc*., [1999] R.J.Q. 2598 (C.A.), § 6; see also Superior Court of Quebec, case Parker c. Apotex Inc., 2015 QCCS 1210 (CanLII).

[74]No official English translation seems to be available on CanLII.

However, how can one speak of the same parties, a prerequisite of *lis pendens*, if no class or group has been created? Can there be a *lis pendens* already before the certification of the class action? The answer given by the Superior Court of Quebec is that "the appearance of *lis pendens* is sufficient" where the "object of the dispute is to seek authorization" for a class action.[75] Probably the appearance will have to be assessed by comparing the proposed definition of classes or groups in parallel class actions. The difference between the physical identity of the parties and the legal identity of the parties could mean that the doctrine of collective party is the solution to be applied in private international law.

In 2012, the Quebec Court of Appeal seemed to have set up a continuation of *lis pendens* doctrine.[76] The rule of *prior tempore, potior iure* was qualified as occasionally having "*des effets préjudiciables pour les membres du groupe représenté*". It offered a *lis pendens* rule mitigated by common law considerations, a technique creating a legal hybrid that is theoretically satisfactory neither to civil nor to common law. The result is nevertheless interesting: the first motion to be filed is, in principle, the one that will be heard in priority; subsequent class actions will be stayed and will be heard, in the order they were filed, only if the preceding class action is ultimately dismissed. This is indeed the classic solution of *lis pendens*. However, the priority of the first class action filed may be challenged by the attorneys responsible for any subsequent class actions filed; the party challenging the priority of a previously filed class action has the burden of establishing that the prior class action is not in the best interests of the putative members, but rather constitutes an abuse of the first-to-file rule such that the subsequent action should proceed instead.[77] From a European point of view the possibility of challenge of the first motion could mean the end of the *lis pendens* doctrine, as there is always a possibility of disregarding a clear rule based on priority of filing by considerations of flexibility and procedural justice.

As far as the cause of action is concerned, the Supreme Court of Canada clarified the application of the *lis pendens* doctrine to cross-border lawsuits with the following words:

> In private international law matters, the nature of the required identities is altered somewhat in the Civil Code of Quebec in the case of *lis pendens*. In particular, in Art. 3137, as in Art. 3155(4), the Code retains identity of the parties and identity of the object but substitutes identity of the facts on which the actions are based for identity of the cause of action. This change takes into account the problems involved in reconciling the specific features of legal systems that come into contact with each other, as well as the diversity in their substantive law concepts and procedural rules. The Quebec judge therefore considers the facts on which the actions are based and does not go beyond the differences in the legal systems in question to try to find an identity of the cause of action. The analysis thus focuses more on the respective objects of the two actions . . . .[78]

[75] *Labrecque v. General Motors of Canada Ltd.*, §12.

[76] *Schmidt v. Johnson & Johnson* e.a, 2012 QCCA 2132 (Schmidt).

[77] English translation of the French original taken from https://www.dwpv.com/en/Insights#/article/Publications/2012/Quebec-Court-of-Appeal-Nuances-First-to-File-Rule-in-Class-Actions.

[78] *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, §§ 51 and 52.

Where both pending class actions allege the same facts and ask for the same type of damages, and many of the allegations made and conclusions sought in *forum* A are very similar if not identical to the ones in *forum* B, there is clearly identity of the material facts and the object.[79] In a class action of international scope, the criteria for finding *lis pendens* were eased, identity of facts being substituted for identity of the cause of action.[80]

10 *Lis Pendens* and Directive 2009/22/EC and Directive (EU) 2020/1828

Injunctive collective redress under the repealed Directive 2009/22/EC and now Directive 2020/1828 is not covered *ratione materiae* by the intra-EU *lis pendens* (Art. 29 Brussels Ia Regulation). As in the case of international *lis pendens*, there is the requirement of the same cause of action and the same parties. Legal scholars even found that no case of *lis pendens* in intra-EU collective redress has yet been reported.[81]

There is no application of the *lis pendens* under Article 30 of the Brussels Ia Regulation in a legal action brought by a Spanish qualified entity against an Austrian enterprise for infringement of consumer protection legislation in Spain before Austrian courts. It will not be barred by a legal action brought by an Austrian qualified entity before Austrian courts against the same Austrian enterprise for infringement of consumer protection legislation in Austria. The Spanish qualified entity has no standing in a lawsuit for similar or same infringement of consumer protection legislation against Austrian consumers. Both actions are heard by the Austrian *forum*. However, one of the conditions of *lis pendens* under Article 30 of the Brussels Ia Regulation is also bringing an action in the courts of different Member States. Where both legal actions are pending before *fora* of the same EU Member State, there is no intra-EU *lis pendens*.

Even assuming (where applicable) that a legal action is brought by a Spanish qualified entity against an Austrian enterprise for infringement of consumer protection legislation in Spain before a Spanish *forum* and a parallel legal action brought by an Austrian qualified entity before an Austrian *forum* against the same Austrian enterprise for infringement of consumer protection legislation in Austria, there will be no identity of the parties. A qualified entity from Austria cannot be considered to be the same party as a qualified entity from Spain. The requirement of a qualified entity under Article 3 of Directive 2009/22/EC (now Art. 4 of Directive (EU) 2020/1828) actually means that any qualified entity is empowered solely to initiate

[79] Superior Court of Quebec, case *Parker c. Apotex Inc.,* 2015 QCCS 1210 (CanLII), § 7.
[80] Superior Court of Quebec, case *Labrecque v. General Motors of Canada Ltd.*, §13.
[81] Chabrny (2019), p. 203.

collective redress for infringement of EU legislation on consumer protection solely in a defined, single EU Member State. The conferral of such an auhtorisation to litigate certifies the qualified entity exclusively for infringements on the territory of the EU Member State where the status of qualified entity was conferred (Carballo Piñeiro 2009, p. 73 [according to the cited author, "la autorización estatal implica ineludiblemente su carácter territorial"]).

The collective redress lawsuit pending before a Spanish and an Austrian *forum* also does not have a same cause of action. Under Article 4 of Directive 2009/22/EC and Art. 6 of Directive (EU) 2020/1828 referring to intra-EU infringement refer to qualified entities from different EU Member States in order to protect the collective interests of consumers in different EU Member State. The limitation to the place of interests protected by the qualified entity means that the requirement of the same cause of action will not be met, as facts might be similar but are not identical, so no *lis pendens* will be triggered. There is the same rule of law concerned, but the protection of interests limited to a given territory makes it impossible to speak of a *lis pendens*.

11 Related Actions

Related actions will have a much more important role to play in collective redress in the EU (van Lith 2010, p. 57; Amaro et al. 2018, p. 101). It has been noted that, "For instance, in the Dieselgate case, one could argue that collective actions brought against Volkswagen in two different Member States by local plaintiffs, are related actions in the sense of Art. 30 [of Brussels Ia Regulation], if a risk of irreconcilability exists" (Amaro et al. 2018, p. 101). Related actions and the *lis pendens* are intrinsically connected. Where the *lis pendens* is given a broad interpretation, there is necessarily an unwanted spillover effect on the related actions (Bureau and Muir Watt 2010, pp. 219 and 220). Under EU law the term "related actions" means the absence of the same cause of action or of the same parties; however pending proceedings are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. A caveat will be given: the definition of a related action is given solely within the intra-EU scope of the Brussels Ia Regulation; the purely international actions in Article 34 do not have a definition. However, there is no reason to consider that the definition of a related action is different in Article 34 than in Article 30(3). As in purely European connected actions, the aim of Article 34 seems to be the prevention of irreconcilable judicial decisions.

The discretionary staying of proceedings in a European *forum* where a US class action is pending is allowed under Article 34 of the Brussels Ia Regulation. A European *forum* is empowered either on the application of one of the parties or, where possible under national law, of its own motion to stay an action which is related to the action in the court of the third state if:

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
(b) it is expected that the court of the third state will give a judgment capable of recognition; and
(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

In the *Royal Dutch Shell* case, a US class action was already certified when a request for declaring a WCAM settlement binding *erga omnes* was lodged (van Lith 2010, p. 57). The facts could be an excellent example of related actions; however, due to legislative development—the adoption and entry into force of the new Brussels Ia Regulation—the narrative of the *Shell* case only has a historical worth, as it deals with national Dutch-related actions. Nevertheless, any possibility of applying the related action doctrine will end in the question of recognition of the US class action ruling.

12 Agreements on Prorogation of Jurisdiction

In international consumer collective redress outside the United States there seems to be a movement towards setting agreements on jurisdictions (prorogation of jurisdiction) in consumer contracts with big US multinational corporations aside. The words "consumer collective redress" are to be stressed.[82]

In consumer contracts at the international level concluded by consumers resident in the EU and US enterprises (B2C contracts), Council Directive 93/13/EEC has to be acknowledged. In the *Océano Grupo Editorial* case, the consumer contracts contained a term conferring jurisdiction on the courts in Barcelona, a city in which none of the consumers were domiciled but where the plaintiffs had their principal place of business.[83] The CJEU ruled that, "The protection provided for consumers in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts." The Court stated, in reference to the clauses of prorogation of jurisdiction, that:

[82]In comparative law in other branches of law such as, for example, labour law, there seems to be an acceptance of traditional instruments of steering access to the courts in international lawsuits also in class actions or collective redress. Instruments of steering access to the courts in international lawsuits are arbitration clauses and prorogation clauses. They seem to be applied also in collective redress. A Canadian court recently gave a decision—in the case *Heller v. Uber Technologies Inc.*, 2018 ONSC 718 (CanLII), concerning the Uber employment case in a single Canadian province—that enforced an arbitration clause.

[83]CJEU, Océano Grupo Editorial, C-240/98 to C-244/98, ECLI:EU:C:2000:346.

> In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term.
>
> [The Court further stated:] There is a real risk that the consumer ... will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.[84]
>
> It is hardly conceivable that, in a system requiring the implementation of specific group actions of a preventive nature intended to put a stop to unfair terms detrimental to consumers' interests, a court hearing a dispute on a specific contract containing an unfair term should not be able to set aside application of the relevant term solely because the consumer has not raised the fact that it is unfair.[85]

In practice, an agreement on prorogation of jurisdiction detrimental to consumers will have to be declared void by the *forum* hearing the case of its own motion already in the preliminary assessment of jurisdiction or objection of jurisdiction.

Such considerations are also to be encountered in non-European legal orders in class action litigation. In an Israeli class action lodged against Facebook for violation of compulsory Israeli data protection laws (breach of privacy under Israeli common law), the agreement on prorogation in favour of a California *forum* was not given effect.[86] Israeli users, i.e. Israeli consumers, express their agreement when registering Facebook and consent to application of California law and consent to jurisdiction of a California *forum*.[87] The Israeli *forum* hearing the case applied Israeli contract law on unfair terms in consumer contracts in the assessment of jurisdiction and held that it was a proper forum. The defence raised by Facebook that California law should be applied to determine the validity of the clause on prorogation of jurisdiction was rejected. If Facebook's contention were accepted, namely

> that the forum selection clause [should] be evaluated based upon the [choice of] law [clause] set forth therein, [then] the result would be that, with respect to a standard contract, no forum selection clause or choice of law clause could be examined under Israeli law, and it would be impossible to determine that they constitute unduly disadvantageous provisions. Doing so would thwart the possibility of filing a class action in Israel against defendants of this type.[88]
>
> [This case involves] a standard contract, that services a large population in Israel, where it is clear that Facebook conformed its website for the use of users in Israel in Hebrew. [It does not matter] whether we are dealing with a personal suit, the value of which is not high, in

[84]CJEU, Océano Grupo Editorial, C-240/98 to C-244/98, ECLI:EU:C:2000:346, § 26.

[85]CJEU, Océano Grupo Editorial, C-240/98 to C-244/98, ECLI:EU:C:2000:346, § 28.

[86]See on that agreement on prorogation in the European context, Stürner & Wendelstein (2018), pp. 1084 and 1085.

[87]http://www.sherby.co.il/blog/2016/06/29/israeli-court-requires-facebook-to-litigate-claims-in-israel-despite-forum-selection-and-choice-of-law-clauses/#comment-164. See also Israeli Supreme Court case PCA 5860/16 Facebook Inc. v. Ohad Ben Hamo. The Israeli *forum* stressed that Facebook exempts some Facebook users from a jurisdiction clause and found that Facebook allows residents of Germany to litigate against Facebook in Germany under German law.

[88]Ibid.

> which case it would be appropriate to allow it to be heard in Israel, because otherwise it would not be brought before any tribunal, or whether [we are dealing with] a collective suit regarding consumer matters. . . . The burden that would be placed on [consumers] to litigate abroad or pursuant to California law would be significant, and it would likely prevent the litigation in many cases.[89]

13 Conclusion

Massification and globalization give rise to a number of negative developments among which may be counted international cartels, which can lead to collective litigation in more than one jurisdiction by the same parties for the same complaint and at the same time. Virtually every foreign enterprise present in the United States has been subject to class actions. In recent times, collective redress has also been applied in other countries. Cases where the same wrongful act is adjudicated in not one but several countries via collective redress are more and more common. However, the same wrongful act means the same mass-delict, infringement of isomorphic rights, similar harms and the same tortfeasor. In procedural terms, it could be said that the same defendant, same facts and the same cause of action (cause and object) in litigation pending in several countries are encountered. Such parallel and concurrent cross-border litigation is traditionally coordinated by mechanisms of toleration of foreign proceedings, anti-suit injunctions, *forum non conveniens* doctrine, *lis pendens* and related actions. Yet, whereas such coordination functions well in individual lawsuits, it is not clear whether such mechanisms will also work in the framework of collective redress.

It would appear that in collective redress—due to its specific nature—the issues of coordination of parallel lawsuits will have to operate under the doctrine of toleration of parallel proceedings. *Forum non conveniens* and anti-suit injunctions, even though applied in class actions of countries belonging to common law legal orders, actually try to avoid any internationalization of collective redress. On the other hand, *lis pendens* as a doctrine of coordination of collective redress in Europe suffers from the inconvenience caused by the requirement of an exact definition of the parties to the proceedings. It is not known how, for example, absent class members are to be treated in a pending collective redress. Are they a party in collective litigation? At the same time, the inconvenience of the approach of toleration is to move the question of parallel proceedings to the recognition stage (irreconcilable judicial decisions as a bar to recognition). Where one lawsuit is closed by a final decision (*res iudicata*) the judicial decision given by another *forum* in another state will not be recognized, and will have no effects (McLachlan 2008, p. 243).

[89] Ibid.

References

Amaro R, Azar-Baud MJ, Corneloup S, Fauvarque-Cosson B, Jault-Seseke F (2018) Study: collective redress in the Member States of the European Union. European Parliament, Brussels, Available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)608829

Andrews DC (2013) Personal Jurisdiction and choice of law in the cloud. Maryland Law Rev 73:313–384

Ballarino T, Ballarino E, Pretelli I (2016) Manuale di diritto internazionale privato, 8th edn. CEDAM, Milano

Barrett E (1947) The Doctrine of Forum Non Conveniens. California Law Rev 35:380–442

Beaumont P (2018) Forum non conveniens and the EU rules on Conflicts of Jurisdictions: A Possible Global Solution, Revue critique de droit international privé 447–457

Braun J (2014) Lehrbuch des Zivilprozeßrechts, 1st ed. J. C. In: B. Mohr, Tübingen

Briggs A (2013) The conflict of laws, 3rd edn. Oxford University Press, Oxford

Brown JP (2008) Seeking recognition of Canadian class action judgments in foreign jurisdictions: perils and pitfalls. Can Class Action Rev 4:220–257

Bureau D, Muir Watt H (2010) Droit international privé, Tome I, Partie générale. Presses universitaires de France, Paris

Cappelletti M (1975) La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile). Revue internationale de droit comparé 27:571–597

Carballo Piñeiro L (2009) Las acciones colectivas y su eficacia extraterritorial: problemas de recepción y transplante de las "class actions" en Europa, Universidad de Santiago de Compostela. Servicio de Publicaciones e Intercambio Científico, Santiago de Compostela

Chabrny J (2019) Grenzüberschreitende Sammelklagen, Verlag Dr. Kovač, Hamburg

Clermont KM (2015) Solving the puzzle of transnational class actions. Indiana Law J Suppl 90:69–77

Clopton ZD (2015) Transnational class action in the shadow of preclusion. Indiana Law J 90:1387–1428

Clopton ZD (2018) The global class action and its alternatives. Theoret Inq Law 19:125–150

Coester-Waltjen D (2017) Das Spannungsverhältnis zwischen Privat – und Parteiautonomie einerseits und staatlichen Schutz – und Ordnungsinteressen im Privatrecht andererseits. Juristenzeitung 72:1073–1080

de Miguel Asensio PA, Cuniberti G, Franzina P, Heinze C, Requejo Isidro M (2018) Study: the Hague conference on private international law "Judgments Convention". European Parliament, Brussels 2018. Available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604954

Dodge J (2014) Facilitative judging: organisational design in mass-multidistrict litigation. Emory Law J 64:329–382

Dowers NA (2013) The anti-suit injunction and the EU: legal tradition and Europeanisation in international private law. Cambridge J Int Comp Law 2:960–973

Duquette MB (2003) Les questions de compétence des tribunaux québécois soulevées par le recours collectif multi-jurisdictionnel: pragmatisme ou cohérence théorique. LL.M. Thesis University of Montreal, Montreal. Available at https://papyrus.bib.umontreal.ca/xmlui/handle/1866/2365

Egea V (2014) La résolution des conflits de procédures dans le règlement Bruxelles I bis. In: Guinchard E (ed) Le nouveau règlement Bruxelles I bis Règlement n°1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale. Buylant, Brussels, pp 147–165

Erk-Kubat N (2014) Jurisdictional disputes in parallel proceedings: a comparative European perspective on parallel proceedings before National Courts and Arbitration Tribunals. Ph.D. Thesis. University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs, St. Gallen. Available at www1.unisg.ch/www/edis.nsf/SysLkpByIdentifier/4226/$FILE/dis4226.pdf

Franzina P (2014a) L'universalisation partielle du régime européen de la compétence en matière civile et commerciale dans le règlement Bruxelles I bis: une mise en perspective. In: Guinchard E (ed) Le nouveau règlement Bruxelles I bis Règlement n°1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale. Buylant, Brussels, pp 39–82
Franzina P (2014b) Lis pendens involving a third country under the Brussels I-bis regulation: an overview. Rivista di diritto privato e processuale 2014:23–42
George JP (1999) Parallel litigation. Baylor Law Rev 51:669–986
George JP (2002) International parallel litigation – a survey of current conventions and model lawS. Texas Int Law J 37:499–540
Glenn HP (1999) L'affaire Bre-X et les recours collectifs transfrontaliers. Revue québécoise de droit international 12:33–45
Goldstein G (2016) Le forum non conveniens en droit civil: Analyse comparative à la lueur du droit international privé du Québec et du Japon. Revue critique de droit international privé 111:51–83
Halfmeier A (2012) Recognition of a WCAM settlement in Germany. Nederlands Internationaal Privaatrecht:176–184
Heß B (2000) Die Anerkennung eines Class Action Settlement in Deutschland. Juristenzeitung 55:373–382
Hess B (2010) Cross-border Collective Litigation and the Regulation Brussels I. Praxis des Internationalen Privat - und Verfahrensrechts (IPRax) 30:116–121
Hess B, Mantovani M (2019) Current developments in forum access: comments on jurisdiction and forum non conveniens – European perspectives on human rights litigation. MPILux Research Paper Series 2019 (1). Available at www.mpi.lu
Johnson GW (2012) Rule 23 and the exclusion of foreign citizens as Class Members in US class actions. Va J Int Law 52:963–993
Kafi-Cherrat O (2018) La class action s'approche: à propos de la reconnaissance en Belgique des class action settlements américaines (Aff. Lernout & Hauspie). Journal du droit international (Clunet) 145:81–95
Kastanidis AT (2015) La litispendance internationale au regard du règlement (UE) 1215/2012. Revue critique de droit international privé 104:579–588
Klauser A (2005) Von der "Sammelklage nach österreichischem Recht" zur echten Gruppenklage. ecolex 16:744–747
Lahav AD (2011) Two views of the class action. Fordham Law Rev 79:1939–1963
McLachlan C (2008) Lis Pendens in International Litigation. Recueil des cours de l'Academie de droit international de la Haye / Collected Courses of the Hague Academy of International Law, vol 336. Nijhoff, Leiden, Boston, pp 199–553
Michaels R (2006) Two paradigms of jurisdiction. Mich J Int Law 27:1003–1069
Monestier T (2010) Personal Jurisdiction over Non-Resident Class-Members: Have We Gone Down the Wrong Road. Texas International Law Journal 45:537–572
Monestier TJ (2011) Transnational class actions and the illusory search for Res Judicata. Tulane Law Rev 86:1–79
Nagareda RA, Bone RG, Chamblee Church E, Silver C, Woolley P (2013) The law of class actions and other aggregate litigation, 2nd edn. West, St. Paul
Nagel H, Gottwald P (2013) Internationales Zivilprozessrecht, 7th edn. Verlag Otto Schmidt, Cologne
Oquendo ÁR (2017) Justice for all: Certifying Global Class Actions. Washington University Global Studies Law Rev 16:71–124
Perucchi L (2008) Anerkennung und Vollstreckung von US class action – Urteilen und – Vergleichen in der Schweiz. Schulthess, Zurich, Basel, Geneva
Picardi N (2010) Le juge naturel – Principe fondamental en Europe. Revue internationale de droit comparé 62:27–73

Piché C (2016) L'emprise des cinq doigts de Frankenstein: réflexions en cinq temps sur l'action collective. Revue internationale de droit comparé 68:291–317
Piché C, Saumier G (2019) Consumer collective redress in Canada. Jpn Yearb Int Law 61:231–259
Romy I (1999) Class actions américaines et droit international privé suisse. Aktuelle juristische Praxis / Pratique actuelle juridique 1999:783–801
Schack H (2017) Internationales Zivilverfahrensrecht, 7th edn. CH Beck, Munich
Schütze R (2009) Rechtsverfolgung im Ausland, Prozessführung vor ausländischen Gerichten und Schiedsgerichten, 4th edn. De Gruyter, Berlin
Segovia González MJ (2018) Les accords judiciaires de coopération internationale. Larcier, Brussels
Shapiro DL (1998) Class actions: the class as party and client. Notre Dame Law Rev 73:913–962
Sherman EF (2008) The MDL model for resolving complex litigation if a class action is not possible. Tulane Law Rev 82:2205. Public Law and Legal Theory Research Paper Series Research Paper No. 08-12, June 2008, http://ssrn.com/abstract=1407588
Sladič J (2013) The remedies and recourses in European civil procedure after the intended abolition of the exequatur. Zeitschrift für europarechtliche Studien 16:329–358
Sladič J (2017a) Conditions of admissibility and access to Justice – A Slovenian perspective. In: Uzelac A, van Rhee CH (eds) Revisiting procedural human rights. Intersentia, Cambridge, pp 209–239
Sladič J (2017b) Das slowenische Gesetz über Sammelklagen. Zeitschrift für Zivilprozess International 22:137–186
Štempihar J (1953) Uvod v mednarodno zasebno pravo. Pravna fakulteta Univerze vLjubljani, Ljubljana
Stürner M, Wendelstein C (2018) Datenschutzrechtliche "Sammelklagen" im Zuständigkeitsregime der Brüssel Ia-VO. Juristenzeitung 73:1083–1092
Symeonides SC (2008) Choice of Law in the American Courts in 2007: Twenty-First Annual Survey. http://www.ssrn.com
Telfer RTC (2017) Forum shopping and the private enforcement of EU competition law: Is forum shopping a dead letter?. Ph.D. Thesis. University of Glasgow, Glasgow. http://theses.gla.ac.uk/8002
Tzankova I, Kortmann J (2010) Remedies for consumers of financial services: collective redress and improvement of class representation. Eur Rev Consum Law / Revue européenne du droit de la consommation 117–140
van Lith H (2010) The dutch collective settlements act and private international law. Aspecten van Internationaal Privaatrecht in de WCAM
Virgós Soriano M, Garcimartín Alférez FJ (2007) Derecho Procesal Civil Internacional (Litigación internacional), 2nd edn. Thomson Reuters, Madrid
Voet S (2017) Chapter 4: Actions for Collective Redress. In: An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082, European Commission, Brussels. Available at https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503
Wasserman R (2011) Transnational class action and interjurisdictional preclusion. Notre Dame Law Rev 86:313–380
Wautelet P (2002) Les conflits de procédures: étude de droit international privé comparé, Ph.D. Thesis. Catholic University in Leuven, Leuven. Available at http://hdl.handle.net/2268/193
Westbrook JL (2003) International judicial negotiation. Texas Int Law J 38:567–586
Winters BA (1985) Jurisdiction over unnamed plaintiffs in multistate class actions. Calif Law Rev 73:181–211

Jorg Sladič PhD. at the University of Saarland (Germany), assistant professor at the European Faculty of Law, Ljubljana, Slovenia, where he specializes in private international law and in comparative law and attorney at law in a law firm Sladič-Zemljak. From 2004 to 2007, he was a EU official at the European Court of Justice in Luxembourg (first as a legal secretary of a judge and latter of advocate general Trstenjak) in 2018 he was a member of the European Commission's Expert group on Modernisation of Judicial Cooperation in Civil and Commercial Matters.