

Review

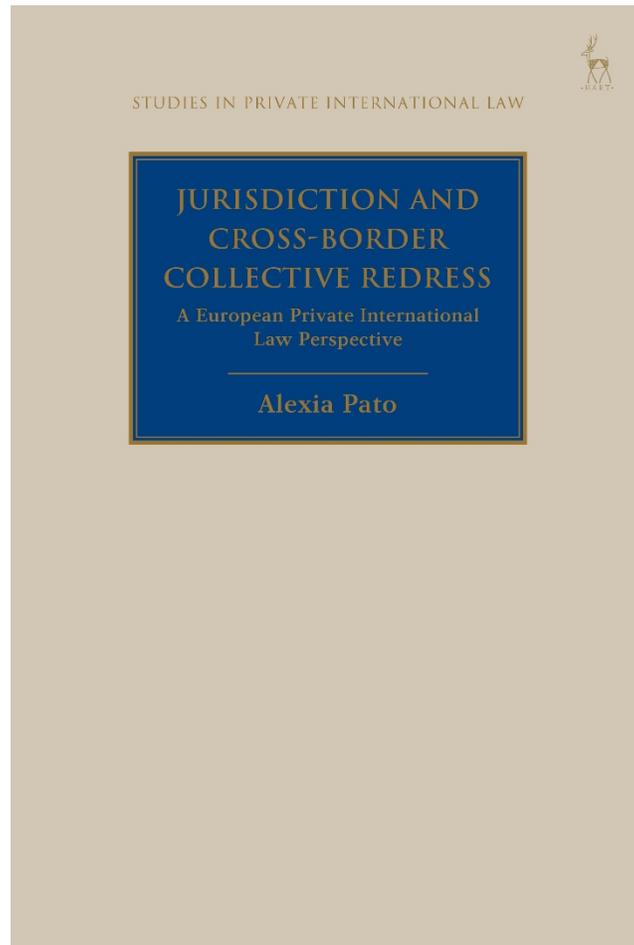
Alexia Pato:

***Jurisdiction and cross-border collective redress:
A European private international law perspective***

Oxford: Hart Publishing, 2019. 338 p.

ISBN: HB 978-1-50993-029-6 / ePDF 978-1-50993-031-9 /
ePub 978-1-50993-030-2

Reviewed by Joost Blom



Jurisdiction and cross-border collective redress: A European private international law perspective, by Alexia Pato, currently Senior Research Fellow at the University of Bonn (Germany), explores an intricate, even esoteric, legal subject that, at the same time, is of great social and political significance. Nations belonging to the European Union (EU), including Belgium and the Netherlands, have been developing unique legal means to address global violations of the law that call for coordinated international solutions, in particular regarding financial crimes and the protection of data. The present work is in the field, not of criminal or regulatory law, but of consumer and investor protection through recourse to the civil courts.

“Collective redress” is a term that describes a variety of ways in which a single legal proceeding can be structured so as to offer a means for adjudicating a large number of claims. These usually stem from a single wrongdoer (defendant) committing wrongs against a large number of customers or members of the public (plaintiffs). In Canada and the United States, the typical collective redress proceeding is the “class action.” The key to the class action is that it collectivizes the procedure but not the rights. Plaintiffs who have claims with similar issues are grouped into a “class” for resolution of those issues. Once those issues are decided by a court – or, much more often, settled without going to trial, with the settlement being approved by a court – the outcome is binding on all members of the class. Each member of that class still has an individual right, but that right is now subject to the court’s order. The court may, for example, have awarded each member of the class a share of a compensation fund, to be allocated according to a formula that takes into account each individual plaintiff’s circumstances.

The “jurisdiction and cross-border” elements in Pato’s book refer to the very common situation that collective redress involves a defendant based in one country who causes loss or harm to plaintiffs in another country or in several countries. This is the domain of “private international law,” the law that determines how a given court will handle cases with cross-border elements. A fundamental problem in private international law is which country’s legal system can be invoked by the plaintiffs. Is it the country where they live and so, presumably, where they were harmed? Or is it the country where the wrongdoer is based? Whose courts, in other words, have “jurisdiction”? Outside a grouping like the EU, each country can set up whatever rules it wants for its own courts’ jurisdiction, although that leaves open whether the decisions of those courts will be recognized as binding or enforced in other countries. That question of recognition or enforcement of foreign judgments is also something that, in principle, each country can decide for itself but may be subject to group rules in the EU and other international organizations.

Within the EU, which, as the author's title indicates, is the focus of Pato's study, rules of jurisdiction are prescribed for all member states. Since all states follow the same jurisdictional rules, each state is bound to recognize the decisions from other EU states because they follow the same agreed rules. (The rules sometimes make it possible for claims to be brought in two, or more, states, but to deal with that problem there are further rules about which state's courts must defer to the jurisdiction of the courts of the other state.) So, the problem Pato examines is how, within the EU, the jurisdictional issues posed by cross-border collective redress are or should be handled. Coming at it cold, you would think this is something the system would have worked out by now, but the opposite is true. The problem is largely unresolved.

One reason is that there is no single European approach to collective redress. The one thing that, generally speaking, the EU's institutions and member states do agree on is a profound distrust of class actions on the American (or North American) model. Basically, the reason is that class actions have evolved, to an arguably unhealthy extent, into a system driven by lawyers and sometimes, as far as money goes, operating largely for the benefit of lawyers. Class action lawyers typically act on a contingency fee basis, meaning that they finance the lawsuit in return for a share of the eventual total damages paid by the wrongdoer. The class plaintiffs bear little financial risk but, if their individual claims are small, stand to make little financial gain. The lawyers bear most of the financial risk but, if the aggregate of claims is large, stand to make a good deal of money out of an award or settlement.

The EU countries by and large regard contingency fee arrangements as open to the ethical objection that they give the lawyers too much of a monetary stake in the success of the clients' case. Generally the EU states have preferred to focus on authorizing public or private entities to take legal action to enforce the rights of groups like consumers and investors. Some have framed the "rights" as rights belonging to the relevant group as a whole (what Pato refers to as "general interests"), while others have enabled the enforcement of "rights" belonging to members of the group individually, with the collective entity acting as the members' agent ("collective interests"). An example of a general interest is a group of consumers' right not to have unfair contract terms imposed on them. An example of a collective interest is the aggregate of financial losses that a defendant's illegal conduct has caused to each of the individual members of the relevant group.

Pato gives particular attention to what she calls the "Dutch model" of collective redress. It is contained in the *Wet Collectieve Afwikkeling Massaschade (WCAM)* ('Dutch Act on Collective Settlements, Law of 23 June 2005'). It is unique because it takes as its starting point, not a court action, but an out-of-court

agreement negotiated between a collective entity and a putative wrongdoer (who need not admit having done a wrong). That settlement is then submitted for approval to the *Gerechtshof Amsterdam* ('Amsterdam Court of Appeal'). Once the court approves the settlement, it binds both the putative wrongdoer and the individuals whose interests the collective entity represents. One notable case under the *WCAM* was a claim by investors resident in the EU and elsewhere (other than those resident in the US, whose claims were the subject of a US class action) against Royal Dutch Shell for losses that came about when Shell disclosed that it had, for years, systematically overstated the size of its oil reserves. The settlement, which the Amsterdam Court of Appeal approved in 2009, required Shell to pay USD 352.6 million in compensation.

The core of the problem addressed by the book is how the variety of forms of collective redress offered by EU states, including the *WCAM*, can be fitted into the EU's jurisdiction system. That system is embodied in an EU regulation ("Brussels I recast," the "I" to distinguish it from subsequent Brussels jurisdictional regulations and "recast" to refer to the thorough revision in 2012). The answer, Pato convincingly argues, is that none of the EU's different collective redress procedures fits very well into the Brussels I recast system.

That system is geared to claims by individual plaintiffs against individual defendants. It takes as its primary jurisdictional rule that defendants can be sued in the country where they are domiciled, which, in the case of corporations, essentially means headquartered. This is far from ideal for collective redress. Where the defendant has caused harm to individuals outside the defendant's home country, it is often very difficult for those individuals, or an organization that represents them, to bring a legal proceeding in the defendant's domicile. This is especially true where it is a collective entity that initiates the proceeding. That entity is not a plaintiff in the ordinary sense, and its authority to act on behalf of the collectivity (of consumers, investors, etc.) may be limited to the state under whose laws the entity is created. In various cases the plaintiff can also sue the defendant in a country other than the defendant's domicile, such as the country where the harm takes place, or, in the case of a consumer claim, the country where the plaintiff is domiciled. Pato shows that none of these additional jurisdictional grounds really works well for collective redress, either.

Her proposed solution is to create a special EU jurisdictional rule that would permit collective redress proceedings to be brought either in the defendant's domicile or in the domicile of the collective entity. (Her proposal is limited to proceedings brought by such entities, the most accepted model in the EU.) The "Dutch model" is taken into account by including, in the scope of the proposal, court approvals of settlement agreements. She admits that this solution would not address all the problems that are posed by cross-border collective

redress. Notably, it would not centralize collective redress proceedings in a single forum, unless everybody sued the defendant in the defendant's domicile. If collective entities in three countries each brought a proceeding in their own country, as the proposal would permit, each proceeding would apply to that country only. It would not bind consumers or investors in other countries because of intractable problems related to the entity's authority to act on behalf of individuals resident in other countries, and the court's authority to decide on the rights of such individuals.

Pato's work is very clearly organized, thorough, and balanced in its approach. It offers an excellent guide through the intricacies both of collective redress mechanisms, in all their variety, and the private international law principles that govern cross-border collective proceedings. It is bound to remain a standard source for a good long time.

About the reviewer

Joost Blom is professor emeritus of law at the Peter A. Allard School of Law at the University of British Columbia (Vancouver, Canada). He took his LL.B. at the University of British Columbia, a B.C.L. at Oxford University (United Kingdom), and an LL.M. at Harvard University (Cambridge, Massachusetts, U.S.). He joined the University of British Columbia law faculty in 1972, was dean from 1997 to 2003, and retired from full-time teaching in 2017. His teaching subjects are private international law, contracts, torts, and intellectual property, and he has published widely in those areas. He is the co-author, with P. T. Burns, of *Economic torts in Canada*, 2nd ed. (LexisNexis, 2016). He has held visiting academic positions at the University of Victoria (British Columbia, Canada), Osgoode Hall Law School at York University (Toronto, Canada), the University of Melbourne Law School (Australia) and the University of Trier (Germany). He was awarded a Queen's Counsel designation in 1985 (British Columbia), served as an elected bencher of the Law Society of British Columbia from 2004 to 2011, and is now a life bencher. He is also a *membre titulaire* ('permanent member') of the International Academy of Comparative Law (Paris, France).