Comments on the "The Implementation of the Representative Action Directive" of Prof. Stadler

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The procedural system of collective redress is of great importance in handling complex cases. In recent years, the issue of third-party funding attracts significant attentions as well. The Chinese law provides in both aspects some new development.

On one hand, in general, a system of bringing representative actions exists which takes the opt-in approach, while no follow-up action for performance is necessary after the registration in the representative action. No action for a model declaratory judgment is possible, so as to the action for skimming-off illegally gained profits. For cases where the potential claimants are clear and able to be identified, the representative actions were brought in practice. Yet, for cases which are similar to the VW-scandal, no real case brought has been heard. In Chinese context, this kind of cases is summarized as the cases "where the subject matter of claims for each party is of the same kind, the parties on one side of an action are numerous, but the exact number of such parties is uncertain when the action is instituted" (Art. 57 of Chinese Civil Procedure Law).

Then, along with the revision of the Security Law in 2019, things changed. Its Art. 95 says the followed:

Article 95 Where investors institute civil actions for damages caused by misrepresentation, among others, related to securities, they may legally recommend and select representatives to participate in the actions if the subject matters of the actions are of the same kind and the parties on one side of the actions are numerous.

For actions instituted according to the provision of the preceding paragraph, if there may be many other investors who have the same claims, the people's court may issue an announcement to state the facts of the case involving the claims and notify investors that they may register with the people's court during a certain period. The judgment or ruling rendered by the people's court shall be valid for the registered investors.

An investor protection institution may, as authorized by 50 or more investors, participate in actions as a representative, and according to the provision of the preceding paragraph, register right holders confirmed by the securities depository and clearing institution with the people's court, except for investors who have expressly indicated their reluctance to participate in the actions.

In this regard, besides the ordinary ones, e.g. consumers, who are with no doubt qualified claimants and already regulated in Civil Procedure Law, some specialized investor protection institutions could be qualified as well. This specific procedural system is then provided by the Provisions of the Supreme People's Court on Several Issues Concerning Representative Actions Arising from Securities Disputes in 2020. Hereby, the judiciary differs the special representative from the ordinary one in Civil Procedure Law

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via its abstract judicial interpretation which is also binding in practice. Among others, the system of special representatives establishes an opt-out mechanism. Art. 34 of the aforementioned judicial interpretation provides the following rules.

Article 34 Where an investor unequivocally expresses its unwillingness to participate in the action, it shall give its withdrawal statement to the people's court within 15 days after the expiration of the announcement period. Failure to give a withdrawal statement shall be treated as consent to participate in the representative action.

For an investor who gives a withdrawal statement, the people's court shall cease to register it as a plaintiff in the special representative action, and the investor may initiate an action separately.

On the other hand, i.e. regarding the third-party funding, a test case was adjudicated by a Shanghai court in May 2022 which raises fierce discussion, after the funding business is developing gradually in practice for years. The judicial attitude is generally negative considering the financial nature of the funding, the excessive control of the funded party's litigation activities, the dangers of non-disclosure and the public interests. The third-party funding is highly related to the access to justice and acts as a crucial background factor for good judicial service. This contribution of Prof. Stadler also gives an outstanding landscape of the related issues in Germany in the framework of EU Directive.

In the end, I would like to ask two questions to the speaker.

1. Do you think the solution taken by the Model Rules provides a better best practice?
2. What kind of role should the litigation insurance or a general insurance for legal protection play in making civil litigation affordable for the normal citizen?

Comments on the "Digitisation and civil procedure" of Prof. Stadler

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The relationship between the trend of digitisation and the civil procedure is one of my fields of research. My attention should especially be attributed to Prof. Deguchi, who led a relevant project for IAPL Conference in Brazil in 2021 and continues working in this field as well as unfortunately also the global pandemic. In Summer 2022, my team of Peking University also invited Prof. Michael Stürner to give a speech on this topic virtually while now I am translating his final contribution of "Der digitale Zivilprozess" in ZZP (2022). In my opinion, the German experience introduced by this contribution, especially the discussion on the proposals for reforms in recent Germany, is always of great value.

As we may all agree, ODR is one of the "two global movements" that can dramatically affect the "complexion of justice." While in every jurisdiction there must have been some modern digital instruments adopted in practice, we have still to look for how the proceedings themselves could be modernized in a digital manner. Prior to the global pandemic, the online service had already been adopted by Chinese courts, e.g. Internet Courts, as well as arbitration institutions. Regarding the latter ones, for instance, both the China International Economic and Trade Arbitration Commission (CIETAC) and the Shenzhen Court of International Arbitration (SCIA) allow the usage of online arbitration. Also, the CIETAC announced its Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic (for Trial) in the summer of 2020 which stipulated how the online arbitration ought to be carried forward and a virtual oral hearing ought to be held. Moreover, online judicial mediation is possible just as online litigation. Despite that there are already countless online mediation cases previously, the SPC promulgated the Rules on Online Mediation of People's Courts on December 30, 2021. This judicial interpretation says basically that the judges and other mediators could mediate the cases before the commencement of or during civil proceedings.

The global pandemic calls especially for more steps taken to reduce the obstacles between the justice provider and ordinary citizens who need to rely on the judiciary. Especially, even at the early stage of the outbreak of the COVID-19 pandemic, the Chinese judiciary and individual judges insisted on continuing hearing cases using e-platform as announced before the pandemic. Not merely China is working very hard in these three years, but almost the whole world tries its best to practice the digitisation principle much more positively. Videoconferences and court hearings using E-technology are used more frequently both in ordinary civil procedure and international arbitration. The digitisation principle stands for the future of justice suggested by Susskind, which is nevertheless already emphasized by the Chinese authority in recent years. The difficulty in promoting civil proceedings in the traditional way merely highlights the need for digital justice.

In China, all types of dispute resolution systems, namely the civil court system, commercial arbitration, facilitated mediation, and e-commerce systems, have introduced ODR into

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their operations. Chinese courts continue reforming their online judicial practice. Besides e-filing of civil cases, evidentiary submissions play a crucial role in civil proceedings and also need to be accomplished electronically. A witness is generally allowed to be examined online as well. Moreover, if we consider the internet streaming of physical trial hearings on the website China Court Trial Online since September 2016 to be a type of ODR, then the online hearing system has already been established for many years. And relying on videoconferencing to support the remote trial, the advanced version of an online hearing is carried out solely online.

It is fair to say that the practice goes more promptly than the research. Three special Internet Courts have been founded in the last four years ago which shall try cases online, while the acceptance, service, mediation, evidence exchange, pre-trial preparation, court trial, judgment pronouncement, and other procedural steps concerning a case shall generally be completed online as well. On the application of a party or depending on the need for the trial, an internet court may decide to complete certain parts of the procedural steps offline. In other words, the parties have no right to reject the adoption of e-justice. Only the relevant court has the discretionary power to determine the form of proceedings adopted.

Such strong arbitral power turns into a milder one when it comes to the new Art. 16 of the Civil Procedure Law statute. It says that (merely) with the consent of the parties, civil proceedings may be conducted online through an information network platform. And online civil proceedings conducted through an information network platform shall have the same legal force as offline legal proceedings. As the background for the new legal norm, we may trace back to the previous pilot program which aims to separate complicated cases from simple ones in civil proceedings. This two-year-long experiment was started on 15 January 2020 and was carried out in some areas of 15 provinces (municipalities) (out of a total of 34). Among others, there was a separate part of this reform experiment that concerns improving electronic litigation, where the consent of the parties did not yet be treated as a precondition for having online judicial activities.

The supplemented requirement of the parties' consent in statute shows the efforts of the academics in China who endeavour to stand for ordinary citizens and justice users. Because the procedural rights of the parties to initiate a civil process will be affected by the new reform equipped with rules for online proceedings, we have to be prudent and cautious to require the agreement of the parties on having such online proceedings. On the other hand, as principles of civil procedure continue developing, we may need to further answer whether both parties have legal rights to a physical trial rather than a virtual one and whether there should be a legal right for the general public to have access to any hearings that are broadcast live. Besides the old doctrines which seem to be self-evident, a delicate analysis of the balance of interests should still be carried out by our generation of proceduralists.

Besides the parties' consent as one general principle to be reconsidered, there could be practical institutions and issues which we may not encounter when the civil procedure is not digital at all. Improper behaviours during online hearings need to be addressed. Bad

internet connections and intentionally interrupting the connection could be most frequently challenged in practice. And some Chinese courts explored the approach of an "asynchronous trial" which means the parties are allowed now to log in to the court's electronic system at different times and places. Moreover, the examination of factual witnesses, the online service of legal documents, or electronic evidence (as a new type of evidence) can be special and rather difficult in internet-based proceedings. The potential use of artificial intelligence (AI) systems in China, as opposed to other jurisdictions, is already a very popular research topic. There is maybe too much research imagining how legal AI could make a difference. In practice, computer programs and websites can provide preliminary answers to legal questions without any manual interference. Yet, the current e-technology is too elementary to be regarded as AI technology that will radically change the understandings and behaviours of the legal community. we may encounter the well-known saying of John von Neumann while trying to solve the problem of complexity: "with four parameters I can fit an elephant, and with five I can make him wiggle his trunk." A complex model may fit the collected data with abundant parameters, whereas using this model to predict the future is another thing. The AI technology has still a long way to go.

Lastly, we may not forget, as a matter of fact, the development of ODR is dependent on the level of technological evolution and the improvement of local infrastructure, which differs dramatically from nation to nation. Among other perspectives on such a highly controversial issue of e-justice, one may argue that it is ODR that must fit for circumstances in the national context, and not the other way around. ODR could be a mirror for the performance of traditional dispute resolution like court service within a physical courtroom or other mediation, arbitration, or mixed choices. Whether ODR is managed successfully or not, depends on the general understanding and operation of dispute resolution in individual jurisdictions. The settled procedural principles regarding due process and neutrality should still be the primary task of civil justice and ADR. Keeping the advantages of the one-stop dispute resolution mechanism in mind, it deserves worries and doubts whether the fundamental right of claim could be safeguarded even if the pre-action mediation is promoted vigorously. Considering the convenience of dispute resolution which is given rise to by a one-stop mechanism, this chance to be mediated should never substitute the parties' day in court. These conclusions could be limited to developing countries such as China that are approaching a steady implementation of the rule of law. Nevertheless, the conclusions could also be generalized more broadly for various jurisdictions.

Among others, I am very interested in your ideas regarding the three following questions:
1. What is your ideal model of the proposed basic documents which may be more suitable for a more digitalized civil proceedings?
2. What should be the international standards for e-justice, as the global jurists may have already successfully summarized the overarching elements of the rule of law?
3. Do you agree that the relatively outstanding performance of the German justice system may be disadvantageous in regard of embracing the technologies-based new justice model?

Concise Comments on the "Model European Rules of Civil Procedure" of Prof. Stadler

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Since I am authorized by the UNIDROIT during the pandemic to translate the Model Rules and the attached commentaries into Chinese and my team is almost at the final stage of publication, I am very interested in this topic and am not disappointed after reading this contribution. Instead of writing substantially on this topic, which was taken in my Chinese contribution as a on-going result of a global cooperative project and a desired career work for proceduralists, I would raise several questions to learn from the speaker.

1. What would be, under your evaluation in general, more optimal for the best practice in civil proceedings, the German law or the Model Rules? Which key elements you would consider when it comes to a specific jurisdiction which would intend to select a mother law as major reference?

2. During IAPL Peru Congress, the issue of judicial independence was visited from various perspectives. While it has been regarded as one of the overarching principle of modern civilized societies, Should the solution provided by the Model Rules be taken as one set of common standards of rule of law?

3. The principle of proportionality has been emphasized both by the English rules and the Model Rules. Yet, someone may argue that this principle provides nothing new but could be covered by the traditional cost-benefit-analysis. What could be your reply to this viewpoint?

Thank you for your attention and look forward to your forthcoming outstanding speeches.

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