Supreme Court of California (ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) v. CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD). A European reading of the ruling

A bit more than a month ago, the Supreme Court of California rendered its decision on a case concerning the (non-)application of the 1965 Hague Service Convention. The case has been thoroughly reported and commented before and after the ruling of the Supreme Court. I will refrain from giving the full picture of the facts; I will focus on the central question of the dispute.

THE FACTS

The parties are U.S. and Chinese business entities. They entered into a contract wherein they agreed to submit to the jurisdiction of California courts and to resolve disputes between them through California arbitration. They also agreed to provide notice and "service of process" to each other through Federal Express or similar courier. The exact wording of the clause in the MOU reads as follows:

"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".

ARBITRATION PROCEEDINGS

An agreement between the companies was eventually not reached, which was reason for Rockefeller to initiate arbitration proceedings. All materials were sent

both by email and Federal Express to the Chinese's company address listed in the MOU. The latter did not appear. The arbitrator awarded Rockefeller the amount of nearly 415 million $. The decision was sent to Sinotype by e-mail and Federal Express.

COURT PROCEEDINGS

In accordance with the Civil Procedure Code of the State of California [*§ 1285. Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award…*], Rockefeller petitioned the award to be confirmed. The same 'service' method was used by the petitioner, i.e. e-mail and Federal Express. Again, Sinotype did not take part in the proceedings.

At a later stage, Sinotype became active, and filed a motion to set aside the default judgment for insufficiency of service of process. In particular, it asserted that it did not receive actual notice of any proceedings until March 2015 and argued that Rockefeller's failure to comply with the Hague Service Convention rendered the judgment confirming the arbitration award void. The motion was denied by the Los Angeles County Superior Court; the Court of Appeal reversed; finally, the Supreme Court reversed the appellate decision.

THE RULINGS

The first instance court confirmed that the Service Convention was in principle applicable, however, the agreement between the parties to accept service by mail was valid and superseded the Convention. The Court of Appeal reversed the judgment, stating exactly the opposite, namely that the Service Convention supersedes private agreements. In light of China's opposition to service by mail, the agreed method of communication was considered inadequate for the purposes of the Convention. The Supreme Court held yet again the opposite, because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification; hence, the Convention does not apply.

COMMENT

I place myself next to the commentators of the case: It is true that the Service Convention does not apply in the course of *arbitration proceedings*. There is convincing case law to support this view from different jurisdictions in different

continents (example here). However, in the case at hand, the issue at stake was the use of a method not permitted by the Convention in *court proceedings*. It was lawfully agreed to send all documents by e-mail or FedEx during arbitration. Nowadays, this has become standard procedure in international commercial arbitration. However, a multilateral convention may not succumb to the will of the parties. If a contracting state refuses to accept postal service within the realm of litigation, the parties have no powers to decide otherwise. The best option would be, as already suggested, to oblige a party to appoint a service agent. This enables service within the jurisdiction, as already decided by the U.S. Supreme Court in the *Volkswagen Aktiengesellschaft v. Schlunk* case. In a similar fashion, the CJEU consolidated the same position in the *Corporis Sp. z o.o. v Gefion Insurance A/S* case, following its ruling in the case *Spedition Welter GmbH v Avanssur SA*.

Finally, returning to the EU, postal service would not require any agreement between the parties; Article 14 of the Service Regulation stipulates service by mail as an equivalent means of service between Member States. In addition, service by e-mail is scheduled to be embedded into the forthcoming Recast of the Regulation under certain requirements which are not yet solidified.

Public international law requirements for the effective enforcement of human rights

Written by Peter Hilpold, University of Innsbruck

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

1. The UN Guiding Principles on Business and Human Rights (2011) have set

forth a process by which Corporate Social Responsibility (CSR) rules are to be further specified. The approach followed is not to impose specific results but to create procedures by which CSR is given further flesh on the basis of a continuing dialogue between all relevant stakeholders.

2. The operationalization of this concept takes place by a three pillar model („protect", „respect", „remedy") based on an approach called „embedded liberalism" according to which the creation of a liberal economic order allowing also for governmental and international intervention is pursued.

3. The „remedies" pillar is the least developed one within the system of the Guiding Principles. Intense discussion and studies are still needed to bring more clarity into this field.

4. In the attempt to bring more clarity into this area guidance can be obtained by discussions that have taken place within the UN in the field of general human rights law and by ensuing academic studies referring to the respective documents.

5. The remedies mentioned in the Guiding Principles are formulated in a relatively „soft" manner, after attempts to create „harder" norms have failed. There are, however, initiatives underway to create a binding instrument in this field. According to the „Zero Draft" for such a treaty much more restrictive rules are envisaged. It is, however, unlikely that such an instrument will meet with the necessary consensus within the foreseeable future.

6. In Europe, within the Council of Europe as well as within the European Union, various attempts have been undertaken to give further substance to the „remedies". The relevant documents contain both an analysis of the law in force as well as proposals for new instruments to be introduced. These proposals are, however, in part rather far-reaching and thus it is unclear whether they can be realized any time soon.

7. If some pivotal questions shall be identified that have emerged as an issue for further discussion, the following can be mentioned:

7.1. The extraterritorial application of remedies

a) In this context, first of all, the specific approach taken by the US Courts when

applying the Alien Tort Statute (ATS) has to be mentioned. However, after „Kiobel“ this development seems to have come to a halt.

b) Some hopes are associated with the application of tort law in Europe according to the „Brussels I”- and the „Rome II”-Regulation. However, on this basis European tort law can be applied to human rights violations by companies and subsidiaries abroad only to a very limited measure.

7.2. Criminal law as a remedy

According to some, remedies should be sought more forcefully within the realm of international criminal law. A closer look at the relevant norms reveals, however, that expectations should not be too high as to such an endeavour. International Investment Agreements (IIAs) and Counterclaims

Due to their „asymmetrical“ nature (As are intended to protect primarily the investor) IIAs do not offer, at first sight, a suitable basis for holding investors responsible for human rights abuses in the guest state. Recently, however, in the wake of the „Urbaser“ case, hopes have come up that counterclaims could be used to such avail. For the time being, however, these hopes are not justified. Nonetheless, attempts are under way to re-draft IIAs so that counterclaims are more easily available and, in general, to emphasize the responsibility of investors.

7.3. The national level

The national level is of decisive importance for finding remedies in the area of CSR. In this context, National Contact Points, National Action Plans and Corporate Social Reporting have to be mentioned. A wide array of initiatives have been taken in this field. Up to this moment the results are, however, not really convincing.

8. The Guiding Principles envisage a vast panoply of judicial and non-judicial initiatives, of State-based and non-State based measures. Many of these measures have to be further specified and tested. It is most probably too early to impose binding obligations in this field as the „Zero Draft“ ultimately intends. Further discussion and a further exchange of experience, as it happens within the „Forum on business and human rights”, seem to be the more promising way to follow.

Full (German) version: *Peter Hilpold,* Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten: Völkerechtliche Anforderungen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 185 et seq.

Private international law requirements for the effective enforcement of human rights

Written by Tanja Domej, University of Zurich

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

1. It is essential for the effective enforcement of human and workers' rights to create effective local institutions and procedures. This encompasses functioning, trustworthy and accessible civil courts, but also other public, private and criminal institutions and mechanisms (e.g. permission, licencing or inspection procedures to ensure safety in the workplace; accident insurance; trade unions). Civil litigation cannot be a substitute for such mechanisms – particularly if it takes place far away from the place where the relevant events occurred.

2. This, however, is not a reason against ensuring effective enforcement mechanisms, including judicial mechanisms, for private law claims arising from violations of human rights or claims aiming to prevent or to terminate such violations. Such judicial proceedings can also help to promote the establishment of effective local mechanisms for preventing and remedying violations.

3. The usual difficulties arising in cross-border litigation tend to be aggravated in

cases concerning human rights violations in developing countries. In addition to issues of jurisdiction and choice of law, there are often considerable challenges particularly with respect to litigation funding, fact-finding and establishing the content of foreign law, if required.

4. Legal aid alone usually is not a viable financial basis for corporate human rights litigation. The funding of such claims largely depends on market mechanisms, particularly on success-based lawyers' fees or commercial litigation funding. Because of the moral hazard that may arise in this context, it is desirable to promote the establishment of public-interest litigation funders. Nevertheless, "entrepreneurial litigating" in the field of corporate human rights cases cannot be considered as per se abusive. There seems to be a need, however, to monitor practices in this field closely to assess whether further regulation is required.

5. Where cross-border judicial cooperation is not functioning, taking of evidence located in a foreign state without involving authorities of the state where such evidence is located becomes increasingly important. A generous approach should be adopted in cases where "direct" taking of evidence neither violates legitimate third-party interests nor involves the use or threat of compulsion in the territory of a foreign state.

6. In cases where liability for damage inflicted by the violation of human rights standards depends on a business's internal operations, it is essential for an effective access to remedy that either the burden of proof with respect to the relevant facts is on the business or that there is a disclosure obligation that ensures access to relevant information. Where such disclosure could endanger legitimate confidentiality interests (particularly with respect to trade secrets), appropriate mechanisms to protect such interests should be put in place.

7. Collective redress mechanisms can improve access to justice with respect to corporate human rights claims. Meanwhile, reducing an excessive burden on the courts that could result from a large number of parallel proceedings currently does not seem to be as important a consideration in practice in the field of corporate human rights litigation as it can be in other fields of mass tort litigation. Appropriate safeguards have to be put in place to protect both the legitimate interests of defendants and those of the members of the claimant group. When designing such safeguards, it is important to ensure that they do not lead to the obstruction of legitimate claims. Particularly in collective redress

proceedings, the court should have strong case management and control powers, both during the proceedings and in the case of a settlement.

8. In addition to claims aiming at remedies for victims of violations, private law claims brought by non-government organisations, by public bodies or by individuals can at least indirectly contribute to the enforcement of human rights standards. Possible examples are claims on the basis of unfair competition, and possibly also contractual claims, because of false statements about production standards. Actions by associations or popular actions for injunctive or declaratory relief could also contribute to private enforcement of human rights standards. It remains to be seen whether litigation among businesses concerning contractual obligations to comply with human rights standards will play a meaningful role in this field in the future as well.

9. Soft law mechanisms and alternative dispute resolution can supplement judicial law enforcement mechanisms, but they are not a substitute for judicial mechanisms. In particular, human rights arbitration depends on a voluntary submission. Its practical effectiveness therefore requires the cooperation of the parties to the dispute. It would, however, be possible to create incentives for such cooperation.

Full (German) version: *Tanja Domej,* Zivilrechtliche Rechtsdurchsetzungsmechanismen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 229 et seq.

Third-party liability of classification and certification

societies in the context of conflict of laws and public international law – a comment on the CJEU's recent 'Rina judgement'

Written by Yannick Morath

Yannick Morath, doctoral candidate at the University of Freiburg, has kindly provided us with his thoughts on the CJEU's judgement in the case of LG and Others v Rina SpA, Ente Registro Italiano Navale (C-641/18 – ECLI:EU:C:2020:349)

(See also the earlier post by Matthias Weller concerning the CJEU's judgement).

1. **Introduction**

Private-law classification and certification societies play a vital role in modern economies. Especially in the maritime sector, external auditors issue certificates dealing with public tasks such as the seaworthiness and safety of vessels. Not only their contractual partners but also third parties rely on the accuracy of such certificates. Due to cross-border mobility of certificates and certified items, issues of Private International Law have to be taken into account when dealing with a certifiers' liability.

When not applying the appropriate level of care, classification and certification agencies can – according to the CJEU – be sued in the courts of the Member State where the agency is seated. By finding this ruling, the CJEU had to deal with two interesting questions: Firstly, it had to establish whether an action for damages, brought against private certifiers falls within the concept of 'civil and commercial matters', and therefore, within the scope of the Regulation 44/2001 (Brussels I). Secondly, the CJEU had to examine the legitimacy of the certifier's plea based on the principle of customary international law concerning immunity from state jurisdiction.

2. Facts of the 'Rina-case'

In 2006, the *Al Salam Boccaccio '98*, a ship sailing under the flag of the Republic of Panama, sunk in the Red Sea, tragically causing the loss of more than 1,000 lives. Relatives of the victims and survivors have brought an action under Italian law before the Tribunale di Genova (District Court, Genoa, Italy) against two private law corporations (the Rina companies), that are seated in Genoa and were responsible for the classification and certification of the ship.

The applicants argue that the defendants' operations, carried out under a contract concluded with the Republic of Panama, are to blame for the ship's lack of stability and its lack of safety at sea, which are the causes of its sinking. Therefore, they claim compensation from the Rina companies for the losses they suffered.

The Rina companies counter that the referring court lacks jurisdiction, relying on the international-law principle of immunity from jurisdiction of foreign States. They state that they are being sued in respect of activities, which they carried out as delegates of the Republic of Panama. The activities in question were a manifestation of the sovereign power of a foreign State and the defendants carried them out on behalf of and in the interests of that State.

The applicants, however, argue in favour of the case's civil law nature, within the meaning of Article 1 (1) of Regulation 44/2001. As the Rina companies are seated in Genoa, the Italian courts should have jurisdiction under Article 2 (1) of that regulation. They submit that the plea of immunity from jurisdiction does not cover activities that are governed by non-discretionary technical rules, which are, in any event, unrelated to the political decisions and prerogatives of a State.

The Tribunale di Genova decided to stay the proceedings and consult the CJEU for further clarification under Article 267 TFEU.

3. Background: The dual role of classification and certification societies

When dealing with the classification and certification of ships it is important to be aware of the dual role private-law societies play in this area. Traditionally they are hired by a shipowner to attest that a ship is built in accordance with the standards of a specific ship class. Those 'class rules' are developed by the classification societies themselves. The maritime industry depends on these services, as the classification of a ship is necessary to evaluate its insurability and marketability. Therefore, these voluntary classifications are mainly prompted by

private interest. This is referred to as the ‘private function’ of classification.

On the other hand, the same societies fulfil a ‘public function’ as well. Under international maritime law, states have a duty to take appropriate measures for ships flying under their flag to ensure safety at sea (Article 94 (3) of the United Nations Convention of the Law of the Sea). For this purpose ships have to be surveyed by a qualified personnel to make sure it meets all relevant safety and environmental standards. Flag states can perform these tasks themselves; however, most of them delegate executive powers to classification societies. Pursuant to Article 3 (2) of Directive 2009/15 this is also possible under EU law. When executing these powers classification agencies are subject to two contracts: The first one is the agreement on the delegation of powers with the flag state, the second contract is the actual certification agreement with the owner of the ship that is about to be surveyed. Whereas shipowners are free to choose one of the recognized classification societies, the certification itself is compulsory.

It must be noted that the classification according to class rules (private function) is a prerequisite for the statutory inspection and certification (public function). In the case at hand, the Rina companies were responsible for both aspects. They classified the ship in accordance with their class rules and then issued the statutory certificate on behalf of and upon delegation from the Republic of Panama. This public law background caused the need for clarification by the CJEU.

4. The CJEU on the interpretation of ‘civil and commercial matters’

Under Article 1(1) of Regulation 44/2001, the scope of that regulation is limited to ‘civil and commercial matters’. It does not extend, in particular, to revenue, customs or administrative matters. In order to ascertain whether Italian courts have jurisdiction pursuant to Article 2 (1) of that regulation it is necessary to interpret the concept of ‘civil and commercial matters’. This concept is subject to an autonomous European interpretation. By determining whether a matter falls within the scope of the Regulation, the nature of the legal relationships between the parties to the dispute is crucial. It must be noted that the mere fact that one of the parties might be a public authority does not exclude the case from the scope of the Regulation. It is, however, essential whether the party exercises public powers (*acta iure imperii*). These powers are ‘falling outside the scope of the ordinary legal rules applicable to relationships between private individuals’

(para. 34).

Following the Advocate General's opinion and the CJEU's judgement in *Pula Parking* (C-551/15 – ECLI:EU:C:2017:193), the Court notes that 'it is irrelevant that certain activities were carried out upon delegation from a State' (para. 39). The fact that the operations were carried out on behalf of and in the interest of the Republic of Panama and that they fulfil a public purpose, do not, in themselves, 'constitute sufficient evidence to classify them as being carried out *iure imperii*' (para. 41.).

In fact it must be taken into account that 'the classification and certification operations were carried out for remuneration under a commercial contract governed by private law concluded directly with the shipowner of the *Al Salam Boccaccio '98*' (para. 45). Moreover, it is the responsibility of the flag state to interpret and choose the applicable technical requirements for the certification necessary to fly their flag.

The CJEU continues to examine the agency's decision-making power. If the agency decides to withdraw a certificate, the respective ship is no longer able to sail. It argues, however, that this effect does not originate from the decision of the agency but rather from the sanction which is imposed by law (para. 47). The role of the certifier simply 'consists in conducting checks of the ship in accordance with the requirements laid down by the applicable legislative provisions.' As it is for the States to fix those provisions, it is ultimately their power to decide on a ship's permission to sail.

Whereas the general remarks on the interpretation of 'civil and commercial matters' are convincing and based on settled case law, the findings about the 'decision making power' of recognised organisations give rise to further questions. If a ship does not comply with the relevant requirements, the statutory certificate must not be issued and the shipowner is not allowed to sail under the flag of the respective state. Even though this legal consequence is finally imposed by law, it is the certifier's application of that law that leads to this effect. Whenever a certification agency refuses to issue a certificate, the ship is initially not able to sail. The CJEU's technical perspective in paragraph 47 does not sufficiently appreciate the factual decision making of the certifier. The judgement does unfortunately not explicitly address the issue of legal discretion and its consequences on the concept of 'civil and commercial matters'.

However, there are other grounds to qualify the case a 'civil matter'. As the CJEU pointed out as well, it follows from Regulation 6 (c) and (d) of Chapter I of the International Convention for the Safety of Life at Sea, that the final responsibility is allocated to the flag state (para. 48). Therefore, the state is subject to far-reaching supervisory duties. Even though this is not expressively regulated by international or EU law, it appears like the flag state can at any time overrule an agency's decision to issue or withdraw the certificate. This would result in a limitation to the finality of the agency's powers and prepare the ground for a civil law qualification. Some further remarks by the CJEU about this aspect would have been interesting.

5. The CJEU on state immunity from jurisdiction

Doubts regarding the jurisdiction of the Italian courts arose from the Rina companies' plea based on the principle of customary international law concerning immunity from jurisdiction. Pursuant to the principle *par in parem non habet imperium*, a State cannot be subjected to the jurisdiction of another State. 'However, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii.* By contrast, it may be excluded if the legal proceedings relate to acts which do not fall within the exercise of public powers' (para. 56).

The CJEU held that this principle does not preclude the application of the Regulation in this case, although it is the referring court that has to examine whether the Rina companies had recourse to public powers within in the meaning of international law. It must be noted that a rule of customary international law will only exist where a given practice actually exists that is supported by a firm legal view (*opinio iuris*). Following the Advocate General, the CJEU finds that the case-law cited by the defendants 'does not support the unequivocal conclusion that a body carrying out classification and certification operations may rely on immunity from jurisdiction in circumstances such as those of the present case` (c.f. para. 109 of his opinion).

In regard of state immunity, the CJEU changes its perspective on the case. Whereas the interpretation of 'civil and commercial matters' was driven by EU law, the doctrine of state immunity requires a different methodological approach, as it originates from international law. Nevertheless, the CJEU's overall convincing remarks are in line with its earlier findings, setting a high bar for

statutory certification societies to plead for state immunity.

6. Final remarks

The CJEU established legal security for the victims of maritime disasters such as the sinking of the *Al Salam Boccaccio '98*. The judgement indirectly clarified the applicability of the Brussels I Regulation in cases where maritime certifiers operate only in their private function. When statutory certifications are a civil matter, this must *a fortiori* be the case for voluntary classifications. Having consistent results when establishing jurisdiction in such cases, also meets with the principle of foreseeability. The remarks on the applicability of the Brussels I regulation are also of significant relevance when dealing with the Brussels Ibis and the Rome I and II Regulations, as all of them apply the concept of 'civil and commercial matters'.

Moreover, the judgement underlines the responsibility of private-law certifiers and recognises their vital role as regulators that operate in the public interest. Even though the CJEU' findings on the interpretation of 'civil matters' are consistent with its earlier developed broad understanding of the concept, further clarification regarding privatised decision making powers would have been desirable.

Corporate responsibility in (public) international law

Written by Oliver Dörr, University of Osnabrück

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

I. Companies – responsibility

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

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

II. Private persons and the law of international responsibility

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

Private persons as subjects of international legal obligations

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

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

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

particular under the Statute of the International Criminal Court.

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

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

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

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

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

Obligations to establish the responsibility of private persons

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

Responsibility of private persons under autonomous national law

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

14. The French Law No. 399-2017 on the plan de vigilance is far too general and vague to serve as an example for an (indirect) international legal reporting

responsibility. The same applies to the CSR directive of the European Union of 2014.

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

Behavioural governance without legally binding effects

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

Processes of rule-making

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

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

Responsibility by reception

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

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

IV. Conclusion

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

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

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

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

The Private International Law of

Virtual Zoom Backgrounds

Written by Tobias Lutzi, University of Cologne

One of the biggest winners of the current pandemic (other than toilet paper producers, conspiracy theorists, and the climate) seems to be the former Silicon Valley startup Zoom, whose videoconferencing solutions have seen its number of daily users increase about thirtyfold since the end of 2019. While the company's success in a market otherwise dominated by some of the world's wealthiest corporations has taken many people – including investors – by surprise, it can be attributed to a number of factors – arguably including its software's highly popular virtual-background feature.

With more and more people using the cockpit of the *Millennium Falcon*, the couch from *The Simpsons*, and other iconic stills from movies or TV series as virtual backgrounds in their private and professional Zoom meetings and webinars, the question arises as to whether this may not constitute an infringement of copyright.

Unsurprisingly, this depends on the applicable law. Whereas using a single frame from a movie as a virtual background may often qualify as 'fair use' under US copyright law even in a professional setting (and thus require no permission from the copyright holder), no such limitation to copyright will be available in many European legal systems, with any 'communication to the public' in the sense of Art 3 of the Information Society Directive 2001/29/EC potentially constituting a copyright infringement under the domestic copyright laws of an EU Member State.

As far as copyright infringements are concerned, the rules of private international law differ significantly less than the rules of substantive law. Under the influence of the Berne Convention, the so-called *lex loci protectionis* principle has long become the leading approach in most legal systems, allowing copyright holders to seek protection under any domestic law under which they can establish a copyright infringement. For infringements committed through the internet, national courts have given the principle a notoriously wide application, under which the mere accessibility of content from a given country constitutes a sufficient basis for a copyright holder to seek protection under its domestic law.

Accordingly, using an image on Zoom without the copyright holder's permission in a webinar that is streamed to users in numerous countries exposes the user to just as many copyright laws – regardless of whether the image is used by the host or by someone else sharing their video with the other participants.

Interestingly, the fact that the image is only displayed to other users of the same software is unlikely to mitigate this risk. While Zoom's (confusingly numbered) terms & conditions unsurprisingly prohibit infringements of intellectual property (clause 2.d.(vi)) and – equally unsurprisingly – subject the company's legal relationship with its users to the laws of California (clause 22/20.1), courts have so far been slow to attach significance to such platform choices of law as with regard to the relationship between individual users. In fact, the EU Court of Justice held in Case C-191/15 *Verein für Konsumenteninformation v Amazon* (paras. 46–47) that even with regard to a platform host's own liability in tort,

> *the fact that [the platform host] provides in its general terms and conditions that the law of the country in which it is established is to apply to the contracts it concludes cannot legitimately constitute […] a manifestly closer connection [in the sense of Art. 4(3) Rome II].*
>
> *If it were otherwise, a professional […] would de facto be able, by means of such a term, to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation.*

While the escape clause of Art. 4(3) Rome II is not directly applicable to copyright infringements anyway, the decision illustrates how courts will be hesitant to give effect to a platform host's choice of law as far as the relationship between users – let alone between users and third parties – is concerned. This arguably also applies to other avenues such as Art. 17 Rome II and the concept of 'local data'.

The liability risks described above are, of course, likely to remain purely theoretic. But they are also easily avoidable by not using images without permission from the copyright holder in any Zoom meeting or webinar that cannot safely be described as private under the copyright laws of all countries from where the meeting can be joined.

Corporate responsibility and private (international) law

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

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

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

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

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

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

provisions (Article 16 Rome II Regulation) or if application of foreign law violates the *ordre public* (Article 26 Rome II Regulation).

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

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

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

8. The difficulties to hold (European) parent and buyer companies *de lege lata* liable for human rights violations committed by their foreign subsidiaries or suppliers raises the question of whether domestic laws should be reformed and their application ensured via the rules of private international law? Should domestic legislatures, for example, introduce an internationally mandatory human

rights due diligence obligation and hold companies liable for violations? Proposals to this end are currently discussed in Germany and in Switzerland. In France, in contrast, they are already a reality. Here, the Law on the monitoring obligations of parent and buyer companies (Loi de vigilance) of 2017 imposes human rights due diligence obligations on bigger French companies and allows victims to sue for damages under the French Civil Code. The situation is similar in England. According to a Supreme Court decision of 2019 English parent companies may, under certain conditions, be held accountable for human rights violations committed by their foreign subsidiaries.

9. The introduction of an internationally mandatory human rights due diligence obligation at the level of national law certainly holds a number of advantages. In particular, it may encourage companies to take measures to prevent human rights violations through their foreign subsidiaries and suppliers. However, it is all but clear whether, under the conditions of globalization, any such obligation will actually contribute to improving the human rights situation in the countries of the Global South. This is because it will induce at least some companies to take strategic measures to avoid the costs associated with compliance. In addition, it will give a competitive advantage to companies which are domiciled in countries that do not impose comparable obligations on their companies.

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

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

Jurisdiction unbound: extraterritorial measures to ensure corporate responsibility

Written by Nico Krisch, Graduate Institute for International and Development Studies, Geneva

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

1. The conceptual framework of jurisdictional boundaries in international law continues to be dominated by the principle of territoriality and its exceptions, even if calls for a reorientation have grown in recent years.

2. The principle of territoriality leads today to far wider jurisdictional claims than in the past, and its limits are being redefined through 'territorial extensions' in a number of areas.

3. These extensions are rarely questioned by states, and clear and consistent jurisdictional boundaries remain hard to define. Contestation arises primarily when states seek to use extraterritorial measures to counteract important policy choices of other states.

4. The result is a far-reaching overlap of different jurisdictional spheres which, if seen in conjunction with the multiple forms of transnational regulation existing today, leads to a multi-layered 'jurisdictional assemblage'.

5. So far, there are no accepted rules governing the relationship of competing jurisdictional spheres in this assemblage. The effective exercise of jurisdiction depends, in large part, on the political and economic power of a country in a given issue area and market.

6. The wider options for action that result from this territorial extension allow for more effective responses to existing societal challenges, especially with a view to the provision of (national and global) public goods, albeit in a limited way.

7. The new jurisdictional regime accentuates hierarchies between countries, interferes with the autonomy of weaker states, and subverts the principle of sovereign equality. Yet under certain circumstances, it also allows actors in weaker states to compensate for their otherwise limited ability to hold multinational companies to account.

8. Existing procedural and substantive proposals only have limited promise for alleviating the tensions resulting from the power imbalance in the exercise of jurisdiction.

9. The territorial principle in the law of jurisdiction has always been sufficiently limited not to overly impede powerful states' pursuit of their interests.

10. Territoriality today appears less as a principle of effective limitations than as the basis of different strategies and tactics through which states seek to hold mobile actors to account and through which they pursue their political aims in a global context.

Full (German) version: *Nico Krisch,* Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 11 et seq.

Jurisdiction for claims against transnational companies for

human rights violations

Written by Anatol Dutta, University of Munich

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

1. The question of the reach of courts' jurisdiction is highly significant for claims against transnational enterprises based on human rights violations or environmental damages abroad. It does not only determine the applicable law but also the access to a particular justice system.

2. Universal jurisdiction of national courts for human rights and environmental damages claims against enterprises cannot be established, neither on the basis of existing law nor from a legal policy perspective. Rather, such claims have to be handled under the traditional jurisdictional mechanisms.

3. From a global perspective, a remarkable shift regarding jurisdiction can be noted: Whereas the courts in the United States are increasingly limiting access to their justice system in cases with foreign elements, jurisdictional limits are no significant hurdle for human rights and environmental damages claims in the European Union.

4. Domestic enterprises can be sued at their seat. Yet, the *forum non conveniens* doctrine allows US courts – and perhaps soon English courts as well – to decline jurisdiction, also for human rights and environmental damages claims.

5. Yet, human rights and environmental damages claims against foreign enterprises can also only be brought under certain circumstances in the EU.

6. Claims against foreign enterprises for human rights violations and environmental damages abroad can only rarely be brought before domestic courts based on special jurisdiction related to specific subject matters, for example the jurisdiction for tort claims at the place where the harmful event occurred.

7. If human rights and environmental damages claims are simultaneously directed against a domestic enterprise, for example a mother company or a buyer company

in the EU, at least partially, foreign subsidiaries and suppliers can be sued on the basis of special jurisdiction over multiple defendants which can be used strategically.

a) If foreign enterprises have their seat in a third State outside the European Union, the jurisdiction of the domestic courts over the foreign co-defendant is governed by the national law of the forum Member State.

b) However, the current trend to establish a separate liability of domestic enterprises, for example, by extending human rights and environment-related duties of care for the supply chain, could endanger this special jurisdiction over multiple defendants, which, on the other hand, could lose significance.

8. Extending the general jurisdiction at the domicile of the defendant by relying on a personal criterion different to the seat of the defendant enterprise is not a viable solution.

a) Today US courts refuse to exercise jurisdiction based solely on the foreign enterprise 'doing business' within the territory. In some EU Member States, for claims against foreign enterprises at least with a seat in a third State, exorbitant jurisdiction can be established, for example, based on assets of the foreign defendant enterprise within the territory.

b) At the most from a policy perspective, for claims against foreign subsidiaries of a domestic enterprise the introduction of an enterprise jurisdiction could be considered.

9. For claims against foreign enterprises jurisdiction of the domestic courts can often only be based on a *forum necessitatis* if proceedings cannot reasonably and effectively be brought or conducted abroad; the hurdles for such an exceptional jurisdiction are, however, high.

10. To hear human rights and environmental damages claims against enterprises lies within the powers of the domestic courts.

a) Foreign enterprises do not enjoy State immunity even if they violate human rights or damage the environment abroad in collaboration with foreign States.

b) The power to adjudicate is also not limited by the fact that a decision of the court on human rights and environmental damages claims potentially has

implications on the foreign policy relations of the forum State.

c) The domestic courts are often even not barred from deciding on human rights and environmental damages claims of foreign States against enterprises.

Full (German) version: *Anatol Dutta*, Internationale Zuständigkeit für privatrechtliche Klagen gegen transnational tätige Unternehmen wegen der Verletzung von Menschenrechten und von Normen zum Schutz der natürlichen Lebensgrundlagen im Ausland, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 39 et seq.

Jurisdiction to Garnish Funds in Foreign Bank Account

By Stephen G.A. Pitel, Faculty of Law, Western University

Instrubel, N.V., a Dutch corporation, has been attempting in litigation in Quebec to garnish assets of the Republic of Iraq. The difficult issue has been the nature of the assets sought to be garnished and where they are, as a matter of law, located. The assets are funds in a bank account in Switzerland payable to the Republic of Iraq (through the Iraqi Civil Aviation Authority) by IATA, a Montreal-based trade association.

The judge at first instance held the assets were not a debt obligation but in effect the property of the Republic of Iraq and located in Switzerland and so could not be subject to garnishment in Quebec proceedings. The Court of Appeal reversed, holding the assets were a debt due to the Republic of Iraq which it could enforce against the trade association at its head office in Quebec, so that the debt was located in Quebec under the basic rule for locating the *situs* of a debt.

Last December the Supreme Court of Canada denied the appeal for the reasons of

the Quebec Court of Appeal. One judge, Justice Cote, dissented with reasons to follow. On May 1, 2020, she released those reasons: see *International Air Transport Association v. Instrubel, N.V.*, 2019 SCC 61 (available here).

As a Quebec case, the decision is based on the civil law. Justice Cote's dissent hinges on the view that the funds in the account are the property of the Republic of Iraq, not the IATA, and are merely being held by the latter before being remitted to the former (see para. 36). The funds are not part of the "patrimony" of the IATA. This is because the nature of the agreement between the Republic of Iraq and the IATA is one of "mandate" (see paras. 40-41 and 45). As Justice Cote notes (at para. 48) "there is a general principle in the law of mandate that a mandatary's obligation towards a mandator is not a debt". While the payments that went into the bank account were collected and held by the IATA, they were made to the Republic of Iraq (para. 53). Indeed, the account "is for practical purposes equivalent to a trust account" (para. 61).

As noted, the six judges in the majority simply adopted the reasons of the Quebec Court of Appeal (available here). So they did not directly engage with Justice Cote's reasons. The Court of Appeal concluded (at para. 41) that "there is no ownership of or real right to the funds … Rather, there is a creditor/debtor relationship". It also observed that the Republic of Iraq "never owned the debts due it by various airlines in consideration of landing at Iraqi airports. It does not now own the funds collected in satisfaction of those debts and deposited by IATA in its bank account. IATA's obligation is to pay a sum of money not to give the dollar bills received from third parties" (para. 43).

The Court of Appeal noted (at para. 50) a practical rationale for its conclusion: "More significantly it seems that [Instrubel, N.V.] and others in similar positions which seek to execute an unsatisfied claim would be forced into an international "shell game" of somehow discovering (or guessing) where the mandatary/garnishee (IATA), deposited the money – a virtually impossible task. The law, correctly applied, should not lead, in my view, to such unworkable results. As the *in personam* debtor of ICAA, it matters not whether IATA deposited the money it collected and giving rise to such indebtedness in a bank account in Geneva, New York or Montreal. The *situs* of its bank account does not change the *situs* of the debt IATA owes to its creditor. As such, that funds were initially collected in Montreal or at an IATA branch office in another country is inconsequential."

The case is at minimum important for what it does not do, which is authorize the garnishing of assets outside Quebec. All judges take the position that would be impermissible.