Application of the Brussels I bis Regulation ratione materiae, interim relief measures and immunities: Opinion of AG Saugmandsgaard Øe in the case Supreme Site and Others, C-186/19

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The Hoge Raad Neederlanden (The Dutch Supreme Court), the referring court in the case Supreme Site Service and Others, C-186/19, harbours doubts regarding the international jurisdiction of Dutch courts under the Brussels I bis Regulation, in respect to a request to lift an interim garnishee order. An insight on the background of the case can be found here and here, while the implications of that background for admissibility of request for a preliminary ruling are addressed in section 1 of the present text.

In replying to a preliminary ruling request made by that court, AG Saugmandsgaard Øe issued his Opinion. Advocate General concluded that a flexible approach should be taken when interpreting the concept of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation. AG was of the view that an action for interim measures as the one brought by SHAPE, aimed at obtaining the lifting of a garnishee order, qualifies as civil and commercial matters, within the meaning of Article 1(1), provided that such garnishee order had the purpose of safeguarding a right originating in a contractual legal relationship which is not characterised by an expression of public powers, a matter that is left to the referring court to verify. For presentation of AG reasoning and its analysis in relation to interim measures, see

section 2.

Moreover, according to AG, alleged claims of immunity enjoyed under international law by one of the parties to the proceedings had no significance, when it comes to the analysis of the material scope of the Brussels I bis Regulation. Against this background, the case provides a good opportunity to explore jurisdictional issues in the face of immunities, such as the debate regarding international jurisdiction preceding the assessment of immunities, and what can be inferred from the case-law of the Court of Justice and the European Court of Human Rights in that respect. Next, it requires us to determine whether the case-law developed in relation to State bodies and their engagement in *acta iure imperii* can be applied mutatis mutandis to the international organisations. Finally, it revives the concerns on whether the scope of the Brussels I bis Regulation should be determined in a manner allowing to establish international jurisdiction under that Regulation even though enforcement against public authorities stands little chances, be that international organisations as in the present case. These issues are discussed in section 3.

1. Admissibility of the preliminary reference

Advocate General Saugmandsgaard Øe made some remarks on the admissibility of the preliminary ruling and on whether a reply of the Court of Justice would be of any avail to the referring court.

It should be recalled that at national level, two sets of proceedings were initiated in parallel. In the first set, – the proceedings on the merits – Supreme, the private-law companies, sought a declaratory judgment that it was entitled to the payment of several amounts by SHAPE, an international organisation. These proceedings were under appeal before the Den Bosch Court of Appeal because SHAPE challenged the first instance court's jurisdiction. In the second set – the proceedings for interim measures where the preliminary ruling originated from – SHAPE brought an action seeking the lift of the interim garnishee order and requesting the prohibition of further attempts from Supreme to levy an interim garnishee order against the escrow account.

In the opinion of AG, the preliminary ruling was still admissible despite the fact that the Den Bosch Court of Appeal ruled on the proceedings on the merits granting immunity of jurisdiction to SHAPE in December 2019 – the judgment is

under appeal before the Dutch Supreme Court. He opined that the main proceedings should not be regarded as having become devoid of purpose until the court renders a final judgment on the question whether SHAPE is entitled to invoke its immunity from jurisdiction, in the context of the proceedings on the merits and whether that immunity, in itself, precludes further garnishee orders targeting the escrow account (point 35).

2. Civil and commercial matters in respect of substantive proceedings or interim relief proceedings?

The Opinion addressed at the outset the question on whether the substantive proceedings should fall under the material scope of the Brussels I bis Regulation in order for the interim relief measures to fall as well within that scope. As a reminder, the object of the proceedings on the merits, is a contractual dispute over the payment of fuels supplied by Supreme to SHAPE, in the context of a military operation carried out by the latter.

As AG signalled, to answer the question several hypotheses have been put forward by the parties at the hearing held at the Court of Justice. The first hypothesis, supported by the Greek Government and Supreme, proposed that in order to determine if an action for interim measures falls within the scope of the Regulation, the proceedings on the merits should fall as well under the material scope of the Regulation. In particular, the characteristics of the proceedings on the merits should be taken into account. The second hypothesis, supported by SHAPE, considered that the analysis should be done solely in respect to the proceedings for interim measures. The European Commission and the Dutch and Belgian Governments opined that in order to determine if the action for interim measures can be characterised as civil and commercial matters, it is the nature of the right which the interim measure was intended to safeguard in the framework of the interim relief proceedings that matters.

Endorsing the latter hypothesis, AG indicated that an application for interim measures cannot be regarded as automatically falling within or outside the scope of the Brussels I bis Regulation, depending on whether or not the proceedings on the merits fall within that scope, simply because it is ancillary to the proceedings on the merits (point 51). To support his conclusion, AG followed the line of

reasoning developed by the Court in the context of the instruments preceding the Brussels I bis Regulation. In that regard, the Court has held that to ascertain that provisional/protective measures come within the scope of the Regulation, it's not the nature of the measures that should be taken into account but the nature of the rights they serve to protect. To illustrate this: in Cavel I, the Court held that interim measures can serve to safeguard a variety of rights which may or may not fall within the scope of the now Brussels I bis Regulation (then the Brussels Convention) depending on the nature of the rights which they serve to protect. This has been confirmed in Cavel II: "ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim". Further, in Van Uden, the Court held that "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights". This case-law has been also confirmed in recent judgments of the Court, namely in Bohez – where a penalty payment was imposed as a measure to comply with the main judgment – and Realchemie Nederland concerning an action brought for alleged patent infringement in the context of interim proceedings, where a prohibition in the form of payment of a fine was ordered.

In brief, what matters in this discussion on interim measures falling or not within the scope of the Brussels I bis Regulation, is not the relation between the main proceedings and the interim measures, the crucial factor being the **purpose – determined from a procedural law standpoint –** of the interim relief measure vis-à-vis the proceedings on the merits: **an interim measure falling within the scope of the Regulation has to safeguard the substantive rights at stake in the main proceedings**. In the present case, the substantive right in question is a credit arising from a contractual obligation that Supreme holds against SHAPE.

3. Whether immunities play a role in determining if an action can qualify as "civil and commercial matters" within the meaning of Article 1(1) of the Regulation

One of the particularities of the case is that in the second set of proceedings

where the preliminary ruling originated, SHAPE and JFCB (NATO) have introduced an action for interim relief measures, based on immunity from execution. SHAPE alleged that its immunity from execution flowing from the 1952 Paris Protocol trumps any jurisdiction derived from that Regulation.

It is against this background that the Dutch Supreme Court asked the Court of Justice if the fact that an International Organisation claims to enjoy immunity from execution under public international law, bars the application of the Brussels I bis Regulation or has an impact on its application *ratione materiae*. In his Opinion, Advocate General considered that the referring court is concerned by the actions relating to "acts or omissions in the exercise of state authority" linked to the concept of "*acta iure imperii*" – a concept which is also used in international law in relation to the principle of State immunity.

The Opinion tackled the question of immunities under public international law and concluded that a dispute where an International Organisation is a party, should not be automatically excluded from the material scope of the Brussels I bis Regulation. Interestingly, some aspects of the reasoning that allowed to reach that conclusion echo the doctrinal debates on the interplay between the jurisdictional rules of EU private international law, on the one hand, and the immunity derived from public international law, on the other hand.

Does immunity precede the jurisdiction under EU PIL?

At point 72, AG rejected the arguments advanced by the Austrian Government, who argued that the Brussels I bis Regulation should not apply to the case at hand. In the view of this government, if an international organisation takes part in a dispute, the immunity that this organisation enjoys on the basis of customary international law or treaty law, characterizes the nature of the legal relationship between the parties. In other words, a criterion based on the nature of a party (*scil*. the fact that it is an international organization that is a party to proceedings) should suffice to decline jurisdiction under the Brussels I regime.

In that respect, AG made some interesting remarks: first, by applying the Brussels I bis Regulation to a dispute where an International Organisation is a party, there is no breach of Article 3(5) TUE and of the obligation to respect public

international law enshrined in that provision. Second, if, based on the Brussels I bis regime, a national court declares its international jurisdiction over a dispute, potential immunity claims advance by the parties will not be affected, as they are to be considered at a later stage of the proceedings. AG departed from the premise that the assessment on immunities should take place after the national judge seised with the case looks into the substance of the merits, including party allegations. This is therefore, at a second stage, after the national court has decided over its international jurisdiction within the first stage, that the immunity needs to be ascertained and its limits set (point 69).

This approach resonates with the idea that national courts are not supposed to engage in an in-depth analysis of the substance at that very first stage, when they are determining their own jurisdiction. They should not be undertaking a mini-trial, ascertaining jurisdiction requires only a first approximation to the facts of the case, solely for the purpose of determining jurisdiction. In FlyLaL II, a case concerning jurisdictional issues pursuant to the Brussels I Regulation, in respect of an action for damages brought for infringement of competition law, the Court observed that at the stage of determining jurisdiction "the referring court must confine itself to a prima facie examination of the case without examining its substance". The statement draws on AG Bobek's Opinion presented in the aforementioned case: "[d]etermination of jurisdiction should be as swift and easy as possible. Thus, a jurisdictional assessment is by definition a prima facie one. […] The jurisdictional assessment will, in practice, require a review of the basic factual and legal characteristics of the case at an abstract level."

From the ECtHR case-law (see, most notably, Waite and Kennedy v. Germany) dealing with immunities of international organizations and the right to a remedy enshrined in Article 6 ECHR, a similar reading can be extracted. National courts deciding on granting of an immunity – be [it] immunity of jurisdiction or from execution – and performing the "reasonable alternative means" test, inevitably engage in a substantive analysis of the merits. **To ensure that the claimant's right to access justice is not breached, requires more than an abstract examination of the facts**. This would seem to favour the idea **that determination of international jurisdiction precedes a substantive analysis of the circumstances of the case in respect to any alleged claim of immunities made by the parties**.

However, it is still not clear how this reasoning can be reconciled with judgments

of the Court of Justice in the cases Universal Music International Holding and Kolassa. There, the Court of Justice held that according to the objective of the sound administration of justice which underlies the Brussels I Regulation, and respect for the independence of the national court in the exercise of its functions, a national court in the framework of ascertaining its international jurisdiction pursuant to the Brussels I regime, must look at all the information available to it. Although such an assertion seems to be construed in very general terms, one may well wonder what exactly a court assessing its international jurisdiction under the Brussels I bis Regulation is required to look at. Should it be a minimal review of the substance or a prima facie analysis strictly focused on the nature of the elements of the action – relevant in the context of the connecting factors used by the rules on jurisdiction –,including all the information available before the court?

If the answer would be the latter, that means that in the case at hand, the immunity from execution relied on by SHAPE in support of its action should be taken into account.

A reading of paragraphs 53 to 58 in the Court of Justice's recent judgment in Rina, hints that in order to establish its own jurisdiction under the Brussels I bis Regulation, a national court has to take into consideration all available information. In the case at issue, party allegations where a party (Rina) invokes immunity of jurisdiction. While at first glance this instruction does not steer away from the judgments in Universal Music International Holding and Kolassa, what the Court proposes here is definitely more complex than a first approximation to the facts of the case. At paragraph 55 the Court notes "a national court implementing EU law in applying [the Brussels I Regulation] must comply with the requirements flowing from Article 47 of the Charter. […] The **referring court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, [the claimants] would not be deprived of their right of access to the courts**, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter." If the national courts were to engage in such analysis – in a similar fashion as the ECtHR established in regards to Article 6 ECHR – it will certainly go beyond a mere examination *in abstracto*, implying rather a deep dive on the merits.

Moreover, the judgment in Rina seems to suggest that the analysis of international law cannot be avoided even when it comes only to the question whether the Brussels I regime applies or not. At paragraph 60, the Court of

Justice explained "[t]he principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court **finds that such corporations have not had recourse to public powers** within the meaning of international law." Again, for the examination of these matters in the framework of determining international jurisdiction, a greater level of scrutiny is required. A national judge would have to dig dipper in the facts and party allegations to come to the conclusion that a certain party did not have recourse to public powers. Something that is everything but a swift and easy exercise.

- ## Does the case-law developed in the context of State bodies apply to international organisations?

Be that as it may, while an immunity claim does not automatically rule out the application of the Brussels I bis Regulation according to AG Saugmandsgaard Øe, the key question in his analysis is to determine if actions related to *acta iure imperii* under Article 1(1) of the Regulation are applicable to international organisations. It flows from the Court of Justice well-settled case-law that disputes between a State body and a person governed by private law come within the scope of civil and commercial matters, if the public authority in question does not act in the exercise of its public powers. At point 75 of his Opinion, AG made a reference to the judgment in Eurocontrol and indicated that exceptions under Article 1(1) *in fine* can extend to acts and omissions carried out by an international organisation. He remarked that, the concept of "public powers" established under the Court's case-law, not only relates to State responsibility but refers also to those situations where a public authority acts under the umbrella of its public powers.

Advocate General moved then to analyse the Court of Justice case-law concerning liability of the State for acts and omissions carried out in the exercise of sovereign authority. Here matters get a bit complicated.

On the one hand, **it remains to be seen how that case-law could be applied mutatis mutandis to international organisations**. Leaving aside the question of immunities and putting emphasis on the notion of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation, the

acts and omissions of an international organization are strictly connected with the powers conferred to the organisation for its proper functioning. Thus, one could wonder whether a functional test would be more suitable to determine if the acts or omissions were carried out by an international organization in the exercise of its public powers: a demarcating line could be drawn between non-official (non-related to the mission of the organization) acts and omissions and those of official nature, therefore necessary to fulfil the organisation's mandate.

On the other hand, concerning the criteria applied by the Court when analysing if a public authority has exercised its powers of State authority, there is no "one size fits all" solution. As AG rightly pointed out at point 84 of his Opinion, the Court has still to sort out the interplay between different criteria: matters characterising the legal relationship between the parties, the subject-matter of the dispute and the basis of the action and the detailed rules governing the action brought.

To illustrate this point: in Préservatrice Foncière TIARD, the Court looked mainly at the legal relationship between the parties, while in Baten and Sapir and Others the Court did not refer to the legal relationship between the parties but focused on the subject-matter of the dispute and the basis of the action brought. Hence, the alternative or cumulative use of these criteria – or a flexible one- seem to reflect the need to provide an adequate response to the case-specific factual context of a particular case.

In that sense, AG pointed out that the criterion concerning the basis of the action is not relevant in all cases, it will be determinant in situations where is not established that the substantive basis of the claim is an act carried out in the exercise of public powers. For that reason, at 90, AG considered more appropriate that **the action is based on a right originating from an act of public authority or in a legal relationship characterized by a manifestation of public power**.

- ## Does the perspective of anticipated recognition/enforcement influence the interpretation of the notion of "civil and commercial matters"?

It is worth mentioning that some commentators (see also Van Calster, G.,

European Private International Law, Hart Publishing, 2016, p. 32) pointed out that, in the light of the judgment in Eurocontrol, the scope of application of the Brussels I bis Regulation should be interpreted by taking into account the perspectives of recognition and enforcement. Thus, if immunity bears no significance at the stage of determining jurisdiction, but it is later granted/recognised resulting in refusal of recognition and/or enforcement, concerns are raised regarding what is the practical use of exercising jurisdiction under the Brussels I bis Regulation against public authorities when there are little chances of recognition/enforcement.

On this point, the Spanish Supreme Court – in a case concerning the enforcement of a judgment rendered in Germany in favour of a private party against the Republic of Argentina –, held that a declaration of enforceability issued in relation to a general enforcement order does not breach the rules on immunity of execution. The Spanish Court precised that only when specific legal attachment measures are taken, a court should determine if the property in question is subject to execution. Thus, **the issue of immunity of execution and the assessment whether the property to be executed is for commercial or official purposes would be at stake at a second stage of the enforcement procedure, not interfering with the application of the Brussels I regime.**

A true game changer and the apex stone of international commercial litigation – the NILR Special

Edition on the 2019 HCCH Judgments Convention is now available as final, paginated volume

On 2 July 2019, the Hague Conference on Private International Law (HCCH) adopted the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019 HCCH Judgments Convention). The instrument has already been described as a true game changer and the apex stone in international commercial litigation.

To celebrate the adoption of the 2019 HCCH Judgments Convention, the Netherlands International Law Review (NILR) produced a special edition entirely dedicated to the instrument.

Volume 67(1) of the NILR, which is now available in its final, paginated version, features contributions from authors closely involved in the development of the instruments. The articles provide deep insights into the making, and intended operation, of the instrument. They are a valuable resource for law makers, practitioners, members of the judiciary and academics alike.

The NILR's Volume comprises the following contributions (in order of print, open access contributions are indicated; the summaries are, with some minor modifications, those published by the NILR).

Thomas John ACIArb, "Foreword" (open access)

Ronald A. Brand, "Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead"

Ron Brand considers the context in which a Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments was first proposed in 1992. It then traces the history of the Hague negotiations, both from within those negotiations and in regard to important developments outside the negotiations, through the completion of the 2005 Convention on Choice of Court Agreements

and the 2019 HCCH Judgments Convention. The article ends with comments on whether it is advisable to now resume discussion of a separate convention on direct jurisdiction.

Francisco Garcimartín, "The Judgments Convention: Some Open Questions"

Francisco Garcimartín explores some of the open issues that were discussed in the negotiation process but remained open in the final text, such as, in particular, the application of the 2019 HCCH Judgments Convention to pecuniary penalties (2) and negative obligations (4), as well as the definition of the res judicata effect (3).

Cara North, "The Exclusion of Privacy Matters from the Judgments Convention"

Cara North considers on issue of particular focus in the later phases of the negotiations of the Convention, namely, what, if any, judgments ruling on privacy law matters should be permitted to circulate under the 2019 HCCH Judgments Convention. Having acknowledged that privacy is an evolving, broad and ill-defined area of the law and that there are obvious differences in the development and operation of privacy laws and policies in legal systems globally, the Members of the Diplomatic Session on the Judgments Convention determined to exclude privacy matters from the scope of the Convention under Article 2(1)(l). The purpose of this short article is to describe how and why the Diplomatic Session decided to exclude privacy matters from the 2019 HCCH Judgments Convention and to offer some observations on the intended scope of that exclusion.

Geneviève Saumier, "Submission as a Jurisdictional Basis and the HCCH 2019 Judgments Convention"

The 2019 HCCH Judgments Convention establishes a list of jurisdictional filters, at least one of which must be satisfied for the judgment to circulate. One of those is the implied consent or submission of the defendant to the jurisdiction of the court of origin. While submission is a common jurisdictional basis in international litigation, its definition and treatment vary significantly across states, whether to establish the jurisdiction of the court of origin or as a jurisdictional filter at the enforcement stage in the requested court. This diversity is most evident with respect to the mechanics and consequences of objecting to jurisdiction to avoid

submission. The 2019 HCCH Judgments Convention adopts a variation on an existing approach, arguably the least complex one, in pursuit of its goal to provide predictability for parties involved in cross-border litigation. This contribution canvasses the various approaches to submission in national law with a view to highlighting the points of convergence and divergence and revealing significant complexities associated with some approaches. It then examines how the text in the 2019 HCCH Judgments Convention came to be adopted and whether it is likely to achieve its purpose.

Nadia de Araujo, Marcelo De Nardi, "Consumer Protection Under the HCCH 2019 Judgments Convention"

The 2019 HCCH Judgments Convention aims at mitigating uncertainties and risks associated with international trade and other civil relationships by setting forth a simple and safe system according to which foreign judgments can easily circulate from country to country. The purpose of this article is to record the historical moment of the negotiations that took place under the auspices of the HCCH, as well as to pinpoint how consumer cases will be dealt with by the Convention under Article 5(2).

Niklaus Meier, "Notification as a Ground for Refusal"

The 2019 HCCH Judgments Convention provides for several grounds for the refusal of recognition, including refusal based on insufficient notification. While this ground for refusal of the 2019 HCCH Judgments Convention seems quite similar to those applied in other conventions, the comparison shows that there are several differences between this instrument and other texts of reference, both with respect to the context of application as well as with respect to the details of the wording. The optional nature of the grounds for refusal under the 2019 HCCH Judgments Convention indicates that its primary focus is the free circulation of judgments, and not the protection of the defendant. The latter's protection is left to the discretion of the state of recognition: a sign of trust amongst the negotiators of the 2019 HCCH Judgments Convention, but also a risk for the defendant. Practice will show whether the focus of the negotiators was justified.

Junhyok Jang, "The Public Policy Exception Under the New 2019 HCCH Judgments Convention"

The public policy exception is inherently a fluid device. Its content is basically left

to each State. A shared public policy is an exception. Therefore, the obligation of uniform interpretation, as provided in Article 20 of the 2019 HCCH Judgments Convention, will have an inherent limit here. Moreover, the 2019 HCCH Judgments Convention leaves some important issues, including procedure, to national rules. Each requested State retains a discretion to invoke the Convention grounds of refusal in a concrete case, and on whether to make an ex officio inquiry or have the parties prove those refusal grounds. The 2019 HCCH Judgments Convention also provides for the concrete applications of the public policy exception, following the model of the 2005 Choice of Court Convention. Here, a purely grammatical reading may create some peripheral problems, especially with the specific defences of conflicting judgments and parallel proceedings. Solutions may be found in the method of purposive interpretation and some general principles, particularly the evasion of the law and the abuse of rights, before resorting to the public policy defence.

Marcos Dotta Salgueiro, "Article 14 of the Judgments Convention: The Essential Reaffirmation of the Non-discrimination Principle in a Globalized Twenty-First Century"

The 2019 HCCH Judgments Convention includes a non-discrimination disposition in Article 14, according to which there shall be no security, bond or deposit required from a party on the sole ground that such a party is a foreign national or is not domiciled or resident in the State in which enforcement is sought. It also deals with the enforceability of orders for payment of costs in situations where the precedent disposition applied, and lays down an 'opt-out' mechanism for those Contracting States that may not wish to apply that principle. This article frames the discussion of the non-discrimination principle in the wider context of previous private international law instruments as well as from the perspectives of access to justice, human rights and Sustainable Development Goals (SDGs), understanding that its inclusion in the 2019 HCCH Judgments Convention was an important, inescapable and necessary achievement.

Paul R. Beaumont, "Judgments Convention: Application to Governments" (open access)

The 2019 HCCH Judgments Convention makes the classic distinction between private law matters within its scope (civil or commercial matters) and public law matters outside its scope. It also follows the same position in relation to State

immunity used in the Hague Choice of Court Convention 2005 (see Art. 2(5) in 2019 and 2(6) in 2005). The innovative parts of the 2019 HCCH Judgments Convention relate to the exclusions from scope in Article 2 relating to the armed forces, law enforcement activities and unilateral debt restructuring. Finally, in Article 19, the Convention creates a new declaration system permitting States to widen the exclusion from scope to some private law judgments concerning a State, or a State agency or a natural person acting for the State or a Government agency. This article gives guidance on the correct Treaty interpretation of all these matters taking full account of the work of the Hague Informal Working Group dealing with the application of the Convention to Governments and the other relevant supplementary means of interpretation referred to in Article 32 of the Vienna Convention on the Law of Treaties.

João Ribeiro-Bidaoui, "The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations"

This article addresses the issue of the uniform and autonomous interpretation of private law conventions, including of private international law conventions, from the perspective of their Contracting States, particularly their judiciaries, and of the international organizations. Firstly, the author analyses the use of standard uniform interpretation clauses, and the origin of such clauses, in the context of the Hague Conference on Private International Law. The following part the article addresses negative and positive obligations imposed on States and their judiciaries under international law regarding the uniform and autonomous interpretation of international treaties. It is argued that States are not only obliged to refrain from referring to concepts from national laws for the purpose of the interpretation of international law instruments, but also that they face certain positive obligations in the process of applying the conventions. Those include referring to foreign case law, international scholarship, and under certain circumstances, also to travaux préparatoires. Thirdly, the author discusses the role of international organizations—e.g. HCCH, UNCITRAL, UNIDROIT, in safeguarding and facilitating the uniform and autonomous interpretation of private law conventions. It does so by describing various related tools and approaches, with examples and comments on their practical use (e.g. advisory opinions, information sharing, access to supplementary material, judicial exchanges and legislative action).

The NILR's Special Edition on the 2019 HCCH Judgments Convention concludes with a reproduction of the text of the *2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, as adopted on 2 July 2019.

Equality of the parties in investment arbitration – public international law aspects

Written by Silja Vöneky, University of Freiburg

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

I. Introduction

1. The question of the status of transnational corporations in investment arbitration is of central importance for the division of spheres of responsibility, for the pursuit and enforcement of values, and thus for the bases of legitimation of the international legal order today.

2. The promotion of foreign direct investments and the deepening of economic cooperation between States to promote economic development with the common welfare objective of increasing the prosperity of the peoples of the contracting States parties has been the legitimating basis of the ICSID Convention, which is central to investment protection under international law, and of the bilateral investment protection agreements.

3. Investment protection law, as part of public international law – from its basis and purpose – should not be understood as a departure from a state-centered

international order.

4. From the point of view of international law, the following questions have to be answered: What are the implications for the investment protection regime and investment arbitration as its core

a) if the triad justifying economic globalization (foreign private investment – promotion of economic development – promotion of prosperity) loses its persuasiveness as a paradigm for its justification in a normative sense, and

b) if a discourse of delegitimization prevails that accuses profit-oriented transnational corporations in their role as investors of irresponsible conduct, which is incompatible with the public welfare, and States of enabling this conduct to the detriment of their own population by means of international treaties establishing investment arbitration?

5. The aim to align investment treaties with the principle of sustainable development can be seen by the reforms initiated by States, groups of States, and the United Nations Conference on Trade and Development; besides, this aim should have an impact on already existing investment treaties and investment arbitration as far as it is coherent with international law.

II. Transnational corporations as equal parties under international law within the framework of investment arbitration

6. A necessary condition for the equality of the host State and an investing foreign corporation as parties is that both by consent agree to arbitration in respect of a legal dispute directly related to an investment, i.e. that the State, which is a contracting party to the ICSID Convention and a subject of international law, besides ratifying the convention additionally gives its written consent (Art. 25 (1), Art. 36 (2) ICSID Convention), which has a threefold function (legitimating element, transformative element and constitutive element).

7. For various reasons, the procedural equality of the host State and the transnational corporations within the framework of a concrete arbitration procedure is justified and thus legitimate with regard to the international legal order as a whole. In particular, it complies with the principle of fair trial and the rule of law as enshrined in international law.

8. The principle of the equality of the parties does not preclude that transnational corporations are given preferential access to arbitration on the basis of international treaties and that arbitration is open only to transnational corporations.

9. The principle of the equality of the parties is inter alia observed during the composition of an arbitral tribunal if the judges are appointed by both parties in the same manner and each judge fulfils criteria which plausibly ensure impartiality. However, the appointment by the parties is not a necessary condition for the equality of the parties.

10. Questions about how to implement the principle of the equality of the parties arise in the arbitral proceedings themselves, in particular with regard to the possibility that several investors seek to bring their claims against the same host State, with regard to the admissibility of a counterclaim by the host State, with regard to the admissibility of "amicus curiae briefs" (third person submissions), with regard to the so-called equality of arms, and with regard to the problem of safeguarding confidentiality interests (in particular State secrecy).

11. Questions of the applicable law within the scope of the merits, such as the possibility of the host State to invoke justifications under international law (e.g. necessity) and the principles of interpretation of the investment protection agreements, are not considered to be questions of the principle of the equality of the parties.

III. (Un)justified unequal treatment to the detriment of transnational corporations as parties with regard to corruption problems

12. The decisions of arbitral tribunals, which deny their jurisdiction or the admissibility of the investor claim if the defendant host State asserts corruption, are convincing (only) with regard to limited types of cases.

13. The lack of jurisdiction of the tribunal or the inadmissibility of the investor's claim does not seem to be justified even if the transnational corporation's act of corruption made the investment possible in the first place: The contrary reasoning in investment arbitration decisions, based inter alia on the wording of bilateral investment treaties, the scope of the host State's consent and/or a violation of fundamental general principles (such as, inter alia, the so-called "clean hands" principle, the "international public policy" or "transnational public

policy", or the principle that no one shall profit from his/her own wrong) is not convincing for various reasons .

14. The same is true even more – in accordance with recent investment arbitration decisions – if the foreign investor acted corruptly after the investment had already been initiated in the host State.

15. Instead, corruption should be taken into account in the decision on the merits of a case in accordance with the objectives and principles of the international legal order in such a way that central values of investment protection are not disproportionately undermined, but nevertheless relevant disadvantages arise for transnational corporations if they engage in acts of corruption abroad for or during investments. This can be achieved if the amount of investors compensation is reduced for example by a multiple of the sum of the corruption.

16. When considering acts of corruption in the merits of a case, the arbitral tribunal should therefore consider the distribution of responsibility, the pursuit and enforcement of global values, and the bases of legitimacy of the current international legal order, also taking into account the state's anti-corruption obligations, in particular as enshrined in anti-corruption conventions and human rights treaties.

IV. Concluding remarks

17. The procedural equality of host States and transnational corporations within the framework of an investment arbitration procedure has no implications on the status of transnational corporations in the international legal order as a whole; other views, which argue that transnational corporations are (full or partial) subjects of international law in a normative sense, exceed the – *de lege lata* – narrowly limited equality.

18. The risks associated with a normative enhancement of transnational corporations in the international legal order present another argument against the view that corporations are (full or partial) subjects of international law. These risks are hinted at in the delegitimization discourse, which grants profit-oriented companies less influence in the international legal order of the 21st century.

19. Even without the status as subjects of international law, transnational corporations can be bound by norms of international law (international law in the

narrow sense and so-called soft law). The UN Guiding Principles for the Business and Human Rights are, inter alia, of particular relevance.

20. If – with good reasons – foreign direct investments by transnational corporations continue to be promoted via international law as a means of increasing prosperity in the participating States for the benefit of the respective population, the public-good orientation of international investment arbitration tribunals should be further developed, on the one hand, by reforming the constitutional aspects of the arbitral procedure, and, on the other hand, by further focusing their jurisprudence on public-good aspects including the proportionate protection of responsible investments.

Full (German) version: *Silja Vöneky,* Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit unter besonderer Berücksichtigung von Korruptionsproblemen – Unternehmen als völkerrechtlich gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 339 et seq.

Private International Law Aspects of Corporate Social Responsibility Ius Comparatum – Global Studies in Comparative Law – Volume 42

A new volume in the series of Ius Comparatum – Global Studies in Comparative Law has been recently published by Springer. The volume was edited by Prof. *Catherine Kessedjian***,** Université Panthéon-Assas Paris II Paris, France, and Prof.

Humberto Cantú Rivera, School of Law University of Monterrey, Mexico.

The book addresses one of the core challenges in the corporate social responsibility (or business and human rights) debate: how to ensure adequate access to remedy for victims of corporate abuses that infringe upon their human rights. However, ensuring access to remedy depends on a series of normative and judicial elements that become highly complex when disputes are transnational. In such cases, courts need to consider and apply different laws that relate to company governance, to determine the competent forum, to define which bodies of law to apply, and to ensure the adequate execution of judgments. The book also discusses how alternative methods of dispute settlement can relate to this topic, and the important role that private international law plays in access to remedy for corporate-related human rights abuses.

This collection comprises 20 national reports from jurisdictions in Europe, North America, Latin America and Asia, addressing the private international law aspects of corporate social responsibility, most of which were prepared for the Fukuoka Conference of the
International Academy of Comparative Law in the summer of 2018. They were last
updated in February 2019 for this publication. The model questionnaires, in French
and English, are included after the national reports.

The book draws two preliminary conclusions: that there is a need for a better understanding of the role that private international law plays in cases involving transnational elements, in order to better design transnational solutions to the issues posed by economic globalisation; and that the treaty negotiations on business and human rights in the United Nations could offer a forum to clarify and unify several of the elements that underpin transnational disputes involving corporate human rights abuses, which could also help to identify and bridge the existing gaps that limit effective access to remedy. Adopting a comparative approach, this book appeals to academics, lawyers, judges and legislators concerned with the issue of access to remedy and reparation for corporate abuses under the prism of private international law.

The list of contributors is the following:

Corona and Private International Law: A Regularly Updated Repository of Writings, Cases and Developments

by Ralf Michaels and Jakob Olbing

Note: This repository will stay permanent at www.conflictoflaws.net/corona.
Please send additions to olbing@mpipriv.de

Updated: November 08, 2021

The coronavirus has created a global crisis that affects all aspects of life everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the

legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

For a time Private international law has been vividly discussing the relevance of the crisis for the field, and of the field for the crisis Private international law matters are crucial to countless issues related to the epidemic – from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

Knowledge of these issues is important. It is important for private international lawyers to realize the importance of our discipline. But it is perhaps even more important for decision makers to be aware of both the pitfalls and the potentials of conflicts of law.

This site, which we hope to update continually, is meant to be a place to collect, as comprehensively as possible, sources on the interaction of the new coronavirus and the discipline. The aim is not to provide general introductions into private international law, or to lay out sources that could be relevant. Nor is this meant to be an independent scholarly paper. What we try to provide is a one-stop place at which to find private international law discussions worldwide regarding to coronavirus.

For this purpose, we limit ourselves to the discipline as traditionally understood—jurisdiction, choice of law, recognition and enforcement, international procedure. Coronavirus has other impacts on transnational private law and those deserve attention too, but we want to keep this one manageable.

Please help make this a good informative site. Please share any reference that you have – from any jurisdiction, in any legislation – and we will, if possible, share them on this site. Please contact olbing@mpipriv.de

General

In the early beginning of the Pandemic, contributions from scholars, courts, international institutes and politicians where of a more general character as it was difficult to predict the scope and duration of the new situation.

The European Law Institute for example issued a set of Principles for the

COVID-19 Crisis, covering a variety of legal topics such as Democracy (Principle 3) and Justice System (Principle 5) as well as Moratorium on Regular Payments, Force Major and Hardship, Exemption from Liability for simple Negligence (Principles 12 to 14). Ending with something everybody hopes for: Return to Normality (Principle 15).

The Secretary General of the Hague Conference recorded a short online message from his home addressing the most urgent topics. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

The university of Oxford's Blavatnik School of Government collects all measures by governments around the world in the "Coronavirus Government Response Tracker".

A German journal is dedicated solely to the topic "COVID-19 and the Law". The journal is interesting for academics and practitioners alike, since it publishes papers on specific COVID-19 related issues, as well as an extensive overview of German judgements.

An open access project by intersentia examines the COVID-19 legislation and its consequences in European states, bringing together contributions from over 85 highly regarded academics and practitioners in one coherent, open access resource.

Matthias Lehmann discusses the role of private international law on a number of issues – the impact of travel restrictions on transportation contracts, contract law issues for canceled events, canceled or delayed deliveries, but also liability for infections.

Online Workshops, Webinars and Conferences

In time of travel restrictions and social distancing the academic exchange is still active and sometimes more diverse than bevor, since people from all around the world come together, as the great number of workshops and symposiums that are held online shows.

Mid November (17 to 19), the Mexican Academy of Private International and Comparative Law discusses during its XLIV seminar among other topics the

impacts of the pandemic on international family as well as aspects surrounding vaccines. participants will discuss in Spanish and the online participation is free of charge.

Contrary to the regular sessions of The Hague Academy of International Law's Centre for Studies and Research, the upcoming edition is entirely online. The topic will be "Epidemics and International Law" and held from September 2020 to June 2021. The collective works will be published later by the Academy. You will find application and programme here.

The Minerva Center for Human Rights at Tel Aviv University hosted an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families. A call for papers expired on 28 February 2021.

Another series of events organized by the University of Sydney's Centre for Asian and Pacific Law will regularly discuss topics such as social justice, civil rights, trade and investment in light of (post) pandemic developments. Of that series one webinar on the aftermath of the pandemic in the Asia-Pacific region focussed on commercial dispute resolution and issues related to private international law.

Marc-Philippe Weller discussed in a workshop on December 1, 2020 about "Nationalism, Territorialism, Unilateralism: Managing the Pandemic Through Private International Law?" if the measures enacted due to the pandemic may have an effect on the connecting factors in European private international law. He had a particular focus on the determination of habitual residence.

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions was the topic of an online conference (mostly in German) on August 2020. Recordings of the presentations are online.

During a live youtube conference on July 23, 2020 Humberto Romero-Muci presented with several others his views on "Migrantes, pandemia y política en el Derecho Internacional Privado". The video is still online.

A webinar organized by experts from MK Family Law (Washington) and Grotius Chamber (the Hague) discussed pertinent issues relating to international child abduction in times of COVID-19.

Matthias Lehmann presented his views on the application of force majeure certificates and overriding mandatory provisions n international contracts in an online-workshop on “COVID-19 and IPR/IZVR”.

Another webinar was held on “Vulnerability in the Trade and Investment Regimes in the Age of #COVID19”, which is available online, as part of the Symposium on COVID-19 and International Economic Law in the Global South.

The University of New South Wales held a talk on “COVID-19 and the Private International Law” in May, which you find on youtube.

As a follow-up of a webinar on PIL & COVID-19, Inez Lopez and Fabrício Polido give “some initial thoughts and lessons to face in daily life”

A group of Brazilian scholars organized an online symposium on Private International Law & Covid-19. Mobility of People, Commerce and Challenges to the Global Order. The videos are here.

The Organization of American States holds a weekly virtual forum on “Inter-American law in times of pandemic” (every Monday, 11:00 a.m., UTC-5h). One topic of many will be on “New Challenges for Private International Law” (Monday, June 15, 2020).

State Liability

Some thoughts are given to compensation suits brought against China for its alleged responsibility in the spread of the virus. One main issue here is whether China can claim sovereign immunity.

In the United States, several suits have been brought in Florida (March 12), Nevada (March 23) and Missouri (April 21) against the Peoples republic of China (PRC), which plaintiffs deem responsible for the uncontrolled spread of the virus, which later caused massive financial damage and human loss in the United States. Not surprisingly officials and scholars in China were extremely critical (see here and here).

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China’s sovereign immunity, as do Sophia Tang

and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-) actions by the Chinese Gorvernment. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. The same conclusion is drawn by Angelica Bonfanti and Chimène Keitner after a thorough analysis of the grounds on which a liability of china could be based. An overview and detailed presentation of many class actions and suits filed by states can be found here.

Until now, only very little has happened concerning the American suits. Some suits where (voluntarily) dismissed or tossed. One suit against the PRC for damages amounting to $ 800 billion was ordered to be dismissed by the District Court, since the plaintiff failed to state a claim (*James-El v the Peoples Republic of China* (M.D.N.C. 2020) WL 3619870). For a general update on the lawsuits against the PRC from January 22, 2021 see here.

In an interview with a German newspaper Tom Ginsburg lays out the legal issues that will be faced, if the claims of state liability are brought in front of a German court. Fabrizio Marrella discusses the Italian perspective on that issue. Brett Joshpe analyzes more generally China's private and public liability in the domestic and international framework.

A Republican Representative is introducing two House Resolutions urging the US Congress to waive China's sovereign immunity in this regard; such a waiver has also been proposed by a Washington Post author. The claim has also found support by Fox News.

Interestingly, there is also a reverse suit by state-backed Chinese lawyers against the United States for covering up the pandemic. Guodong Du expects this will likewise be barred by sovereign immunity.

Martins Paparinskis shares the concerns about a successful litigation against foreign states. However, he suggests to change the law of state responsibility fundamentally to be prepared for further international catastrophes such as the current pandemic.

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of

them in public international law, but also including suits in Chines, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

Contract Law

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here. Two chapters of the book "*La pandemia da COVID-19. Profili di diritto nazionale, dell'Unione Europea ed internazionale*" edited by Marco Frigessi di Rattalma are dedicated to jurisdiction and applicable law in contract matters.

The UNIDROIT Secretariat has released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.

Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as *lex contractus*, as *lois des police* and through consideration within the applicable law.

Gerhard Wagner presents COVID caused defaults under the aforementioned ELI principles.

If a contracting party is unable to perform its contractual obligations, incapacity to perform can be based on force majeure or hardship. Some contributions suggest to apply for force majeure certificates which are offered by most countries, for example by China, Russia. How such a certificate can influence contractual obligations under English and New York Law is shown by Yeseung Jang. The German perspective is given by Philip Reusch and Laura Kleiner. Further the South Korean, French and the Common Law perspective on force majeure have been published. Bruno Ancel compares the French and American approach. The difficulty to implement appropriate force majeure clauses in a contract is shown by Matteo Winkler.

Drawing from recent cases and experiences Franz Kaps analyses the difficulties in the operation within ICC force majeure clauses and suggests how "state-of-the-art force majeure clauses" should be constructed to include an international

pandemic.

Victoria Lee, Mark Lehberg, Vinny Sanchez and James Vickery go beyond force majeure implications on contracts in their expert analysis.

William Shaughnessy presents issues which might occur in international construction contracts.

Another crucial aspect is the application of overriding mandatory rules on international contracts. Ennio Piovesani discusses whether Italian decree-laws enacted in view of the pandemic can operate as overriding mandatory rules and whether that would be compatible with EU law. So does Giovanni Zarra on international mandatory rules. Aposotolos Anthimos adds the Greek perspective, Claire Debourg the French to the discussion.

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.

Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

The crisis hits in particular global value and production chains. Impacts are discussed by Tomaso Ferando, by Markus Uitz and Hemma Parsché and by Anna Beckers, though neither focuses specifically on private international law.

Caterina Benini explains a new Italian mandatory rule providing a minimum standard of protection for employees.

Klaus Peter Berger and Daniel Behn in their historical and comparative study on force majeure and hardship, highlight that such remedies are quite regular to find and fit to distribute the risk emanating from such a crisis evenly.

CISG

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe

dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

Performance on advance purchase agreements on delivering the COVID-19 vaccines, have been a major political debate recently. While asking which law is applicable on such contracts Ben Köhler and Till Maier-Lohmann suspect, that if CISG is in fact the applicable law, the consequences would be far reaching and could be the very first time the CISG enters the "global centre stage". Unfortunately, a Belgian court deciding over a claim by the EU against AstraZeneca for the delivery of doses of vaccines, did not even consider the application of the CISG.

Corporate Law

If the questions of purchasing COVID-19 vaccines shifts to buying the entire company the issue at hand becomes more political. Arndt Scheffler analyses the situation in which a foreign investor tries to purchase a company, which is crucial for the domestic battle against the pandemic and the search for a vaccine.

Employment Law

Closed borders and practically everybody working from has its impact on employment law.

In export-oriented economies such as Germany, it is very common, that employees are posted abroad on a long-term basis. COVID-19 legislation shapes and influences the legal relation between employer and employee, but also between employee and host-country. Roland Falder and Constantin Franke-Fahle discuss these influences with particular attention to the question of the applicable law here.

Tort Law

Damages caused by an infection are mostly subject to tort law but can also arise

in a contractual relation. Focusing on the applicable law on non-contractual liability Rolf Wagner explains, that sometimes damages can be claimed both, as contractual and as non-contractual. He stresses that as the substantive law on damages caused by an infection is still to evolve, applying foreign law is a particular challenge.

An extensive overview about the law applicable to damages caused by an COVID-19 infection under Indian international tort law is given by Niharika Kuchhal, Kashish Jaitley and Saloni Khanderia. Khanderia published a second article, concerning the need of a codification of Indian conflict of laws on tort in respect of a foreseeable surge in international tort proceedings, caused by the pandemic.

General implications of the coronavirus on product liability and a possible duty to warn costumers, without specific reverence to conflict of laws.

In Austria, a consumer protection association is considering mass litigation against the Federal State of Tyrolia and local tourist businesses based on their inaction in view of the spreading virus in tourist places like Ischgl. A questionnaire is opened for European citizens. Matthias Weller reports.

Florian Heindler discusses how legal measures to battle the virus could be applicable to a relevant tort case (either as local data or by special connection), by analyzing the hypothetical case of a tourist who gets infected in Austria.

Jos Hoevenars and Xandra Kramer discuss the potential of similar actions in the Netherlands under the 2005 Collective Settlement Act, WCAM.

Family Law

Implications also exist in family law, for example regarding the Hague Abduction Convention.

In an Ontario case (Onuoha v Onuoha 2020 ONSC 1815), concerning children taken from Nigeria to Ontario, the father sought to have the matter dealt with on an urgent basis, although regular court operations were suspended due to Covid-19. The court declined, suggesting this was “not the time” to hear such a motion, and in any way international travel was not in the best interest of the

child. For the discussion see here.

Further sspects of travel restrictions in international abduction cases are analysed by Gemme Pérez.

A general overview of abduction in times of corona was published by Nadia Rusinova. Another article by Nadia by her covers recent case law and legislation on remote child related proceedings which were conducted during the last weeks around the world. She also highlights, that COVID-19 measures can impact Article 8 ECHR.

Also cases of international surrogacy come into mind which are affected by COVID-19, as Mariana Iglesias shows.

Personal Data

The protection of personal data in transnational environments has always been a controversial topic in conflict of laws. Jie Huang shows, that due to COVID-19 existing tensions between the EU, the USA and China are reflected in their conflict of laws approach.

The European Commission published a "toolbox for the use of technology and data to combat and exit from the COVID-19 crisis", which was an opportunity for some contributions on the GDPR and Tracing Apps.

Economic Law

The crisis puts stress on global trade and therefore also economic law. Sophie Hunter discusses developments in the competition laws of various countries (though with no explicit focus on conflict of laws issues).

A list of authors from around the world analyses the interrelation between "Competition law and health crises" in its international context in the current issue Concurrences.

Intellectual Property

Due to lockdowns and school closures, online work and teaching has exorbitantly increased but, as Marketa Trimble stresses, with little notion of transnational copyright issues.

To tackle those a prominently endorsed letter to the World Intellectual Property Organization, emphasizes the need to ensure that intellectual property regimes should support the efforts against the Coronavirus and should not be a hindrance.

Public Certification

In times of lockdown and closed borders notarization and public certification become almost impossible. Therefore, various countries have adjusted their legislation. You will find an overview here.

The electronic Apostille Program (e-APP)experiences a new popularity, as a considerable number of countries have implemented new components of the e-APP. For more information see here.

Dispute Resolution

In Dispute resolution two main questions are being discussed.

On the one hand the question of jurisdiction as such, for example for claims suffered within contractual or non-contractual relationships. Rolf Wagner gives the European and German perspective presenting the possible courts of jurisdiction under Brussel I Regulation (recast), the Lugano Convention and the German code of civil procedure.

In a recent case by the Supreme Court of Queensland (AUS), the court examined the impact of COVID-19 on a foreign jurisdiction clause. You can find Jie Huang's comments on the decision here.

One the other hand, it is being discussed to what extend the requirement of physical presence in courts can conform with social distancing and travel restrictions. As a more drastic reaction some courts suspended their activities

except for urgent matters all together. Developments in Italy are discussed here, developments in English law here.

On the other hand, another possibility is the move to greater digitalization, as discussed comparatively by Emma van Gelder, Xandra Kramer and Erlis Themeli. The Hague Conference on Private International Law (HCCH) published a Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention, discussed also with reference to Corona by Mayela Celis.

Using the pandemic, Gisela Rühl analyses why the potential of digitalization is so scarcely used in civil procedure and how it can be improved to serve the needs of a digital society.

Benedikt Windau analyses the German civil procedure and how international digital heraings could be possible within the existing law.

In litigation, virtual hearings become a prominent measure to overcame restrictions on physical presence. While in on some jurisdiction such hearings are possible, Luigi Malferrari discusses the question if such hearings should also be enabled before the CJEU.

Maxi Scherer takes the crisis as an opportunity to analyse virtual hearings in international arbitration. Complications and long-term effects of virtual arbitration are presented here. Mirèze Philippe however sees this development as a positive game changer not just in health aspect but also to protect the environment and saving time as well as travelling costs (further articles covering international arbitration and virtual hearings: here and here).

A very broad presentation of legislation in France, Italy and Germany in civil procedure, including cross border service and taking of evidence as well as its implications on international child abduction and protection, is given by Giovanni Chiapponi.

Jie Huang examines the case of substitute service under the Hague Service Convention during the pandemic in the case Australian Information Commission v Facebook Inc ([2020] FCA 531).

A US project guided by Richard Suskind collects cases of so-called “remote courts” worldwide.

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.

Gilberto A. Guerrero-Rocca analyses the impacts of COVID-19 on international arbitration in relation to the CISG.

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Corporate responsibility in (public) international law

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Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

I. Companies – responsibility

1. As for commercial entities, international law is concerned, above all, with transnational or multinational companies. The term basically describes the conglomerate of commercial entities that are acting separately in at least two different countries and which are tied together by a regime of hierarchical coordination.

2. In times of „global governance" the international legal concept of responsibility

is undergoing a process of de-formalization and, thus, encompasses the violation of social behavioural expectations, which for companies may result from international standards that are not legally binding. The resulting responsibility is a legal one insofar as the law adopts those standards and attaches negative consequences to their violation.

II. Private persons and the law of international responsibility

3. Private companies may be held responsible under international law to the extent that they are either themselves bound by primary legal obligations (direct responsibility), or their business activities are regulated by States which, in doing so, are fulfilling their own international legal obligations (indirect responsibility). A State may just as well impose such regulation without actually being under an obligation to do so (e.g. the US Alien Tort Statute).

Private persons as subjects of international legal obligations

4. Private persons being themselves bound by international legal obligations pertain to the process of de-medatization, which established the legal personality of the individual under international law.

5. Sovereign States can, by concluding international treaties, create legal obligations for private persons, including private companies, directly under international law. The personal scope of this comprehensive law-creating power of States is delimitated by their personal jurisdiction under international law. Whether an individual treaty itself gives rise to legal obligations for private persons, is, just as the creation of individual rights, a matter of treaty interpretation.

6. Genuine legal obligations have evolved for private persons under international criminal law: Here, detailed primary obligations of private persons have developed that are linked to a specific regime of individual responsibility, in particular under the Statute of the International Criminal Court.

7. In contrast, the extension of international human rights obligations to apply directly between private persons is not yet part of the international *lex lata*. Individual texts pointing in that direction (such as art. 29 para. 1 of the Universal Declaration of Human Rights) are merely of a programmatic nature.

8. Genuine international legal obligations of companies can today be found in the rules regulating deep sea-bed activities (arts. 137, 153 para. 2 UN Convention on the Law of the Sea) and in various treaties establishing regimes of civil liability.

9. Obligations of private persons under international law, including those having direct effect within UN Member States, may also be created by the UN Security Council through resolutions under arts. 39, 41 of the UN Charter.

10. It is fairly uncertain whether the initiative, currently being undertaken within the UN Human Rights Council, to adopt a „legally binding instrument" encompassing direct human rights liability of private companies, will ever have a chance of becoming binding law.

11. To the extent that there actually are primary obligations of private persons under international law, a general principle of law requires their violation to result in a duty to make reparation. Only in exceptional circumstances could the rules of State responsibility be transferred to private persons.

Obligations to establish the responsibility of private persons

12. An indirect responsibility under international law applies to undertakings via the international legal obligation of States to criminalize certain activities, e.g. in respect of waste disposal, bribery in foreign countries, organized crime and corruption.

Responsibility of private persons under autonomous national law

13. Provisions in national law that autonomously sanction private acts for international law violations bridge with their own binding effect the fact that the private person is not itself bound by the international legal norm.

14. The French Law No. 399-2017 on the plan de vigilance is far too general and vague to serve as an example for an (indirect) international legal reporting responsibility. The same applies to the CSR directive of the European Union of 2014.

III. Responsibility on the basis of non-binding rules of conduct

Behavioural governance without legally binding effects

15. The values contained in certain international law principles shape some social behavioural expectations that are summarized today in concepts of corporate social responsibility (CSR). As a matter of substance, those expectations relate to human rights, the environment, conditions of labour and fighting corruption.

Processes of rule-making

16. The discussion is mainly focused on certain international, cross-sector corporate codes of conduct, such as the OECD Guidelines for Multinational Enterprises (1976), die ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), the UN Global Compact (2000) and the UN Guiding Principles on Business and Human Rights (2011).

17. In particular, with regard to human rights and environment, those rules are extremely unspecific, which means that here, law merely serves as a backdrop in order to endow social behavioural expectations with moral authority.

Responsibility by reception

18. In order to adopt and implement those business-related standards, basically all instruments of law-making and application can be used, as long as they impose normative requirements on companies and their activities. Legal certainty standards under the rule of law, as well as the rules of international law on the jurisdiction of States, can limit the reception.

19. Non-binding standards could be implemented, for example, via the legal regimes of State aid (in particular with respect to export finance), public procurement, investment protection and the rules on civil liability. So far, however, the international standards on business conduct are rarely being implemented in a legally binding manner.

IV. Conclusion

20. If the distinction of law and non-law is to be maintained, responsibility of companies in international law is a theoretical possibility, but of little practical relevance: Only in very specific circumstances are private companies themselves subjected to international legal obligations; moreover, it is similarly rare that „soft“ international standards of conduct are being adopted by „hard“ law and thereby made into specific legal duties of companies.

21. Behavioural standards that determine the international debate on CSR assign a mere „backdrop function“ to the law, as they neither identify concretely the international legal norms referred to, nor differentiate them properly. In that context, companies are simply required to publicly declare their commitment to „the good cause“, which results in duties to take precautionary measures, to exercise transparency and to publish reports.

22. That is why environmental protection, human rights etc. in relation to the activities of private companies is still mainly the responsibility of States. Tools that exist in international law in this respect, such as the rules of attribution or protective duties, must be adapted and enhanced, in order to achieve adequate solutions for detrimental business conduct on the basis of State responsibility.

Full (German) version: *Oliver Dörr*, Unternehmensverantwortlichkeit im Völkerrecht, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 133 et seq.

Webinars on Private International Law and Covid-19: 11-22 May 2020

Gathering (or rather e-gathering) professors and researchers from Brazil, Argentina, Uruguay, Mexico, Spain, and Portugal, a series of webinars is taking place from today until 22 May, under the general topic of PIL and Covid-19: Mobility, Commerce and Challenges in the Global Order.

Subtopics are:

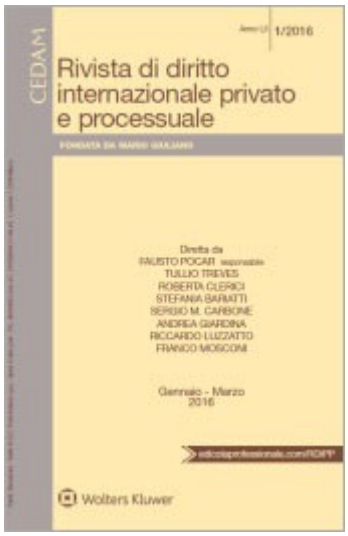
I – PIL, International Institutions and Global Governance in times of Covid-19

II – Protecting persons in mobility and Covid-19: Human Rights, Families, Migrants, and Consumers

III – International Commerce and Covid-19: Global Supply Chains, Civil Aviation, Technologies & Labor

Full programme and more information: here.

Rivista di diritto internazionale privato e processuale (RDIPP) No 1/2020: Abstracts



The first issue of 2020 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Antonietta Di Blase, Professor at the University of Roma Tre, **Sull'interpretazione delle convenzioni e delle norme dell'Unione europea in materia di diritto internazionale privato** ('On the Interpretation of the European Private International Law Conventions and Provisions'; in Italian)

- The paper provides an overview of the practice of international and national Courts relating to the interpretation of private international law conventions and EU rules, where uniform approach and autonomy from the national legal orders of Member States are construed as fundamental

criteria. Some elements, especially drawn from the Court and the Italian practice, makes it evident that the national judicial organs have substantially endorsed the interpretation by the Court of Justice of the EU of the acts adopted within the framework of the judicial cooperation in civil matters. Possible gaps in EU rules could be overcome through interpretation – in keeping with the main human rights principles – taking into account that sometimes the legislation in force in the Member States follow a different approach, as in the case of family law. Finally, the paper addresses problems connected to the interpretation of conventions with Third States, also taking into account the consequences of the UK's exit from the European Union.

Gilles Cuniberti, Professor at the University of Luxembourg, **Signalling the Enforceability of the Forum's Judgments Abroad** (in English)

- The aim of this article is to document and assess the efforts made by international commercial courts to signal the enforceability of their judgments abroad. To that effect, three strategies were developed. The first and most obvious one was to enter into agreements providing for the mutual enforcement of judgments of contracting States which could serve the same function as the 1958 New York Convention for arbitral awards. Yet, as the 2005 Hague Convention has a limited scope and the 2019 Hague Convention is not yet in force, alternative strategies were identified. Several international commercial courts are actively pursuing the conclusion of non-binding documents with other courts or even law firms suggesting that the judgments of the forum would be enforced by the courts of other States. Finally, one international court has also explored how it could convert its judgments into arbitral awards.

Laura Baccaglini, Associate Professor at the University of Trento, **L'esecuzione transfrontaliera delle decisioni nel regolamento (UE) 2015/848** ('Cross-Border Enforcement of Decisions Pursuant to (EU) Regulation 2015/848'; in Italian)

- This paper addresses the cross-border enforcement of insolvency decisions in Europe. Notably, it examines how the claims brought in the interest of an insolvency proceeding opened in one Member State can be pursued in other Member States. The topic refers to EU Regulation

848/2015 that, as of 26 June 2017, replaced EC Regulation No 1346/2000 without introducing any significant new features as regards the circulation of such judgments, which remain subject to a system of automatic recognition. The reference made by such Regulation to Regulation No 1215/2012 makes the enforcement of those judgments equally automatic, without the need for prior exequatur by the court of the State addressed but only requiring the delivery of a certificate of enforceability by the court of the State of origin. The problem is examined by taking the liquidation procedure as a model, assuming that it was opened in a Member State other than Italy, where the insolvency practitioner needs to recover assets that have been disposed of by the debtor, after the opening of the procedure. The question is addressed as to how the insolvency practitioner can prevent the continuation of individual enforcement proceedings still pending and whether he can intervene to have the assets liquidated, withholding the proceeds. More generally, the problem arises as to which rules govern the liquidation of assets located in Italy and belonging to the debtor. In all these cases, the issue is whether the foreign judgment should be enforced and, if so, how it should be enforced.

The following comment is also featured:

Giovanna Adinolfi, Professor at the University of Milan, **L'accordo di libero scambio tra l'Unione europea e la Repubblica di Singapore tra tradizione e innovazione** ('The Free Trade Agreement between the European Union and the Republic of Singapore between Tradition and Innovation'; in Italian)

- The Free Trade Agreement (FTA) with Singapore entered into force on 21 December 2019. It is one of the so-called new generation treaties negotiated and concluded by the European Union within the framework of the trade policy strategy launched in 2006. The FTA is complemented by the Investment Protection Agreement (IPA), signed in 2018 and whose entry into force requires the ratification by all EU Member States, in addition to the EU and Singapore. The overall purpose of the contribution is to assess to what extent the parties to the two agreements have not overlooked the dense network of other treaties and conventions that already govern their cooperation in economic matters. Indeed, the substantive provisions and the dispute settlement mechanisms established

under the FTA and IPA have been inspired by these external sources and by their relevant case law. The analysis focuses, first, on the FTA provisions on trade in goods and services, establishment, subsidies, government procurement and intellectual property rights (para 2-6). Thereafter, the IPA is taken into consideration for the purposes of identifying possible overlaps with the FTA rules on establishment (para 7). Finally, focus is placed on the envisaged dispute settlement mechanisms, in view of the role they may play for a proper safeguard of the businesses' interests (para 7). This issue arises because of the provisions included in both the FTA and the IPA excluding the direct effects of the two agreements in the parties' legal order. Against this framework, the investor-State dispute settlement mechanism established under the IPA is called on to play a crucial role, also in the light of the detailed provisions on the enforcement of awards under art. 3.22 IPA.

In addition to the foregoing, this issue features the following book review by *Angela Lupone*, Professor at the University of Milan: Nora Louisa Hesse, **Die Vereinbarkeit des EU-Grenzbeschlagnahmeverfahres mit dem TRIPS Abkommen**, Mohr Siebeck, Tübingen, 2018, pp. XI-274.

Corporate responsibility and private (international) law

Written by Giesela Rühl, University of Jena/Humboldt-University of Berlin

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of all contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. Corporate social responsibility has been the subject of lively debates in private

international law for many years. These debates revolve around the question of whether companies domiciled in countries of the Global North can be held liable for human rights violations committed by foreign subsidiaries or suppliers in countries of the Global South (so-called supply chain liability).

2. According to the majority view in the public international law literature, companies are not, at least not directly bound by human rights. Although numerous international law instruments, including the UN's 2011 Guidelines for Business and Human Rights (Ruggie Principles), also address companies, liability for human rights violations is, therefore, a matter of domestic law.

3. The domestic law applicable to liability for human rights violations must be determined in accordance with the provisions of (European) private international law. Direct recourse to the *lex fori*, in contrast, is not possible. The legal situation in Europe is, therefore, different from the United States where actions which are brought on the basis of the Alien Tort Claims Act (ATCA) are governed by US-American federal (common) law.

4. Claims for human rights violations committed abroad will usually be claims in tort. Under (European) private international law it is, therefore, the law of the place where the damage occurs (Article 4(1) Rome II Regulation) and, hence, foreign law which governs these claims. Exceptions apply only within narrow limits, in particular if domestic laws can be classified as overriding mandatory provisions (Article 16 Rome II Regulation) or if application of foreign law violates the *ordre public* (Article 26 Rome II Regulation).

5. In addition to tort law, claims for human rights violations may also be based on company law, namely when directors are directly held liable for torts committed by a foreign subsidiary. According to the relevant private international law provisions of the Member States these claims are governed by the law of the (administrative or statutory) seat of the foreign subsidiary. As a consequence, claims in company law are also subject to foreign law.

6. The fact that (European) private international law submits liability for human rights violations to foreign law is very often criticized in the private international law literature. Claiming that foreign law does not sufficiently protect the victims of human rights violations, a number of scholars, therefore, attempt to subject liability claims *de lege lata* to the domestic law of the (European) parent or buyer

company.

7. These attempts, however, raise a number of concerns: first, under traditional (European) private international law, substantive law considerations do not inform the determination of the applicable law. Second, the wish to apply the domestic law of a European country is mostly driven by the wish to avoid poorly functioning court systems and lower regulatory standards in countries of the Global South. Neither of these aspects, however, has anything to do with the applicable tort or company law. Regulatory standards, for example, are part of public law and, therefore, excluded from the reach of private international law. Finally, the assumption that the domestic law of the (European) parent or buyer company provides more or better protection to the victims of human rights violations does not hold true *de lege lata*. Since parent and buyer companies are legally independent from their foreign subsidiaries and suppliers, parent and buyer companies are only in exceptional cases liable to the victims of human rights violations committed abroad by their foreign subsidiaries or suppliers (legal entity principle or principle of entity liability).

8. The difficulties to hold (European) parent and buyer companies *de lege lata* liable for human rights violations committed by their foreign subsidiaries or suppliers raises the question of whether domestic laws should be reformed and their application ensured via the rules of private international law? Should domestic legislatures, for example, introduce an internationally mandatory human rights due diligence obligation and hold companies liable for violations? Proposals to this end are currently discussed in Germany and in Switzerland. In France, in contrast, they are already a reality. Here, the Law on the monitoring obligations of parent and buyer companies (Loi de vigilance) of 2017 imposes human rights due diligence obligations on bigger French companies and allows victims to sue for damages under the French Civil Code. The situation is similar in England. According to a Supreme Court decision of 2019 English parent companies may, under certain conditions, be held accountable for human rights violations committed by their foreign subsidiaries.

9. The introduction of an internationally mandatory human rights due diligence obligation at the level of national law certainly holds a number of advantages. In particular, it may encourage companies to take measures to prevent human rights violations through their foreign subsidiaries and suppliers. However, it is all but clear whether, under the conditions of globalization, any such obligation will

actually contribute to improving the human rights situation in the countries of the Global South. This is because it will induce at least some companies to take strategic measures to avoid the costs associated with compliance. In addition, it will give a competitive advantage to companies which are domiciled in countries that do not impose comparable obligations on their companies.

10. Any human rights due diligence obligations should, therefore, not (only) be established at the national level, but also at the European or – even better – at the international level. In addition, accompanying measures should ensure that the same rules of play apply to all companies operating in the same market. And, finally, it should be clearly communicated that all these measures will increase prices for many products sold in Europe. In an open debate it will then have to be determined how much the Global North is willing to invest in better protection of human rights in the Global South.

Full (German) version: *Giesela Rühl*, Unternehmensverantwortung und (Internationales) Privatrecht, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 89 et seq.

Germany's Approach to Cross-border Corporate Social Responsibility of Enterprises: Latest Developments

by Marie Elaine Schäfer

The cross-border expansion of EU companies' economic activities not only leads

to a globalised market, but also impacts human rights as well as the environment in countries worldwide. The recent rise of claims against EU companies for the violations committed by their subsidiaries located in third countries is a by-product of that context. With Germany being the world's third largest importing country, the question of corporate responsibility for harmful events abroad is crucial. The present post provides an overview of the most recent legal developments on that topic.

"National Action Plan" and voluntary principle

The central aspect of Germany's approach to prevent human rights violations and environmental damages caused by German companies' foreign subsidiaries is a voluntary – as opposed to binding – principle.

In 2016, the German Government adopted the "Nationaler Aktionsplan Wirtschaft und Menschenrechte" (National Action Plan on Business and Human Rights) to implement the UN guiding principles on Business and Human Rights (Ruggie Principles). This fixed framework is the first of its kind in Germany. The objective of the National Action Plan is to delineate German enterprises' responsibility to protect human rights: at least 50 per cent of all large companies in Germany (with more than 500 employees) have to implement a system of human rights due diligence by 2020. Accordingly, "[c]ompanies should publicly express their willingness to respect human rights in a policy statement, identify risks, assess the impact of their activities on human rights, take countermeasures if necessary, communicate how they deal with risks internally and externally and establish a transparent complaints mechanism" (see the Report on the National Action Plan).

An inter-ministerial committee (on business and human rights), formed by the Government under the auspices of the German Federal Foreign Office, monitors the status of implementation of human rights due diligence. However, any tangible measures remain optional for companies and inaction entails no consequences yet.

KiK litigation

German courts faced the question of companies' liability to some extent in the KiK litigation, which ended with a judgment issued by the Court of Dortmund (Germany) in 2019.

The facts of that case are the following: the German textile importer and reseller KiK Textilen and Non-Food GmbH (hereafter, KiK) is listed amongst the ten largest providers in the German textile industry and has over 28.000 employees. In September 2012, 259 people died in a fire in a textile factory in Pakistan and 47 more were injured. The main buyer of the factory's goods was KiK. In 2015, relatives of three of the deceased victims and one of the injured workers himself started proceedings against KiK in the Regional Court of Dortmund for damages of 30.000 € each for suffering and the death of the deceased victims.

The court ruled that, based on Art. 4(1) of the Rome II Regulation, Pakistani law was applicable. In the main proceedings, that court retained expert evidence on Pakistani Law and dismissed the lawsuit due to the Pakistani limitation period for such claims that ended even before the proceedings in Germany had started. For further general discussion on Article 4(1) of the Rome II Regulation as well as on the potential relevance of Article 4(3) Rome II Regulation see here.

According to the further holdings of the court, the claimants could alternatively hold KiK liable for the events in Pakistan, had an acknowledgement of liability been written. However, KiK had agreed on a code of conduct with the supplier, which the court and the expert on Pakistani law evaluated as an agreement to compensate on an **ex gratia** basis and not as an acknowledgement of liability. Furthermore, the court stated that, even if German law was applicable, a code of conduct would then, at most, lead to a legal binding agreement between KiK and the supplier. The suppliers' employees could not file any direct claims against KiK based on the supply contract and the code of conduct, which cannot be seen as a contract to the benefit of a third party under German law (supplementary interpretation of the contract).

In light of this, it is questionable how long the voluntary principle will remain the leading path in Germany's approach to deal with expanding supply chains and the challenges for both environmental and human rights standards.

Current legislative developments

An alliance of non-governmental institutions (similar to the coalition that launched the Swiss *initiative populaire* "entreprises responsables – pour protéger l'être humain et l'environnement" in 2016) has formed the "Initiative Lieferkettengesetz" (Supply chain Law Initiative) with the intention of

establishing binding obligations as they can be found in the French Duty of Vigilance Law ("loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre"). Accordingly, German companies shall establish diligence plans to protect human rights and the environment in the states where their subsidiaries are located. Violations of diligence would lead to sanctions in form of shortening of government aids and high fines. In order to ensure the companies' liability for violations in German courts, the law would be formed as an overriding mandatory provision in the sense of Art. 9(1) of the Rome I Regulation.

Applied to the KiK litigation, the problem does not only lie within the applicability of German law. As the Court of Dortmund ruled, only a written acknowledgement of liability would enable employees to start proceedings. Since a mandatory system of due diligence would likely take the form of codes of conduct rather than acknowledgements of liability, violations of German law would lead to the sanctioning of the companies but would not offer a cause of action to suppliers' employees against the German enterprises.

Even though the enactment of a supply chain law remains highly disputed within the government, recent developments show that a change towards binding obligations may be on its way.
The ministers of labour and of development are of the opinion that the voluntary principle does not lead to the desired result, since only about 20 per cent of the companies affected by the National Action Plan have carried out human rights due diligence in 2019. According to Gerd Müller, the minister of development, legislation will follow if a second survey in 2020 does not show any improvement.

In addition to that, in 2019, more than 40 German companies, ranging from larger enterprises, such as Nestlé Germany to Start-Ups, publicly demanded binding obligations to ensure legal certainty and equal competitive competitions.

As shown, German Companies' responsibility is a question of voluntary implementation of the National Action Plan. In light of the KiK litigation, employees' proceedings against enterprises will likely have no success, although legislation in this field may lead to higher standards that enterprises then would have to impose to their suppliers abroad.

Still, the introduction of legislation remains uncertain as the result of a second

survey on the National Action Plan's implementation will determine upcoming developments and the future of the German voluntary principle.

As was reported on this blog here, the Munich Dispute Resolution Day on 5 May 2020 was going to focus on "Human Rights Lawsuits before Civil and Arbitral Courts in Germany", but Covid-19 forced the organisors to reschedule.

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