Nigeria and AfCFTA: What Role has Private International Law to Play?

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The idea of economic integration is not new to Africa. It is a phenomenon that has been conceived as far back as the 1960s when many African countries gained independence. In 1980, the Organisation of African Unity (now African Union) came up a blueprint for the progressive development of Africa: the Lagos Plan of Action for the Economic Development of Africa, 1980–2000. However, the first concrete step towards achieving this objective was taken in 1991 when the African Heads of State and Government (AHSG) signed the treaty establishing the African Economic Community (AEC) (Abuja Treaty) in Nigeria. One of the operational stages of the AEC was the creation of a Continental Free Trade Area by 2028. In 2013, the AHSG further signed a Solemn Declaration during the 50th anniversary of the African Union. The Declaration sets another blueprint for a 50-year development trajectory for Africa (Agenda 2068). Item C of that Declaration is a commitment from the Member States to the speedy implementation of the Continental Free Trade Area. At last, this is now a reality.

The AfCFTA was adopted 5 years later on 21st March 2018 and it became effective on 30th May 2019. It was expected that trading activities under this framework would commence in July 2020. The ongoing global pandemic and shutdown of national economies frustrated the plan. The Agreement is now scheduled to take effect from 1st January 2021.

Africa seems to be showing some seriousness with the AfCFTA compared to previous attempts. Concerns were initially expressed when Nigeria was reluctant to sign the Agreement (Ghana Ports and Harbours Authority, 2020; Mizner, 2019; Financial Times, 2019). Such concerns cannot be dismissed considering that Nigeria is the biggest economy in Africa and has a population of about 200 million people. Happily, the Nigerian Federal Executive Council formally approved the ratification of the Agreement on 11th November 2020(Government of Nigeria, 2020). As at today, all the African countries are members of the AfCFTA except Eritrea. We can safely say that AfCFTA has come to stay.

According to the United Nations Economic Commission for Africa, the AfCFTA will be the biggest single market, with a GDP of $2.5 trillion and a whooping population of 2.5 billion people across 55 countries (UNECA, 2020). By 2050, it is also projected that Africa's population will be 2.5 billion; contributing about 26% of the world's working-age population (UNECA, 2020). As expected, AfCFTA has been generating interesting debates. Some legal commentators have penned some thoughts on the Agreement largely from international economic/trade law perspectives (Magwape, 2018; Onyejekwe and Ekhator, 2020; Akinkugbe 2019). Only a few private international scholars have written on the framework (Theunissen, 2020; Uka, 2020).

Nigeria's ratification of AfCFTA indicates that AfCFTA will become effective in Nigeria from next year, although Nigerian law requires AfCFTA to be domesticated (Abacha v. Fawehinmi [2000] 6 NWLR (Pt 660) 228). AfCFTA is projected to have significant impacts on the Nigerian economy. Although Nigeria's trade in goods and services to other African countries stands at 19.6% (export) and 2.13% (import) as indicated in the Q4 2019 statistic (National Bureau of Statistics, 2019), it is expected that this should witness a significant growth when AfCFTA becomes effective. More intra-African trading activities would potentially lead to the increase in cross border litigation in Africa generally and Nigeria in particular. The relevant question is to what extent does Nigerian private international law support trade liberalisation agenda of AfCFTA?

The AfCFTA has a dispute settlement mechanism modelled along the WTO system. This affects only disputes between the Member States. The Agreement is conspicuously silent on cross-border disputes amongst private citizens and the divergent systems of law operating in the Member States. It thus appears that for the meantime, the divergent national private international rules which are obsolete in many Member States will continue to govern cross-border disputes. To what extent this can support the objective of intra-African trade facilitation is left to be seen.

For Nigeria, it is time we revamped the Nigerian private international law. As a prominent member of AfCFTA, Nigeria should take a special interest in the progressive development of private international law through multilateral platforms both under the AfCFTA and other global bodies such as the Hague Conference. The current lackadaisical attitude to multilateral private international rules needs to change. For instance, Nigeria has neither joined the Hague Conference nor acceded to any of its conventions. The Evidence and Service Conventions would have delivered a more efficient international civil procedure for Nigeria. Also, the 2005 Choice of Court Convention (and hopefully the 2019 Judgments Convention) would give Nigerian judgments wider circulation and respect. At the Commonwealth level, Nigeria did not pay any significant role in the making of the 2017 Commonwealth Model Law on Judgments and has no intention of domesticating it. The point we are making is that Nigeria needs to be responsive to international calls for the development of private international law, not just from AfCFTA when such is made, but also ongoing global private international law projects.

To reap the benefit of AfCFTA, the Nigerian justice system must be made to be attractive to foreign businesspersons. No doubt, foreign litigants will be more interested in doing business in countries that have in place an efficient, effective and credible legal system that enforce contracts and dispose of cases timeously. Nigeria will be competing with countries such as South Africa, Egypt, Rwanda and Ghana. In one recent empirical research carried out by Prof Yemi Osibajo, the current Vice President of Nigeria, on the length of trial time in civil cases in Lagos State, it takes an average of 3.4 years to resolve a civil and commercial transaction in Nigeria. A further period of 2.5 and 4.5 years is required if the matter proceeded to the Court of Appeal and the Supreme Court respectively (Osinbajo, 2011). Excessive delays in dispute resolution may make Nigeria unattractive for resolving business disputes. The other side of the coin is the enforcement of contracts, especially jurisdiction agreements. Foreign litigants may be persuaded to trade with Nigeria if they are assured that foreign jurisdiction clauses will be respected by Nigerian courts. The current approach is not too satisfactory as there are some appellate court decisions which suggest that parties' choice may not be enforced in certain situations (Okoli, 2020b). Some of the local statutes like the Admiralty Jurisdiction Act which grants exclusive jurisdiction over a wide range of commercial matters may equally need to be reviewed.

Jurisdiction and judgments are inextricably linked together. Nigerian litigants should now be concerned about how Nigerian judgments would fare in other African countries. Our jurisdictional laws need to be standardised to work in harmony with those of foreign countries. Recent decisions indicate that Nigerian courts still apply local venue rules – designed to determine which judicial division should hear a matter (for geographical and administrative convenience) within a State in Nigeria – to determine jurisdiction in matters involving foreign element; consider taking steps to release property as submission; may even exercise jurisdiction based on temporary presence (Okoli, 2020a; Okoli, 2020b; Bamodu, 1995; Olaniyan, 2012; Yekini, 2013). It is doubtful if judgments from these jurisdictional grounds will be respected in other African countries, the majority of whose legal systems are not rooted in common law. In the same vein, Nigerian courts will recognise and enforce judgments from other African countries notwithstanding that Nigeria has not extended its statutory enforcement scheme to most African countries (Yekini, 2017). Nigerian judgments may not receive similar treatment in other African states as our reciprocal statute can be misconstrued to mean that their judgments are not enforceable in Nigeria without a treaty. Nigerian government should either discard the reciprocity requirement or conclude a treaty with other African states to guarantee the enforcement of Nigerian judgments abroad.

Boosting investors’ confidence requires some assurances from the Nigerian government for the respect of rule of law. The government’s rating is not too encouraging in this regard. In its 2020 Rule of Law Index, the World Justice Project ranked Nigeria 108 out of 128 countries surveyed (World Justice Project, 2020). This should not surprise practitioners from Nigeria. For instance, the Nigerian government does have regard for ECOWAS judgments although court sits in Abuja, Nigeria’s Federal Capital Territory. Such judgments are hardly recognised and enforced thereby contravening art 15(4) of the ECOWAS Revised Treaty which stipulates that judgments of the court shall be binding on Member States (Adigun, 2019).

Lastly, AfCFTA should spark the interest of Nigerian practitioners, judges, academia, policymakers and other stakeholders in private international law matters. Nigeria cannot afford to be a spectator in the scheme of things. It should leverage on its status in Africa to drive an Afrocentric and global private international law agenda. More awareness should be created for the subject in the universities. Government and the business community should fund various programmes and research on the impact of AfCFTA, and subsequent frameworks that will be rolled out to drive AfCFTA, on the Nigerian legal system, its economy and people.

Determining the applicable law of an arbitration agreement when there is no express choice of a governing law – Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38.

This brief note considers aspects of the recent litigation over the identification of an unspecified applicable law of an arbitration agreement having an English seat. Though the UK Supreme Court concluded that the applicable law of the arbitration agreement itself was, if unspecified, usually to be the same as that of the contract to which the arbitration agreement refers, there was an interesting division between the judges on the method of determining the applicable law of the arbitration agreement from either the law of the arbitral seat (the view favoured by the majority) or from the applicable law of the underlying contract (the view favoured by the minority). As will become clear, the author of this note finds the views of the minority to be more compelling than those of the majority.

In a simplified form the facts were that, in February 2016, a Russian power station was damaged by an internal fire. 'Chubb', insurer of the owners of the power station, faced a claim on its policy. In May 2019, Chubb sought to sue 'Enka' (a Turkish subcontractor) in Russia to recover subrogated losses. Enka objected to these Russian proceedings claiming that under the terms of its contract of engagement any such dispute was to be arbitrated via the ICC in England: in September 2019, it sought declaratory orders from the English High Court that the matter should be arbitrated in England, that the applicable law of the arbitration agreement was English, and requested an English anti-suit injunction to restrain Chubb from continuing the Russian litigation.

Neither the arbitration agreement nor the contract by which Chubb had originally engaged Enka contained a clear provision specifically and unambiguously selecting an applicable law. Though it was plain that the applicable law of the underlying contract would, by the application of the provisions of the Rome I Regulation, eventually be determined to be Russian, the applicable law of the arbitration agreement itself could not be determined as directly in this manner because Art. 1(2)(e) of the Regulation excludes arbitration agreements from its scope and leaves the matter to the default applicable law rules of the forum.

After an unsuccessful interim application in September 2019, Enka's case came before Baker J in December 2019 in the High Court. It seems from Baker J's judgment that Enka appeared to him to be somewhat reticent in proceeding to resolve the dispute by seeking to commence an arbitration; this, coupled with the important finding that the material facts were opposite to those that had justified judicial intervention in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, may explain Enka's lack of success before the High Court which concluded that the correct forum was Russia and that there was no basis upon which it should grant an anti-suit injunction in this case.

In January 2020, Enka notified Chubb of a dispute and, by March 2020, had filed a request for an ICC arbitration in London. Enka also however appealed the decision of Baker J to the Court of Appeal and duly received its requested declaratory relief plus an anti-suit injunction. The Court of Appeal sought to clarify the means by which the applicable law of an arbitration agreement should be determined if an applicable law was not identified expressly to govern the arbitration agreement itself. The means to resolve this matter, according to the court, was that without an express choice of an applicable law for the arbitration agreement itself, the curial law of the arbitral seat should be presumed to be the applicable law of the arbitration agreement. Thus, though the applicable law of the underlying contract was seemingly Russian, the applicable law of the arbitration agreement was to be presumed to be English due to the lack of an express choice of Russian law and due to the fact of the English arbitral seat. Hence English law (seemingly wider than the Russian law on a number of important issues) would determine the scope of the matters and claims encompassed by the arbitration agreement and the extent to which they were defensible with the assistance of an English court.

In May 2020, Chubb made a final appeal to the UK Supreme Court seeking the discharge of the anti-suit injunction and opposing the conclusion that the applicable law of the arbitration agreement should be English (due to the seat of the arbitration) rather than Russian law as per the deduced applicable law of the contract to which the arbitration agreement related. The UK Supreme Court was thus presented with an opportunity to resolve the thorny question of whether in such circumstances the curial law of the arbitral seat or the applicable law of the agreement being arbitrated should be determinative of the applicable law of the arbitration agreement. Though the Supreme Court was united on the point that an express or implied choice of applicable law for the underlying contract usually determines the applicable law of the arbitration agreement, it was split three to two on the issue of how to proceed in the absence of such an express choice.

The majority of three (Lords Kerr, Hamblen and Leggatt) favoured the location of the seat as determinative in this case. This reasoning did not proceed from the strong presumption approach of the Court of Appeal (which was rejected) but rather from the conclusion that since there had been no choice of applicable law for either the contract or for the arbitration agreement, the law with the closest connection to the arbitration agreement was the curial law of the arbitral seat. As will be seen, the minority (Lords Burrows and Sales) regarded there to have been a choice of applicable law for the contract to be arbitrated and proceeded from this to determine the applicable law of the arbitration agreement.

The majority (for the benefit of non-UK readers, when there is a majority the law is to be understood to be stated on this matter by that majority in a manner as authoritative as if there had been unanimity across all five judges) considered that there was no choice of an applicable law pertinent to Art.3 of Rome I in the underlying contract by which Enka's services had been engaged. It is true that this contract did not contain a helpful statement drawn from drafting precedents that the contract was to be governed by any given applicable law; it did however make many references to Russian law and to specific Russian legal provisions in a manner that had disposed both Baker J and the minority in the Supreme Court to conclude that there was indeed an Art.3 choice, albeit of an implied form. This minority view was based on a different interpretation of the facts and on the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ EU No C 282-1). The majority took the view that the absence of an express choice of applicable law for the contract must mean that the parties were unable to agree on the identity of such a law and hence 'chose' not to make one. The minority took the view that such a conclusion was not clear from the facts and that the terms of the contract and its references to Russian law did indicate an implied choice of Russian law. As the majority was however unconvinced on this point, they proceeded from Art.3 to Art.4 of Rome I and concluded that, in what they regarded as the absence of an express or implied choice of applicable law for the contract, Russian law was the applicable law for the contract.

For the applicable law of the arbitration agreement itself, the majority resisted the idea that on these facts their conclusion re the applicable law of the contract should also be determinative for the applicable law of the arbitration agreement. Instead, due to the Art.1(2)(e) exclusion of arbitration agreements from the scope of the Regulation, the applicable law of the arbitration agreement fell to be determined by the English common law. This required the identification of the law with which the arbitration agreement was 'most closely connected'. Possibly reading too much into abstract notions of international arbitral practice, the majority concluded that, in this case, the applicable law of the arbitration agreement should be regarded as most closely connected to the curial law of the arbitral seat. Hence English law was the applicable law of the arbitration agreement despite the earlier conclusion that the applicable law of the contract at issue was Russian.

As indicated, the minority disagreed on the fundamental issue of whether or not there had been an Art.3 implied choice of an applicable law in the underlying contract. In a masterful dissenting judgment that is a model of logic, law and clarity, Lord Burrows, with whom Lord Sales agreed, concluded that this contract contained what for Art.3 of Rome I could be regarded as an implied choice of Russian law as '… clearly demonstrated by the terms of the contract or the circumstances of the case'. This determination led to the conclusion that the parties' implied intentions as to the applicable law of the arbitration agreement were aligned determinatively with the other factors that implied Russian law as the applicable law for the contract. Russian law was (for the minority) thus the applicable law of the underlying contract and the applicable law of the ICC arbitration (that, by March, 2020 Enka had acted to commence) was to take place within the English arbitral seat in accordance its English curial law. Lord Burrows also made plain that if had he concluded that there was no implied choice of Russian law for the contract, he would still have concluded that the law of the arbitration agreement itself was Russian as he considered that the closest and most substantial connection of the arbitration agreement was with Russian law.

Though the views of the minority are of no direct legal significance at present, it is suggested that the minority's approach to Art.3 of the Rome I Regulation was more accurate than that of the majority and, further, that the approach set out by Lord Burrows at paras 257-8 offers a more logical and pragmatic means of settling any such controversies between the law of the seat and the law of the associated contract. It is further suggested that the minority views may become relevant in later cases in which parties seek a supposed advantage connected with the identity of the applicable law of the arbitration. When such a matter will re-occur is unclear, however, though the Rome I Regulation ceases to be directly applicable in the UK on 31 December 2020, the UK plans to introduce a domestic analogue of this Regulation thereafter. It may be that a future applicant with different facts will seek to re-adjust the majority view that in the case of an unexpressed applicable law for the contract and arbitration agreement that the law of the seat of the arbitration determines the applicable law of the arbitration agreement.

As for the anti-suit injunction, it will surprise few that the attitude of the Court of Appeal was broadly echoed by the Supreme Court albeit in a more nuanced form. The Supreme Court clarified that there was no compelling reason to refuse to consider issuing an anti-suit injunction to any arbitral party who an English judge (or his successors on any appeal) has concluded can benefit from such relief. They clarified further that the issuance of an anti-suit injunction in such circumstances does not require that the selected arbitral seat is English. The anti-suit injunction was re-instated to restrain Chubb's involvement in the Russian litigation proceedings and to protect the belatedly commenced ICC arbitration.

The enforcement of Chinese money judgments in common law

courts

By Jack Wass (Stout Street Chambers, Wellington, New Zealand)

In the recent decision of *Hebei Huaneng Industrial Development Co Ltd v Shi*,[1] the High Court of New Zealand was faced with an argument that a money judgment of the Higher People's Court of Hebei should not be enforced because the courts of China are not independent of the political arms of government and therefore do not qualify as "courts" for the purpose of New Zealand's rules on the enforcement of foreign judgments.

The High Court rejected that argument: complaints of political interference may be relevant if a judgment debtor can demonstrate a failure to accord natural justice in the individual case, or another recognized defence to enforcement, but there was no basis for concluding that Chinese courts were not courts at all.

As the court noted, complaints about the independence or impartiality of foreign courts might arise in two circumstances. Where the court was deciding whether to decline jurisdiction in favour of a foreign court, it would treat allegations that justice could not be obtained in the foreign jurisdiction with great wariness and caution.[2] Where the issue arose on an application to enforce a foreign judgment, the enforcement court has the benefit of seeing what actually happened in the foreign proceeding, and can assess whether the standards of natural justice in particular were met. Simply refusing to recognize an entire foreign court system would give rise to serious practical problems,[3] as well as risk violating Cardozo J's famous dictum that courts "are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[4]

The judge found that Chinese courts were distinct from the legislative and administrative bodies of the state, and that although there was evidence to suggest that Chinese judges sometimes felt the need to meet the expectations of the local people's congress or branch of the Communist Party, this did not justify refusing to recognize the court system as a whole. In a commercial case resolved according to recognizably judicial processes, where there was no suggestion of actual political interference, the judgment could be recognized.

[1] *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992. The decision arose on an application to stay or dismiss the enforcement proceeding at the jurisdictional stage.

[2] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

[3] The judge noted that the House of Lords had rejected the argument that it should not recognize the courts of the German Democratic Republic (*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853), and the Second Circuit Court of Appeals was not persuaded that justice could not be done in Venezuela (*Blanco v Banco Industrial de Venezuela* 997 F 2d 974 (2nd Cir 1993)). By contrast, a Liberian judgment was refused recognition in *Bridgeway Corp v Citibank* 45 F Supp 2d 276 (SDNY 1999), 201 F 3d 134 (2nd Cir 2000) where there was effectively no functioning court system.

[4] *Loucks v Standard Oil Co* 224 NY 99 (1918).

Changzhou Sinotype Technology Co., Ltd, Hague Service Convention and Judgment Enforcement in China

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Changzhou Sinotype Technology Co, Ltd. v. Rockefeller Technology Investments (Asia) VII is a recent case decided by the Supreme Court of California on April 2, 2020. The *certiorari* to the Supreme Court of the US was denied on 5 October 2020. It is a controversial case concerning the interpretation of the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters of November 15, 1965 (the "Hague Service Convention") for service of process in China.

1. **Facts:**

Changzhou SinoType Technology Co. (SinoType) is based in China. Rockefeller Technology Investments (Asia) VII (Rockefeller) is an American investment firm. In February 2008, they signed a memorandum of understanding (MOU) which provided that:

> *"6. The parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.*
>
> *7. The Parties hereby submit to the jurisdiction of the Federal and State courts in California and consent to service of process in accord with the notice provisions above.*
>
> *8. In the event of any disputes arising between the Parties to this Agreement, either Party may submit the dispute to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution pursuant to according to [sic] its streamlined procedures before a single arbitrator who shall have ten years judicial service at the appellate level, pursuant to California law, and who shall issue a written, reasoned award. The Parties shall share equally the cost of the arbitration. Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."*

Due to disputes between the parties, in February 2012, Rockefeller brought an arbitration against SinoType. SinoType was defaulted in the arbitration proceeding. According to the arbitrator, SinoType was served by email and Federal Express to the Chinese address listed for it in the MOU. In November 2013, the arbitrator found favorably for Rockefeller.

Instead of enforcing the award in China according to the New York Convention,[1] Rockefeller petitioned to confirm the award in State courts in California. Cal. Civ. Proc. Code § 1290.4(a) provides that a petition to confirm an arbitral award "shall be served in the manner provided in the arbitration agreement for the service of such petition and notice." Therefore, Rockefeller transmitted the summons and its petition to SinoType again through FedEx and email according to paragraph 7 of the MOU. SinoType did not appear and the award was confirmed in October 2014. SinoType then appeared specially and applied to set aside the judgment. It argued that the service of the Californian court proceeding did not comply with the Hague Service Convention; therefore, it had not been duly served and the judgment was void.

2. **Decision**

The California Supreme Court rejected SinoType's argument.

The Court discerned three principles for the application of the Hague Service Convention. First, the Convention applies only to "service of process in the technical sense" involving "a formal delivery of documents". The Court distinguished "service" and "notice" by referring to the Practical Handbook on the Operation of the Service Convention, published by the Permanent Bureau of the Hague Conference on Private International Law ('Handbook'). The Court cited that

> *"the Convention cannot—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served and which document needs to be served. Thus, if the law of the forum states that a notice is to be somehow directed to one or several addressee(s), without requiring service, the Convention does not have to be applied."[2]*

Second, the law of the sending forum (i.e. the law of California) should be applied to determine whether "there is occasion to transmit a judicial or extrajudicial document for service abroad."

Third, if formal service of process is required under the law of the sending forum, the Hague Convention must be complied for international transmission of service documents.

The court held that the parties have waived the formal service of process, so the Hague Service Convention was not applicable in this case.[3]

3. **Comments**

The *Changzhou Sinotype Technology Co, Ltd* has a number of interesting aspects and has been commented such as here, here and here.

First, the Hague Service Convention is widely considered as 'non-mandatory' but 'exclusive'.[4] Addressing the non-mandatory nature of the Convention, the Handbook states that "the Convention can not—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served and which document needs to be served."[5] However, this statement does not necessarily mean, *when judicial documents are indeed transmitted from a member state to another to charge a defendant with notice of a pending lawsuit*, a member state can opt out of the Convention by unilaterally excluding the transmission from the concept of service. *Volkswagen Aktiengesellschaft v Schlunk* decided by the Supreme Court of the US and *Segers and Rufa BV v. Mabanaft GmbH* decided by the Supreme Court of the Netherlands (Hoge Raad) are the two most important cases on the non-mandatory nature of the Convention. Both cases concentrate on which law should be applied to whether a document needed to be transmitted abroad for service.[6] However, *Rockefeller* is different because it is about which law should be applied to determine the concept of service when the transmission of judicial documents takes place in the soil of another member state. The Handbook provides that the basic criterion for the Convention to apply is "transmission abroad" and "place of service is determining factor".[7] When judicial documents are physically transmitted in the soil of a member state, allowing another member state to unilaterally determine the concept of service in order to exclude the application of the Convention will inappropriately expand the non-mandatory character of the Convention. This will inevitably narrow the scope of the application of the Convention and damage the principle of reciprocity as the foundation of the Convention. The Hague Convention should be applied to *Rockefeller* because the summons and petitions were transmitted across border for service in China.

Second, as part of its accession to the Hague Convention, China expressly stated that it does not agree to service by mail. Indeed, the official PRC declarations and reservations to the Hague Convention make it clear that, with the limited exception of voluntary service on a foreign national living in China by his country's own embassy or consulate, the ***only*** acceptable method of service on China is through the Chinese Central Authority. Therefore, although China has recognized monetary judgments issued in the US according to the principle of reciprocity, the judgment of *Changzhou Sinotype Technology Co, Ltd* probably cannot be recognized and enforced in China.

The California Supreme Court decision has important implications. For Chinese parties who have assets outside of China, they should be more careful in drafting their contracts because *Changzhou Sinotype Technology Co, Ltd* shows that a US court may consider their agreement on service by post is a waiver of China's reservation under the Hague Service Convention. For US parties, if Chinese defendants only have assets in China for enforcement, *Changzhou Sinotype Technology Co, Ltd* is not a good case to follow because the judgment probably cannot be enforced in China.

[1] China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention").

[2] Practical Handbook on the Operation of the Service Convention (4th ed. 2016) par. 54, p. 23, fn. Omitted.

[3] The Court emphasized that their conclusions should be limited to Section 1290.4, subdivision (a): "Our conclusions as to California law are narrow. When parties agree to California arbitration, they consent to submit to the personal jurisdiction of California courts to enforce the agreement and any judgment under section 1293. When the agreement also specifies the manner in which the parties "shall be served," consistent with section 1290.4, subdivision (a), that agreement supplants statutory service requirements and constitutes a waiver of formal service in favor of the agreed-upon method of notification. If an arbitration agreement fails to specify a method of service, the statutory service requirements of section 1290.4, subdivisions (b) or (c) would apply, and those statutory requirements *would* constitute formal service of process. We express no view with respect to service of process in other contexts."

[4] Martin Davies et al., Nygh's Conflict of Laws in Australia 36 (10th ed. 2020).

[5] Paragraph 54 of the Handbook.

[6] Ibid., paragraphs 31-45, and 47.

[7] Ibid., paragraph 16.

Chris Thomale on the EP Draft Report on Corporate Due Diligence

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

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

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

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

The solution proposed in terms of international jurisdiction, I will readily admit, looks puzzling to me. I fail to see, which cases the proposed Art. 8 para 5 Brussels Ibis Regulation is supposed to cover: As far as international jurisdiction is awarded to the courts of the "Member State where it has its domicile", this adds nothing to Art. 4, 63 Brussels Ibis Regulation. In fact, it will create unnecessary confusion as to whether this venue of general jurisdiction is good even when there is no "damage caused in a third country [which] can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship." Thus, we are left with the courts of "a Member State […] in which [the undertaking] operates." As already pointed out, this term itself will trigger a lot of controversy regarding certain threshold issues. But there is more: Oftentimes this locus activitatis will coincide with the locus delicti commissi, e.g., when claimants want to rely on an omission of oversight by the European parent company. In that case, Art. 7 No. 2 Brussels Ibis Regulation offers a venue at the very place, i.e.

both in terms of international and local jurisdiction, where that omission was committed. How does the new rule relate to the old one? And, again, which cases exactly are supposed to be captured by this provision? In my view, this is a phantom paragraph that, if anything, can only do harm to the fragile semantic and systematic architecture built up by the Brussels Ibis Regulation and CJEU case law.

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

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

Human Rights Due Diligence

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

In April of 2020, EU Commissioner Didier Reynders announced plans for a legislative initiative that would introduce EU-wide mandatory human rights due diligence requirements for businesses. Only recently, Reynders reiterated his intentions during a conference regarding "Human Rights and Decent Work in Global Supply Chains" which was hosted by the German Federal Ministry of Labour and Social Affairs on the 6. October, and asseverated the launch of public consultations within the next few weeks. A draft report, which was prepared by MEP Lara Wolters (S&D) for the European Parliament Committee on Legal Affairs, illustrates what the prospective EU legal framework for corporate due diligence could potentially look like. The draft aims to facilitate access to legal remedies in cases of corporate human rights abuses by amending the Brussels *Ibis* Regulation as well as the Rome II Regulation. However, as these amendments have already inspired a comments by Geert van Calster, Giesela Rühl, and Jan von Hein, I won't delve into them once more. Instead, I will focus on the centre piece of the draft report – a proposal for a Directive that would establish mandatory human rights due diligence obligations for businesses. If adopted, the Directive would embody a milestone for the international protection of human rights. As is, the timing could simply not be better, since the UN Guiding Principles (UNGPs) celebrate their 10th anniversary in 2021. The EU should take this opportunity to present John Ruggie, the author of the UNGPs, with a special legislative gift. However, I'm not entirely sure if Ruggie would actually enjoy this particular present, as the Directive has obvious flaws. The following passages aim to accentuate possible improvements, that would lead to the release of an appropriate legal framework next year. I will not address every detail but will rather focus on the issues I consider the most controversial – namely the scope of application and the question of effective enforcement.

General Comments

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

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

Moving on to my criticism.

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

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

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

Scope of Application

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

First off, the Directive does not define the term "undertaking". Given the factual connection, we could understand it in the same way as the Non-Financial Reporting Directive (2014/95/EU) does. However, an "undertaking" within the scope of the Non-Financial Reporting Directive refers to the provisions of the Accounting Directive (2013/34/EU), which has another purpose, i.e. investor and creditor protection, and is, therefore, restricted to certain types of limited liability companies. Such a narrow understanding would run counter to the purpose of the proposed Directive because it excludes partnerships and foreign companies. On the other hand, "undertaking" probably does mean something different than in EU competition law. There, the concept covers "any entity engaged in an economic activity, regardless of its legal status" and must be understood as "designating an economic unit even if in law that economic unit consists of several persons, natural or legal" (see e.g. CJEU, Akzo Nobel, C-97/08 P, para 54 ff.). Under EU competition law, the concept is, therefore, not limited to legal entities, but also encompasses groups of companies (as "single economic units"). This concept of "undertaking", if applied to the Directive, would correspond with the term "business enterprises" as used in the UNGP (see the Interpretive Guide, Q. 17). However, it would ignore the fact that the parent company and its subsidiaries are distinct legal entities, and that the parent company's legal power to influence the activities of its subsidiaries may be limited under the applicable corporate law. It would also lead to follow-up questions regarding the precise legal requirements under which a corporate group would have to be included. Finally, non-economic activities and, hence, non-profit organisations would be excluded from the scope, which possibly leads to significant protection gaps (just think about FIFA, Oxfam, or WWF). In order to not jeopardise the objective – ensuring “harmonization, legal certainty and the securing of a level playing field” (see Recital 9 of the Directive) – the Directive should not leave the term “undertaking” open to interpretation by the Member States. A clear and comprehensive definition should definitely be included in the Directive, clarifying that “undertaking” refers to any legal entity (natural or legal person), that provide goods or services on the market, including non-profit services.

Secondly, the scope of application is not coherent for several reasons. One being that the chosen form of the proposal is a Directive, rather than a Regulation, thus providing for minimum harmonisation only. It is left to the Member States to lay down the specific rules that ensure companies carrying out proper human rights due diligence (Article 4(1)). This approach can lead to slightly diverging due diligence requirements within the EU. Hence, the question of which requirements a company must comply with arises. From a regulatory law’s perspective alone, this question is not satisfactorily answered. According to Article 2(1), “the Directive” (i.e. the respective Member States’ implementation acts) applies to any company which has its registered office in a Member State or is established in the EU. However, the two different connecting factors of Article 2(1) have no hierarchy, so a company must probably comply with the due diligence requirements of any Member State where it has an establishment (agency, branch, or office). Making matters worse (at least from the company’s perspective), in the event of a human rights lawsuit, due diligence would have to be characterised as a matter relating to non-contractual obligations and thus fall within the scope of the new Art. 6a Rome II. The provisions of this Article potentially require a company to comply with the due diligence obligations of three additional jurisdictions, namely lex loci damni, lex loci delicti commissi, and either the law of the country in which the parent company has its domicile (in this regard, I agree with Jan von Hein who proposes the use not of the company’s domicile but its habitual residence as a connecting factor according to Article 23 Rome II) or, where it does not have a domicile (or habitual residence) in a Member State, the law of the country where it operates.

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

Finally, and perhaps most controversially in regard to the scope, the requirements shall apply to all companies regardless of their size. While Article 2(3) allows the exemption of micro-enterprises, small companies with at least ten employees and a net turnover of EUR 700,000 or a balance sheet total of EUR 350,000 would have to comply fully with the new requirements. In contrast, the French duty of vigilance only applies to large stock corporations which, including their French subsidiaries and sub-subsidiaries, employ at least 5,000 employees, or including their worldwide subsidiaries and sub-subsidiaries, employ at least 10,000 employees. The Non-Financial Reporting Directive only applies to companies with at least 500 employees. And the due diligence law currently being discussed in Germany, will with utmost certainty exempt companies with fewer than 500 employees from its scope and could perhaps even align itself with the French law's scope. Therefore, I doubt that the Member States will accept any direct legal obligations for their SMEs. Nonetheless, because the Directive requires companies to conduct value chain due diligence, SMEs will still be indirectly affected by the law.

Value Chain Due Diligence

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

Mapping the complete supply chain is one thing; conducting extensive human rights impact assessments is another. Even if a company knows its chain, this does not yet mean that it comprehends every potential human rights risk linked to its remote business operations. And even if a potential human rights risk comes to its attention, the tasks of “ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating” (see Article 3) it is not yet fulfilled. These difficulties call up to consider limiting the obligation to conduct supply chain due diligence to Tier 1 suppliers. However, this would not only be a divergence from the UNGP (see Principle 13) but would also run counter to the Directive’s objective. In fact, limiting due diligence to Tier 1 suppliers makes it ridiculously easy to circumvent the requirements of the Directive by simply outsourcing procurement to a third party. Hence, the Directive takes a different approach by including the entire supply chain in the due diligence obligations while adjusting the required due diligence processes to the circumstances of the individual case. Accordingly, Article 2(8) states that “[u]ndertakings shall carry out value chain due diligence which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of their supply chain, the size of the undertaking, its capacity, resources and leverage”. I consider this an adequate provision because it balances the interests of both companies and human rights subjects. However, as soon as it comes to enforcing it, it burdens the judge with a lot of responsibility.

Enforcement

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

The Directive provides for three different ways to enforce its due diligence obligations. Firstly, the Directive requires companies to establish grievance mechanisms as low-threshold access to remedy (Articles 9 and 10). Secondly, the Directive introduces transparency and disclosure requirements. For example, companies should publish a due diligence strategy (Article 6(1)) which, inter alia, specifies identified human rights risks and indicates the policies and measures that the company intends to adopt in order to cease, prevent, or mitigate those risks (see Article 4(4)). Companies shall also publish concerns raised through their grievance mechanisms as well as remediation efforts, and regularly report on progress made in those instances (Article 9(4)). With these disclosure requirements, the Directive aims to enable the civil society (customers, investors and activist shareholders, NGOs etc.) to enforce it. Thirdly, the Directive postulates public enforcement mechanisms. Each Member State shall designate one or more competent national authorities that will be responsible for the supervision of the application of the Directive (Article 14). The competent authorities shall have the power to investigate any concerns, making sure that companies comply with the due diligence obligations (Article 15). If the authority identifies shortcomings, it shall set the respective company a time limit to take remedial action. It may then, in case the company does not fulfil the respective order, impose penalties (especially penalty payments and fines, but also criminal sanctions, see Article 19). Where immediate action is necessary to prevent the occurrence of irreparable harm, the competent authorities may also order the adoption of interim measures, including the temporary suspension of business activities.

At first glance, public enforcement through inspections, interim measures, and penalties appear as quite convincing. However, the effectiveness of these mechanisms may be questioned, as demonstrated by the Wirecard scandal in Germany. Wirecard was Germany’s largest payment service provider and part of the DAX stock market index from September 2018 to August 2020. In June of 2020, Wirecard filed for insolvency after it was revealed that the company had cooked its books and that EUR 1.9 billion were “missing”. In 2015 and 2019, the Financial Times already reported on irregularities in the company’s accounting practices. Until February 2019, the competent supervisory authority BaFin did not intervene, but only commissioned the FREP to review the falsified balance sheet, assigning only a single employee to do so. This took more than 16 months and did not yield any results before the insolvency application. While it is true that the Wirecard scandal is unique, it showcased that investigating malpractices of large multinational companies through a single employee is a crappy idea. Public enforcement mechanisms only work if the competent authority has sufficient financial and human resources to monitor all the enterprises covered by the Directive. So how much manpower does it need? Even if the Directive were to apply to companies with more than 500 employees, in Germany alone one would have to monitor more than 7.000 entities and their respective value chains. We would, therefore, need a whole division of public inspectors in a gigantic public agency. In my opinion, that sounds daunting. That does not mean that public enforcement mechanisms are completely dispensable. As Ruggie used to say, there is no single silver bullet solution to business and human rights challenges. But it is also important to consider decentralised enforcement mechanisms such as civil liability. In contrast to public enforcement mechanisms, civil liability offers victims of human rights violations “access to effective remedy”, which, according to Principle 25, is one of the main concerns of the UNGP.

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

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

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

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

2. Any agreement between an operator of an AI-system and a natural or legal person who suffers harm or damage because of the AI-system, which circumvents or limits the rights and obligations set out in this Regulation, concluded before or after the harm or damage occurred, shall be deemed null and void as regards the rights and obligations laid down in this Regulation.
3. This Regulation is without prejudice to any additional liability claims resulting from contractual relationships, as well as from regulations on product liability, consumer protection, anti-discrimination, labour and environmental protection between the operator and the natural or legal person who suffered harm or damage because of the AI-system and that may be brought against the operator under Union or national law."

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

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

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

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

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

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

At first impression, it seems rather strange that a regulation on a very modern technology – artificial intelligence – should deploy a conflicts approach that seems to have more in common with Joseph Beale's First Restatement of the 1930's than with the modern and differentiated set of conflicts rules codified by the EU itself at the beginning of the 21st century, i.e. the Rome II Regulation. While the

European Parliament's resolution, in its usual introductory part, diligently enumerates all EU regulations and directives dealing with substantive issues of liability, the Rome II Regulation is not mentioned *once* in the Recitals. One wonders whether the members of Parliament were aware of the European Union's acquis in the field of private international law all. In sum, compared with Rome II, the conflicts approach of the draft regulation would be a regrettable step backwards. It remains to be seen how the relationship between the draft regulation and Rome II will be designed and fine-tuned in the further course of legislation.

Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims

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

The need for having a conflicts rule on the law applicable to business-related human rights claims derives from the fact that the draft report proposes a directive which only lays down minimum requirements for corporate due diligence concerning human rights, but which does not contain an independent set of rules on civil liability triggered by a violation of such standards. Thus, domestic corporate and tort laws will continue to play an important role in complementing the rules of the directive once they have been transposed into domestic law. In theory, this problem might be avoided by trying to pass a wholesale EU Regulation containing both rules on corporate due diligence as well as on related issues of civil liability. The EU has already passed the Regulations on Timber and Conflict Minerals, which deal with fairly specific issues and which are limited in their scope. Taking into account, however, that both domestic corporate law and tort law are very intricate bodies of law, the EU legislature so far has, in the overwhelming number of cases, opted for the less intrusive and more flexible instrument of a directive (see, e.g., the Directive [EU] 2017/1132 relating to certain aspects of company law or the Product Liability Directive). The regulatory choice made in the draft report is thus fully consistent with established modes of EU legislation and the principle of subsidiarity.

The fundamental conflicts problem arising in cross-border human-rights litigation is well-known: Art 4(1) Rome II leads to the application of the law in force at the place of damage, which is frequently located in a third world country having a "weak legal system and enforcement (cf. Recital 2 of the draft directive). Starting a suit in such a forum frequently results not in a "home-court advantage" for plaintiffs, but rather diminishes their prospects of success. Insofar, suing a multinational corporation in the EU becomes attractive. While the hurdle of international jurisdiction can be surmounted rather easily in most cases, e.g. by suing the defendant at its general jurisdiction (Art. 4(1) Brussels I*bis*), a Member State court will nevertheless, under Art. 4(1) Rome II, apply a third state law. In the discussion about domestic due diligence laws, the widely preferred, if not the only viable solution so far has consisted in characterising such laws as being of an overriding mandatory nature within the meaning of Art. 16 Rome II, thus ensuring their application in spite of the otherwise applicable tort law. Seen from the national perspective, this is of course a sound approach because a Member State legislature simply has no mandate to tinker with the Rome II Regulation itself. Once the question of corporate due diligence and liability is answered at the EU level itself, however, there is no practical need for limiting the doctrinal discussion to a unilateral approach within the narrow framework of Art. 16 Rome II. In light of this fact, it is not surprising that the draft report explores another conflicts tool that has been developed in order to strengthen the protection of weaker parties or general interests, i.e. the principle of applying the law more favourable to a party in a given case. This approach, which nowadays mostly consists in letting the plaintiffs choose which law they consider more favourable to them, is well-known, for example, in the domestic PIL codes of Italy and Germany. In those countries, it even is the general rule in international tort law – a hardly convincing solution, because the victim is not the weaker party in every case (for an in-depth treatment of this issue, see here). Therefore, the more modern Rome II Regulation opted for a more differentiating approach: *lex loci damni* is the general rule (Art. 4(1) Rome II), whereas the principle of ubiquity – i.e. that a tort may be located in more than one place – is only codified in groups of cases where a specific interest legitimises deviating from this rule: first, environmental damage (Art. 7 Rome II), and secondly, multi-state cases involving cartel damages (Art. 6(3) Rome II). Moreover, while Rome II is not applicable to violations of personality rights, the CJEU's case law on Art. 7(2) Brussels I*bis* has frequently been emulated in domestic conflicts law as well. In sum, the principle of ubiquity has always remained a part of the doctrinal toolbox of EU choice of law.

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

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

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

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

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

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

The latter option should refer to the habitual residence of a corporation because this is the connecting factor commonly used in the Rome II Regulation (Art. 23 Rome II). There is no practical need to replace it with "domicile" which is a concept deployed in European civil *procedure* (Art. 63 Brussels I*bis*), but not in EU choice-of-law Regulations.

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

Chinese Court Holds Arbitral

Award by Foreign Arbitration Institutions in China Enforceable

(This is another version of views for the recent Chinese case on international commercial arbitration provided by Chen Zhi, a PhD candidate in the University of Macau, Macau, PRC)

On 6 August 2020, Guangzhou People's Intermediate Court ("Guangzhou court") handed down a ruling on a rare case concerning the enforcement of an award rendered by International Commercial Court of Arbitration ("ICC") in China,[1] which have given rise to heated debate by the legal community in China. This case was thought to be of great significance by many commentators because it could open the door for enforcement of arbitral awards issued by foreign institution with seat of proceeding in China, and demonstrates the opening-up trend for foreign legal service.
[1]Brentwood Industries Inc. v. Guangdong Faanlong Co, Ltd and Others 2015 Sui Zhong Min Si Fa Chu No.62?

Backgrounds of the facts
The plaintiff, Brentwood Industries, Inc. a USA based company, entered into a Sale and Purchase Agreement ("SPA") along with a Supplementary Agreement with three Chinese companies (collectively, "Respondents") in April 2010. Article 16 of Sale and Purchase Agreement provided as follow:
Any dispute arising out of or in connection with this contract shall be settled by amicable negotiation between the parties. If such negotiations fail to resolve the dispute, the matter shall be referred to the Arbitration Commission?sic?of International Chamber of Commerce for arbitration at the project site in accordance with international practice. The award thereof shall be final and binding on the Parties. The costs of the arbitration shall be borne by the losing party, unless the Arbitration Commission?sic?decides otherwise. The language of the arbitration shall be bilingual, English and Chinese.

According to Article 3 of Supplementary Agreement, the project site was in Guangzhou.
On 29 May 2011, Brentwood submitted an application to Guangzhou Court, seeking for nullification of the arbitration clause in SPA. The Guangzhou Court

handed down a judgement in early 2012 rejecting Brentwood's application and confirming the validity of the arbitration clause.
Because the ICC does not have an office in Guangzhou, Brentwood subsequently commenced an arbitration proceeding before Arbitration Court of International Chamber of Commerce Hong Kong Office on 31 August of 2012. In the course of proceeding, all three respondents participate in the arbitration presenting their written defenses, and among them, one respondent also raised objection of jurisdiction of the ICC Court to handle the case. The ICC Court decided that the jurisdiction issue shall be addressed by a sole arbitrator after giving all parties equal opportunities to present their arguments. Hence, with the consensus of all parties, the ICC Court appointed a sole arbitrator on 10 January of 2013.

On 3rd April 2013, the case management conference was held in Guangzhou and each party appeared and agreed upon the Term of Reference. After exchange of written submissions and hearing (all attended by all parties), the arbitrator rendered Final Award with the reference No. 18929/CYK (the Final Award) on 17 March 2014.

Enforcement proceeding and judgment
Brentwood sought to enforce the Final Award before the Guangzhou Court, mainly on the basis of non-domestic award as prescribed in Article 1(1) of the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which China is a signatory party ("New York Convention"). To increase its options in obtaining enforcement, Brentwood also invoked the Arrangement on Reciprocal Enforcement of Arbitral Awards Between SPC and Hong Kong Special Administrative Region Government, in the event the court regards the award as Hong Kong award because conducted by the ICC Hong Kong Office.
The Respondents raised their own objections respectively, which can be summarized to four main points:
(1) non-domestic award under New York Convention was not applicable to the PRC because it had declared reservation on this matter;
(2) the arbitration clause was invalid because the ICC Court was not an arbitration institutions formed in accordance with Article 10 of the PRC Arbitration Law (revised in 2017);
(3) there are substantive errors in the Final Award;
(4) the arbitrator exceeded its power in the Final Award.

The Guangzhou Court ruled that the arbitration clause was valid and its validity had been confirmed in previous case by the same court. As for the nationality and enforceability of the Final Award, the court opined that it shall be regarded as a domestic award which can be enforced in accordance to Article 273 of Civil Procedural Law (revised in 2012), and stipulated that the awards by foreign-related arbitration institutions in China were enforceable before competent intermediated courts. Based on the above reasoning, the court stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that the case shall be closed without enforcing the Final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis.

China's Stance to domestic award by foreign institutions

There is no law directly applicable to awards issued by foreign institution with seat in China. The current legislation divided awards into three categories:

(1) domestic award rendered by Chinese arbitration institutions, which is governed by the Arbitration Law and Civil Procedure Law.

(2) foreign-related award made by Chinese institutions, which is enforceable under Article 273 of Civil Procedure Law.

(3) awards made offshore, which are governed by international conventions (i.e. New York Convention), judicial arrangements and Supreme People Court's judicial interpretation depending on the place of arbitration.

The problem arises mainly because of the conflict between Chinese law and international conventions. Unlike the common practice in international arbitration across the world, which decides the nationality of award and competent court for remedies thereof based on the seat of arbitration proceeding, Chinese law traditionally relied upon the nationality of arbitration institutions instead. The term "arbitration seat" was not embedded in the legislation framework until the SPC's Interpretation on Application of Arbitration Law in 2006, and Supreme People's Court only begins to decide the nationality of award based on the seat since 2009.[2]

Due to the lacuna in law, there is no remedy for such China seated foreign award, and therefore parties may face enormous legal risks: on one hand, such award cannot be enforced by any Chinese court if the losing party refuse to perform it voluntarily, on the other hand, the party who is dissatisfactory with the award or arbitration proceeding has no way to seek for annulment of the award.

In 2008, Ningbo Intermediate Court ruled on a controversial case concerning the enforcement of an ICC award rendered in Beijing,[3] granting enforcement by regarding the disputed award as "non-domestic" award as prescribed in the last sentence of the Article 1(1) of New York Convention, under which the member states may extend the effect of Convention to certain type of award which is made inside its territory while is not considered as domestic for various reasons. It shall be noted that the method used by Ningbo Court is problematic and have given rise to heavy criticisms,[4] because China had filed the reservation set out in Article 1(3) of New York Convection confirming that it will apply the Convention to the "recognition and enforcement of awards made only in the territory of another Contracting State". In other words, said non-domestic award approach shouldn't be use by Chinese courts.
With this respect, the approach employed in Brentwood seems less controversial because it does not concern a vague and debatable concept not included in current law. Moreover, by deciding the nationality of award based on the seat of arbitration instead of the base of institution, the Guangzhou Court is actually promoting the reconciliation of Chinese law with New York Convention.

[2]See Article 16 of SPC's Interpretation on Several Questions in Application of Arbitration Law Fa Shi 2006 No.7, see also SPC's Notice on Matters of Enforcing Hong Kong Award in Continental China Fa 2009 No. 415. As cited in Gao Xiaoli, The Courts Should Decide the Nationality of Arbitral Award by Seat Instead of Location of Arbitration Institution, People's Judicature (Volume of Cases), Vol.2017 No. 20, p. 71.
[3] Duferco S.A. v. Ningbo Art & Craft Import & Export Corp. 2008 Yong Zhong Jian No.8.
[4] Author Dong et al, Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?, available at http://arbitrationblog.kluwerarbitration.com/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/

Comments

Brentwood decision does not appear out of thin air, but contrarily, it is in line with the opening-up trend in the judicial practice of commercial arbitration in China started in 2013. At that time, the Supreme People's Court ruled on the landmark Longlide case by confirming the validity of arbitration agreement which require arbitration proceeding conducted by foreign arbitration in China.[5]This stance has been followed and further developed by the First Intermediate Court of Shanghai in the recent Daesung Industrial Gases case,[6]. In this case, a clause providing "arbitration in Shanghai by Singapore International Arbitration Center" was under dispute by two respondents who alleged that foreign based institutions were prohibited from managing arbitration proceeding in China. However the court viewed this assertion as lacking of legal basis in Chinese law, and was contradictory to the developing trend of international commercial arbitration in the PRC.

In addition, local administrative authorities have shown firm stance and laudable attempt to promote the opening-up policy by attracting foreign institutions to carry out business in China. In late 2019, the justice department of Shanghai adopted new policies permitting foreign arbitration bodies to setup branch and carry out business in Lingang Free Trade Pilot Zone, and to set up detailed rules for registration and supervision in this regard.[7] On 28 August of 2020, the State Council agreed to a new proposal jointly by the Beijing government and the Ministry of Commerce on further opening up service industry, allowing world-renowned offshore arbitration institutions to run business in certain area of Beijing after registration at the Beijing justice department and the PRC Justice Ministry. This goes even further than Shanghai's policy by stipulating that competent authorities shall support preservations for arbitration proceeding, increasing the reach of foreign institution on local justice system.[8]

Nevertheless, there are still lots of works to be done for the landing of foreign institutions:

First, as the lacuna in the law still exists, the judicial policy will continue to be "uncertain, fraught with difficulty and rapidly evolving" in this regard, as described by the High Court of Singapore. [9] Because Article 273 of Civil Procedural Law does not contain award by foreign institution stricto senso, and Guangzhou Court applied it only on analogous basis, this approach is more likely to be an expedient measure by taking into account surrounding circumstances (i.e. the validity of arbitration clause in dispute had been confirmed by the court itself, and all respondents had actively participated in the arbitration proceeding), instead of corollary of legal terms. Further, albeit the decision in Brentwood case is consistent with SPC's opening-up and arbitration friendly policy, no evidence shows its legal validity was endorsed by SPC like that in Longlide case. Therefore, it is doubtful whether this approach will be employed by other courts in future.

Second, even though the validity and enforceability issues have been settled, the loophole in law concerning auxiliary measures (i.e. interim relief, decision of jurisdiction, etc.) and annulment proceeding remains unsolved, which will probably be another obstruction for foreign institution to proceed with arbitration proceeding in Continental China. The above mentioned proposal by Beijing government provides a good example in this respect, while this problem can only be fully settled through revision of law.

Third, the strict limitations on the content of arbitration agreement remain unchanged. Arbitration agreements providing ad hoc proceeding is still invalid by virtue of the law. Moreover referring dispute without foreign-related factor to foreign institutions is also unacceptable under current judicial policy, even for exclusively foreign-owned enterprises. These limitations have been heavily criticized by legal practitioners and researchers over the years, however whilst the above issues have been formally lifted, the arbitration agreement shall be well drafted in terms of both arbitration institution and the seat of arbitration.

[5] Longlide Packaging Co. Ltd. v. BP Agnati S.R.L. (SPC Docket Number: 2013-MinTa Zi No.13).
[6] Daesung Industrial Gases Co., Ltd.&Another v. Praxair (China) Investment Co., Ltd 2020 Hu 01 Min Te No.83.
[7] See: Measures for the Establishment of Business Bodies by Offshore Arbitration Institutions in the New Lingang Area of the Pilot Free Trade Zone of China (Shanghai) available at http://sfj.sh.gov.cn/xxgk_gfxwj/20191020/3fbcd61ef43147379c5841e28bdf6007.html
[8] See Article 8 of State Council's Instruction on the Work Plan for the Construction of a National Demonstration Zone for Expanding and Opening Up Beijing's Services Industry in a New Round of Comprehensive Pilot Project?available at http://www.gov.cn/zhengce/content/2020-09/07/content_5541291.htm?trs=1
[9] BNA v BNB [2019] SGHC 142 para.116.

Human rights in global supply chains: Do we need to amend the Rome II-Regulation?

Written by Giesela Rühl, Humboldt-University of Berlin

The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies – and companies operating in Europe – to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However, from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss – and criticize – the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

Victims' unilateral right to choose the applicable law

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

1) the law of the country in which the damage occurred, i.e. the law of the place of injury,

2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,

3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,

4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply – and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* – while certainly good for victims – is conceptually ill-conceived because it results in legal uncertainty for all companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four – potentially – different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not completely) fallen out of favour.

Alternative roads to European law

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts – irrespective of the provisions of the Rome II Regulation. However, even if the European legislature prefers to adopt a European instrument in the form of a Directive – for political or competence reasons –, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks – and then abandons – the proposed Article 6a Rome II Regulation.

Note: This post is also available via the blog of the European Association of Private International Law.