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

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Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of 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

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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.

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

by Marie Elaine Schäfer

The cross-border expansion of EU companies' economic activities not only leads to a globalised market, but also impacts human rights as well as the environment in countries worldwide. The recent rise of claims against EU companies for the violations committed by their subsidiaries located in third countries is a by-product of that context. With Germany being the world's third largest importing country, the question of corporate responsibility for harmful events abroad is crucial. The present post provides an overview of the most recent legal developments on that topic.

"National Action Plan" and voluntary principle

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

In 2016, the German Government adopted the "Nationaler Aktionsplan Wirtschaft und Menschenrechte" (National Action Plan on Business and Human Rights) to implement the UN guiding principles on Business and Human Rights (Ruggie Principles). This fixed framework is the first of its kind in Germany. The objective of the National Action Plan is to delineate German enterprises' responsibility to

protect human rights: at least 50 per cent of all large companies in Germany (with more than 500 employees) have to implement a system of human rights due diligence by 2020. Accordingly, "[c]ompanies should publicly express their willingness to respect human rights in a policy statement, identify risks, assess the impact of their activities on human rights, take countermeasures if necessary, communicate how they deal with risks internally and externally and establish a transparent complaints mechanism" (see the Report on the National Action Plan).

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

KiK litigation

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

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

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

According to the further holdings of the court, the claimants could alternatively hold KiK liable for the events in Pakistan, had an acknowledgement of liability been written. However, KiK had agreed on a code of conduct with the supplier,

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

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

Current legislative developments

An alliance of non-governmental institutions (similar to the coalition that launched the Swiss *initiative populaire* "entreprises responsables – pour protéger l'être humain et l'environnement" in 2016) has formed the "Initiative Lieferkettengesetz" (Supply chain Law Initiative) with the intention of establishing binding obligations as they can be found in the French Duty of Vigilance Law ("loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre"). Accordingly, German companies shall establish diligence plans to protect human rights and the environment in the states where their subsidiaries are located. Violations of diligence would lead to sanctions in form of shortening of government aids and high fines. In order to ensure the companies' liability for violations in German courts, the law would be formed as an overriding mandatory provision in the sense of Art. 9(1) of the Rome I Regulation.

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

Even though the enactment of a supply chain law remains highly disputed within

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

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

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

Still, the introduction of legislation remains uncertain as the result of a second survey on the National Action Plan's implementation will determine upcoming developments and the future of the German voluntary principle.

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

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Remote Child-Related Proceedings

in Times of Pandemic – Crisis Measures or Justice Reform Trigger?

by Nadia Rusinova

The coronavirus will have an enormous impact on how we consume, how we learn, how we work, and how we socialize and communicate. It already significantly impacts the functioning of the justice system – the COVID-19 pandemic and social distancing requirements have required courts to be flexible and creative in continuing to carry out essential functions.

Six weeks ago, it was almost difficult to imagine that in a regular child-related proceeding the hearing could be conducted online, and that the child can be heard remotely. Is this the new normal in the global justice system? This post will first provide brief overview regarding the developments in the conduction of remote hearings, and discuss the limitations, but also the advantages, of the current procedures related to children. Second, it will touch upon the right of the child to be heard in all civil and administrative proceedings which concern its interest, pursuant to Article 12 of the United Nations Convention on the Rights of the Child and how this right is regarded in remote proceedings in the context of the COVID-19 situation. It will also highlight good practices, which are without doubt great achievements of the flexibility and adaptability of the professionals involved in child-related civil proceedings, which deserve to be appreciated and which may provide grounds for significant change in the future (e.g. by using remote tools much more often.)

In civil and administrative proceedings, which concern children, strict insistence on personal attendance is unlikely to be feasible during the Coronavirus pandemic, and may contravene current health guidance, putting both families and professionals at unacceptable risk. As a consequence, the number of children's hearings scheduled to take place during the Coronavirus pandemic have globally been reduced to only those required to ensure essential and immediate protection of children or to consider orders relating to restriction of liberty. So long as restrictions regarding social distancing remain in place all over the world, many

children's hearings in the next months will be conducted remotely and digital facilities are being put in place to enable a wide range of people to participate remotely in virtual hearings.

I. What the recent experience on the remote hearings shows

Worldwide, over the past month, thousands of hearings took place remotely, many of them concerning children. How did the authorities comply with the current challenges and also with the right of the child to express its views?

Some countries, like Scotland, issued special rules as an amendment to the existing national law. In the context of the emergency, the provisions in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, issued by the Scottish Parliament as an update to the Coronavirus (Scotland) Bill, are designed to enable best use of very limited resources by local authorities, and the children's hearings system, so that efforts can be focused on safeguarding the welfare of Scotland's most vulnerable children, and on supporting families and careers who need it most. The provisions are also time-limited and will automatically expire within six months, unless the Scottish Parliament extends them for a further period of six month.

The American Bar Association has also prepared detailed rules on "Conducting Effective Remote Hearings in Child Welfare Cases" to distill some best practices and other recommendations for remote or "virtual" hearings, providing special considerations to the judges, and directions for all professionals dealing with child-related proceedings.

The case law of the domestic courts is not less intriguing. In one recent judgment of The Family Court of England and Wales – RE P (A CHILD: REMOTE HEARING) [2020] EWFC 32, delivered by Sir Andrew McFarlane, the issues surrounding the advantages and disadvantages of the remote hearing when the case concerns children are discussed in a very original way. The case concerns ongoing care proceedings relating to a girl who is aged seven. The proceedings are already one year old and they were issued as long ago as April 2019, but the possibilities for multiple appeals in the adversarial proceedings caused immense delay. It has been initiated by the local authority, which have made a series of allegations, all aimed at establishing the child has been caused significant harm as a result of fabricated or induced illness by its mother. The allegations are all fully contested

by the mother, and a full final hearing is to take place in order to be decided if the child should be return to its mother or placed in long term foster care. Since April 2019 the child has been placed in foster care under an interim care order. The 15-day hearing was scheduled to start on Monday, 20 April, but the Covid-19 pandemic has led to a lockdown and most Family Court hearings that have gone ahead are being undertaken remotely, over the telephone or via some form of video platform.

II. Challenges

In this light it might be useful to identify some of the issues that the justice system faced in the attempts to comply with the special measures amid the pandemic and the lockdown order in disputes about children.

Must a hearing take place remotely, or this is just an option to be decided on by the court?

All the guidance available aims mostly at the mechanics of the process. The question whether any particular hearing should, or should not, be conducted remotely, is not specifically discussed. In any case, the access to justice principle should in some way provide for flexibility and practicability. In this sense, the fact that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.

As Sir McFarlane said, *"In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."* Obviously, the question is how to strike a fair balance between keeping the principle of fair trial as paramount while not putting the child into an intolerable situation that might follow as a consequence of the limitations in this pandemic situation.

In which cases it is justified to hold a remote hearing?

Given the Government's imposition of the 'stay at home' policy in many countries, requests for an attended hearing are highly unlikely to be granted unless there is a genuine urgency, and it is not possible to conduct a remote hearing, taken as a cumulative condition together. If one of these elements is not present, the respective judge should assess the emergency in the particular case.

In general, all cases are pressing when the welfare of children is to be

determined. However, some of it indeed call for urgency and it is to be analyzed on a case by case basis, in accordance with the claims of the parties and available evidence. In the discussed case RE P [2020] EWFC 32 the girl was already suffering significant emotional harm by being held "in limbo", and that she could only be released from this damaging situation of simply not knowing where she is going to live and spend the rest of her childhood, at least for the foreseeable future, by the court decision. As the judge says, *"she needs a decision, she needs it now and to contemplate the case being put off, not indefinitely but to an indefinite date, is one that (a) does not serve her interests, because it fails to give a decision now, but (b) will do harm itself because of the disappointment, the frustration and the extension of her inability to know what her future may be in a way that will cause her further harm."*

Another issue to be considered is to which extent the personal impression (for which the face-to-face hearing is best suited to) and the physical presence in the courtroom as a procedural guarantee for fair trial in adversarial proceedings, are decisive in the particular case. In RE P [2020] EWFC 32 sir McFarlane holds that *"The more important part, as I have indicated, for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court."* This is a case for protection from violence, and taking into account the subjective aspect, the personal impression is crucial. Yet, it might be that other type of cases, with less impact on the life of the child, or when the balance between the urgency and the importance of personal attendance might affect the best interest of the child ,might still be held remotely. In the discussed case the judge refers explicitly to the need of the physical presence of the parties, and especially of the mother, for him to get personal impression, and to give her full opportunity to present her defense and to ensure fair trial. The Court therefore finds that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, the judge holds that this hearing cannot "properly or fairly" be conducted without her physical presence in a courtroom.

A similar approach (with different outcome) has been taken in Ribeiro v Wright,

2020 ONSC 1829, Court of Ontario, Canada. The parties, currently in the process of divorce, and the plaintiff wishes to obtain a safeguard order so that the defendant's access rights are modified such that they are suspended and replaced by contacts via technological means (Skype, Facetime, etc.). Due to the ongoing divorce procedure at the stage of the application for the safeguard order, some evidence is available already. The judge recognizes that the social, government and employment institutions are struggling to cope with COVID-19 and that includes the court system. Obviously, despite extremely limited resources, the court will always prioritize cases involving children, but it is stated that parents and lawyers should be mindful of the practical limitations the justice system is facing. If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion under the domestic law – but they should not presume that raising COVID-19 considerations will necessarily result in an urgent hearing. In this case the judge refuses to start emergency proceeding (which would be conducted remotely), takes into account the behavior of the parents and urge them to renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner, asking them to return to court if more serious and specific COVID-19 problems arise.

In order to determine some general criteria to be applied when the emergency assessment is to be done, a good general example can be seen in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions (Scotland). The Scottish Government seeks to empower professional staff and volunteer tribunal members to exercise sound judgment and make decisions to protect and support children and young people, based on available information and in partnership with families. It provides that this exercise of emergency powers should: i. be underpinned by a focus on children's, young people's, and families' human rights when making decisions to implement powers affecting their legal rights; ii. be proportionate – limited to the extent necessary, in response to clearly identified circumstances; iii. last for only as long as required; iv. be subject to regular monitoring and reviewed at the earliest opportunity; v. facilitate, wherever possible and appropriate, effective participation, including legal representation and advocacy for children, young people and family members, and vi. be discharged in consultation with partner agencies.

Furthermore, in the Scottish Children's Reporter Administration update paper on

Children's Hearings System, issued on 20 April 2020, it is stated that the reporter assesses and considers each individual child's case and their unique circumstances, and the panel makes the best possible decision based on the information before them. Priority is given to hearings with fixed statutory timescales, or to prevent an order from lapsing. The UK Protocol Regarding Remote Hearings, issued on 26 March 2020, also sets some general criteria in par. 12 applicable to child-related proceedings, stating that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

What form the "remote" hearing may take?

There is currently no 'single' technology to be used by the judiciary. The primary aim is to ensure ongoing access to justice by all parties to cases before the court, so the professionals and parties involved must choose from a selection of possible IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom, etc.) At present, many courts provide laptops to magistrates with secure Skype for Business and Microsoft Teams installed.

Remote hearings may be conducted using any of the facilities available. Generally, it could be done by way of an email exchange between the court and the parties, by way of telephone using conference calling facilities, or by way of the court's video-link system, if available. In the specific child related proceedings however, it should be noted that the UN General comment No. 12 (2009) on the right of the child to be heard sets one recommendation in par. 43 – the experience indicates that the situation should have the format of a talk rather than a one?sided examination. Therefore, the use of tools allowing conversational approach, like Skype for Business, BT MeetMe, Zoom, FaceTime or any other appropriate means of remote communication can be considered. If other effective facilities for the conduct of remote hearings are identified, the situation obviously allows for any means of holding a hearing as directed by the court, so there is considerable flexibility.

The timing of the hearing of the child

Naturally, if there are rules in place regarding the timely hearing of the child, in the current situation some adjustments could be accepted. In the domestic systems, when such provisions exist, respective temporary amendments could be

a solution to facilitate the activity in these very challenging circumstances.

If we look again at the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, it provides for situations where it will not be practicable for there to be a hearing within three working days (as prescribed by the law), due to the likely shortage of social workers, reporters, decision-makers, children and families to attend an urgent hearing in the new area. As a result, the Act amends the time limit for some particular proceedings involving children up-to seven days. It is duly noted that in order to avoid unnecessary delays, the respective professionals involved should note these extended timescales, and prepare accordingly.

Is the objection by the parties to the hearing being held remotely decisive?

The pandemic situation is very potentially convenient for the parties who seek delays for one reason or another. As an example, the passage of time could undoubtedly affect the court's decision to assign custody in parental disputes, or as pointed by the ECtHR in Balbino v. Portugal, the length of proceedings relating to children (and especially in child abduction proceedings) acquire particular significance, since they are in an area where a delay might in fact settle the problem in dispute.

The objections that deserve attention would be most likely based on two grounds: health reasons, related or not to COVID-19, and the technical issue of internet access. When we speak about health reasons, the first logical suggestion would be to request medical evidence. Sadly, in the coronavirus situation this is not the case – simply because one can have contracted it without any knowledge or symptoms, which puts the courts in difficult position having in mind the considerable danger if they take the wrong decision. Therefore, it is justified that the judges continue with the proceedings and do not accede to these kinds of applications, but to indicate that the party's health and the resulting ability to engage in the court process would be kept under review.

Regarding internet access, this might arise as a difficult issue. On one side, it is easy to say that the arrangements for the party to engage in the process, as they are currently understood, involve the party being in her/his home and joining the proceedings over the internet, and all that's needed is some basic internet access. It can be also said that the party can go to some neutral venue, maybe an office in

local authority premises, a room in a court building, and be with an attorney that they are instructing, keeping a safe socially isolated distance. However, for objective reasons the internet access available might be not sufficient, and this should not lead to a violation of the principle of a fair trial, and the judge should also take these considerations seriously.

How is security and transparency addressed?

This section will briefly touch upon only two of a multitude of issues related to the security and transparency when dealing with remote hearings – the open hearings principle and the recording of the hearing.

Obviously, all remote hearings must be recorded for the purposes of making records of the respective hearing, and it goes without saying that the parties may not record without the permission of the court. Some of the solutions might be recording the audio relayed in an open court room by the use of the court's normal recording system, recording the hearing on the remote communication program being used (e.g. BT MeetMe, Skype for Business, or Zoom), or by the court using a mobile telephone to record the hearing.

As to the second issue, remote hearings should, so far as possible, still be public hearings. Some of the proceedings concerning children are indeed not public, but this is not the rule. The UK Protocol Regarding Remote Hearings addresses how this can be achieved in times of pandemic: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorized in legislation. This way, the principles of open justice remain paramount.

It could be suggested that, in established applications moving to a remote hearing, any transparency order will need to be discharged and specific directions made. In the UK Court of protection remote hearings the authorities are satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having particular regard to the public health situation which has arisen, and also the detailed steps set out are designed to ensure that the consequences on the rights of people generally and the press in particular

under Article 10 are minimized.

III. How to assess if a particular child-related hearing is suitable to take place online?

As noted by Sir McFarlane, whether or not to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for its life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a "thorough, forensically sound, fair, just and proportionate manner". The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

Therefore, it should be assessed on a case per case basis if a hearing that concerns a child can be properly undertaken over the remote system. Sometimes the proceedings prior to this moment are supporting the judge in allowing the hearing to go remotely – the allegations have been well articulated in documents, they are well known to the parties, the witnesses – members of the medical profession, school staff, social workers – gave or can give their evidence remotely over the video link and for the process of examination and cross-examination to take place. What normally goes wrong is the technology rather than the professional interaction of the lawyers and the professional witnesses. In this sense the case might be ready for hearing and the parties are sufficiently aware of all of the issues to be able to have already instructed their legal teams with the points they to make.

IV. The right of the child to be heard in the context of remote proceedings

It is natural that remote hearings and all means of online communication

unavoidably affect the proceedings itself. The current situation, unprecedented as it is and with all the challenges described above, raises the question of specifically how the child should be heard, if at all, and is this an absolute right, considering that providing a genuine and effective opportunity for the child to express their views requires the court to take all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case?

To explore this right in the light of the COVID-19 pandemic, some background should be provided. As it is pointed in the UN General comment No. 12 (2009) on the right of the child to be heard, the right itself imposes a clear legal obligation on States' parties to recognize it and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States' parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. Something more – in par. 19 it says that *"Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children."*

The right of the child to be heard is regulated in the same sense in Article 24(1) of the Charter of the Fundamental Rights of the EU and Article 42(2)(a) of Regulation No. 2201/2003 (Brussels II bis). The Hague convention of 25 October 1980 on the Civil Aspects of International Child Abduction also provides in Article 13 that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision – Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. It states that the court may use "all means available to it under national law as well as the speci?c instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No 1206/2001" but "in so far as possible and always taking into consideration the best interests of the

child" thus retaining some degree of discretion also in this regard.

In Joseba Andoni Aguirre Zarraga v. Simone Pelz (case C-491/10 PPU) however CJEU held that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

It is worth noting that in some cases the hearing of the child can be conducted indirectly or via representative, or where it is considered as harmful for the child it can be dispensed with altogether. In the case of Sahin v. Germany, on the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. The expert stated that after several meetings with the child, her mother and the applicant, he considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to requiring the direct questioning of the child on her relationship with her father.

So far, the question how the right of the child to be heard is regarded in the remote hearings, that had to take place recently, is not widely discussed. Therefore, at this moment we should draw some conclusions from the available case-law and emergency rules. Naturally, this right itself cannot be waived and the views of children and young people should be taken into account when emergency placements are first made; the decision at any given time must take into account the best interests of the child. The most appropriate approach would be adjusting the available domestic proceedings, and at all times the local authorities should provide pertinent information to inform this decision and the child must be at the center of all decision making, which includes the social work team listening to the child's views.

How this might look in practice? First of all, the children as a rule should be offered the opportunity to join their hearing virtually and securely. Testing and

monitoring are crucial in order to get as many children as possible able to attend. Good suggestion would be a letter giving them more information about how they can participate via their tablet laptop/PC or mobile phone, information sheet which will explain how they can join a virtual hearing, instructions to help them with the set up. This should be followed by a test to make sure everyone is prepared for the day of the hearing. In accordance with the domestic procedural rules, information about rights and reminder for the children and young people that they have the right to have a trusted adult, an advocate or lawyer attend the virtual hearing to provide support might be also useful.

However, it for sure would not be possible for every child to join its hearing remotely. In this case, they should still provide their views – e.g. by emailing the information to the local team mailbox and the judge will then ensure this information is given to the respective professionals involved in the procedure.

V. Conclusion

The rapid onset of the Covid-19 pandemic has been a shock to most existing justice systems These are times unlike any other, and extraordinary measures are being taken across the world. Many of us are already asking ourselves – why not earlier? And with those changes in place, can things go back to the way they were? Should a regular framework for the development of virtual courtrooms and remote hearings that enables all concerned, including the judges, to operate remotely and efficiently be created, and was it due even before the pandemic? There are no easy answers – but it is well-worth analyzing the options of applying and making full use of the existing online tools and resources in child-related proceedings in the future. Well summarized by Justice A. Pazaratz in *Ribeiro v Wright*: “None of us have ever experienced anything like this. We are all going to have to try a bit harder – for the sake of our children.”

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Foreign Limitation Periods in England & Wales: Roberts v SSAFA

Written by Elijah Granet

When a British woman gives birth in a German hospital staffed with British midwives on a contract from the British ministry of defence, what law applies and to what extent? This seemingly simple question took Mrs Justice Foster, in the English and Welsh High Court of Justice, 299 paragraphs to answer in a mammoth judgment released on 24 April: *Roberts (a minor) v Soldiers, Sailors, Airmen and Families Association & Ors* [2020] EWHC 994 (QB). In the course of resolving a variety of PIL issues, Mrs Justice Foster held that the German law of limitations should be disapplied as, on the specific facts of the case, contrary to public policy.

Facts

The British military has maintained a continuous presence in Germany since the end of the Second World War. In June 2000, Mrs Lauren Roberts, the wife of a British soldier serving in Germany and herself a former soldier, gave birth to her son, Harry, in the Allegemeines Krankenhaus in Viersen ('**AKV**'), a hospital in North-Rhine Westphalia.

AKV had been contracted to provide healthcare for British military personnel and their dependents by Guy's & St Thomas's Hospital NHS Trust in London, which, in turn, had been contracted by the British Ministry of Defence ('**MoD**') to procure healthcare services in Germany. Midwifery care for British personnel and dependents, however, was supplied instead by the Soldiers, Sailors, Airmen and Families Association ('**SSAFA**'), a charity. These British midwives worked under the direction of AKV, taking advantage of the mutual recognition of qualifications under EU law.

Tragically, during the birth, Harry suffered a brain injury which has left him severely disabled. Mrs Roberts, who brought the action in her son's name, alleges that negligence on the part of an SSAFA midwife during Harry's birth caused these injuries. She further alleges that the MoD is vicariously liable for

this negligence. The MoD, in turn, while denying negligence on the midwife's part, asserts that, regardless, German law allocated any vicarious liability to AKV. These allegations have yet to be tried before the court.

The applicable law

Due to unfortunate procedural delays, the case, although begun in 2004, took until 2019 to reach the High Court. This meant that the 2007 Rome II Regulation was inapplicable, and the case instead was governed by English conflicts rules. The relevant statutory provision was the Private International Law (Miscellaneous Provisions Act). Section 11 of that Act lays out a general rule of *lex loci delicti commissi*, but s 12 allows this principle to be displaced where significant factors connecting a tort or delict to another country mean 'that it is substantially more appropriate' to use a law other than that of the location of the tort or delict. Counsel for Mrs Roberts argued that the s 12 exception should apply, given that *inter alia* Mrs Roberts was only in Germany at the behest of the Crown, had no familial or personal connections to Germany, moved back to England in 2003, and were being treated by English-trained midwives who were regulated by British professional bodies.

The authoritative text on English conflicts rules, *Dicey, Morris & Collins on the Conflict of Laws* (15th ed), provides that at para 35-148 that the threshold for invoking s 12 is very high, and that the section is only rarely invoked successfully. This is reinforced by *inter alia* the decision of the English and Welsh Court of Appeal, *per* Lord Justice Longmore, in *Fiona Trust and Holding Corp & Ors v Skarga & Ors* [2012] EWCA Civ 275. Mrs Justice Foster (at para 132) ruled (at paras 132–144) that this threshold was not met. Her Ladyship placed great significance on the fact that the midwives were required to learn basic German, follow the directions of German obstetricians, operate according to the rules of the German healthcare system, and provide care to military personnel who were living in Germany. Thus, German law was applicable.

The limitation period question

English jurisprudence addresses questions of foreign law as matters of objective fact to be determined through expert evidence. This can prove, as it did in this case, to an extremely complex task. For the purposes of this article, it is

sufficient to note that Mrs Justice Foster ultimately found (after extensive discusssion at paras 192–280) that, in light of various decisions of the German Bundesgerichtshof (Federal Court of Justice) on the application of both the old and new versions of §852 of the Bürgerliches Gesetzbuch (German Civil Code), the relevant limitation period of three years commenced in 2003, meaning that the claim issued in 2004 was within time.

More relevantly for PIL scholars, Her Ladyship also ruled that, in the alternative, any applicable German limitation period was to be disapplied. In English law, the disapplication of foreign limitation periods is governed by the appropriately-named Foreign Limitation Periods Act 1984. While the general rule is that foreign limitation periods displace English limitations, Section 2(2) allows for the disapplication of foreign limitation periods where their application would 'conflict with public policy to the extent that its application would cause undue hardship' to a party. This is, once again, a deliberately high threshold which is rarely applied; the authoritative English text on limitation, *McGee on Limitation Periods* (8th ed), provides (at para 25-027) that '[j]udges should be very slow indeed to substitute their views for the views of a foreign legislature'. Similarly, Mr Justice Wilkie, in *KXL v Murphy* [2016] EWHC 3102 (QB), para 45, warned that the entire system of private international law could collapse if public policy was too readily invoked, and the public policy test should only succeed where the foreign provision caused undue hardship which would be 'contrary to a fundamental principle of justice'.

After surveying the case law, Mrs Justice Foster concluded, at paras 181–184, that undue hardship must be a 'detriment of real significance', whose existence (or lack thereof) must be determined through a careful and holistic evaluation of the particular facts of any given situation. Thus, the question was not if the German limitation period *per se* caused undue hardship (and indeed, Mrs Justice Foster held at para 182 that it did not), but rather if the application of an otherwise unobjectionable provision to the unique factual matrix of the case would create undue hardship. Thus, Mrs Justice Foster ruled (at paras 185–6) that, if (contrary to her findings) the German limitation period commenced in 2001, this would be a disproportionate hardship given the disadvantages Mrs Roberts had as a primigravida unfamiliar with obstetrics who had given birth in a foreign country where she did not speak the language. Furthermore, the highly complex organisational structure of medical care, between the SSAFA, the MoD,

and AKV would mean that it would be unjust and disproportionate for the relevant 'knowledge' for the purposes of the §852 limitation period to have been said to commence in 2001.

Comment

This case demonstrates the complexities which arise when applying abstract rules of private international law to the realities of human affairs. Although the (by comparative standards) wide discretion accorded to judges in English law has its critics, in this case, the ability to disapply foreign law where it might lead to an unjust result was able to ensure that the Roberts family, for whom one must have the greatest sympathy, were able to proceed with their claim. It is hard to disagree with Mrs Justice Foster's conclusion that, on the facts, it would be a disproportionate hardship on the family. Both the case-law and texts are clear that this discretion should be applied only rarely, given that its overuse would be to the detriment of the principles of legal certainty and English conflicts rules, *Roberts* demonstrates that the common law preference for flexibility can, if used wisely, avert serious injustice in those rare circumstances where the general rules are insufficient.