

PART XIV

CROSS-BORDER AND INTERNATIONAL DIMENSIONS

CHAPTER 3

ACCESS TO JUSTICE FOR FOREIGN PLAINTIFFS

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1 ACCESS TO JUSTICE

- 1 This chapter examines potential access to justice obstacles related to cross-border litigation in civil matters. Defining the subject in such a manner invites a focus on access to justice understood primarily as access to courts. In this sense, therefore, any element of domestic procedural law that imposes conditions on a foreign claimant's access to its civil justice system that do not apply to domestic claimants can be understood as an access to justice obstacle. There are numerous potential access obstacles for foreign claimants, including language, lack of knowledge of procedural law, limitations on foreign lawyers' ability to represent their clients abroad, travel requirements, etc. This chapter will focus on three specific obstacles: (i) possible limitations on a foreign claimant's *capacity* to institute proceedings, (ii) possible imposition of *security for costs* required of foreign claimants and (iii) possible limitations on foreign claimants' access to *collective action procedures*. The first two are well-known and have been the subject of international or regional instruments for several decades. The latter is a more recent phenomenon arising from the uneven development of collective action mechanisms. Examining these three topics will demonstrate that cross-border obstacles to access to justice are a long-standing challenge.

1.1 Capacity as a Potential Obstacle to Cross-Border Access to Justice

- 2 The notion of capacity in its procedural dimension refers to the capacity to sue or be sued. Typically, this is premised on the concept of legal or juridical personality which includes having the 'capacity to hold rights and be liable to duties under substantive law.'¹ For natural persons, juridical personality in this substantive sense is generally recognized from birth in contemporary law, although there may be limitations until the age of majority. Capacity in this sense is generally governed by the party's personal law² – whether connected to residence, domicile, or nationality – but some jurisdictions carve out special rules for different substantive issues, such as capacity to contract or to inherit³. Nevertheless, with regards to *capacity in procedural terms*, jurisdictions commonly disregard a foreign incapacity and consider an individual to have capacity to be a party to litigation if this would be recognized according to the *lex fori*.
- 3 Some well-known historical examples involve limitations on foreign claimants' access to courts, but this was typically through jurisdictional rules rather than by denying them the capacity to institute proceedings. In France, the infamous Articles 14 and 15 of the Civil Code

¹ E J Cohn, 'Volume XVI: Civil Procedure | Chapter 5 Parties' in *International Encyclopedia of Comparative Law* (1977), para 15.

² See A Dutta, 'Personal Status' in J Basedow et al (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing Limited 2017) 1346, para 1347.

³ Ibid. See also B Ubetazzi, 'Capacity and Emancipation' in J Basedow et al (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing Limited 2017) 251.

limited court jurisdiction in cross-border cases to claims by or against French nationals. The consequence was that a non-national couldn't institute a claim against another non-national. It was not until 1948 that the French Cour de Cassation reversed this interpretation of those provisions in the name of equal access.⁴

- 4 The situation is not as straightforward where a party to litigation is not an individual. Indeed, whether a non-individual entity has juridical personality is a question of substantive law. Comparative law confirms that legal personality is granted by national substantive law to a great diversity of entities either formed by single individuals or formed as a result of associations between individuals, whether for commercial or non-commercial ends.⁵ Alternatively, a legal system may recognize that such an entity has litigation capacity, that is the capacity to sue or be sued in the entity's name, even if the entity is not considered to have legal personality separate from the individual or individuals that compose it.⁶ There is less consensus on whether entities without any human element can be considered to have legal personality or litigation capacity. While this is not a new issue,⁷ it has gained momentum with more instances of express declarations that non-human natural entities, such as rivers, are holders of rights whose violation may be subject to a judicial remedy.⁸ Given that natural entities may cross borders, this raises the question of whether any accompanying attributions of legal personality will be recognized outside the forum whose substantive law recognizes that status. A similar question arises regarding the representation of future generations in climate change litigation.
- 5 For the purposes of this chapter, the question arises whether an entity's litigation capacity under its constitutive law will be recognized in another jurisdiction. Should this not be the case, this would arguably constitute an obstacle to its access to justice in that jurisdiction. Equally, however, such a refusal to recognize an entity's litigation capacity could constitute

⁴ Cass. Civ. 27 July 1948, *Lefait*.

⁵ See, for example, C Gerner-Beuerle and M Schillig, *Comparative Company Law* (Oxford UP 2019), discussing UK, US, French and German law.

⁶ Eg, In Quebec, partnerships are not granted legal personality but may nevertheless sue or be sued in their own name (Art 2225 CCQ 'A partnership may sue and be sued under the name it declares.').; compare for the UK, the difference between a limited partnership (no separate legal personality and no litigation capacity in its own name) and a limited liability partnership (separate legal personality and thus litigation capacity in its own name) (<https://www.gabyhardwicke.co.uk/briefing-notes/company-partnership-or-llp/>). For a discussion of other examples in Europe, see A Dorresteyn et al, *European Corporate Law* (Wolters Kluwer 2022) para 211 ff.

⁷ See, for example, C D Stone, 'Should Trees Have Standing-Toward Legal Rights for Natural Objects' (1972) 45:2 S Cal L Rev 450.

⁸ See M Kauffman and P L Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' (2018) 18:4 Glob Environ Polit 43.

an access to justice obstacle for any claimant wishing to institute proceedings against the entity outside of that entity's home jurisdiction.

- 6 If the determination of legal personality, or even merely of litigation capacity, was uniformly subject to the law of state of the entity's original constitution, this would eliminate the risk of non-recognition of litigation capacity abroad. As regards the corporate form (eg, separate legal personality and limited liability), no such uniformity exists as at least two competing theories co-exist: the incorporation theory and the 'real seat' theory.⁹ According to the former, a corporation's existence as well as its rights and obligations are determined according to the law under which it was incorporated. The 'seat theory' starts from the presumption that the place of a corporation's registered seat must also be the seat of its principal establishment. As such, if an entity otherwise validly incorporated abroad has its 'real seat' elsewhere, its existence, rights and obligations should be determined by the latter law. Following that view, if a foreign-incorporated entity were to have its real seat in a state subscribing to the seat theory, the status of the entity, including its litigation capacity, would fall to be determined by the law of that state, which may not recognize the entity unless it was adequately (re)constituted under the law of that state. These two opposing views rest on distinct policy considerations regarding corporate law. The incorporation theory is premised on private autonomy whereas the seat theory prioritizes the State's regulatory interest.
- 7 The seat theory is often associated with the civil law tradition whereas the incorporation theory is associated with the common law.¹⁰ This divide is not wholly reliable, particularly in Europe where the CJEU has interpreted freedom of establishment under EU law to impose the mutual recognition of legal personality for entities incorporated in any EU member state.¹¹ This has led some European states, such as Belgium, to abandon the seat theory in favour of the incorporation theory.¹² Still, other states, such as France, have considered since 1990 that the principle of non-discrimination under the European Convention on Human Rights compels recognition of foreign incorporation, which extends its reach beyond EU member states.¹³

⁹ For discussion of these two theories see Dorresteyn (n 6) para 2.57-2.59 and J Meeusen, 'Companies' in P Beaumont and J Holliday (ed), *A Guide to Global Private International Law* (Hart Publishing 2022) 219.

¹⁰ See Meeusen, *Ibid* 219.

¹¹ The CJEU jurisprudence on this issue deals with complex issues of EU law that go beyond the scope of this chapter. For analysis of this jurisprudence, see C Thomale and M C Weller, 'Chapter F.11: Freedom of establishments/persons (European Union) and private international law' in Basedow (n 2) 807. See also Meeusen (n 9) 224-26. See also Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

¹² Following from amendments to the Belgium *Code des sociétés et associations* in 2019.

¹³ Cass. Crim. 12 nov. 1990, *Extraco Anstalt*, Bull. n° 377. This was later confirmed by legislation in 2007.

- 8 The cross-border recognition of personality and litigation capacity for legal persons has been the subject of international and regional instruments. An early example is the *Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions* adopted by the Hague Conference on Private International Law.¹⁴ Other instruments include the *European Convention on the Establishment of Companies*, adopted in 1966 by the Council of Europe and the 1968 *Convention sur la reconnaissance mutuelle des sociétés et personnes morales*, signed by the original six EEC states. None of the three instruments ever came into force, however, no doubt due to their common attempt to put forward the incorporation theory but without excluding recourse to the real seat theory.¹⁵ In the Americas, the 1979 *Inter-American Convention on Conflicts of Laws Concerning Commercial Companies* and the 1984 *Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law* were slightly more successful as they are in force between a small number of states.¹⁶ They adopt the law of incorporation (or constitution) as the connecting factor for establishing the status of legal persons, including their litigation capacity.¹⁷ This approach differs from reference to the law of the corporation's domicile, understood as the place of its 'real seat', in earlier uniform codifications in the Americas, such as the 1940 Montevideo Treaty.¹⁸
- 9 The doctrinal debate concerning the recognition of the legal personality of corporations across borders exists because of the diversity in substantive corporate law in different jurisdictions. To a certain extent, the incorporation theory is more amenable to the deployment of corporate law as a competitive regulatory tool for States, which can in turn be exploited by private actors to avoid accountability in cross-border activity. Recent developments in corporate responsibility suggest that it may be time to reconsider the implications of the incorporation theory. Indeed, the corporate law concepts of separate legal personality and limited liability have come under increased scrutiny in relation to international environmental and human rights law.¹⁹ Legislation seeking to impose obligations on parent companies for activities of their subsidiaries (and even partners in

¹⁴ Full text available, only in French, at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=36> accessed 8 July 2024. See also Y Loussouarn, 'La Convention de La Haye sur la reconnaissance des personnes morales étrangères' (1958–59) *Trav Com Fr DIP* 67.

¹⁵ See Meeusen (n 9) 220–223.

¹⁶ For a discussion of both instruments and their application in the contracting states, see Candela N Villegas, 'El Derecho Internacional Privado de Sociedades mercosureño' (2021) 27 *Revista Electrónica Instituto de Investigaciones Jurídicas y Sociales A L Gioja* 251. See also T B De Maekelt, 'General Rules of Private International Law in the Americas. New Approach' in *Collected Courses of the Hague Academy of International Law*, Volume 177 (Brill 1982).

¹⁷ Villegas, *Ibid*.

¹⁸ De Maekelt (n 16) 233–34.

¹⁹ See, for example, P Dowling, 'Limited Liability and Separate Corporate Personality in Multinational Corporate Groups: Conceptual Flaws, Accountability Gaps and the Case for Profit-Risk Liability' in L Enneking et al (ed), *Accountability, International Business Operations and the Law* (Routledge 2020) 219.

their global supply chains) is emerging.²⁰ Such attempts to regulate transnational corporate group activity reinforce the effect of the law of incorporation with respect to the parent company while potentially diluting the impact of the law of incorporation of its foreign subsidiaries. The ‘group of companies’ concept has the potential to disrupt current thinking about legal personality in general, with inevitable but rather unpredictable consequences on narrower questions such as litigation capacity.

1.2 Security for Costs

- 10 Security for costs – also known as *cautio judicatum solvi* in the civil law tradition – refers to the requirement that a claimant engaging in litigation provides a guarantee for the payment of an eventual cost order against it. The purpose is to protect the defendant against a potentially insolvent claimant or one whose assets are beyond the reach of the court’s cost order, typically in a foreign jurisdiction. This second rationale is the most relevant one to this Chapter as it is directly related to cross-border litigation. On its face, security for costs is an obstacle to access to justice in that it imposes an additional cost to instituting court proceedings. Where such security is imposed solely on the basis of the claimant’s foreign status, it may also be considered to be discriminatory.
- 11 The extent to which security for costs may constitute an obstacle to access to justice distinct from the cost of litigation generally is not a straightforward determination. Indeed, it might depend on the amount involved; if it is minimal relative to the other costs of litigation in a jurisdiction, it may not warrant special consideration. The amount of security in turn depends on what is included in a cost order in a given jurisdiction. While a general discussion of costs is outside the scope of this Part,²¹ it is generally well known that the costs of litigation vary widely across jurisdictions.²² As a result, what will be required as security for such costs will necessarily vary as well. Nevertheless, where such security is imposed specifically against *foreign* claimants in cross-border litigation, it may constitute a barrier to instituting a claim that is connected directly to the international dimension of the dispute.
- 12 To explore these issues, this section of the Chapter will examine non-national instruments addressing security for costs (i) and security for costs against foreign claimants in national law (ii).

²⁰ See, for example, France’s Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. See also Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, COM/2022/71 final. For an overview of other initiatives, see N Bueno and C Bright, ‘Implementing Human Rights Due Diligence through Corporate Civil Liability’ (2020) 69(4) *International and Comparative Law Quarterly* 789.

²¹ See instead Part 3.

²² M Reimann, *Cost and Fee Allocation in Civil Procedure – A Comparative Study* (Springer 2012).

1.2.1 Non-National Instruments Addressing Security for Costs

- 13 Security for costs in international litigation is not a recent concern.²³ The Hague Conference on Private International Law has a long history of seeking to eliminate security for costs based on the foreign status of the claimant. Its very first instrument dating back to 1896 dealt with civil procedure. The *Convention du 14 novembre 1896 relative à la procédure civile* included provisions on security for costs (*caution judicatum solvi*). Article 11 of the *Convention* stipulated that no security for costs could be imposed on nationals of a contracting state, who were domiciled in a contracting state, on the basis of the party being a foreign national, domiciliary or resident of the state where the claim was instituted. This protection was thus dependent on two conditions regarding the claimant: nationality of one of the contracting states and domicile in one of the contracting states. As a corollary to that protection against security for costs, Article 12 of the *Convention* provided for the enforcement of any ensuing cost order against the claimant in any contracting state. To further support the prohibition against security for costs based on foreignness, Article 12 also declared the enforceability of cost orders from contracting states whose law did not impose security for costs based on foreignness. Absent such a provision, the *Convention* would have created a perverse incentive on states to adopt rules on security for costs based on the foreign status of the claimant in order for their cost orders to circulate under the instrument. That *Convention* was replaced in 1905²⁴ and again in 1954.²⁵ This latter instrument is still in force with 49 contracting states, the latest one being Kazakhstan in 2015. In 1980, a new *Convention on International Access to Justice* was adopted by the Hague Conference. It entered into force in 1988 and has 28 contracting states.
- 14 Throughout all of these revisions, the prohibition against security for costs based on foreignness has been constant and was even broadened in the last version in 1980. Indeed, under Article 14 of that instrument, the protection against security for costs depends only on the claimant being a habitual resident of a contracting state, regardless of nationality or domicile.²⁶ Several other Hague Conference instruments also include similar provisions

²³ The Institut de droit international had called for its abolition in 1877: Institut de Droit International, Session de Zurich 1877, *Annuaire de l'Institut de droit international*, Edition nouvelle abrégée (1928), vol I, 95.

²⁴ *Convention du 17 juillet 1905 relative à la procédure civile*. The Articles on security for costs were maintained verbatim at Articles 17-19.

²⁵ *Convention of 1 March 1964 on Civil Procedure*. This is the first English version of the instrument. The French version remained the same as in the previous instrument.

²⁶ See generally G Möller, 'Explanatory Report on the 1980 Hague Access to Justice Convention' (1983) U Actes et documents de la Quatorzième session, Tome IV, *Entraide judiciaire*, 235.

prohibiting security for costs on the basis of foreignness,²⁷ the most recent being the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.²⁸

- 15 Despite this consistency, it is worth noting that the 1980 Convention allows contracting states to opt out of these provisions on security through a reservation.²⁹ The reason given for including this reservation in the 1980 Convention is worth noting. According to the Explanatory Report,

The right to exclude Chapter II is due to the fact that delegates of some common law States pointed out that, in view of the traditional discretion left to courts in those countries as regards security for costs, it may be difficult for those countries to accept treaty obligations in respect of security for costs.³⁰

- 16 This explanation merits discussion. To say that an order for security for costs is ‘discretionary’ in a common law jurisdiction merely means that there is no *right* to security for costs.³¹ A party may seek such an order, but the court is never obliged to grant it, even if the conditions for such an order are met. In such a context, a rule prohibiting the granting of an order for security for costs based solely on the foreign status of the claimant is not incompatible with a discretion not to grant security. Admittedly such a prohibition may interfere with a court’s discretion to grant such an order, but it would be erroneous to conceive of common law courts’ discretion in procedural matters as impervious to legislative intervention. Although historically procedural rules were formulated by courts themselves³² and not legislatures, the existence of legislative procedural law in common law jurisdictions

²⁷ See, for eg, Art 17 of the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Art 22 of the 1980 Convention on the Civil Aspects of International Child Abduction and Article 14 of the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

²⁸ See Article 14 and M D Salgueiro, ‘Article 14 of the Judgments Convention: The Essential Reaffirmation of the Non-discrimination Principle in a Globalized Twenty-First Century’ (2020) 67:1 Neth Int Law Rev 113.

²⁹ See respectively, Article 28 and Article 14(3). Even the 1954 Convention allowed for a reservation to narrow the application of its protection against security for costs. Article 32 allows a state to declare that it will only apply Article 17 ‘to the nationals of Contracting States having their habitual residence in its territory.’ Only one state – Cyprus – has made the permitted reservation in relation to both instruments.

³⁰ Möller (n 26) 265. The issue was raised mainly by the delegations from Australia and Canada, but the U.K. supported it. See ‘Working Document no. 18’ in *Actes et documents de la Quatorzième session, Tome IV, Judicial Cooperation*, 1980, 142.

³¹ See N Andrews, *Andrews on Civil Processes: Court Proceedings* (Intersentia 2013), Chapter 19 para 19.06.

³² Indeed, exercises of discretion are typically framed by conditions, often contained in rules of court, which courts are normally bound to apply. See for example, for security for costs, the current English rules contained in UKCPR 23.13. But see also Andrews (n 31) Chapter 19 at footnote 7, where he notes that English courts consider that their power to order security for costs is not restricted to the circumstances set out in the rules of court.

is not unusual.³³ Thus, to suggest that common law jurisdictions could not sign on to a treaty that contained a limited prohibition on security for costs because they had no legislative way to enforce it is unpersuasive. The fact that the United Kingdom had signed numerous bilateral treaties including a prohibition against security for costs appears to have been ignored.³⁴ Moreover, that two years later the United Kingdom acceded to the 1968 Brussels Convention, which included that very prohibition on security for costs,³⁵ is an obvious rebuttal to the argument. In any event, none of the concerned common law countries became signatories to the 1980 Convention, even though it included the reservation they had insisted upon.

- 17 Almost forty years later, the same debate arose during negotiations of the 2019 Judgments Convention, ultimately leading to the inclusion of an opt-out in that Convention's provision on security for costs (Article 14), which otherwise largely parallels the approach in the 1980 Convention on Access to Justice.
- 18 As mentioned above, a similar approach to security for costs can be found in regional instruments, such as the 1968 Brussels Convention and its successor, the Brussels Regulation (2000)³⁶ and its recast (2012). Unchanged from its original wording in the 1968 treaty, the provision reads as follows:

Article 56

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for the enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State addressed.

- 19 The corollary of enforcement of costs orders is implicit in the nature of the instrument, whose purpose is to provide for the circulation of judgments within the European Union,³⁷ and its definition of 'judgment', which includes orders for costs.³⁸ Interestingly, this instrument does not include a general provision on security for costs in originating proceedings, thus leaving this issue to domestic law. However, as will be seen below, other

³³ In Canadian common law jurisdictions, for example, there are numerous examples of procedural statutes dealing with court jurisdiction, enforcement of judgments and class proceedings. Similarly, many Australian states have adopted civil procedure statutes.

³⁴ See for example the 1931 Convention on Legal Assistance between the United Kingdom and Austria at issue in the *Saldanha v Hiross Holding AG* case at the CJEU (C-122/96).

³⁵ In Art 45; the same is true of the Brussels Regulation which also had the well-known effect of excluding the courts' discretion to decline jurisdiction.

³⁶ Article 51.

³⁷ See E Vallines, 'Article 56' in M Requejo Isidro (ed), *Brussels I Bis* (Edward Elgar Publishing 2022).

³⁸ See Article 2(b).

legal limitations, from constitutional, human rights or European Union law, have imposed equivalent constraints on domestic procedural law.

- 20 Two other regional instruments worth mentioning come from the Americas, namely the 1928 Convention on Private International Law, also known as the *Bustamante Code*,³⁹ and the 1992 *Las Leñas Protocol*⁴⁰ from Mercosur. The former includes the following provision:

Article 386. None of the Contracting States shall impose on the nationals of another the *cautio judici sisti* or the *onus probandi*, in cases where they do not require their own nationals to do so.⁴¹

- 21 Although ratified by 16 countries from Central America, Latin America and the Caribbean shortly after its adoption by the Sixth International Conference of American States, these ratifications were subject to numerous reservations, including to Article 386 by two states, Haïti and The Bahamas.⁴² The United States had participated in the conference but did not sign on, citing conflicts with its constitution⁴³ and claiming the absence of federal competence in the field of private international law.⁴⁴

- 22 The much more recent *Las Leñas Protocol*, adopted in 1992 and amended in 2002,⁴⁵ states:

Art. 4: No security or deposit, whatever its denomination, may be imposed by reason of the status of national, citizen or permanent or habitual resident of another State Party. The preceding paragraph shall apply to legal entities constituted, authorized or registered under the laws of any of the States Parties.⁴⁶

³⁹ See generally De Maekelt (n 16) 225-27.

⁴⁰ *Las Leñas Protocol* of 27 June 1992 on judicial cooperation and assistance in civil, commercial, labour and administrative matters, 2145 UNTS 421. It is in force between Argentina, Brazil, Paraguay and Uruguay since 17 March 1996.

⁴¹ OAS, Law and Treaty Series, No 23 (free translation). This regional convention was adopted in Havana on 20 February 1928 at the Sixth International Conference of American States.

⁴² See https://www.oas.org/en/sla/dil/inter_american_treaties_a-31_bustamante_code_signatories.asp accessed 8 July 2024.

⁴³ Ibid.

⁴⁴ See De Maekelt (n 16) 227.

⁴⁵ One of the 2002 amendments was precisely to Article 4, adding nationality and habitual residence alongside citizenship and permanent residence from the original version.

⁴⁶ Free translation. For the original version see <https://normas.mercosur.int/public/normativas/1742> accessed 8 July 2024. For discussion see E Tellechea Bergman, 'Condición procesal del litigante foráneo en el derecho internacional privado interamericano, del MERCOSUR y uruguayo de fuente nacional' (2015) 3:6 RSTPR 323.

- 23 Two soft-law sources deserve mention here. First, the 2006 ALI/Unidroit Principles of Transnational Civil Procedure, posit the following as deriving from the principle of equal treatment of parties:

3.3 A person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident of the forum state.⁴⁷

- 24 The commentary indicates that this is a compromise position between the view that security for costs should never be imposed and the view that security for costs against foreign plaintiffs may be legitimate to protect a defendant.⁴⁸ The compromise is therefore not to prohibit security for costs entirely but rather to subject it to conditions other than the mere foreign status of the plaintiff.

- 25 Similarly, the 2016 ASADIP Principles on Transnational Access to Justice provide:

Article 2.1. States shall grant litigants of foreign nationality or residing abroad the same rights that are conferred to its own nationals or residents. The right to access to justice precludes requiring from foreign citizens or residents a bond, deposit or any type of security based exclusively on their foreign nationality or residency abroad or on the bases of reciprocity.⁴⁹

- 26 This brief overview of regional, international and soft-law instruments suggests a consensus view that security for costs based solely on the foreign status of the plaintiff should be prohibited. This view is strengthened when accompanied by the *quid pro quo* of enforcement of foreign cost orders. Since cross-border enforcement of cost orders can typically only be guaranteed by treaty, it may not be surprising that some states prefer to maintain the possibility of security for costs against foreign plaintiffs in the absence of such guarantees.

1.2.2 Security for Costs against Foreign Claimants in National Law

- 27 It is not uncommon for national procedural law to include provisions on security for costs against a 'foreign' claimant.⁵⁰ There is, however, no uniformity regarding how 'foreignness'

⁴⁷ Available at <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/> accessed 8 July 2024.

⁴⁸ Ibid.

⁴⁹ Available at http://www.asadip.org/v2/?page_id=231 accessed 8 July 2024.

⁵⁰ See for example Germany (GCCP Sec 110), UK (UKCPR 25.13(2)), Belgium (CJ Art 851), Japan (JCCP Art 75), Quebec (QCCP Art 492), Brazil (CCP art 83-84), New York (CPRL Art 85), Serbia (PIL Act, Art 82-83), Australia (UCPR 671), Switzerland (Art 62(2) BGG).

is assessed. It may be based on nationality, domicile or residence or a combination of these.⁵¹ In some jurisdictions, the foreignness of the claimant gives rise to an automatic imposition of security for costs.⁵² In others, security must be expressly requested by the defendant and will not be imposed *ex officio*.⁵³ Even in the latter context, the foreignness of the claimant may be treated differently. It may be a determinative criterion that will necessarily lead to the imposition of security.⁵⁴ Or foreignness of the claimant may be one factor among a list of criteria for determining whether security for costs will be imposed, leaving the decision to the court's discretion.⁵⁵ The amount of security may also be based on an objective standard, such as the amount of the claim,⁵⁶ or may be variable according to the particular circumstances of the case.⁵⁷ Finally, some jurisdictions that previously imposed it based on foreignness have subsequently abolished it.⁵⁸ In comparative terms, therefore, there is significant variability regarding the imposition of security for costs against foreign plaintiffs in national procedural law.

- 28 Some jurisdictions have had to revise strict rules on security for costs as a result of challenges to such rules based on the general principles of non-discrimination or access to justice. These principles may come from a state's constitution or from a non-national source including a human rights instrument. A few examples will illustrate this process.
- 29 First, in the European Union, the CJEU held early in the 1990s that EU law prohibitions against discrimination based on nationality could preclude the imposition of security for costs on the sole basis of nationality where the claimant was a national of another Member State.⁵⁹ Interestingly, German courts initially held that U.K. nationals no longer benefitted, post-Brexit, from the exemption from security for costs under EU law.⁶⁰ More recently, however, this view has been amended, on the basis that the 1955 Council of Europe

⁵¹ For example: non-resident (NY, UK, Germany, Brazil); foreign domicile (Switzerland, Quebec, Japan); foreign nationality (Belgium); foreign nationality but not if local domicile (Serbia).

⁵² For example in Japan.

⁵³ For example in Brazil and England.

⁵⁴ For example in Quebec.

⁵⁵ For example Ontario.

⁵⁶ For example Brazil.

⁵⁷ For example New York.

⁵⁸ For example France and Uruguay (in 1988 with the adoption of its new procedural code – see Bergman (n 46)).

⁵⁹ Four judgments are worth mentioning in this regard: *Hubbard v Hamburger*, Case C-20/92; *Date Delecta v MSL Dynamics*, C-43/95; *Saldanha v Hiross Holding AG*, Case C-122/96 and *Hayes v Kronenberger GmbH*, Case C-323/95. For a detailed discussion see the comment by Thomas Ackermann in (1998) 35 Common Market Law Review 783.

⁶⁰ See Matthias Lehmann, 'Further Brexit Troubles: German Courts Force British Claimants to Provide Security for Costs', (29 April 2021), online: EAPIL <https://eapil.org/2021/04/29/further-brexit-troubles-german-courts-force-british-claimants-to-provide-security-for-costs/> accessed 8 July 2024.

Convention on Establishment,⁶¹ (in force between Germany and the U.K.), excludes security for costs, at least for natural persons.⁶² The second example is from England, where in 2001 the Court of Appeal held that imposing security for costs against non-residents could be construed as a violation of Art 6 ECHR (right to trial) if there was no obstacle to the foreign enforcement of an eventual costs award against that claimant.⁶³ Third, the Belgium Constitutional Court held, in 2018, that the rule on security for costs in Belgian law was unconstitutionally discriminatory because it allowed a defendant to seek security from a non-national but not from a Belgian national who lived abroad and had no assets in Belgium. According to the Court, the security rule had to be revised to allow for security against any non-resident with no assets in Belgium, regardless of nationality.⁶⁴ In the US, there is mixed case law on the constitutionality of security costs for non-residents.⁶⁵ A recent decision from New York involving interstate litigation considered that the answer depended on whether the amount involved constitutes a ‘reasonable burden’ on the claimant.⁶⁶

- 30 Overall, it is difficult to justify a rule on security for costs based solely on the ‘foreign’ status of a claimant, however defined. It is obvious that ‘foreignness’ is merely a proxy for the assumption that the claimant has no seizable assets in the jurisdiction to satisfy an eventual costs award against that claimant and that foreign enforcement of any such cost award would be a significant burden. While these assumptions may have made sense a century ago, it may no longer be as persuasive today, whether for physical or legal persons, given the increased mobility of people and assets, and to a lesser extent of judgments. At the very least, any security rule based on foreignness should operate as a rebuttable presumption, allowing a claimant to show that foreign enforcement of any cost award would either not be necessary or would not otherwise be an obstacle significantly greater than other challenges related to the execution of judgments in domestic law. Moreover, as indicated by the Belgian Constitutional Court, if the justification for security for costs is the absence of local assets, then it should also be available against claimants who are non-resident

⁶¹ ETS No. 019. There are twelve contracting states. For a list see <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=019> accessed 8 July 2024.

⁶² The BGH, on 27 September 2022 - VI ZR 68/21 held that claimants from the UK are not obliged to provide security because of Article 9 of the Convention.

⁶³ *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556. The Court held that where the claimant was domiciled in the EU, the facility of enforcement under the Brussels Regime justified a refusal to grant an order for security for costs against such a claimant. Post-Brexit that justification no longer holds.

⁶⁴ Arrêt no 135/2018 du 11 octobre 2018. Interestingly the Court gave the legislator one year to amend the law, which four years later it has still not done.

⁶⁵ The issue has been considered under the ‘equal protection’, ‘due process’ and ‘privileges and immunities’ clauses of the US Constitution. See generally J A Gliedman, ‘Access to Federal Courts and Security for Costs and Fees’ (2000) 74(4) *St John’s Law Review* 953.

⁶⁶ See *Clement v Durban*, 32 N.Y.3d 337 (2018; New York Court of Appeal), where USD 500 security imposed on American national resident in the State of Georgia was not considered to violate any constitutional protections.

nationals with no local assets. Indeed, as all of the international and regional instruments examined above confirm, there is no fundamental policy objection to security for costs in such circumstances, as it is not based on discrimination between foreign and local parties.

1.3 Collective Actions

- 31 There is significant academic literature on collective actions in a comparative perspective,⁶⁷ much of it concerned with debates over the legitimacy or appropriateness of various models of collective actions. That central issue is the subject of an entire other Part of this project on collective actions. In this chapter, the focus is directed at specific cross-border aspects of collective actions.⁶⁸ This section begins with a brief overview of the three basic models of actions for collective redress (to which it limits itself) and the challenges they may present in the cross-border context. Two specific challenges of relevance across legal systems will be examined: preclusive effect and international jurisdiction. The discussion will be presented at a high level of generality given that the growing diversity of national systems puts any systematic or detailed analysis beyond the scope of the chapter.⁶⁹
- 32 The opt out model, in essence, enables an individual (or entity) to institute proceedings on behalf of a proposed class of members with common claims against a defendant without obtaining the prior consent of those class members. Ultimately, the outcome of the action will be binding on all members of the class. If successful, the class members will be entitled to benefit from the remedy granted by the court. If unsuccessful, the class members will be precluded from instituting a further action against the defendant (*res judicata* effect). To mitigate the absence of prior consent from class members, the procedure requires that notice of the action be given and that class members have the opportunity to opt out of it.

⁶⁷ See, for example, A Uzelac and S Voet (ed), *Class Actions in Europe Holy Grail or a Wrong Trail?* (Springer 2021); B T Fitzpatrick and R S Thomas, *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge UP 2021); I Nagy Csongor, *Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis* (Springer Open 2019); R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004).

⁶⁸ There is also a growing body of literature on this complex question. See for example, A Pato, *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective* (Hart 2019); R Mulheron, 'Asserting Personal Jurisdiction over Non-Resident Class Members: Comparative Insights for the United Kingdom' (2019) 15 *Journal of Private International Law* 445; D Fairgrieve and E Lein (ed), *Extraterritoriality and Collective Redress* (Oxford UP 2012); F Dorsemont, Z Jaspers and H O E K van Auckje, *Cross-Border collective actions in Europe: a legal challenge* (Intersentia 2008); A Nuyts and N E Hatzimihail (ed), *Cross-border class actions: the European way* (Walter de Gruyter 2013).

⁶⁹ The diversity of mechanisms and outcomes to litigation arising from the Volkswagen 'Dieselgate' scandal and the complexity of its cross-border dimensions is made evident in D Hensler et al, *The Globalization of Mass Civil Litigation – Lessons from the Volkswagen 'Clean Diesel' Case* (Santa Monica, RAND Corporation 2021). See also BEUC, 'Seven years of Dieselgate – A never ending story', Report published 12 December 2022 (https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-130_Dieselgate_7th_report.pdf accessed 8 July 2024).

In such a case, members who have opted out will not be bound by the eventual result of the action, whether successful or not. The main jurisdictions⁷⁰ following this model are well known: the United States, Canada and Australia.

- 33 The competing model is the opt in model. According to this model, collective actions can be instituted on behalf of, or for the benefit of, a class of individuals (or entities) on the basis of a common claim against a defendant but members of the class must expressly opt into the proceedings in order to benefit from, or be bound by, the outcome of the proceedings. This is the model privileged in most jurisdictions in Europe including France⁷¹ and Italy.⁷²
- 34 Still other models are hybrid. They provide for an opt out model for domestic claimants but impose the opt in model for foreign claimants. This approach can be found, for example, in the U.K.'s Consumer Rights Act⁷³ (but limited to competition law claims) and the Dutch Class Action Act.⁷⁴ It is also the model put forward in the recent 2020 EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers.⁷⁵ It was also, for a period, the model in some Canadian provinces,⁷⁶ but those have since reverted to a single opt out model. Another version of hybridity may be found in the EU's General Data Protection Regulation which provides for opt-in collective redress but makes it optional for Member States to prefer an opt-out model.⁷⁷
- 35 Yet another variation may be found in Brazil, according to which class members can benefit from a positive outcome but are not bound by a negative outcome, that is, if the defendant is held not liable. Admittedly the class action system in Brazil is complex and confusing and,

⁷⁰ Other jurisdictions in Europe with opt out proceedings include Portugal (*Ação Popular*, with no express exclusion of foreign class members); the UK Collective Proceedings Order regime for competition law claims introduced in 2015 (non-UK domiciliaries must opt-in) and the Dutch Class Action Act, introduced in 2020 (foreign class members must opt in). The Dutch Collective Settlement Act is also opt-out but is quite distinct from a class action procedure.

⁷¹ See M Azar-Baud and V Magnier, 'Class Action à la française' in B Fitzpatrick and R Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge UP 2021) para 14.3.3.2.

⁷² See P Giudici, P and B Zuffi, 'The New Italian Regulation on Class Actions' in Fitzpatrick and Thomas (n 71) 217.

⁷³ See N Andrews, 'English Systems of Multiparty Litigation' in Fitzpatrick and Thomas (n 71) 153.

⁷⁴ See C Van der Elst and W Weterings, 'The Dutch Mechanisms for Collective Redress: Solid, and Excellent within Reach' in Fitzpatrick and Thomas (n 71) 272.

⁷⁵ 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 L 409.

⁷⁶ On the Canadian model, see generally J Kalajdzic and C Piché, 'Cold Facts from the Great White North: Empirical Truths, Contemporary Challenges and Class Action Reform' in Fitzpatrick and Thomas (n 71) 109.

⁷⁷ General Data Protection Regulation (EU) 2016/679, Articles 79-80.

according to commentators, in need of reform.⁷⁸ Moreover, the cross-border implications remain unclear.⁷⁹

- 36 It is worth mentioning that opt in models have the potential to rival opt out models in terms of reaching a large number of eligible claimants. For example, the development of online platforms to receive claimant registrations was very successful in Germany in relation to claims against Volkswagen in the *Dieseldgate* scandal.⁸⁰ The involvement of third-party funders can also facilitate the aggregation of claims in an opt-in system through financing of such online platforms and other publicity initiatives to attract claimants.⁸¹

1.3.1 Preclusive Effect

- 37 The principal cross-border challenge of the opt out model flows from the fact that it is not widely adopted. As a result, if a class is defined so as to include foreign members, the intended preclusive effect of the action may not be recognized in jurisdictions where the absence of prior consent is considered anathema and not cured by the notice and opt out mechanism. While the risk of non-recognition abroad is intrinsic to cross-border litigation, it is multiplied in the class action context. Indeed, the risk is not of one action going forward in one foreign jurisdiction but rather of multiple actions in multiple jurisdictions. This is particularly problematic for any attempt to resolve the initial action by a settlement. Potential future non-recognition for foreign class members will militate against their inclusion in a settlement as the finality sought by settling parties, especially defendants, will be impaired.⁸² Even in the absence of settlement, however, courts should be wary of

⁷⁸ See C Gouvêa and H Refosco, 'Class Action in Brazil: Overview, Current Trends and Case Studies' in Fitzpatrick and Thomas (n 71) 129.

⁷⁹ See D Bermudes Lino, 'Jurisdição Brasileira nos processos coletivos transnacionais: o que podemos aprender com as discussões enfrentadas no contexto europeu?' (2019) 20:1 Revista Eletrônica de Direito Processual 131.

⁸⁰ A claims aggregator – *myRight* – financed by a litigation funder, claimed to have attracted over 40,000 German consumers in this manner. See Hensler, *supra* note 69 at 44-45.

⁸¹ *Ibid.* Third-party funding is a complex issue that is dealt with in detail in Part 9.

⁸² It should be noted that in the common law jurisdictions admitting opt-out class actions, settlements must be approved by courts to be effective. The preclusive effect is thus attached to a court judgment and not the settlement itself as a private document.

expending scarce public resources on actions that will be ineffective. U.S. courts have often considered the risk of non-recognition as grounds to exclude foreign class members.⁸³

- 38 This risk is thought to be avoided by an opt in model, since by opting in, any class member has expressed consent to being bound by the outcome of the action. As such, systems that are exclusively opt in, or those that impose opt in for foreign class members, anticipate that the preclusive effect of any ensuing judgment will be recognized elsewhere, or at least that the express consent of the class member will answer any concerns regarding the jurisdiction of the court of origin over those class members.
- 39 Admittedly, even between jurisdictions that share the opt out model, problems with cross-border proceedings remain. There is a large body of case law and commentary, for example, on multi-jurisdictional class actions within the U.S. and Canada, although those tend to be closely connected to internal constitutional considerations.⁸⁴ As between the two countries, however, the general principle that opt out class actions are legitimate and can give rise to judgments binding on class members is well accepted including with regard to classes that include members of the other country.⁸⁵ Nevertheless, parallel actions and overlapping classes arise in practice between the two countries and are addressed on an *ad hoc* basis by the courts involved, mainly by recourse to *forum non conveniens* or by redefining the class to exclude the overlap. Judicial cooperation is encouraged by the *Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions* jointly developed by the American Bar Association and the Canadian Bar Association in 2011.⁸⁶ While such cooperation mechanisms can provide frameworks for responding to parallel cross-border

⁸³ For a critical discussion of US case law on this point, see T Monestier, 'Transnational Class Actions and the Illusory Search for Res Judicata' (2011) 86 Tulane Law Review 1. This should not be confused with the exclusion of foreign members in so-called 'f-cubed' actions. Those refers to claims by foreign purchasers of foreign securities on foreign exchanges – the fact that the security in question was listed for sale on a US exchange was held to be insufficient to justify the jurisdiction of the US courts, essentially because the statutory basis for the claim, grounded in US law, was found to be territorially limited (*Morrison v. National Australian Bank Ltd.* (Supreme Court, US) [130 S. Ct. 2869]). For further discussion see L Silberman, 'Morrison v. National Australia Bank: Implications for Global Securities Class Actions' (2010) Swiss Yearbook of Private International Law.

⁸⁴ While the US do have a federal class action system alongside the state mechanisms, there is no equivalent in Canada. Most class actions in Australia are brought in Federal Court, which eliminates internal cross-border dimensions.

⁸⁵ See for example *Currie v McDonald's Restaurants of Canada Ltd*, (2005), 74 OR (3d) 321, 250 DLR (4th) 224 (Ont CA) referring to a Michigan class action that included US and Canadian members. While the Ontario Court of Appeal refused to recognize the *res judicata* effect of the US settlement in Ontario, it was only because it found that the notice to Canadian customers had been insufficient – the court specifically held that, since the defendant was a Michigan corporation, the U.S. court had jurisdiction over it and that *in principle* the procedural safeguards of notice, opt out and adequate representation in the U.S. class action procedure were sufficient to bind Canadian class members to the result.

⁸⁶ See <https://www.cba.org/Our-Work/Resolutions/Resolutions/2011/Protocole-de-communication-entre-les-tribunaux-dan> accessed 8 July 2024.

class actions in the two countries, they impose no obligations on courts in either country and create no rights for the parties engaged in litigation. It is significant that despite several decades of experience with opt-out cross-border class actions, parallel and overlapping actions persist.⁸⁷ This suggests that the challenges presented are resistant to resolution by *ex ante* rule-based approaches.⁸⁸

1.3.2 The Jurisdictional Issue

- 40 As with all cross-border litigation, collective procedures are subject to rules of international jurisdiction. When the forum where an action is instituted is the defendant's home jurisdiction, there should, in principle, be no jurisdictional obstacle for a foreign consumer to have access to the procedure in that jurisdiction. Indeed, in such a situation, if a foreign claimant could institute an individual action against a local defendant, there would appear to be no *jurisdictional* ground to deny the same claimant access to a collective procedure. For the many collective action procedures requiring that foreign claimants opt into the proceedings,⁸⁹ this result would appear to be wholly consistent with traditional rules governing international jurisdiction. Moreover, such a scenario should not raise any special concerns about the preclusive effect of any eventual outcome in the foreign claimant's home state (or in any other state): the claimant has consented to the court of origin deciding the case and jurisdiction over the defendant is clearly established. As long as this would suffice for recognition in the foreign claimant's home jurisdiction, the collective nature of the proceedings should not change the result.
- 41 In systems with opt out mechanisms, however, the risk relating to preclusive effect remains the same as outlined previously. Because opt out systems remain the exception globally, there is a risk that the absence of prior consent of class members in the court of origin's system will be considered by other jurisdictions to deny recognition of that court's jurisdiction over those class members, even if the court had jurisdiction over the defendant.
- 42 If the collective action is not instituted in the defendant's home jurisdiction, the possibility of access for foreign claimants is less evident in jurisdictional terms. Indeed, if a collective action is instituted in a jurisdiction that has links to the underlying facts giving rise to the claims, this connection will typically not exist for the majority of foreign claimants; their claims will more likely be connected to their home jurisdiction. If jurisdictional rules are

⁸⁷ See J P Brown and B Kain, 'Cross-border actions for collective redress – some lessons from Canada' in E Lein et al (ed), *Collective Redress in Europe Why and How?* (British Institute of International and Comparative Law 2015) 203.

⁸⁸ The great diversity and complexity of mechanisms dealing with parallel proceedings in general is fully explored in Chapter 8 of this Part.

⁸⁹ But note that under the Dutch Class Action Act, even if the defendant resides in the Netherlands, it must also be the case that 'additional circumstances suggest a sufficient relationship with the Netherlands'.

strictly applied to collective actions, this would potentially entail multiple collective actions in all of the jurisdictions where the defendant is active.⁹⁰ Moreover, claimants from jurisdictions that do not have a collective procedure would be limited to such a procedure in the defendant's home jurisdiction, assuming it has a collective action procedure. In the negative, these claimants would appear to be limited to individual claims. In cases where collective actions relate to low-value claims that are not individually viable, such a result would be akin to a denial of access to justice.

- 43 One solution to this would be for the defendant to consent to the inclusion of foreign claimants. Indeed, where international jurisdiction based on consent is admitted, this would be sufficient to provide access to foreign claimants. Where a collective action procedure requires foreign claimants to opt in, this should provide the same *res judicata* assurances as for the first scenario involving actions in the defendant's home forum. Such a scenario would be expected where a defendant is seeking a global (or regional) resolution of all claims in preference to having to face proceedings in different jurisdictions. The problem with this solution is that it is not normally predictable *ex ante*, being dependent on the defendant's subjective decision once the action is instituted. As such, a foreign claimant cannot rely on the defendant's consent as a basis for gaining access to a forum other than the defendant's home jurisdiction.
- 44 This lack of *ex ante* predictability of the defendant's consent may itself be overcome if a jurisdiction provides a mechanism for giving collective effect to settlements reached prior to an action being instituted. In such a scenario, a potential claimant will know in advance that the defendant will not challenge the jurisdiction of the court whose approval of a settlement is sought. Such 'settlement class actions' are well-known in some systems, such as in Canada and the US.⁹¹ The Dutch Collective Settlement mechanism operates on a similar idea.⁹² Moreover, these are all opt out mechanisms, and suffer from the same preclusion challenges discussed previously. There does not appear to be an example of an equivalent

⁹⁰ The CJEU decision in *Schrems II* is instructive in this regard as it held that the protective jurisdiction at the consumer's place of residence was not available for collective action through the assignment of claims. See *Case C-498/16 Maximilian Schrems v Facebook Ireland Limited*. The same court did hold, however, in *C-343/19, Verein für Konsumenteninformation v. Volkswagen AG*, that Austrian courts had jurisdiction over VW with regard to claims by Austrian purchasers based on the place of harm. Given the absence of true collective redress in Austria, however, this still meant parallel actions within Austria. See BEUC Report, *supra*, note 69, at 10.

⁹¹ This is a common approach in Canada and the US where 'settlement class actions' are brought to courts for certification and settlement approval in the same proceeding. Given that the parties are in agreement, and that courts in those jurisdictions will not typically raise jurisdictional objections *proprio motu*, the potential absence of jurisdiction is not assessed. For a discussion of settlement class actions in the US, see H M Erichson, 'The Problem of Settlement Class Actions' (2014) 82 *George Washington LR* 951.

⁹² See X E Kramer, 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries' (2014) 27 *Global Business & Development Law Journal* 235.

model among existing opt in collective action mechanisms. The development of an opt-in settlement mechanism may be one way that jurisdictions can provide broader access to collective redress for claimants from multiple jurisdictions while satisfying traditional rules of international jurisdiction. This would be particularly attractive where the defendant's home forum does not provide for collective action. Of course, any such mechanism would have to ensure oversight of the quality of the settlement, as is typically provided for in those systems that admit this process.⁹³

- 45 A second way to overcome the jurisdictional obstacle is to modify the jurisdictional condition to account for the particular nature of the collective proceeding. This is how courts in many Canadian provinces have responded to this challenge. The origins of this approach rests with the absence of availability of collective proceedings in all jurisdictions and may be instructive on a global level. Although class action procedures are available across Canada today, this was not always the case. Thirty-years ago, only three provinces had adopted class action procedures: Quebec, Ontario and British Columbia.⁹⁴ When litigation around breast implants arose in that period, a class proceeding was brought in British Columbia, against foreign manufacturers.⁹⁵ Those manufacturers objected to the inclusion of non-residents in the proposed class,⁹⁶ arguing that the B.C. court did not have jurisdiction over those claims because the non-resident claims had no link to B.C.⁹⁷ The court rejected the objection, noting that many of the non-residents were from other Canadian provinces that did not have a class action mechanism and that joining the B.C. action was likely the only effective option for them, given the complexity of the case and the prohibitive cost of individual proceedings. Considering that the non-resident claims related to a product manufactured and sold throughout Canada by the defendants,⁹⁸ the court held that the 'commonality' of

⁹³ Although court oversight of settlements has been criticized as insufficient in Australia, Canada and the US. See for example, for Australia, M Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38 Melbourne Univ. L. R 590; for Canada, C Piché, *Fairness in Class Action Settlements* (Toronto Carswell 2011). In the US this led to legislative intervention to allow for increased opportunities to challenge the proposed settlement (*Class Action Fairness Act* of 2005) including a requirement to notify the Department of Justice of proposed settlements and entitling it to intervene to challenge the fairness of settlements to absent class members.

⁹⁴ For a discussion of the history of Canadian class actions, see S Finn, 'In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission', (2005) 2 Canadian Class Action Review 333.

⁹⁵ It should be noted that procedural law is not federal in Canada and jurisdictional issues are dealt with at a provincial level.

⁹⁶ The proposed class included all Canadian residents except those in Ontario and Quebec, where separate class proceedings had been instituted.

⁹⁷ *Harrington v. Dow Corning Corp.* (Supreme Court British Columbia, Canada) [1997 CanLII 4153]. At that time, the BC statute required that non-resident class members opt into the proceedings. In 2018, BC revised its legislation to remove the opt in requirement for non-residents (*Class Proceedings Act*, RSBC 1996, c 50, s. 4.1).

⁹⁸ The court acknowledged that the non-resident claims would be determined according to the law of their jurisdiction and not the law of BC, under applicable choice of law rules.

the non-resident and resident claims was a sufficient basis upon which to establish the requisite connection to B.C. to justify jurisdiction over all claims. While this was certainly a creative response, it was upheld on appeal⁹⁹ and has since been followed in all other Canadian provinces save Quebec,¹⁰⁰ once these other provinces enacted class action legislation. Moreover, the approach is not limited to non-resident class members from within Canada. Indeed, in a recent Ontario class proceeding alleging a conspiracy to fix the price of air cargo to and from Canada, the foreign airline defendants failed in their attempt to exclude non-Canadian class members whose shipments had no connection to Ontario.¹⁰¹ This approach to jurisdiction in cross-border collective litigation thus ‘fits’ with the reach of the defendant’s alleged wrongdoing, which is not defined by geographic boundaries but rather by its market.¹⁰² Such an approach, however, carries a serious *res judicata* risk if this expanded jurisdictional rule is not recognized elsewhere. Nevertheless, this approach would respond to calls for reimagining the way private international law operates in the context of mass wrongs.¹⁰³

- 46 So far this does not appear to have taken place. For example, even after decades of debate over collective actions in the European Union, the recent 2020 EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers has not addressed the issue. Instead, it states in Article 2 that the Directive applies ‘without prejudice to Union rules on private international law, in particular rules regarding jurisdiction’.¹⁰⁴ As the Brussels I bis Regulation includes no jurisdictional rules tailored to collective procedures, nor is there any evidence of those in the national law of Member States, the possibility of a single EU-wide consumer collective redress action against a non-EU defendant would appear to be excluded.¹⁰⁵

⁹⁹ *Harrington v. Dow Corning Corp.* (Court of Appeal British Columbia, Canada) [2000 BCCA 605].

¹⁰⁰ In Quebec, the Court of Appeal has applied the jurisdictional rules strictly, such that class members who could not institute an individual claim against the defendant in the province will be excluded from the proposed class. See *Hocking c. Haziza* (Court of Appeal Quebec, Canada) [2008 QCCA 800].

¹⁰¹ *Airia Brands Inc. v. Air Canada, Air France, Lufthansa Cargo et al.* (Superior Court of Justice Ontario, Canada) [2017 ONCA 792]. For a discussion of the many actions worldwide, see J Sladic, ‘The Lessons of Airfreight Cartel: Mechanisms of Coordination of Parallel Collective Lawsuits in Several Jurisdictions?’ in A Uzelac and S Voet (ed), *Class Actions in Europe Holy Grail or a Wrong Trail?* (Springer 2021) 249.

¹⁰² See H Muir Watt, ‘The Trouble with Cross-Border Collective Redress’ in D Fairgrieve and E Lein (ed), *Extraterritoriality and Collective Redress* (Oxford UP 2012) 119, para 7.11.

¹⁰³ *Ibid*, para 7.08.

¹⁰⁴ 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 L 409.

¹⁰⁵ See generally H Muir Watt, ‘The Trouble with Cross-Border Collective Redress’ in D Fairgrieve and E Lein (ed), *Extraterritoriality and Collective Redress* (Oxford UP 2012) 119. See also H Muir Watt, ‘Chapter C.17: Collective Redress’ in Basedow (n 2) 373, 378.

- 47 In the United States, the jurisdictional question relating to non-resident class members has gone largely unexplored,¹⁰⁶ given the focus in US law on links between the defendant and the forum.¹⁰⁷ Recently, however, the 2017 U.S. Supreme Court decision in *Bristol-Myers Squibb Co.*¹⁰⁸ has brought the jurisdictional dimension to the forefront. In that case, the court held that a California court did not have jurisdiction over non-resident plaintiffs' claims in a mass action against a non-resident corporation because those claims had no connection to California. While the case was not a class action, it gave the issue sufficient visibility to bring it to the attention of defendants, who began to object to the inclusion of non-resident class members in national class litigation.¹⁰⁹ The issue appears to have divided U.S. courts so far.¹¹⁰ On the one hand, the argument is that a class action is merely procedural and thus cannot modify rules of jurisdiction – which would support excluding non-resident class members who could not have brought an individual claim. On the other hand, the efficiency of class actions would be lost if a defendant with a national presence was forced to defend the same claim in fifty states, to which the answer is that this would not arise if the defendant consented to the court's jurisdiction or were the action to be instituted in the defendant's home state. While these cases all involve inter-state proceedings, the jurisdictional question is just as relevant for class members from outside the United States. Depending on how this jurisprudence develops, it might signal a new obstacle to foreign participation in U.S. class actions.
- 48 To conclude this section of the chapter, it appears evident that there is no easy solution to the challenges associated with cross-border collective actions. The opt in model has fewer preclusion risks than the opt out model, but jurisdictional conditions may still limit foreign claimants to the defendant's home jurisdiction. The Canadian revisions to jurisdiction for class actions outside of the defendant's home jurisdiction can overcome this but its opt out model suffers from the lack of preclusion risk. The history of parallel and overlapping cross-border actions in Canada and the U.S. suggests that mechanisms to address these in a systematic and predictable manner are elusive. There have been international soft law initiatives by the International Bar Association but these propose only general

¹⁰⁶ In the earlier seminal decision in *Phillips Petroleum Co. v. Shutts* (Supreme Court, US) [472 U.S. 797 (1985)], involving class members from all fifty US states and several foreign countries, this precise issue was not raised by the defendant in contesting the class definition. See also B A Winters, 'Jurisdiction over unnamed plaintiffs in multistate class actions' (1985) 73 Calif Law Rev 181.

¹⁰⁷ See L Silberman, 'Judicial jurisdiction and forum access: the search for predictable rules' in F Ferrari and D P Fernández Arroyo (ed), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar Publishing 2019) 332.

¹⁰⁸ *Bristol-Myers Squibb Co v. Superior Court of California* (Supreme Court, US) [137 S. Ct. 1773 (2017)].

¹⁰⁹ See Silberman (n 107) 340.

¹¹⁰ See *Molock v. Whole Foods Market Group, Inc.* (Court of Appeals, US) [2020 WL 1146733 (D.C. Cir. Mar. 10, 2020)], *Mussat v. IQVIA* (Court of Appeals, US) [2020 WL 1161166 (7th Cir. Mar. 11, 2020)]; *Cruson v. Jackson Life Insurance Co.* (Court of Appeals, US) [2020 WL 1443531 (5th Cir. Mar. 25, 2020)].

approaches.¹¹¹ It is difficult to conceive of effective solutions to these challenges save through multilateral negotiations. While these could be envisaged under the auspices of the Hague Conference on Private International Law, there is no indication that this topic is ripe for inclusion on its agenda.¹¹²

¹¹¹ See, for example, the IBA Task Force on Guidelines on Recognition and Enforcement of Collective Redress Judgments and Task Force on international procedures and protocols for collective redress.

¹¹² Work is ongoing on the jurisdiction project, but it seems stalled at discussions about parallel proceedings and has said nothing about collective actions since one mention in 2014. See <https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project> accessed 8 July 2024.

ABBREVIATIONS AND ACRONYMS

ALI	American Law Institute
Art	Article/Articles
ASADIP	Asociación americana de derecho internacional privado
BC	British Columbia (Canada)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ed	editor/editors
edn	edition/editions
EEC	European Economic Community
eg	<i>exempli gratia</i> (for example)
etc	et cetera
EU	European Union
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
IBA	International Bar Association
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
JCCP	Code of Civil Procedure (Japan)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
SCC	Supreme Court Canada
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America
USD	United States Dollar

LEGISLATION

International/Supranational

Convention du 14 novembre 1896 relative à la procédure civile

Convention du 17 juillet 1905 relative à la procédure civile

1928 Convention on Private International Law (Bustamante Code)

1955 Council of Europe Convention on Establishment

Convention of 1 March 1964 on Civil Procedure

1966 European Convention on the Establishment of Companies

1968 Convention sur la reconnaissance mutuelle des sociétés et personnes morales

1979 Inter-American Convention on Conflicts of Laws Concerning Commercial Companies

1980 Convention on International Access to Justice

1984 Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law

Las Leñas Protocol of 27 June 1992 on judicial cooperation and assistance in civil, commercial, labour and administrative matters

2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Regulation (EU) 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 (recast)

Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

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 L 409

Soft Law sources

2006 ALI/Unidroit Principles of Transnational Civil Procedure

2016 ASADIP Principles on Transnational Access to Justice

CASES

International/Supranational

CJEU

Case C-20/92 *Hubbard v Hamburger*

Case C-43/95 *Date Delecta v MSL Dynamics*

Case C-122/96 *Saldanha v Hiross Holding AG*

Case C-323/95 *Hayes v Kronenberger GmbH*

Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited.*

Case C-343/19 *Verein für Konsumenteninformation v. Volkswagen AG*

National

Canada

Airia Brands Inc. v. Air Canada, Air France, Lufthansa Cargo et al., 2017 ONCA 792

Currie v McDonald's Restaurants of Canada Ltd, (2005), 74 OR (3d) 321, 250 DLR (4th) 224 (Ont CA)

Harrington v. Dow Corning Corp., 1997 CanLII 4153 (B.C.)

Harrington v. Dow Corning Corp., 2000 BCCA 605

Hocking c. Haziza, 2008 QCCA 800

France

Cass. Crim. 12 nov. 1990, *Extraco Anstalt*, Bull. n° 377

Germany

VI ZR 68/21, 27 September 2022, BGH

United Kingdom

Nasser v United Bank of Kuwait [2001] EWCA Civ 556

United States

Molock v. Whole Foods Market Group, Inc., 2020 WL 1146733 (D.C. Cir. Mar. 10, 2020)

Cruson v. Jackson Life Insurance Co., 2020 WL 1443531 (5th Cir. Mar. 25, 2020)

Bristol-Myers Squibb Co v. Superior Court of California, 137 S. Ct. 1773 (2017)

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)

Morrison v. National Australian Bank Ltd., 130 S. Ct. 2869

Clement v Durban, 32 N.Y.3d 337 (2018; New York Court of Appeal)

Mussat v. IQVIA, 2020 WL 1161166 (7th Cir. Mar. 11, 2020)

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