UK Supreme Court in Okpabi v Royal Dutch Shell (2021 UKSC 3): Jurisdiction, duty of care, and the new German "Lieferkettengesetz"

by Professor Dr Eva-Maria Kieninger, Chair for German and European Private Law and Private International Law, University of Würzburg, Germany

The Supreme Court's decision in Okpabi v Royal Dutch Shell (2021 UKSC 3) concerns the preliminary question whether English courts have jurisdiction over a joint claim brought by two Nigerian communities against Royal Dutch Shell (RSD), a UK parent company, as anchor defendant, and a Nigerian oil company (SPDC) in which RSD held 30 % of the shares. The jurisdictional decision depended (among other issues that still need to be resolved) on a question of substantive law: Was it "reasonably arguable" that RSD owed a common law duty of care to the Nigerian inhabitants whose health and property was damaged by the operations of the subsidiary in Nigeria?

In the lower instance, the Court of Appeal had not clearly differentiated between jurisdiction over the parent company and the Nigerian sub and had treated the "arguable case"-requirement as a prerequisite both for jurisdiction over the Nigerian sub (under English autonomous law) and for jurisdiction over RSD, although clearly, under Art. 4 (1) Brussels Ia Reg., there can be no such additional requirement pursuant to the CJEU's jurisprudence in *Owusu*. In *Vedanta*, a case with large similarities to the present one, *Lord Briggs*, handing down the judgment for the Supreme Court, had unhesitatingly acknowledged the unlimited jurisdiction of the courts at the domicile of the defendant company under the Brussels Regulation. In *Okpabi, Lord Hamblen*, with whom the other Justices concurred, did not come back to this issue. However, given that from a UK point of view, the Brussels model will soon become practically obsolete (unless the UK will still be able to join the Lugano Convention), this may be a pardonable omission. It is to be expected that the English courts will return to the traditional common law restrictions on jurisdiction such as the "arguable case"-criterion and

"forum non conveniens".

Although the Supreme Court's decision relates to jurisdiction, its importance lies in the potential consequences for a parent company's liability on the level of substantive law: The Supreme Court affirms its previous considerations in *Vedanta* (2019) and rejects the majority opinion of the CoA which in 2018 still flatly ruled out the possibility of RDS owing a duty of care towards the Nigerian inhabitants. Following the appellants' submissions, *Lord Hamblen* minutely sets out where the approach of the CoA deviated from *Vedanta* and therefore "erred in law". The majority in the CoA started from the assumption that a duty of care can only arise where the parent company effectively "controls" the material operations of the sub, and furthermore, that the issuance of group wide policies or standards could never in itself give rise to a duty of care. These propositions have now been clearly rejected by the Supreme Court as not being a reliable limiting principle (para 145). In the present judgment, the SC affirms its view that "control" is not in itself a meaningful test, since in practice, it can take many different forms: *Lord Hamblen* cites with approval *Lord Briggs's* statement in *Vedanta*, that "there is no limit to the models of management and control which may be put in place within a multinational group of companies" (para 150). He equally approves of *Lord Briggs*'s considerations according to which "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if in fact it does not do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken" (para 148).

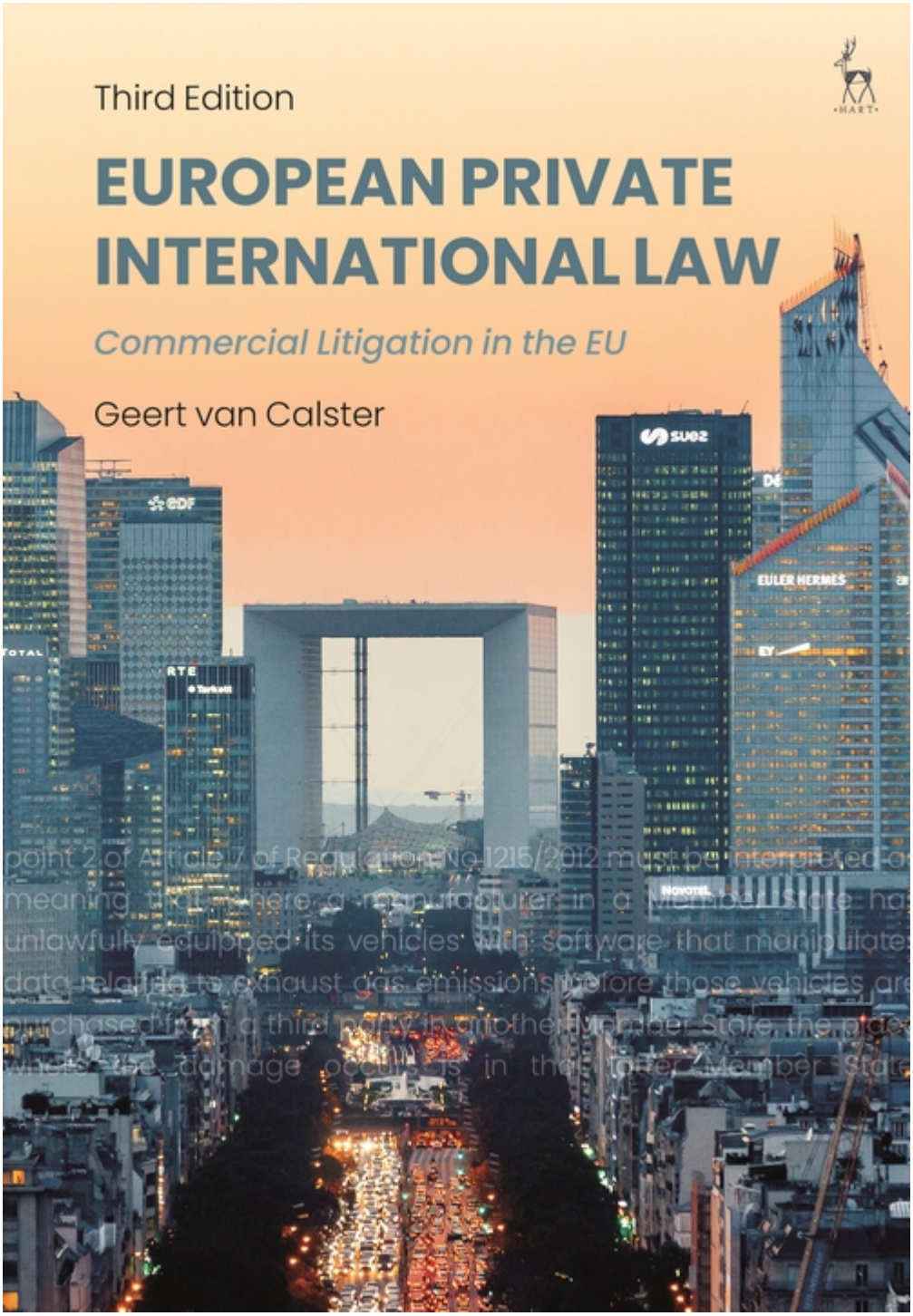
Whether or not the English courts will ultimately find a duty of care to have existed in either or both of the *Vedanta* and *Okpabi* sets of facts remains to be seen when the law suits have been moved to the trial of the substantive issues. Much will depend on the degree of influence that was either really exercised on the sub or publicly pretended to be exercised.

On the same day on which the SC's judgment was given (12 February 2021), the German Federal Government publicly announced the key features of a future piece of legislation on corporate social resonsibility in supply chains (*Sorgfaltspflichtengesetz*) that is soon to be enacted. The government wants to pass legislation before the summer break and the general elections in September 2021, not the least because three years ago, it promised binding legislation if

voluntary self-regulation according to the National Action Plan should fail. Yet, contrary to claims from civil society (see foremost the German "*Initiative Lieferkettengesetz*") the government no longer plans to sanction infringements by tortious liability towards victims. Given the applicability of the law at the place where the damage occurred under Art. 4 (1) Rome II Regulation, and the fact that the UK Supreme Court in *Vedanta* and *Okpabi* held the law of Sambia and Nigeria to be identical with that of England, this could have the surprising effect that the German act, which the government proudly announced as being the strictest and most far-reaching supply chain legislation in Europe and the world (!!), would risk to fall behind the law in anglophone Africa or on the Indian sub-continent. This example demonstrates that an addition to the Rome II Regulation, as proposed by the European Parliament, which would give victims of human rights' violations a choice between the law at the place of injury and that at the place of action, is in fact badly needed.

European Private International Law

Geert van Calster has just published the third edition of the book titled "European Private International Law: Commercial Litigation in the EU" with Hart.



The blurb reads as follows:

This classic textbook provides a thorough overview of European private international law. It is essential reading for private international law students who need to study the European perspective in order to fully get to grips the subject. Opening with foundational questions, it clearly explains the subject's central tenets: the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort). Additional chapters explore the Succession Regulation, private international law and insolvency, freedom of establishment,

and the impact of PIL on corporate social responsibility. The new edition includes a new chapter on the Hague instruments and an opening discussion on the impact of Brexit.
Drawing on the author's rich experience, the new edition retains the book's hallmarks of insight and clarity of expression ensuring it maintains its position as the leading textbook in the field.

The purpose of the book is to serve as an introductory text for students interested in EU Private International Law. The book can also be appreciated by non-EU students interested in EU Private International Law since it serves as an introductory text. It contains seven core chapters including the introduction. The full table of contents and introduction are provided free to readers and can be accessed respectively here and here

From what I have read so far in the introduction, this book is highly recommended. It brings the subject of EU Private International Law to the doorstep of the uninitiated and refreshes the knowledge of any expert on Private International Law ("PIL"). Though the core foundation of the book is on EU PIL, it contains some comparisons to other systems of PIL especially in the common law, in order to illustrate. Importantly, the introduction ends with the implications of Brexit for EU PIL and some interesting speculations.

More information on the book can be found here

Opinion of AG Bobek in the case Obala i lucice, C-307/19: unpaid public parking ticket revisited

In today's Opinion delivered in the case Obala i lucice, C-307/19, Advocate General Bobek revisits the line of case law built upon the judgment in Pula

Parking, C-551/15, pertaining to the enforcement of unpaid public parking tickets by means of a writ of execution issued by a Croatian notary. This time both the Brussels I bis Regulation and the Service Regulation are at stake.

Factual context

A car is leased from NLB Leasing d.o.o., a company that provides financing for the use of vehicles, equipment and real estate in Slovenia and is – as it may be inferred from point 1 of the Opinion – based in that Member State.

On 30 June 2012, the car is parked on a public street in Zadar (Croatia). The street is defined parking zone with designated parking spaces. Obala i lucice d.o.o., entity based in Croatia, is charged with the management and maintenance of public areas for parking of motor vehicles. As the car does not have a parking ticket on display, that entity issues a daily parking ticket.

On 1 July 2013, Croatia joins the EU. Four years later, in 2017, the parking management entity commences enforcement proceedings for recovery of the parking ticket debt with a notary, by making an application for enforcement on the basis of an 'authentic document'. That document is an extract from the accounts of Obala i lucice d.o.o., which recorded the debt relating to the unpaid ticket.

The notary issues a writ of execution on the basis of the 'authentic document', which is subsequently served to NLB Leasing d.o.o. in Slovenia. The latter challenges the writ before Croatian courts.

A commercial court in Pazin rules that it lacks jurisdiction and refers the case to the commercial court in Zadar. The latter also considers that it lacks jurisdiction and refers the case to the high commercial court, which decides to seize the Court of Justice with a series of preliminary questions.

Opinion of AG

It has to be mentioned at the outset that the Opinion is not addressing all the questions referred to the Court of Justice for a preliminary ruling. As the Opinion clarifies at its point 25, the Court asked its AG to elaborate only on some of the questions. The Opinion constitutes therefore the so-called 'conclusions ciblées'.

At point 34, AG establishes the need to rearrange these questions and lists the legal inquiries analyzed in the Opinion, namely, firstly, **whether the enforcement of a debt relating to the unpaid public parking ticket is a dispute relating to 'civil and commercial matters'** within the meaning of the Brussels I bis and Service Regulations; secondly, **whether the notaries in Croatia may themselves effect service (under the Service Regulation) of writs of execution drawn up on the basis of an 'authentic document'** and thirdly, **whether any of the special grounds of jurisdiction of the Brussels I bis Regulation confer jurisdiction on the courts of a Member State other than the domicile of the defendant**.

As a consequence, the Opinion is not addressing the questions concerning, in particular, the law applicable under the Rome I and Rome II Regulations (Questions 8 and 9). It is yet to be seen how they will be answered in the judgment of the Court. It is worth noticing, however, that the facts underlying the case pending before the national courts predate the accession of Croatia to the EU.

Notion of 'civil and commercial matters'

At points 39 to 54, a reminder of the case law leads AG Bobek to distinguishing two approaches adopted by the Court in order to establish whether the Regulations on 'civil and commercial matters' are applicable. He defines them as 'subject matter' and 'legal relationship' approaches ('perspectives').

Pronouncing himself in favour of 'legal relationship' approach at point 59, AG Bobek concludes that:

> *'The concept of "civil and commercial matters", as laid down in Article 1(1) of [the Brussels I bis Regulation] and Article 1(1) of [the Service Regulation], must be interpreted as requiring the legal relationship which characterises the underlying dispute, assessed against the framework generally applicable to private parties in such situations, not to be characterised by a unilateral exercise of public powers by one of the parties to the dispute.*
>
> *While it falls to the national court to determine whether those conditions are satisfied, the circumstances of the present case do not appear subject to such*

an exercise of public powers.'

Service of writs of execution

At points 88 et seq., the Opinion addresses the question whether, under the Service Regulation, the notaries in Croatia may themselves effect service of writs of execution drawn up on the basis of an 'authentic document'. At point 105, AG concludes:

> *'[The Service Regulation] must be interpreted as meaning that, in order for a writ of execution based on an "authentic document" to qualify as a "judicial document" within the meaning of Article 1(1) of that regulation, the issuing entity must be a judicial body of a Member State forming part of its judicial system.*
>
> *Articles 2 and 16 of [the Service Regulation] must be interpreted as meaning that, where a Member State has failed to designate notaries as "transmitting agencies" within the meaning of Article 2(1) of that regulation, those notaries cannot transmit "extrajudicial documents" for service to another Member State under the provisions of that regulation.'*

Special grounds of jurisdiction

At points 106 et seq., the Opinion goes on to establish whether special grounds of jurisdiction of the Brussels I bis Regulation confer jurisdiction on the courts of a Member State other than the domicile of the defendant. Three possibilities are addressed within this part of the Opinion.

Firstly, at point 109, AG Bobek excludes the applicability of Article 7(2) of the Brussels I bis Regulation. He seems to argue, in essence, that the dispute pertaining to the unpaid public parking ticket is contractual in nature.

Next, at point 111, the applicability of the ground of exclusive jurisdiction provided for in Article 24(1) of the Regulation is excluded. Here, it is argued that '[o]n the basis of the facts present in the court file, there is no indication that

either possession or other rights ‘in rem’ in the parking space were transferred to the defendant upon parking there (or that they are, in fact, at issue). Moreover, the article’s raison d’être militates against such an interpretation.’.

Finally, at point 112, the Opinion comes to the conclusion that Article 7(1) of the Brussels I bis Regulation is applicable and contends:

> *‘Article 7(1) of Regulation No 1215/2012 must be interpreted as meaning that parking a car in a designated parking space on a public road can, under the legal system of a Member State in which the issuing of parking tickets and the collection of parking fees is entrusted to a private entity, constitute a “matter relating to a contract”, as referred to in that provision.’*

The Opinion can be consulted here. The request for a preliminary ruling is accessible here.

Out now: RabelsZ 4/2020

Issue 4 of RabelsZ is now available online and in print. It contains the following articles:

MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht (Early Marriage in Comparative Law: Practice, Substantive Law, Choice of Law), pp. 705–785

> *Early marriage is a global and ancient phenomenon; its frequency worldwide, but especially in Europe, has declined only in recent decades. Often, early marriage results from precarious situations of poverty, a lack of opportunities and education, and external threats, for example in refugee situations. However the concepts and perceptions of marriage, family, identities, and values in different societies are diverse, as the comparison of regulations and the practice of early marriage in over 40 jurisdictions shows. Even if early marriage appears generally undesirable, for some minors the alternatives are even*

worse. Some countries set fixed ages for marriage; others use flexible criteria such as physical or mental maturity to determine a threshold for marriage. All, however, until very recently provided for the possibility of dispensation. In Western countries, such dispensations have rarely been sought in the last decades and have consequently been abolished in some jurisdictions; elsewhere they still matter. Also, most countries bestow some legal effects to marriages entered into in violation of age requirements in the name of a favor matrimonii.

Early marriage has an international dimension when married couples cross borders. Generally, private international law around the world treats marriages celebrated by foreigners in their country of origin as valid if they comply with the respective foreign law. Such application is subject to a case-specific public policy exception with regard to age requirements, provided the marriage has some relation to the forum. Recent reforms in some countries, Germany included, have replaced this flexible public policy exception with a strict extension of the lex fori to foreign marriages, holding them to the same requirements as domestic marriages and thereby disabling both a case-by-case analysis of interests and the subsequent remediation of a violation of the forum's age requirements. As a consequence, parties to a marriage celebrated abroad can be treated as unmarried, meaning they derive no rights and protection from their marriage, and their marriage may be limping – valid in one country, invalid in another.

The extension of domestic age requirements to foreign marriage without exception, as done in German private international law, is problematic in view of both European and German constitutional law. The refusal to recognize early marriages celebrated abroad can violate the European freedom of movement. It can violate the right to marriage and family (Art. 6 Grundgesetz) and the child's best interests. It can violate acquired rights. It can also violate the right to equality (Art. 3 Grundgesetz) if no distinction is made between the protection of marriages validly entered into abroad and the prevention of marriages in Germany. Such violations may not be justifiable: The German rules are not always able to achieve their aims, not always necessary compared with milder measures existing in foreign laws, and not always proportional.

Edwin Cameron and Leo Boonzaier, Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence, pp. 786–840

[Excerpt taken from the introduction]: After long years of rightful ostracism under apartheid, great enthusiasm, worldwide, embraced South Africa's reintegration into the international community in 1994. The political elite preponderantly responsible for the Constitution, the legal profession, and the first democratic government under President Nelson Mandela were committed to recognisablyliberal principles, founded on democratic constitutionalism and human rights.

This contribution is an expanded version of a keynote lecture given by Justice Edwin Cameron at the 37th Congress of the Gesellschaft für Rechtsvergleichung at the University of Greifswald on 19 September 2019.

Chris Thomale, Gerichtsstands– und Rechtswahl im Kapitalmarktdeliktsrecht (Choice-of-court and Choice-of-law Agreements in International Capital Market Tort Law), pp. 841–863

The treatment of antifraud provisions in international securities litigation is a salient topic of both European capital markets law and European private international law. The article sets the stage by identifying the applicable sources of international jurisdiction in this area as well as the situations in which a conflict of laws may arise. It then moves on to give a rough and ready interpretation of these rules, notably construing the "place where the damage occurred", according to both Art. 7 Nr. 2 Brussel Ibis Regulation and Art. 4(1) Rome II Regulation, as being equivalent to the market where a financial instrument is listed or is intended to be listed. However, as the article sets out in due course, this still leaves plenty of reasonable opportunity for a contractual choice of court or choice of law. This is why the article's main focus is on creating a possibility to utilize choice-of-court and choice-of-law agreements. This is feasible either in the issuer's charter or, notably in the case of bonds, in the prospectus accompanying the issuance of a given financial instrument. The article shows that both arrangements satisfy the elements of Art. 25 Brussel Ibis Regulation on choice-of-court agreements and Art. 14(1) lit. b Rome II Regulation on ex ante choice-of-law agreements.

Moritz Hennemann, Wettbewerb der Datenschutzrechtsordnungen – Zur Rezeption der Datenschutz-Grundverordnung (The Competition Between Data Protection Laws – The Reception of theGeneral Data Protection Regulation), pp.

864–895

The General Data Protection Regulation (GDPR) has granted the European Union an excellent position in the "competition" between data protection laws. This competition goes along with a gradual convergence of data protection laws worldwide, initiated and promoted by the European Union. In this competition, the European Union benefits not only from the so-called Brussels Effect (Bradford), but also from distinct legal instruments: The GDPR rules on the scope of application and on data transfer to non-EU countries are of legal importance in this competition, and the adequacy decision under Art. 45 GDPR creates further de facto leverage for negotiations on free trade agreements with non-EU countries. The European Union has already been able to use this tool as a catalyst for European data protection law approaches. The European Union should, however, refrain from "abusing" its strong position and not press for extensive "copies" of the GDPR worldwide – and thereby create legislative lock-in-effects. Alternative regulatory approaches – potentially even more innovative and appropriate – are to be evaluated carefully by means of a functional and/or contextual comparative approach.

Chris Thomale on the EP Draft Report on Corporate Due Diligence

Professor Chris Thomale, University of Vienna and Roma Tre University, has kindly provided us with his thoughts on the recent EP Draft Report on corporate due diligence and corporate accountability.

In recent years, debate on Corporate Social Responsibility (CSR) has picked up speed, finally reaching the EU. The Draft Report first and foremost contains a

draft Directive on corporate due diligence and corporate accountability, which seems a logical step ahead from the status quo developed since 2014, which so far only consists of reporting obligations (see the Non-Financial Reporting Directive) and sector specific due diligence (see the Regulations on Timber and Conflict Minerals). The date itself speaks volumes: Precisely, to the very day (!), 8 years after the devastating fire in the factory of Ali Enterprises in Pakistan, which attracted much international attention through its follow-up litigation against the KiK company in Germany, the EU is taking the initiative to coordinate Member State national action plans as required under the Ruggie Principles. Much could be said about this new Directive in terms of company law and business law: The balancing exercise of on the one hand, assuring effective transparency of due diligence strategies and, on the other hand, avoiding overregulation in particular with regard to SMEs still appears somewhat rough and ready and hence should see some refinement in due course. The same applies to the private enforcement of those due diligence duties: By leaving the availability and degree of private enforcement entirely to the Member States (Art. 20), the Directive seems to gloss over one of the most pressing topics of comparative legal debate. The question of availability, conditions and extent of private liability imposed on parent companies for human rights violations committed in their value chains abroad, must be addressed by the EU eventually.

To this forum, however, the private international implications of the Draft Report would appear even more important:

As regards the conflicts of laws solution, the proposed Art. 6a Rome II Regulation seeks to make available, at the claimant's choice, several substantive laws as conveniently summarized by Geert van Calster in the terms of lex loci damni, lex loci delicti commissi, lex loci incorporationis and lex loci activitatis. Despite my continuous call for a choice between the first two de regulatione lata, to be reached by applying a purposive reading of Art. 4 para 1 and 3 Rome II (see JZ 2017 and ZGR 2017), the latter two, lex loci incorporationis and lex loci activitatis, seem very odd to me. *First*, they are supported, to my humble knowledge, by no existing Private International Law Code or judicial practice. *Second*, the lex loci incorporationis has no convincing rationale, why it should in any way be connected with the legal *relationship* as created by the corporate perpetrator's tort. Lex loci activitatis is excessively vague and will create threshold questions as well as legal uncertainty. *Third*, I would most emphatically

concur with Jan von Hein's opinion of a quadrupled choice being excessive and impractical in and of itself.

The solution proposed in terms of international jurisdiction, I will readily admit, looks puzzling to me. I fail to see, which cases the proposed Art. 8 para 5 Brussels Ibis Regulation is supposed to cover: As far as international jurisdiction is awarded to the courts of the "Member State where it has its domicile", this adds nothing to Art. 4, 63 Brussels Ibis Regulation. In fact, it will create unnecessary confusion as to whether this venue of general jurisdiction is good even when there is no "damage caused in a third country [which] can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship." Thus, we are left with the courts of "a Member State […] in which [the undertaking] operates." As already pointed out, this term itself will trigger a lot of controversy regarding certain threshold issues. But there is more: Oftentimes this locus activitatis will coincide with the locus delicti commissi, e.g., when claimants want to rely on an omission of oversight by the European parent company. In that case, Art. 7 No. 2 Brussels Ibis Regulation offers a venue at the very place, i.e. both in terms of international and local jurisdiction, where that omission was committed. How does the new rule relate to the old one? And, again, which cases exactly are supposed to be captured by this provision? In my view, this is a phantom paragraph that, if anything, can only do harm to the fragile semantic and systematic architecture built up by the Brussels Ibis Regulation and CJEU case law.

The same seems true of the proposed Art. 26a Brussels Ibis: *First*, there is no evident need for such a *forum necessitatis*, rendering Member State courts competent to hear foreign-cubed cases with no connection to the EU whatsoever. To the contrary, recent development of the US Alien Torts Statute point in the opposite direction. *Second*, the EU might be overreaching its legislative jurisdiction: Brussels Ibis Regulation is based on the EU's competence to legislate on judicial cooperation in civil matters (Art. 81 para 2 TFEU). Such a global long-arm statute may not be covered by that competence, if it is legal at all under the public international confines incumbent upon civil jurisdiction (for details, see here). *Third*, it will be virtually anybody's guess what a court seized with a politicised and likely emotional case like the ones we are talking about will deem a "reasonable" Third State venue. In fact, this would be a forum non conveniens test with inverted colours, i.e. the very test the CJEU, in 2005, deemed

irreconcilable with the exigencies of foreseeability and legal certainty within the Brussels Ibis Regulation.

A step in the right direction, but nothing more – A critical note on the Draft Directive on mandatory Human Rights Due Diligence

Written by Bastian Brunk, research assistant at the Humboldt University of Berlin and doctoral candidate at the Institute for Comparative and Private International Law at the University of Freiburg.

In April of 2020, EU Commissioner Didier Reynders announced plans for a legislative initiative that would introduce EU-wide mandatory human rights due diligence requirements for businesses. Only recently, Reynders reiterated his intentions during a conference regarding "Human Rights and Decent Work in Global Supply Chains" which was hosted by the German Federal Ministry of Labour and Social Affairs on the 6. October, and asseverated the launch of public consultations within the next few weeks. A draft report, which was prepared by MEP Lara Wolters (S&D) for the European Parliament Committee on Legal Affairs, illustrates what the prospective EU legal framework for corporate due diligence could potentially look like. The draft aims to facilitate access to legal remedies in cases of corporate human rights abuses by amending the Brussels *Ibis* Regulation as well as the Rome II Regulation. However, as these amendments have already inspired a comments by Geert van Calster, Giesela Rühl, and Jan von Hein, I won't delve into them once more. Instead, I will focus on the centre piece of the draft report – a proposal for a Directive that would establish mandatory

human rights due diligence obligations for businesses. If adopted, the Directive would embody a milestone for the international protection of human rights. As is, the timing could simply not be better, since the UN Guiding Principles (UNGPs) celebrate their 10th anniversary in 2021. The EU should take this opportunity to present John Ruggie, the author of the UNGPs, with a special legislative gift. However, I'm not entirely sure if Ruggie would actually enjoy this particular present, as the Directive has obvious flaws. The following passages aim to accentuate possible improvements, that would lead to the release of an appropriate legal framework next year. I will not address every detail but will rather focus on the issues I consider the most controversial – namely the scope of application and the question of effective enforcement.

General Comments

To begin with a disclaimer, I believe the task of drafting a legal document on the issue of business and human rights to be a huge challenge. Not only does one have to reconcile the many conflicting interests of business, politics, and civil society, moreover, it is an impossible task to find the correct degree of regulation for every company and situation. If the regulation is too weak, it does not help protect human rights, but only generates higher costs. If it is too strict, it runs the risk of companies withdrawing from developing and emerging markets, and – because free trade and investment ensure worldwide freedom, growth, and prosperity – of possibly inducing an even worse human rights situation. This being said, the current regulatory approach should first and foremost be recognised as a first step in the right direction.

I would also like to praise the idea of including environmental and governance risks in the due diligence standard (see Article 4(1)) because these issues are closely related to each other. Practically speaking, the conduct of companies is not only judged based on their human rights performance but rather holistically using ESG or PPP criteria. All the same, I am not sure whether or not this holistic approach will be accepted in the regulatory process: Putting human rights due diligence requirements into law is difficult enough, so maybe it would just be

easier to limit the proposal to human rights. Nonetheless, it is certainly worth a try.

Moving on to my criticism.

Firstly, the draft is supposed to be a Directive, not a Regulation. As such, it cannot impose any direct obligations on companies but must first be transposed into national law. However, the proposal contains a colourful mix of provisions, some of which are addressed to the Member States, while others impose direct obligations on companies. For example, Article 4(1) calls upon Member States to introduce due diligence obligations, whereas all other provisions of the same article directly address companies. In my eyes, this is inconsistent.

Secondly, the Directive uses definitions that diverge from those of the UNGPs. For example, the UNGPs define "due diligence" as a process whereby companies "identify, prevent, mitigate and account for" adverse human rights impacts. This seems very comprehensive, doesn't it? Due diligence, as stipulated in the Directive, goes beyond that by asking companies to identify, cease, prevent, mitigate, monitor, disclose, account for, address, and remediate human rights risks. Of course, one could argue that the UNGP is incomplete and the Directive fills its gaps, but I believe some of these "tasks" simply redundant. Of course, this is not a big deal by itself. But in my opinion, one should try to align the prospective mechanism with the UNGPs as much as possible, since the latter are the recognised international standard and its due diligence concept has already been adopted in various frameworks, such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the ISO 26000. An alignment with the UNGP, therefore, allows and promotes coherence within international policies.

Before turning to more specific issues, I would like to make one last general remark that goes in the same direction as the previous one. While the UNGP ask

companies to respect “at minimum” the “international recognized human rights”, meaning the international bill of rights (UDHR, ICCPR, ICESCR) and the ILO Core Labour Standards, the Directive requires companies to respect literally every human rights catalogue in existence. These include not only international human rights documents of the UN and the ILO, but also instruments that are not applicable in the EU, such as the African Charter of Human and People’s Rights, the American Convention of Human Rights, and (all?) “national constitutions and laws recognising or implementing human rights”. This benchmark neither guides companies nor can it be monitored effectively by the authorities. It is just too ill-defined to serve as a proper basis for civil liability claims or criminal sanctions and it will probably lower the political acceptance of the proposal.

Scope of Application

The scope of application is delineated in Article 2 of the Directive. It states that the Directive shall apply to all undertakings governed by the law of a Member State or established in the territory of the EU. It shall also apply to limited liability undertakings governed by the law of a non-Member State and not established within EU-territory if they operate in the internal market by selling goods or providing services. As one can see, the scope is conceivably broad, which gives rise to a number of questions.

First off, the Directive does not define the term “undertaking”. Given the factual connection, we could understand it in the same way as the Non-Financial Reporting Directive (2014/95/EU) does. However, an “undertaking” within the scope of the Non-Financial Reporting Directive refers to the provisions of the Accounting Directive (2013/34/EU), which has another purpose, i.e. investor and creditor protection, and is, therefore, restricted to certain types of limited liability companies. Such a narrow understanding would run counter to the purpose of the proposed Directive because it excludes partnerships and foreign companies. On the other hand, “undertaking” probably does mean something different than in EU competition law. There, the concept covers “any entity engaged in an economic activity, regardless of its legal status” and must be understood as

"designating an economic unit even if in law that economic unit consists of several persons, natural or legal" (see e.g. CJEU, Akzo Nobel, C-97/08 P, para 54 ff.). Under EU competition law, the concept is, therefore, not limited to legal entities, but also encompasses groups of companies (as "single economic units"). This concept of "undertaking", if applied to the Directive, would correspond with the term "business enterprises" as used in the UNGP (see the Interpretive Guide, Q. 17). However, it would ignore the fact that the parent company and its subsidiaries are distinct legal entities, and that the parent company's legal power to influence the activities of its subsidiaries may be limited under the applicable corporate law. It would also lead to follow-up questions regarding the precise legal requirements under which a corporate group would have to be included. Finally, non-economic activities and, hence, non-profit organisations would be excluded from the scope, which possibly leads to significant protection gaps (just think about FIFA, Oxfam, or WWF). In order to not jeopardise the objective – ensuring "harmonization, legal certainty and the securing of a level playing field" (see Recital 9 of the Directive) – the Directive should not leave the term "undertaking" open to interpretation by the Member States. A clear and comprehensive definition should definitely be included in the Directive, clarifying that "undertaking" refers to any legal entity (natural or legal person), that provide goods or services on the market, including non-profit services.

Secondly, the scope of application is not coherent for several reasons. One being that the chosen form of the proposal is a Directive, rather than a Regulation, thus providing for minimum harmonisation only. It is left to the Member States to lay down the specific rules that ensure companies carrying out proper human rights due diligence (Article 4(1)). This approach can lead to slightly diverging due diligence requirements within the EU. Hence, the question of which requirements a company must comply with arises. From a regulatory law's perspective alone, this question is not satisfactorily answered. According to Article 2(1), "the Directive" (i.e. the respective Member States' implementation acts) applies to any company which has its registered office in a Member State or is established in the EU. However, the two different connecting factors of Article 2(1) have no hierarchy, so a company must probably comply with the due diligence requirements of any Member State where it has an establishment (agency, branch, or office). Making matters worse (at least from the company's

perspective), in the event of a human rights lawsuit, due diligence would have to be characterised as a matter relating to non-contractual obligations and thus fall within the scope of the new Art. 6a Rome II. The provisions of this Article potentially require a company to comply with the due diligence obligations of three additional jurisdictions, namely lex loci damni, lex loci delicti commissi, and either the law of the country in which the parent company has its domicile (in this regard, I agree with Jan von Hein who proposes the use not of the company's domicile but its habitual residence as a connecting factor according to Article 23 Rome II) or, where it does not have a domicile (or habitual residence) in a Member State, the law of the country where it operates.

That leads us to the next set of questions: When does a company "operate" in a country? According to Article 2(2), the Directive applies to non-EU companies which are not established in the EU if they "operate" in the internal market by selling goods or providing services. But does that mean, for example, that a Chinese company selling goods to European customers over Amazon must comply fully with European due diligence requirements? And is Amazon, therefore, obliged to conduct a comprehensive human rights impact assessment for every retailer on its marketplace? Finally, are states obliged to impose fines and criminal sanctions (see Article 19) on Amazon or the Chinese seller if they do not meet the due diligence requirements, and if so, how? I believe that all this could potentially strain international trade relations and result in serious foreign policy conflicts.

Finally, and perhaps most controversially in regard to the scope, the requirements shall apply to all companies regardless of their size. While Article 2(3) allows the exemption of micro-enterprises, small companies with at least ten employees and a net turnover of EUR 700,000 or a balance sheet total of EUR 350,000 would have to comply fully with the new requirements. In contrast, the French duty of vigilance only applies to large stock corporations which, including their French subsidiaries and sub-subsidiaries, employ at least 5,000 employees, or including their worldwide subsidiaries and sub-subsidiaries, employ at least 10,000 employees. The Non-Financial Reporting Directive only applies to companies with at least 500 employees. And the due diligence law currently being discussed in

Germany, will with utmost certainty exempt companies with fewer than 500 employees from its scope and could perhaps even align itself with the French law's scope. Therefore, I doubt that the Member States will accept any direct legal obligations for their SMEs. Nonetheless, because the Directive requires companies to conduct value chain due diligence, SMEs will still be indirectly affected by the law.

Value Chain Due Diligence

Value chain due diligence, another controversial issue, is considered to be anything but an easy task by the Directive. To illustrate the dimensions: BMW has more than 12,000 suppliers, BASF even 70,000. And these are all just Tier 1 suppliers. Many, if not all, multinational companies probably do not even know how long and broad their value chain actually is. The Directive targets this problem by requiring companies to "make all reasonable efforts to identify subcontractors and suppliers in their entire value chain" (Article 4(5)). This task cannot be completed overnight but should not be impossible either. For example, VF Corporation, a multinational apparel and footwear company, with brands such as Eastpack, Napapijri, or The North Face in its portfolio, has already disclosed the (sub?)suppliers for some of its products and has announced their attempt to map the complete supply chain of its 140 products by 2021. BASF and BMW will probably need more time, but that shouldn't deter them from trying in the first place.

Mapping the complete supply chain is one thing; conducting extensive human rights impact assessments is another. Even if a company knows its chain, this does not yet mean that it comprehends every potential human rights risk linked to its remote business operations. And even if a potential human rights risk comes to its attention, the tasks of "ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating" (see Article 3) it is not yet fulfilled. These difficulties call up to consider limiting the obligation to conduct supply chain due diligence to Tier 1 suppliers. However, this would not only be a divergence from the UNGP (see Principle 13) but would also run counter to the

Directive's objective. In fact, limiting due diligence to Tier 1 suppliers makes it ridiculously easy to circumvent the requirements of the Directive by simply outsourcing procurement to a third party. Hence, the Directive takes a different approach by including the entire supply chain in the due diligence obligations while adjusting the required due diligence processes to the circumstances of the individual case. Accordingly, Article 2(8) states that "[u]ndertakings shall carry out value chain due diligence which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of their supply chain, the size of the undertaking, its capacity, resources and leverage". I consider this an adequate provision because it balances the interests of both companies and human rights subjects. However, as soon as it comes to enforcing it, it burdens the judge with a lot of responsibility.

Enforcement

The question of enforcement is of paramount importance. Without effective enforcement mechanisms, the law will be nothing more than a bureaucratic and toothless monster. We should, therefore, expect the Directive – being a political appeal to the EU Commission after all – to contain ambitious proposals for the effective implementation of human rights due diligence. Unfortunately, we were disappointed.

The Directive provides for three different ways to enforce its due diligence obligations. Firstly, the Directive requires companies to establish grievance mechanisms as low-threshold access to remedy (Articles 9 and 10). Secondly, the Directive introduces transparency and disclosure requirements. For example, companies should publish a due diligence strategy (Article 6(1)) which, inter alia, specifies identified human rights risks and indicates the policies and measures that the company intends to adopt in order to cease, prevent, or mitigate those risks (see Article 4(4)). Companies shall also publish concerns raised through their grievance mechanisms as well as remediation efforts, and regularly report on progress made in those instances (Article 9(4)). With these disclosure requirements, the Directive aims to enable the civil society (customers, investors

and activist shareholders, NGOs etc.) to enforce it. Thirdly, the Directive postulates public enforcement mechanisms. Each Member State shall designate one or more competent national authorities that will be responsible for the supervision of the application of the Directive (Article 14). The competent authorities shall have the power to investigate any concerns, making sure that companies comply with the due diligence obligations (Article 15). If the authority identifies shortcomings, it shall set the respective company a time limit to take remedial action. It may then, in case the company does not fulfil the respective order, impose penalties (especially penalty payments and fines, but also criminal sanctions, see Article 19). Where immediate action is necessary to prevent the occurrence of irreparable harm, the competent authorities may also order the adoption of interim measures, including the temporary suspension of business activities.

At first glance, public enforcement through inspections, interim measures, and penalties appear as quite convincing. However, the effectiveness of these mechanisms may be questioned, as demonstrated by the Wirecard scandal in Germany. Wirecard was Germany's largest payment service provider and part of the DAX stock market index from September 2018 to August 2020. In June of 2020, Wirecard filed for insolvency after it was revealed that the company had cooked its books and that EUR 1.9 billion were "missing". In 2015 and 2019, the Financial Times already reported on irregularities in the company's accounting practices. Until February 2019, the competent supervisory authority BaFin did not intervene, but only commissioned the FREP to review the falsified balance sheet, assigning only a single employee to do so. This took more than 16 months and did not yield any results before the insolvency application. While it is true that the Wirecard scandal is unique, it showcased that investigating malpractices of large multinational companies through a single employee is a crappy idea. Public enforcement mechanisms only work if the competent authority has sufficient financial and human resources to monitor all the enterprises covered by the Directive. So how much manpower does it need? Even if the Directive were to apply to companies with more than 500 employees, in Germany alone one would have to monitor more than 7.000 entities and their respective value chains. We would, therefore, need a whole division of public inspectors in a gigantic public agency. In my opinion, that sounds daunting. That does not mean that public

enforcement mechanisms are completely dispensable. As Ruggie used to say, there is no single silver bullet solution to business and human rights challenges. But it is also important to consider decentralised enforcement mechanisms such as civil liability. In contrast to public enforcement mechanisms, civil liability offers victims of human rights violations "access to effective remedy", which, according to Principle 25, is one of the main concerns of the UNGP.

So, what does the Directive say about civil liability? Just about nothing. Article 20 only states that "[t]he fact that an undertaking has carried out due diligence in compliance with the requirements set out in this Directive shall not absolve the undertaking of any civil liability which it may incur pursuant to national law." Alright, so there shouldn't be a safe harbour for companies. But that does not yet mean that companies are liable for human rights violations at all. And even if it were so, the conditions for asserting a civil claim can differ considerably between the jurisdictions of the Member States. The Directive fails to achieve EU-wide harmonisation on the issue of liability. That's not a level playing field. This problem could be avoided by passing an inclusive Regulation containing both rules concerning human rights due diligence and a uniform liability regime in case of violations of said rules. However, such an attempt would probably encounter political resistance from the Member States and result in an undesirable delay of the legislative process. A possible solution could be to only lay down minimum requirements for civil liability but to leave the ultimate drafting and implementation of liability rules to the Member States. Alternatively, the Directive could stipulate that the obligations set out in Articles 4 to 12 are intended to determine the due care without regard to the law applicable to non-contractual obligations. At least, both options would ensure that companies are liable for any violation of their human rights due diligence obligations. Is that too much to ask?

Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law

On 20 October 2020, the European Parliament adopted – with a large margin – a resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (AI). The text of this resolution is available here; on other issues of AI that are part of a larger regulatory package, see the Parliament's press release here. The draft regulation (DR) proposed in the resolution is noteworthy from a choice-of-law perspective because it introduces new, specific conflicts rules for artificial intelligence (AI) (on the general issues of AI and PIL, see the conference report by Stefan Arnold here). With regard to substantive law, the draft regulation distinguishes between legally defined high-risk AI systems (Art. 4 DR) and other AI systems involving a lower risk (Art. 8 DR). For high-risk AI systems, the draft regulation would introduce an independent set of substantive rules providing for strict liability of the system's operator (Art. 4 DR). Further provisions deal with the amount of compensation (Art. 5 DR), the extent of compensation (Art. 6 DR) and the limitation period (Art. 7 DR). The spatial scope of those autonomous rules on strict liability for high-risk AI systems is determined by Article 2 DR, which reads as follows:

"1. This Regulation applies on the territory of the Union where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage to the life, health, physical integrity of a natural person, to the property of a natural or legal person or has caused significant immaterial harm resulting in a verifiable economic loss.

2. Any agreement between an operator of an AI-system and a natural or legal person who suffers harm or damage because of the AI-system, which circumvents or limits the rights and obligations set out in this Regulation, concluded before or after the harm or damage occurred, shall be deemed

null and void as regards the rights and obligations laid down in this Regulation.

3. This Regulation is without prejudice to any additional liability claims resulting from contractual relationships, as well as from regulations on product liability, consumer protection, anti-discrimination, labour and environmental protection between the operator and the natural or legal person who suffered harm or damage because of the AI-system and that may be brought against the operator under Union or national law."

The unilateral conflicts rule found in Art. 2(1) DR would prevail over the Rome II Regulation on the law applicable to non-contractual relations pursuant to Art. 27 Rome II, which states that the Rome II Regulation shall not prejudice the application of provisions of EU law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations. Insofar, it must be noted that Art. 2(1) DR deviates considerably from the choice-of-law framework of Rome II. While Art. 2(1) DR reflects the lex loci damni approach enshrined as the general conflicts rule in the Rome II Regulation (Art. 4 Rome II), one must not overlook the fact that product liability is subject to a special conflicts rule, i.e. Art. 5 Rome II, which is considerably friendlier to the victim of a tort than the general conflicts rule. Recital 20 Rome II states that "[t]he conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade". In order to achieve these purposes, the Rome II Regulation opts for a cascade of connections, starting with the law of the country in which the person sustaining the damage has his or her habitual residence when the damage occurred, provided that the product was marketed in that country (Art. 5(1)(a) Rome II). If that connection fails because the product was not marketed there, the law of the country in which the product was acquired governs, again provided that the product was marketed in this state (Art. 5(1)(b) Rome II). Finally, if that fails as well, the Regulation returns to the lex loci damni under Art. 5(1)(c) Rome II, if the product was marketed there. This cascade of connections is evidently influenced by the desire to protect the mobile consumer from being confronted with a law that may be purely accidental from his point of view because it has neither a relationship with the legal environment that he is accustomed to (his habitual residence) nor to the place where he decided to expose himself to the danger possibly emanating from the product (place of

acquisition). The rule reflects the presumption that most consumers will be affected by a defective product in the country where they are habitually resident. Insofar, Art. 2(1) DR is, in comparison with the Rome II Regulation, friendlier to the *operator* of a high-risk AI system than to the *consumer*.

Even if one limits the comparison between Art. 2(1) DR and the Rome II Regulation to the latter's general rule (Art. 4 Rome II), it is striking that the DR does not adopt familiar approaches that allow for deviating from a strict adherence to lex loci damni. Contrary to Art. 4(2) Rome II, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, Art. 2 DR does not allow to apply the law of that country. Moreover, an escape clause such as Art. 4(3) or Art. 5(2) Rome II is missing in Art. 2 DR. Finally yet importantly, Art. 2(2) DR bars any party autonomy with regard to strict liability for a high-risk AI system, which deviates strongly from the liberal approach found in Art. 14 Rome II.

Apart from the operator's strict liability for high-risk AI systems, the draft regulation would introduce a fault-based liability rule for other AI systems (Art. 8 DR). In principle, the spatial scope of the latter liability rule would also be determined by Art. 2 DR as already described. However, unlike the comprehensive set of rules on strict liability for high-risk systems, the draft regulation's model of fault-based liability is not completely autonomous. Rather, the latter type of liability contains important carve-outs regarding the amounts and the extent of compensation as well as the statute of limitations. Pursuant to Art. 9 DR, those issues are left to the domestic laws of the Member States. More precisely, Art. 9 DR provides that

"Civil liability claims brought in accordance with Article 8(1) shall be subject, in relation to limitation periods as well as the amounts and the extent of compensation, to the laws of the Member State in which the harm or damage occurred."

Thus, we find a lex loci damni approach with regard to fault-based liability as well. Again, all the modern approaches codified in the Rome II Regulation – the cascade of connecting factors for product liability claims, the common habitual residence rule, the escape clause, and party autonomy – are strikingly absent from the draft regulation.

Moreover, the draft regulation, in principle, limits its personal scope to the liability of the operator alone (as legally defined in Art. 3(d)–(f) DR). Recital 9 of the resolution explains that the European Parliament "[c]onsiders that the existing fault-based tort law of the Member States offers in most cases a sufficient level of protection for persons that suffer harm caused by an interfering third party like a hacker or for persons whose property is damaged by such a third party, as the interference regularly constitutes a fault-based action; notes that only for specific cases, including those where the third party is untraceable or impecunious, does the addition of liability rules to complement existing national tort law seem necessary". Thus, for third parties, the conflicts rules of Rome II would continue to apply.

At first impression, it seems rather strange that a regulation on a very modern technology – artificial intelligence – should deploy a conflicts approach that seems to have more in common with Joseph Beale's First Restatement of the 1930's than with the modern and differentiated set of conflicts rules codified by the EU itself at the beginning of the 21st century, i.e. the Rome II Regulation. While the European Parliament's resolution, in its usual introductory part, diligently enumerates all EU regulations and directives dealing with substantive issues of liability, the Rome II Regulation is not mentioned *once* in the Recitals. One wonders whether the members of Parliament were aware of the European Union's acquis in the field of private international law all. In sum, compared with Rome II, the conflicts approach of the draft regulation would be a regrettable step backwards. It remains to be seen how the relationship between the draft regulation and Rome II will be designed and fine-tuned in the further course of legislation.

Back to the Future – (Re-)Introducing the Principle of

Ubiquity for Business-related Human Rights Claims

On 11 September 2020, the European Parliament's Committee on Legal Affairs presented a draft report with recommendations to the Commission on corporate due diligence and corporate accountability. This report has already triggered first online comments by Geert van Calster and Giesela Rühl; the present contribution aims both at joining and at broadening this debate. The draft report consists of three proposals: first, a directive containing substantive rules on corporate due diligence and corporate accountability; secondly, amendments to the Brussels I*bis* Regulation that are designed to grant claimants from third states access to justice in the EU Member States; and thirdly, an amendment to the Rome II Regulation on the law applicable to non-contractual obligations. The latter measure would introduce a new Art. 6a Rome II, which codifies the so-called principle of ubiquity for business-related human rights claims, i.e. that plaintiffs are given the right to choose between various laws in force at places with which the tort in question is closely connected. While the basic conflicts rule remains the place of damage (*lex loci damni*) under Art. 4(1) Rome II, Art. 6a of the Rome II-draft will allow plaintiffs to opt for the law of the country in which the event giving rise to the damage occurred (the place of action or *lex loci delicti commissi* in the narrow sense), the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates.

The need for having a conflicts rule on the law applicable to business-related human rights claims derives from the fact that the draft report proposes a directive which only lays down minimum requirements for corporate due diligence concerning human rights, but which does not contain an independent set of rules on civil liability triggered by a violation of such standards. Thus, domestic corporate and tort laws will continue to play an important role in complementing the rules of the directive once they have been transposed into domestic law. In theory, this problem might be avoided by trying to pass a wholesale EU Regulation containing both rules on corporate due diligence as well as on related issues of civil liability. The EU has already passed the Regulations on Timber and Conflict Minerals, which deal with fairly specific issues and which

are limited in their scope. Taking into account, however, that both domestic corporate law and tort law are very intricate bodies of law, the EU legislature so far has, in the overwhelming number of cases, opted for the less intrusive and more flexible instrument of a directive (see, e.g., the Directive [EU] 2017/1132 relating to certain aspects of company law or the Product Liability Directive). The regulatory choice made in the draft report is thus fully consistent with established modes of EU legislation and the principle of subsidiarity.

The fundamental conflicts problem arising in cross-border human-rights litigation is well-known: Art 4(1) Rome II leads to the application of the law in force at the place of damage, which is frequently located in a third world country having a "weak legal system and enforcement (cf. Recital 2 of the draft directive). Starting a suit in such a forum frequently results not in a "home-court advantage" for plaintiffs, but rather diminishes their prospects of success. Insofar, suing a multinational corporation in the EU becomes attractive. While the hurdle of international jurisdiction can be surmounted rather easily in most cases, e.g. by suing the defendant at its general jurisdiction (Art. 4(1) Brussels I*bis*), a Member State court will nevertheless, under Art. 4(1) Rome II, apply a third state law. In the discussion about domestic due diligence laws, the widely preferred, if not the only viable solution so far has consisted in characterising such laws as being of an overriding mandatory nature within the meaning of Art. 16 Rome II, thus ensuring their application in spite of the otherwise applicable tort law. Seen from the national perspective, this is of course a sound approach because a Member State legislature simply has no mandate to tinker with the Rome II Regulation itself. Once the question of corporate due diligence and liability is answered at the EU level itself, however, there is no practical need for limiting the doctrinal discussion to a unilateral approach within the narrow framework of Art. 16 Rome II. In light of this fact, it is not surprising that the draft report explores another conflicts tool that has been developed in order to strengthen the protection of weaker parties or general interests, i.e. the principle of applying the law more favourable to a party in a given case. This approach, which nowadays mostly consists in letting the plaintiffs choose which law they consider more favourable to them, is well-known, for example, in the domestic PIL codes of Italy and Germany. In those countries, it even is the general rule in international tort law – a hardly convincing solution, because the victim is not the weaker party in every case (for an in-depth treatment of this issue, see here). Therefore, the more modern Rome II Regulation opted for a more differentiating approach: *lex loci*

damni is the general rule (Art. 4(1) Rome II), whereas the principle of ubiquity – i.e. that a tort may be located in more than one place – is only codified in groups of cases where a specific interest legitimises deviating from this rule: first, environmental damage (Art. 7 Rome II), and secondly, multi-state cases involving cartel damages (Art. 6(3) Rome II). Moreover, while Rome II is not applicable to violations of personality rights, the CJEU's case law on Art. 7(2) Brussels I*bis* has frequently been emulated in domestic conflicts law as well. In sum, the principle of ubiquity has always remained a part of the doctrinal toolbox of EU choice of law.

Insofar, the question must be answered as to whether the ubiquity approach has major advantages compared with the mandatory rule approach. The first factor in favour of applying the principle of ubiquity to business-related human rights claims as well is that it considerably reduces the need for the frequently difficult delineation between human rights violations (Art. 6a Rome II draft) and environmental damages (Art. 7 Rome II). Thus, intricate problems of characterisation and, if necessary, adaptation, are avoided at the outset. In addition, tortious human rights claims may also be rooted in a violation of ILO labour standards (see the definition of "human rights risk" in Art. 3 of the proposed directive). In light of the fact that Art. 8(1) Rome I favours the employee as well by providing for an alternative connection of contractual claims, having a *favor laboratoris* for labour-related human-rights claims fits into the normative framework of EU law, too.

A second advantage is that the ubiquity approach respects party autonomy (Art. 14 Rome II), whereas the parties could not derogate from a truly mandatory rule (Art. 16 Rome II). Thus, the ubiquity approach facilitates settlements, particularly in human rights cases that involve a large number of claimants.

Thirdly, claimants from the Global South are frequently compelled by the "weak legal systems and enforcement" of their home country to seek their fortune abroad rather than by weaknesses of their own substantive laws. In many former colonies, the Common Law or the French Code Napoléon are still in force (with modifications) and would in principle allow a successful suit based on a tortious claim. In this regard, giving claimants the option to sue a company in a Member State, while at the same time applying their own law if they so wish, avoids a paternalistic, neo-colonialist stance that rests on the implicit assumption that our Western laws are inherently better than those of developing countries.

A fourth factor arguing for giving plaintiffs the right to choose the applicable law is that the mandatory rule approach will frequently not sufficiently cover the risks inherent in cross-border litigation. In the German *Rana Plaza* case, the claims of the plaintiffs failed because, under the law of Pakistan, they were barred by the statute of limitations, which was extremely short (just one year) compared with German standards, particularly for a cross-border case (see OLG Hamm NJW 2019, 3527). In light of the CJEU case law on Art. 16 Rome II, however, German limitation periods could hardly be characterised as being of an overriding mandatory nature (ECLI:EU:C:2019:84). Under Art. 6a Rome II-draft, the claimants could simply have chosen German law to govern their case.

On the other hand, the ubiquity approach has been criticised as leading to an impairment of foreseeability because the question of the applicable law remains unanswered until the plaintiffs have made their choice. However, under the mandatory rule approach as well, foreseeability of the applicable law is not necessarily guaranteed. Only a Member State court would apply the due diligence standard as a part of its own *lex fori* (Art. 16 Rome II), but a company would always face the risk of being sued in a third state where it would not be ensured that a local court would take a foreign mandatory rule into account. Even among the Member States, such a courtoisie could not be taken for granted because, unlike Art. 9(3) Rome I, the Rome II Regulation contains no rule on the applicability of *foreign* overriding mandatory rules. One might argue that this concern is purely academic because the proposed directive would harmonise the standards of corporate due diligence in the EU anyway. Yet this would be a serious error because the proposal (Art. 1(1) subpara. 2) only establishes *minimum* requirements.

Thus, the advantages inherent in the ubiquity approach clearly outweigh those of the mandatory rule approach. Nevertheless, it is certainly true that there can be too much of a good thing. Allowing the plaintiffs to choose between *four* different laws is hardly practical and sets up a very dangerous liability trap for lawyers who would have to perform extremely difficult studies in comparative law before advising their clients on where to sue a defendant. Thus, the number of options should simply be reduced to two: either the place of damage or the habitual residence of the defendant.

The latter option should refer to the habitual residence of a corporation because this is the connecting factor commonly used in the Rome II Regulation (Art. 23

Rome II). There is no practical need to replace it with “domicile” which is a concept deployed in European civil *procedure* (Art. 63 Brussels I*bis*), but not in EU choice-of-law Regulations.

In sum, Article 6a Rome II-draft certainly leaves room for further refinement, but its basic approach rests on a sound doctrinal rationale and has major practical advantages compared with the mandatory rule model so far favoured in domestic due diligence laws. Thus, the EP draft deserves an appropriate and thorough consideration rather than a hasty judgment.

Out now: Zeitschrift für vergleichende Rechtswissenschaft (ZVglRWiss) 119 (2020) No. 3

The most recent issue of the German Journal of Comparative Law (Zeitschrift für Vergleichende Rechtswissenschaft) features three articles on private international and comparative law.

The abstracts read:

- **Katharina Beckemper: Bestechung und Bestechlichkeit im geschäftlichen Verkehr – Die gegenläufige Umsetzung des EU-Rahmenbeschlusses 2003/568/JI in Spanien und Deutschland, ZVglRWiss 119 (2020), 277-313**

Criminal law on corruption is largely determined by Union law. This can make a comparison of the national law of two Member States interesting if there have been different implementations in detail as Union law leaves room for interpretation. However, the German legislator did not see any such room for interpretation when, in 2015, it reorganized the facts of bribery and corruption in business dealings. Rather, he felt compelled to introduce the so-called business owner model. Meanwhile, Spain removed a comparable regulation from the

relevant facts in the same year. This raises the question of whether European law offers more scope for implementation than the German legislator assumed or whether the Spanish legislator violated the requirements.

- **Patrick Hell: Die Shareholder Proposal Rule des US-amerikanischen Kapitalmarktrechts als Instrument des nachhaltigkeitsorientierten Aktionärsaktivismus, ZVglRWiss 119 (2020), 314-338**

Environmental, social and governance (ESG) issues play a major role on both sides of the Atlantic in the current discussion in corporate and capital market law. Investors are increasingly developing their own ESG standards and are trying to influence ESG issues through direct dialogue with their companies and through voting. This sustainability-oriented shareholder activism has a long tradition in the United States. The Shareholder Proposal Rule enables non-binding decisions initiated by shareholders. This has led to a significant increase in sustainability-oriented shareholder proposals in recent years. In the following article, this rule will be presented from a historical, dogmatic and functional perspective in order to take a comparative look at German stock corporation law.

- **Frederick Rieländer: Der Schutz von Geschäftsgeheimnissen im europäischen Kollisionsrecht, ZVglRWiss 119 (2020), 339-368**

Whilst the Directive (EU) 2016/943 ensures that there is a consistent level of civil redress in the internal market in the event of trade secret violations, the determination of the law applicable to non-contractual claims arising out of trade secret violations raises several unresolved questions. As will be shown hereafter, non-contractual obligations flowing from infringements of trade secrets within the meaning of the Directive ought to be governed by the lex loci protectionis principle as enshrined in Art.?8(1) Rome II Regulation. Nevertheless, the law of the country in which the market is distorted applies in so far as claims are based on trade secret violations by means of ”unfair competition” within the meaning of Art.?6(1) Rome II Regulation.

The Journal can be accessed here (no open access)

Opinion of AG Campos Sánchez-Bordona in the case WV, C-540/19: jurisdiction and action for recovery of maintenance brought by a public body

According to the judgment in Blijdenstein, delivered by the Court of Justice in 2004, a public body which seeks reimbursement of sums paid under public law to the original maintenance creditor, to whose rights it is subrogated against the maintenance debtor, cannot rely on Article 5(2) of the Brussels Convention. It cannot, therefore, sue the debtor before the courts for the place of domicile/habitual residence of the original maintenance creditor.

In 2008, the EU legislator adopted the Maintenance Regulation. As it follows from Article 68 of this Regulation, it replaced the provisions of the Brussels regime relating to maintenance obligations. The Regulation contains a provision that seems to be somehow similar to Article 5(2) of the Brussels Convention. Its Article 3(b) allows to bring the proceedings in matters relating to maintenance obligations before the court for the place where the creditor is habitually resident.

Is that similarity sufficient to justify faithful application of interpretation provided in the judgment in Blijdenstein in relation to the provisions of the Maintenance Regulation? This is, in essence, the question at stake in the case WV, C-540/19. This Thursday, 18 June 2020, Advocate General Campos Sánchez-Bordona presented his Opinion in which he addresses that question.

Facts of the case and the question referred

In proceedings before a German court, a social assistance institution being a public body asserts claims for parental maintenance against the defendant who

lives in Austria. The public body contends that the parental maintenance claim has been transferred to that body because it regularly granted the defendant's mother social assistance benefits. Indeed, the defendant's mother lives in Germany where she receives regular social assistance. The defendant submits that the German courts lack international jurisdiction.

In line with the submission of the defendant, the first instance considers that the German courts have no international jurisdiction. It argues that jurisdiction under Article 3(b) of the Maintenance Regulation is excluded because the creditor within the meaning of that provision is only the maintenance creditor itself, and not a state body asserting maintenance claims legally transferred to it by way of recovery. The second instance court disagrees and, ultimately, the German Supreme Court (Bundesgerichtshof, BGH) decides to refer a request for a preliminary ruling to the Court of Justice. It submits a following question:

Can a public body which has provided a maintenance creditor with social assistance benefits in accordance with provisions of public law invoke the place of jurisdiction at the place of habitual residence of the maintenance creditor under Article 3(b) of the Maintenance Regulation in the case where it asserts the maintenance creditor's maintenance claim under civil law, transferred to it on the basis of the granting of social assistance by way of statutory subrogation, against the maintenance debtor by way of recourse?

Advocate General's Opinion…

In his Opinion, Advocate General proposes to answer the preliminary question in the affirmative. In his view, Article 3(b) of the Maintenance Regulation can be relied on by a public body who contends that it has subrogated the original maintenance creditor.

At point 34, the Opinion recalls the judgment in Blijdenstein and explains that the Court held in its judgment, in essence, that a maintenance creditor is regarded as the weaker party in the proceedings in matters relating to maintenance obligations and therefore that creditor can rely on a rule of jurisdiction which derogates from this general principle of actor sequitur forum rei. The original maintenance creditor could therefore rely on Article 5(2) of the Brussels Convention. A public body which brings an action for recovery against a

maintenance debtor is not in an inferior position with regard to the latter and it cannot bring its actions before the courts that would otherwise have jurisdiction under Article 5(2) of the Brussels Convention.

However, Advocate General develops a series of arguments in support of non-application of the interpretation provided for in the judgment in Blijdenstein within the framework established by the Maintenance Regulation.

First, at points 37 to 42, the Opinion lays down some arguments of systemic interpretation and stresses that **the Maintenance Regulation establishes a complete system: while the Brussels regime is in principle not applicable in relation to the third-State defendants, the circumstance that the defendant is habitually resident in a third State does not entail the non-application of the Maintenance Regulation**. If the public bodies could not rely on Article 3(b) of the Maintenance Regulation, the complete character of the system established by the Regulation would be affected. In all the scenarios where the debtor is a third-State defendant, a public body would most likely have to assert its claim before the courts of that third-State.

Next, at points 43 to 45, the Opinion adds that unlike in the Brussels regime, under the Maintenance Regulation **the place of jurisdiction at the habitual residence of the maintenance creditor is conceptualized not as an exception, but as an alternative general place of jurisdiction**.

Then, at points 46 to 47, the Opinion elaborates on the judgment in R. At paragraph 30 of this judgment, it is stated that the objective of the Maintenance Regulation consists in preserving the interest of the maintenance creditor, who is regarded as the weaker party in an action relating to maintenance obligations; Article 3 of that Regulation offers that party, when it acts as the applicant, the possibility of bringing its claim under bases of jurisdiction that do not follow the actor sequitur forum rei principle. In his Opinion, Advocate General emphasizes that the formulation of paragraph 30 of the judgment in R must have been influenced by the factual context of that case. It should not, however, be understood as preventing the public bodies from relying on some specific grounds of jurisdiction of Article 3.

After that, at point 51, the Opinion has recourse to an argument based on historical interpretation: **even though a proposal endorsing a solution**

according to which a public body could bring action only before the courts for the place of habitual residence of the defendant was brought up during the drafting of the Maintenance Regulation, that proposal is not reflected in its final version.

Finally, at points 54 to 60, the Opinion addresses the objectives of the Maintenance Regulation. In particular, at point 59, Advocate General points out that **Blijdenstein case law should be discontinued as it seems to contradict the logics of the Regulation – it does not reinforce the protection of the maintenance creditor. In fact, it favors the maintenance debtors once the maintenance of a creditor is covered by the payments of the public body**: the debtor is no longer at risk of being sued before the courts of a Member State other than the Member State of his habitual residence.

… and insights on the lessons that may be learned from it:

The above presentation of the arguments developed by Advocate General in his Opinion is far from being extensive. It is best to recommend giving it an attentive lecture as there is much more to bite into. In addition to that, the Opinion raises some arguments that may be relevant in other contexts than that of the case WV, C-540/19.

continuity / adequacy of case law and its reversals

As mentioned before, **the Opinion is structured around the question whether Blijdenstein case law should be still applied despite the modification of legal framework.** It is interesting to note that, at point 69, the Opinion even anticipates a scenario in which the Court would decide not to follow the proposal of Advocate General. In this context, Advocate General puts forward some modifications that, according to him, should be introduced into the Blijdenstein case law.

The importance of the debate that this question may inspire extends far beyond the scope of the case reported here. **When it comes to the interpretation of EU private international law instruments, what factors should be taken into account in assessing whether a pre-existing case law should be reversed?**

coordination between forum and ius

At points 61 to 66, the Opinion offers an additional argument in favor of discontinuation of Blijdenstein and allowing the public bodies to sue before the courts for the place of the creditor's habitual residence. **It argues that the interpretation proposed in the Opinion allows to ensure coordination between forum and ius – a court having jurisdiction under the Maintenance Regulation will, as far as possible, apply its own law**.

In fact, since Blijdenstein times, not only the instrument containing the rules on jurisdiction in matters relating to maintenance obligations has changed. The legal landscape was profoundly altered by the common conflict of laws rules of the Hague Protocol on the Law Applicable to Maintenance Obligations. Under the general rule on applicable law of Article 3(1) of the Protocol, obligations shall be governed by the law of the State of the habitual residence of the creditor. As the Opinion notes, according to Article 64(2) of the Maintenance Regulation, a right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject. In most instances, a public body subrogating the original maintenance creditor is arguably established in the Member State of that creditor's residence.

It seems that a similar point has been already tackled in the judgment in Kainz. At paragraph 20, it addresses the question relating to the necessity to ensure coordination between, on the one hand, jurisdiction to settle a dispute on the liability for damage caused by a product [under Article 5(3) of the Brussels I Regulation] and, on the other hand, law applicable to a non-contractual obligations arising to such damage [under Article 5(1) of the Rome II Regulation]. In the judgment in Kainz, that question is answered in the negative.

Yet, the Maintenance Regulation/the Hague Protocol duo seem to follow different logics than the aforementioned Regulations. There must have been a reason to extract the rules on jurisdiction in matters relating to maintenance from the Brussels regime and adopt a new Regulation.

It is true that the Protocol does not set a general rule according to which the maintenance obligation is governed by the law of the forum. As it follows from Article 3(1), it relies heavily on the law for the place of the creditor's habitual

residence.

However, one the one hand, even with its general rule on applicable law of Article 3(1), it can be argued that the Protocol does indirectly promote a coordination between ius and forum. That is the case as long as one accepts that, in practice, the application of the rules of jurisdiction of the Maintenance Regulation leads to the conferral of jurisdiction to the courts for the place of the creditor's habitual residence (see, to that effect, paragraph 49 of the judgment in KP). On the other hand, as the Opinion remarks at its footnote 47, at least in some scenarios where it would reinforce the situation of the maintenance creditor, the Hague Protocol provides for a subsidiary application of the law of the forum. According to Articles 4(2) and (3) of the Protocol, the law of the forum applies when the creditor is 'unable to obtain maintenance' under the law primarily applicable to the maintenance obligation.

Moreover, striving to ensure that a court applies its own law somewhat echoes Recital 27 of the Succession Regulation. As a reminder, this Recital explains, inter alia, that the Regulation is devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law.

At point 61 of the Opinion, Advocate General himself qualifies his argument drawn from the existence of the Maintenance Regulation/the Hague Protocol duo as being of a lesser theoretical importance, yet having practical bearing. However, **the argument provokes also a more general question: to what extent the coordination of ius and forum is – and if so, in which constellations – a point of consideration in EU private international law?**

The Opinion is available in Spanish [original language] and, inter alia, in German and French. There is no English version yet.