Short Table of Contents

Foreword	v
List of Authors	vii
Introduction: Market Regulation, Judicial Cooperation and Collective Redress Lukasz Gorywoda, Nikitas Hatzimihail and Arnaud Nuyts	1
A. The Private International Law of Collective Redress	
Collective Redress and the Jurisdictional Model of the Brussels I Regulation <i>Burkhard Hess</i>	59
The Consolidation of Collective Claims Under Brussels I Arnaud Nuyts	69
Recognition, Enforcement and Collective Judgments Richard Fentiman	85
European Class Actions and Applicable Law Ralf Michaels	111
B. New Perspectives on Collective Redress	
Collective Redress and Competition Policy Lia Athanassiou	145
The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and Its Main Features <i>Lukasz Gorywoda</i>	173

ix



The Class Action Experience in Israel and the Value of Having a Representative with a Personal Claim <i>Michael M. Karayann</i> i	189
Class Arbitration in Europe? <i>Luca G. Radicati di Brozolo</i>	209
C. Case Studies on Cross-Border Collective Redress	
Private International Law and Collective Redress – The case of Antitrust damage claims <i>Michael Hellner</i>	223
Compensatory Consumer Collective Redress and the Brussels I Regulation (Recast) Cristina González Beilfuss and Beatriz Añoveros Terradas	241
Rethinking Collective Redress, Consumer Protection and Brussels I Regulation <i>Małgorzata Posnow-Wurm</i>	259
Transnational Securities Fraud Class Actions: L oo king Towards Europe? <i>Natalia A. Kapetanaki</i>	277
Rome II and the Law of Financial Markets: The Case of Damage Caused by the Breach of Disclosure <i>Sabine Corneloup</i>	291
Collective Redress and Global Governance (Concluding Remarks) - Nikitas E. Hatzimihail	315

Table of Contents

Foreword	v
List of Authors	vii

Introduction: Market Regulation, Judicial Cooperation and Collective Redress Lukasz Gorywoda, Nikitas Hatzimihail and Arnaud Nuyts				
I.	Int	rod	uction	1
II.	Ma	rket	t Regulation and Private Law in Europe	4
	1.	Th	e European Union as a 'Regulatory State'	5
		a)	Governance approaches towards public-interest objectives:	
			from 'Welfare State' to 'Regulatory State'	10
		•	Defining Regulation	12
			Social Regulation	12
			Economic Regulation	13
			The EU Program for the Regulation of the Internal Market	13
		d)	Market Integration as the Key Concept behind the	
			European Regulatory State	15
	2.		Private Law as Regulatory Law	17
			Modern Concept of Regulation	18
		b)	Fitting Private Law into the Modern Concept of Regulation	19
111.	Ju	dicia	al Cooperation in Matters of Market Regulation	24
	1.	Th	e Area of Freedom, Security and Justice	25
	2.	Th	e Brussels I Regulation	27
		a)	Objectives and Principles of Brussels I Regulation	29
		b)	The Revision Process of the Brussels I Regulation	30
	3.	Th	e EU Private Regulatory Law and its Impact on Judicial	
			operation in Civil and Commercial Matters	32
		a)	Cross-Border Civil Litigation, Private Enforcement and	
			the European Regulatory Space	34

.

IV.

aa) Enforcement Rules and the Transformation of Private Law	34
bb) Public Regulation and Private Law Relationships	35
cc) Civil Procedure and Its Purposes	36
dd) The Public/Private Divide and the Regulatory Function of	
European Civil Litigation	37
ee) Public and Private Enforcement of EU Law	40
b) Extraterritoriality of Regulatory Regimes	43
aa) Extraterritoriality of Claims based on Securities	
Regulation Measures	43
bb) Extraterritoriality of Competition Law Claims	44
c) Development of Collective Redress Proceedings	45
aa) Specific Cross-border Problems in the Practical Application	
of the Jurisdiction Rules of Brussels I Regulation	48
bb) Special Rules on Collective Redress to Ensure Effective	
Enforcement of EU Law	53
Conclusion	54

A. The Private International Law of Collective Redress

Collective Redress and the Jurisdictional Model of the Brussels I Regulation Burkhard Hess

1.	Introduction	59
2.	Multiple Claimants	61
3.	Multiple Defendants	63
4.	Collective Settlements	64
5.	Conclusion: The Need for a Coherent Instrument on Cross-Border Collective Redress in the European Union	67

The Consolidation of Collective Claims Under Brussels I Arnaud Nuyts

1.	Introduction	69
2.	Domicile of the Defendant	71
3.	Protective Jurisdiction	73
4.	Special Jurisdiction: Contracts	74
5.	Special Jurisdiction: Tort	76
6.	Parallel Collective Redress Proceedings	79

Recognition, Enforcement and Collective Judgments *Richard Fentiman*

1.	Preamble	85
2.	Four Issues – and Some Deeper Questions	88
3.	The Enforcement of Collective Judgments	89
4.	The Preclusive Effect of Collective Judgments	91
	a) The Risk of Non-preclusion	91
	b) Non-parties and Procedural Justice	92
	c) Indefeasible Rights of Action	93
	d) Absentees and Due Process	94
	e) Contingent Difficulties	95
	f) Interim Conclusions	96
5.	The Status of Collective Settlements	98
6.	Preclusion and Collective Judgments in the EU regime	100
	a) Problems Stated	100
	b) Non-recognition and Public Policy	101
	c) Non-recognition and Due Notice	101
	d) Preclusion and Collective Settlements	102
7.	Conclusions	105

a)	The Recognition of Foreign Settlements	105
b)	Remission to National Law	106
c)	The Problem of Collective Justice	107

European Class Actions and Applicable Law

Ralf Michaels

1.	Int	roduction	111
	a)	Problem and Discussion in the EU	111
	b)	The US Comparison	114
	c)	Structure of the Analysis	116
2.	Cla	ss Action and Applicable Law: Foundations	116
	a)	Three Functions of Class Actions	117
	b)	The Class Action and multiple potentially applicable laws	118
	c)	Existing Proposals	120
	d)	The triple problem of private international law:	122
		aa) Consolidation of Claims	123
		bb) Regulation and Compensation	123
3.	Cla	ss Certification	124
	a)	Legal Background	124
	b)		125
	c)	•	126
	d)	Certification Despite Potential Differences in Law	1 26
4.	Ap	plicable Law	128
	a)	Application of different laws	129
		Consolidation through Choice	130
		aa) Unanimous Choice	130
		bb) Unilateral Choice	132
		cc) Exercise of Choice	133
	c)		133
		aa) Defendant's incorporation law	134
		bb) Market Most Affected	134
		cc) "Average Law"	135
		dd) Place of Conduct	136
		ee) General problems	137

5.	Policy Suggestions	140
	cc) Lex Fori for Unharmonized Law	140
	bb) Lex Fori for Harmonized Law	1 39
	aa) Lex Fori in Existing EU Private International Law	138
	d) Consolidation through Application of Lex Fori	138

B. New Perspectives on Collective Redress

Collective Redress and Competition Policy

Lia Athanassiou

1.	Introductory remarks	145
	a) Points of horizontal consensus	145
	b) Collective redress as a tool of competition policy	147
2.	Issues to be addressed in competition claims	149
	a) Identification of the victims	149
	aa) The problem of passing-on and the responses	
	of national laws	149
	bb) Collective litigation and levels of chain	
	b) Quantification of damages	154
	aa) Techniques of quantification	
	bb) Quantification on a collective basis: the idea of an	
	"approximate compensation"	155
	c) Multiplicity of enforcing agents	157
	aa) Decentralized application of competition rules	157
	bb) The role of competition authorities in collective redress	159
3.	Collective redress implications	160
	a) The various profiles of collective actions	160
	aa) One size does not fit all	160
	bb) Gate-keepers and Opt-out mechanisms	162
	b) The appropriate remedies	165
	aa) Compensation as one of the available remedies	165
	bb) Is there a need for distribution?	166
	cc) The Greek model as an example of good intentions	167
	c) Issues requiring a uniform European approach	168
4.	. Conclusions	170

The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and Its Main Features Lukasz Gorywoda

1.	Introduction	173
2.	Institutional Dimension of the Emerging EU Regime	
	of Collective Redress	174
	a) Collective Redress Policy Developed by DG SANCO	175
	b) Collective Redress Policy Developed by DG COMP	177
	c) The Joint Work of the European Commission: Towards a	
	Horizontal EU Legal Framework	179
	d) National Models of Collective Redress	181
	e) Conclusion	184
3.	The Main Features of the Emerging EU Regime	
	of Collective Redress	184
	a) Collective Redress is Expected to Improve Enforcement	
	of the EU Law	184
	b) Collective Redress is Expected to Improve Access to Justice .	185
	c) Collective Redress Should Not Incentivize	
	Abusive Litigation Practices	186
4.	Conclusion	187
Re	e Class Action Experience in Israel and the Value of Having a presentative with a Personal Claim ichael M. Karayanni	
1.	Introduction	189
2	The Main Requisites for Filing a Class Action under CAL, 2006	192
	a) Preconditions	192
	a) The Claim	192
	bb) Standing	192
	cc) Procedure	192
		173

,

Table of Contents

	b)	Administering the Class Action	194 194 195
		cc) Withdrawal and Settlement	196
		dd) State Institutions as Defendants in Class Actions	198
		dd) Judgment and Rewards	199
3.	Se	ction Two: Who Should Represent the Class and	
	W	hy it Matters?	200
	a)	Historical Barriers	201
	b)	The Value of the Personal Claim in	
		Negative-Value Class Action	203
	c)	Has the Israeli Legislature Realized These Objectives	
		in CAL, 2006?	206
4.	Su	mmary and Conclusions	208
		Arbitration in Europe? G. Radicati di Brozolo	
1.	In	troduction	209
2.	Cla	ass arbitration and multiparty arbitration	211

4.	The main issues posed by class arbitration	214
	a) Is the notion of a class action compatible with	
	that of arbitration?	214
	b) Consent to class arbitration	216
	c) The waiver of class arbitration	217
	d) Other problems	218
	e) The specific issues of international arbitration	218
5.	Conclusions	219

C. Case Studies on Cross-Border Collective Redress

Private International Law and Collective Redress – The case of Antitrust damage claims *Michael Hellner*

1.	Private Antitrust Damages Claims	223
2.	Jurisdiction – the Brussels I Regulation	225
	a) Choice of Court Agreements – Article 23	226
	b) Defendant's domicile – Article 2	228
	c) Actions in contract – Article 5(1)	229
	d) Actions in tort – Article 5(3)	
	e) Consolidation of Actions – Article 6(1)	
2	Choice of Law	236
э.	a) Tort	
		236
	b) Contract	237
4.	Recognition and Enforcement	238
	istina González Beilfuss and Beatriz Añoveros Terradas Introduction	241
2.	Definition of collective redress:	
	injunctive and compensatory actions	243
3.	Collective consumer redress and the Brussels I Recast Regulation	245
	a) The domicile of the defendant	246
	b) Jurisdiction in consumer contracts	246
	aa) Applicability of Section 4 Chapter II to compensatory	
	collective redress: representative and group actions	248
	c) Jurisdiction in consumer contracts in matters relating	
	to a contract: art. 7(1) BIR	252
	aa) The application of the proper rules on jurisdiction: lurality	
	of consumers domiciled in different Member States	253
4.	Concluding remarks	257

;

Table of Contents

Rethinking Collective Redress, Consumer Protection and Brussels I Regulation 2		259
Ma	ułgorzata Posnow-Wurm	
1.	The Henkel case connecting collective redress, consumer protection and Brussels I Regulation	259
2.	The material scope of Brussels I Regulation and collective redress: action brought by a person governed by private law v. action brought by a public body	261
3.	The scope of Section 4 of the Brussels I Regulation: collective interest of group of consumers v. the individual consumers' interests	268
4.	The scope of points (1) and (2) of Article 7 of the Brussels I Regulation: the case of class (group) actions: consumers as both the party to the action and the party to the relationship concerned by the proceedings	270
5.	Is designing of the new rule on jurisdiction adapted to collective redress in the field of consumer protection possible?	274
То	ansnational Securities Fraud Class Actions: Looking wards Europe? atalia A. Kapetanaki	
1.	Introduction	277
2.	The Pre-Morrison Era of Securities Fraud Class Actions Blossom in the United States	280
3.	The Post-Morrison Era of Securities Fraud Class Actions Decline in the United States	282
4.	Is it the Dawn of a European Era for Securities Class Actions?	286

.

Rome II and the Law of Financial Markets: The Case of Damage Caused by the Breach of Disclosure Sabine Corneloup

1.	Introduction	291
2.	Application of the Rome II Regulation	298
	a) The law of contract (culpa in contrahendo)	299
	b) The law of the place of injury	300
	aa) Difficulty in locating the damage	300
	bb) Inadequacy of the place where the damage occurred	302
	c) The law of the common habitual residence of the parties	303
	d) The law that manifestly presents the closest links	304
	e) The law chosen by the parties	304
3.	Specialization of the rules of the Rome II Regulation	306
	a) Draft proposal	306
	b) The testing of the proposal	308

Collective Redress and Global Governance (Concluding Remarks) Nikitas E. Hatzimihail

1.	Introduction	315
2.	(Re)thinking Collective Redress	315
	(a) Typology of collective redress	315
	(b) Policy considerations	317
	(c) Procedure Mechanisms	318
3.	Problems under the existing framework	319
	(a) Jurisdiction	320
	(b) Parallel proceedings and lis pendens	322
	(c) Recognition and enforcement	322
	(d) Applicable law	323
4.	Conclusions	325

;