Anti-Semitism – Responses of Private International Law

Prof. Dr. Marc-Philippe Weller and Markus Lieberknecht, Heidelberg University, *have kindly provided us with the following blog post which is a condensed abstract of the authors' article in the Juristenzeitung (JZ) 2019, p. 317 et seqq. which explores the topic in greater detail and includes comprehensive references to the relevant case law and literature.*

In one of the most controversial German judgments of 2018, the Higher Regional Court of Frankfurt held that the air carrier *Kuwait Airways* could refuse transportation to an Israeli citizen living in Germany because fulfilling the contract would violate an anti-Israel boycott statute enacted by Kuwait in 1964. The Israeli citizen had validly booked a flight from Frankfurt to Bangkok with a layover in Kuwait City. However, Kuwait Airways hindered the Israeli passenger from boarding the aircraft in Frankfurt. According to the judgment of the Frankfurt Court, Kuwait Airways acted in line with the German legal framework: specific performance of the contract of carriage was deemed to be impossible because of the Kuwait boycott statute.

This judgment is wrong. Hence, it is not surprising that the decision sparked reactions in German media outlets which ranged from mere disbelief to sheer outrage.

The case demonstrates that the seemingly 'neutral' domain of Private International Law is not exempt from having to deal with delicate political matters such as the current global rise in anti-Israel and anti-Semitic sentiments. However, Private International Law is not as ill-equipped as the Frankfurt judgment seems to suggest. In fact, both Private International Law and (German) substantive law offer a wide range of instruments to respond to anti-Semitic discrimination.

First, the article explores the term anti-Semitism in order to carve out a workable definition for legal purposes. Based on this concept and on the available empirical data, we identify three scenarios which appear particularly relevant from a private law perspective: these include, first, encroachment on the personal honor

and dignity of Jewish persons; second, attempts to alienate Jewish persons economically, one example being the *Kuwait Airways* case; third, physical attacks on Jewish persons or their property.

When addressing such behavior, private law operates under the influence of a superseding framework of anti-discriminatory provisions contained in international Law, European Law and constitutional law. We attempt to show that the protection of Jewish identity constitutes an overarching paradigm of Germany's post-war legal order, a notion which finds support in the Jurisprudence of the German Federal Constitutional Court.

On a Private International Law level, this basic value of Germany's post-war legal order shapes the domestic public policy (*ordre public*). Moreover, it translates into a twofold use of overriding mandatory provisions. First, under Art. 9(3) Rome I Regulation German courts are precluded from applying foreign overriding mandatory provisions with an anti-Semitic objective, such as Kuwait's boycott statute. Although the ECJ's reading of Art. 9(3) Rome I Regulation in *Nikiforidis* does leave room to take such provisions, or their effects, into account within the applicable substantive law as purely factual circumstances or as foreign data, we argue that the result of this process must not be that provisions which violate the *ordre public* are inadvertently given effect through the 'back door' of substantive law.

Applying our findings to the case, we conclude that *Kuwait Airways* lacked grounds to invoke both legal and factual impossibility. Whereas the former is precluded under Art. 9(3) Rome I Regulation for constituting a normative application of the Kuwaiti law, the latter requires a more intricate reasoning: We argue that the passenger's right to specific performance had to be upheld under German contract law, while any purported intrusion of the Kuwaiti authorities into the performance is best dealt with at the enforcement stage. This approach is in line both with the result-driven desire to avoid granting the Kuwaiti law any effect within the German legal order and with the doctrinal structures of German law. One could reach the same conclusion by relying on a fact pointed out by *Jan von Hein* (Freiburg University): *Kuwait Airways* is a *state* enterprise owned by Kuwait, *i.e.* the very creator of the legal impediment (the boycott statute). Hence, it should not be allowed to rely on a self-created obstacle to refuse performance.

Conversely, overriding mandatory provisions contained in German law, *e.g.* anti-

discrimination statutes, can be used to ward off or modify anti-Semitic effects of a foreign *lex causae* governing the legal relation in question. We then go on to discuss the necessity, or lack thereof, of adopting a Blocking Statute specifically designed to subvert the effectiveness of foreign legislation with an anti-Semitic agenda.

Lastly, we demonstrate that, in addition to securing the right to specific performance of Israeli citizens, the substantive law provides a host of legal grounds which can serve to empower victims of anti-Semitic discrimination. These instruments range from contractual damages to possible claims based on anti-discrimination law and the law of torts, addressing all of the relevant scenarios outlined above.