Transnational Tort Litigation as a Trade and Investment Issue

Alan O. Sykes (Stanford Law School) has posted “Transnational Tort Litigation as a Trade and Investment Issue” on SSRN. Here’s the abstract:

Tort plaintiffs regularly bring cases in U.S. courts seeking damages for harms that have occurred abroad, attracted by higher expected returns than are available in the jurisdiction where the harm arose. Such claims are especially likely to be filed by plaintiffs from developing countries, who commonly argue that the remedies available to them in their home jurisdictions are deficient or non-existent. This paper focuses on a potential inefficiency of forum shopping that is of special importance in transnational tort litigation against business defendants – the potential distortion of trade and investment patterns that can result from implicit “discrimination” in the applicability of legal rules to producers or investors of different nationalities. These distortions are akin to those associated with discriminatory tariff or tax policies. They can reduce global economic welfare, and afford a potentially important argument for limiting foreign tort plaintiffs to the law and forum of the jurisdiction in which their harm arose. The problem arises even if the substantive or procedural law of the foreign jurisdiction in question is demonstrably inferior to U.S. law from an economic standpoint. The analysis has implications for a number of areas of legal doctrine, including the construction of the Alien Tort Statute, the rules governing choice of law in transnational tort cases, and the doctrine of forum non conveniens.

You can download the article, for free, from here.
Warnings for a new Beginning: Singapore Choice of Law in Tort

To complete our round-up of newly available articles today, we have an article on “Warnings for a New Beginning” by William Tong (University of Nottingham), which explores the tort choice of law rules in Singapore, and how they compare with other common law jurisdictions such as the UK. Here’s the abstract:

In striking contrast with some of the Commonwealth developments in the area of tort choice of law, where notably even the United Kingdom has abandoned the English common law position in relation to tort choice of law for a statutory regime embodied by Part III of the Private International (Miscellaneous Provisions) Act 1995, Singapore has largely maintained its adherence to the English common law position with the unequivocal acceptance by the Singapore Court of Appeal that the “applicable choice of law rule in Singapore with respect to torts committed overseas is that laid down in Phillips v. Eyre” and that the “exception to the rule as formulated in Boys v. Chaplin, Johnson v. Coventry Churchill and Red Sea Insurance” is part of Singapore law as well.

Available to download from here.

Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches

There is an article in the new issue of the International & Comparative Law Quarterly (October 2006; Vol. 55, No. 4) by Reid Mortenson (TC Beirne School of Law, University of Queensland) on "Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches". The abstract reads:
Since 1994, Canada, the United Kingdom and Australia have adopted new choice of law rules for cross-border torts that, in different ways, centre on the application of the law of the place where the tort occurred (the lex loci delicti). All three countries abandoned some species of the rule in Phillips v Eyre, which required some reference to the law of the forum (the lex fori) as well as the lex loci delicti. However, predictions were made that, where possible, courts in these countries would continue to show a strong inclination to apply the lex fori in cross-border tort cases—and would use a range of homing devices to do so. A comprehensive survey and analysis of the cases that have been decided under the Australian, British and Canadian lex loci delicti regimes suggests that courts in these countries do betray a homing instinct, but one that has actually been tightly restrained by appeal courts. Where application of the lex fori was formally allowed by use of a ‘flexible exception’ in Canada and the United Kingdom, this has been contained by courts of first appeal. Indeed, only the continuing characterization of the assessment of damages as a procedural question in Canada and the United Kingdom, seems to remain as a significant homing device for courts in these countries.

For those with online access to the ICLQ, the full article can be downloaded from here.

There is also a shorter article by Richard Frimpong Oppong (PhD candidate, University of British Columbia) in the latest issue of the ICLQ on "Private International Law and the African Economic Community: A Plea for Greater Attention". The full article, again for those with a subscription, can be found here.
Forum Non Conveniens and Choice of Law in Tort & Equity in the Singapore Court of Appeal

In *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2006] SGCA 39 (handed down on 3rd November 2006), there was an appeal against the first-instance decision that the appellant’s (Rickshaw Investments Ltd) action against the respondent (Nicolai Baron von Uexkull) be stayed on the ground of *forum non conveniens*. The appellants had hired the respondent in 2001 to sell dynasty artefacts from the “Tang Cargo”. The employment contract was subject to German law and the competence of the German courts. When the appellant terminated the contract in 2004, the respondent commenced proceedings in Germany against the first appellant on the basis of a claim in contract.

The appellants, meanwhile, commenced an action against the respondent in Singapore on 10 June 2005. The appellants stated four causes of action, as follows:

- conversion of 25 pieces of the Tang Cargo by the respondent;
- breach of the respondent’s equitable duty of confidentiality towards the appellants;
- breach of the respondent’s fiduciary duties as agent of the appellants; and
- deceit arising from the respondent’s misrepresentations.

In deciding whether or not the appellant’s claim in Singapore should be stayed on the ground of *forum non conveniens*, the Singapore Court of Appeal looked to the classic test given by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, stage one of which is that:

*a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice*
In order to determine whether Singapore was the appropriate forum for the present proceedings, the court stated the relevant factors for consideration were the **general connecting factors**; the **jurisdiction in which the tort occurred**; choice of law, ie, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and the **effect of the concurrent proceedings in Germany**.

The court found that, under the **general connecting factors**, Singapore was the appropriate forum to hear the substantive dispute, as the location of the key witnesses was Singapore, and the respondent was a permanent resident of Singapore and resided in Singapore at the time the alleged tortious acts and equitable breaches took place.

In deciding **whether the natural and most appropriate forum is that in which the tort occurred**, the court placed considerable reliance on *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd’s Rep 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004, which held that, inter alia, “...if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum” (per Goff LJ in the Alberforth at 96). In agreeing with that general principle, the court held that

> we must emphasise that the result that is arrived at through the application of the Albaforth principle is only the prima facie position and/or a weighty factor pointing in favour of that jurisdiction. Applying this to the present case, the fact that the respondent’s alleged torts were committed in Singapore does point towards Singapore as being the natural forum to hear the dispute, but this is only one of the factors to be taken into account in the overall analysis, albeit a significant one.

In the **choice of law** analysis (looked at on the basis that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying this law than the courts of the jurisdiction from which the *lex causae* originates), a key issue was whether the appellant’s choice to sue in tort was tantamount to an avoidance of the governing law provision in the contract of employment. The court held that, absent bad faith on the part of the appellants,

> ...we see no reason why they should be denied the freedom of choice to frame
their causes of action in the way they have. This has in fact been made clear in the case law. It is, for example, established law that the mere presence of a contractual relationship does not in itself preclude the existence of an independent duty of care in tort: Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 as well as the decision of this court in The Jian He [2000] 1 SLR 8 at [26]....In other words, although the allegedly tortious acts were committed in the course of the respondent’s employment in fact, the acts had a separate legal existence from his contractual obligations and breaches thereof.

The claims in conversion, the other for fraudulent misrepresentation or deceit were claims in tort, and so the double actionability rule applied, subject to the double flexibility exception (see Briggs (1995) 111 LQR 18 at 21); i.e. the decision in Red Sea Insurance Co Ltd v Bouygues SA [1995] 1 AC 190 meant that the tort might nevertheless be actionable even though it was not actionable under the lex fori or the lex loci delicti, and even heralded the possibility that the lex causae of a tort could be the law of a third jurisdiction (other than the lex fori or the lex loci delicti), which has the most significant relationship with the occurrence and with the parties. The court held that it might, in certain exceptional circumstances, be possible for a law other than Singapore law to apply, even in the case of a local tort (i.e. a tort committed in Singapore). That said, the claim in conversion was held to be governed by the lex fori – Singapore law, as that was also the lex loci delicti. The Red Sea exception did not apply, as most of the connecting factors (as discussed above) pointed to Singapore. The claim for fraudulent misrepresentation or deceit likewise fell wholly within Singaporean law under the double actionability rule.

The claims in breach of confidence, and breach of fiduciary duties, were claims in equity. In identifying the choice of law principles, the court relied heavily on T M Yeo, Choice of Law for Equitable Doctrines (Oxford University Press, 2004). The court decided that:

We would, however, accept the more limited proposition to the effect that where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned.
On that basis, as the allegations of breach of fiduciary duty as well as breach of confidence arose from the contract of employment itself, German law (as the governing law of the contract) should govern the claims in equity.

The court therefore concluded that, as a whole, the connecting factors clearly pointed to Singapore as being the appropriate forum for the hearing of the substantive issues concerned. On that basis, the appellants’ action in the Singapore courts against the respondent ought not to be stayed.

It is also clear that Singapore is the most natural and appropriate forum to hear the claims in tort. The issue of choice of law appears, as we have noted, to be neutral and, although there is a risk of conflicting decisions by the Singapore and German courts, this factor does not weigh decisively in the respondent’s favour, having regard to the other factors.

Seminar: Substance and Procedure in the Law Applicable to Torts - Harding v Wealands & the Rome II Regulation

Seminar at the British Institute of International & Comparative Law

Tuesday 21 November 2006 17:00 to 19:00
Location: Charles Clore House, 17 Russell Square, London WC1B 5JP

Participants:
This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled Private International Law in the UK: Current Topics and Changing Landscapes, sponsored by Herbert Smith.

For more information, see the BIICL website.

Those who attended the launch seminar on 24th October may be interested to know that a transcript is now available on the BIICL website (Institute members only.)

---

**Torts and Choice of Law: Searching for Principles**

Keith N. Hylton (Boston University School of Law) has just published an article entitled "Torts and Choice of Law: Searching for Principles" on SSRN. The abstract reads:

> If a tortious act (e.g., negligently firing a rifle) occurs in state X and the harm (e.g., killing a bystander) occurs in state Y, which state's law should apply? This is a simple example of the “choice of law” problem in torts. The problem arises between states or provinces with different laws within one nation and between different nations. In this comment, prepared for the 2006 American Association of Law Schools Annual Meeting, I examine this problem largely in terms of incentive effects, and briefly consider how the analysis could be incorporated into the standard introductory course on tort law. I conclude that a zone of foreseeable impact rule provides the best underlying principle in conflict of law situations. This rule supports the traditional legal approach (lex loci) to
Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

E. Schollmeyer: The effect of the entry in the domestic register is governed by foreign law: Will the new rules on cross-border divisions work?

One of the most inventive conflict-of-law rules that secondary law of the European Union has come up with, can be discovered at a hidden place in the new Mobility Directive. Article 160q of the Directive assigns the determination of the effective date of a cross-border division to the law of the departure Member State. The provision appears as an attempted clearance of the complicated brushwood of the registration steps of a cross-border division of a company. This article explores whether the clearance has been successful.


The Apostille is of utmost importance for the exchange of public documents among different nations. The 118 states currently having acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents issue, altogether, several millions of Apostilles per year in order to certify the authenticity of public documents emanating from their territory. Some years ago, the electronic Apostille was implemented, which allows states to issue their Apostilles as an electronic document. Interested parties may...
verify the authenticity of such an electronic document via electronic registers which are accessible on the internet. Whereas Germany has not yet acceded to that new system, 38 other jurisdictions already have done so.

G. Mäsch: Third Time Lucky? The ECJ decides (again) on the place of jurisdiction for cartel damages claims

In three decisions now the ECJ has dealt with the question of where the “place of the causal event” and the “place where the damage occurred” are to be located in order to determine, based on the ubiquity principle enshrined in Article 7(2) of the Brussels Ibis Regulation, the place of jurisdiction for antitrust damages (tort) claims. In this paper the overall picture resulting from the ECJ decisions in CDC Hydrogen Peroxides, flyLAL-Lithuanian Airlines and now Tibor-Trans is analysed. The place of the “conclusion” of a cartel favoured by the ECJ to determine the place of the causal event is not only unsuitable in the case of infringements of Art. 102 TFEU (abuse of a dominant market position), but also in cases of infringement of Art. 101 TFEU (prohibition of cartels). The same criticism applies to the ECJ’s localisation of the place where the damage occurred at the place where the competition is impaired and the victim of the cartel or the abuse of the dominant market position (claimant) sustained the financial loss. In this paper it is suggested to dock the place of the causal event to the actual seat(s) of the cartel offender(s) and the place where the damage occurred exclusively to the affected market.

J. Kleinschmidt: Jurisdiction of a German court to issue a national certificate of succession (‘Erbschein’) is subject to the European Succession Regulation

The European Succession Regulation provides little guidance as to the relationship between the novel European Certificate of Succession and existing national certificates. In a case concerning a German “Erbschein”, the CJEU has now clarified an important aspect of this relationship by holding that jurisdiction of a Member State court to issue a national certificate is subject to the harmonised rules contained in Art. 4 et seq. ESR. This decision deserves approval because it serves to avoid, as far as possible, the difficult problems ensuing from the existence of conflicting certificates from different Member States. It remains, however, an open question whether the decision can be extended to national certificates issued by notaries.

In “Mahnkopf” the CJEU had to decide whether the material scope of application of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4/7/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession also covers national provisions which, like Section 1371 (1) of the German Civil Code (BGB), grant the surviving spouse a lump-sum compensation for gains after the death of the other spouse by increasing his or her inheritance. Hence, this was a question of the qualification of Section 1371 (1) BGB, which had been discussed controversially in Germany for a long time and had only been clarified on a national level in 2015. The CJEU decided in favour of a qualification under inheritance law at the level of Union law, and thus took a view which contradicts that of the Federal Court of Justice (BGH) for national conflict of laws. The authors agree with the result of the CJEU but criticise the methodical approach to the implementation of the functional qualification. The article identifies the new questions and problems that will now have to be clarified by the German courts as a result of the CJEU decision and in this context analyses two recent decisions of Higher Regional Courts. The authors note that in the context of Section 1371 (1) BGB, the question of the (temporal) scope of application of the Regulation is likely to become more important in the future, as otherwise, in their opinion, the BGH case law will still have to be considered. Accordingly, in the opinion of the authors, for future German jurisdiction much will depend on whether the BGH adapts its previous case law to that of the CJEU.

P. Mankowski: Recognition and free circulation of names ‘unlawfully’ acquired in other Member States of the EU

The PIL of names is one of the strongholds of the recognition principle. The touchstone is whether names “unlawfully” acquired in other Member States of the EU must also be recognised. A true recognition principle implies that any kind of révision au fond is interdicted. Yet any check on the “lawfulness” or “unlawfulness” of acquiring a certain name abroad amounts to nothing else than a révision au fond.
M. Gernert: **Termination of contracts of Iranian business relations due to US sanctions and a possible violation of the EU Blocking Regulation and § 7 AWV**

US secondary sanctions are intended to subject European economic operators to the further tightened US sanctions regime against Iran. In contrast, the so-called Blocking Regulation of the European Union is intended to protect European companies from such extraterritorial regulations and prohibits to comply with certain sanctions. In view of the great importance of the US market and the intended uncertainty in the enforcement of US sanctions, many European companies react by terminating contracts with Iranian business partners in order to rule out any risk of high penalties by US authorities. This article examines if and to what extent the Blocking Regulation and § 7 AWV influence the effectiveness of such terminations.

B. Rentsch: **Cross-border enforcement of provisional measures - lex fori as a default rule**

Titles from provisional measures are automatically recognised and enforced under the Brussels I-Regulations. In consequence, different laws will apply to a title’s enforceability (country of the rendering of the provisional measure) and its actual enforcement (country where the title is supposed to take effect). This sharp divide falls short of acknowledging that questions of enforceability and the actual conditions of enforcement are closely entangled in preliminary measure proceedings, especially the enforcement deadline under Sec. 929 para. 2 of the German Code of Civil Procedure (ZPO). The European Court of Justice, in its decision C-379/17 (Societ Immobiliare Al Bosco Srl) refrained from creating a specific Conflicts Rule for preliminary measures and ruled that the deadline falls within the scope of actual enforcement. This entails new practical problems, especially with regard to calculating the deadline when foreign titles are involved.

A. Spickhoff: **“Communication torts” and jurisdiction at the place of action**

Communication torts in more recent times are mostly discussed as “internet torts”. Typically, such torts will be multi-state torts. In contrast, the current case of the Austrian Supreme Court concerns the localisation of individual communication torts. The locus delicti commissi in such cases has been concretised by the Austrian Supreme Court according to general principles of
jurisdiction. The locus delicti commissi, which is characterised by a falling apart of the place of action and place of effect, is located at the place of action as well as at the place of effect. In the event of individual communication torts, the place of effect is located at the victim’s place of stay during the phone call or the message arrival. The place of action has to be located at the sending location. On the other hand, in case of claims against individual third parties, the place of effect is located at the residence of the receiver. The Austrian Supreme Court remitted the case to the lower court for establishing the relevant facts for jurisdiction in respect of the denial of the plaintiff’s claim. However, the court did not problematise the question of so-called “double-relevant facts”. The European Court of Justice, in line with the judicial practice in Austria and Germany, has accepted a judicial review of the facts on jurisdiction only with respect to their conclusiveness.

R. Rodriguez/P. Gubler: Recognition of a UK Solvent Scheme of Arrangement in Switzerland and under the Lugano Conventions

In recent years, various European companies have made use of the ability to restructure their debts using a UK solvent scheme of arrangement, even those not having their seat in the UK. The conditions and applicable jurisdictional framework under which the scheme of arrangement can be recognised in jurisdictions outside the UK are controversial. In Switzerland doctrine and jurisprudence on the issue are particularly scarce. This article aims to clarify the applicable rules of international civil procedural law as well as the requirements for recognition of a scheme of arrangement in Switzerland. It is held that recognition should be generally granted, either according to the 2007 Lugano Convention or, in a possible “no-deal Brexit” scenario, according to the national rules of private international law, or possibly even the 1988 Lugano Convention.

T. Helms: Foreign surrogate motherhood and the limits of its recognition under Art. 8 ECHR

On request of the French Court of Cassation the Grand Chamber of the European Court of Human Rights has given an advisory opinion on the recognition of the legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and its intended mother who is not genetically linked to the child. It held that Art. 8 ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended
mother. But it falls within states’ margin of appreciation to choose the means by which to permit this recognition, the possibility to adopt the child may satisfy these requirements.

---

**Justice Andrew Bell opines on arbitration and choice of court agreements**

By Michael Douglas and Mhairi Stewart

Andrew Bell is a leader of private international law in Australia. His scholarly work includes *Forum Shopping and Venue in Transnational Litigation* (Oxford Private International Law Series, 2003) and several editions of *Nygh’s Conflict of Laws in Australia* (see LexisNexis, 10th ed, 2019). As a leading silk, he was counsel on many of Australia’s leading private international law cases. In February 2019, his Honour was appointed President of the New South Wales Court of Appeal.

Recently, in *Inghams Enterprises Pty Ltd v Hannigan [2020] NSWCA 82*, his Honour provided a helpful exposition of the principles applicable to dispute resolution agreements, including arbitration and choice of court agreements. His Honour dissented from the majority of Justices of Appeal Meagher and Gleeson.

**Background**

Inghams Enterprises, the Australian poultry supplier, entered a contract with Gregory Hannigan by which Hannigan would raise and feed chickens provided by Inghams.

The contract was to continue until 2021 but in 2017 Inghams purported to terminate the contract for alleged breaches by Hannigan. Hannigan successfully sought a declaration that the contract had been wrongfully terminated; see
In May 2019 Hannigan issued a notice of dispute to Inghams seeking unliquidated damages for losses he incurred between 8 August 2017 and 17 June 2019 while the contract was wrongfully terminated. Following an unsuccessful mediation in August 2019, Hannigan considered that clause 23.6 of the contract—extracted below—entitled him to refer the dispute to arbitration.

Hannigan’s referral to arbitration was premised by a complex and tiered dispute resolution clause: clause 23. Compliance with clause 23 was a precondition to commencing court proceedings. The clause also contained a requirement to provide notice of a dispute; to use ‘best efforts’ to resolve the dispute in an initial period; and to then go to mediation. If mediation were unsuccessful, then the clause provided that certain disputes must be referred to arbitration. Relevantly, clause 23 included the following:

‘23.1 A party must not commence court proceedings in respect of a dispute arising out of this agreement (“Dispute”), including without limitation a dispute regarding any breach or purported breach of this agreement, interpretation of any of its provisions, any matters concerning of parties’ performance or observance of its obligations under this agreement, or the termination or the right of a party to terminate this agreement) until it has complied with this clause 23.’

‘23.6 If:

23.6.1 the dispute concerns any monetary amount payable and/or owed by either party to the other under this agreement, including without limitation, matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 under clauses 9.4, 10, 11, 12, 13 and 15.3.3 ...

23.6.2 the parties fail to resolve the dispute in accordance with clause 23.4 within twenty eight (28) days of the appointment of the mediator

then the parties must (unless otherwise agreed) submit the dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman.’ (Emphasis added.)
Inghams sought to restrain the referral to arbitration and failed at first instance; see *Inghams Enterprises Pty Ltd v Hannigan* [2019] NSWSC 1186.

Inghams sought leave to appeal. In hearing the question of leave together with the appeal, then granting leave, the two key issues for determination by the Court of Appeal were:

- Whether a claim for unliquidated damages could fall within the scope of the arbitration clause which required claims to be concerning monetary amounts ‘under this agreement’ (the construction issue); and
- Whether Hannigan had waived his entitlement to arbitrate by bringing the proceedings in 2017 (the waiver issue).

**The construction issue**

Meagher JA, with whom Gleeson JA agreed, determined Hannigan’s claim for unliquidated damages for breach of contract was not a claim ‘under’ the contract and therefore did not fall within the terms of the arbitration clause in clause 23.

The phrase ‘monetary amount payable and/or owed’ referred to a payment obligation by one party to another. Read with the phrase ‘under this agreement’, the clauses required that the contract must be the source of the payment obligation to invoke the requirement to arbitrate. A claim for unliquidated damages was beyond the scope of the clause.

The majority and Bell P thus disagreed on whether an assessment for unliquidated damages for breach of contract is ‘governed or controlled’ by a contract because the common law quantum of damages considers the benefits which would have been received under the contract. The majority found that liquidated damages are a right of recovery created by the contract itself and occur as a result of a breach; unliquidated damages for a breach are compensation determined by the Court.

Bell P included provided a detailed discussion of the interpretation of dispute resolution clauses and considered the orthodox process of construction is to be applied to the construction of dispute resolution clauses. That discussion is extracted below. Bell P’s liberal approach was not followed by the majority.
The waiver issue

The Court found that Hannigan did not unequivocally abandon his right to utilise the arbitration clause by initiating the breach of contract proceedings against Inghams for the following reasons:

1. Hannigan did not abandon his right to arbitration by failing to bring a damages claim in the 2017 proceedings.
2. In 2017 Hannigan enforced his rights under clause 23.11 by seeking declaratory relief.
3. The contract explicitly required that waiver of rights be waived by written notice.
4. The bringing of proceedings did not constitute a written agreement not to bring a damages claim to arbitration.

It was noted that if Hannigan had sought damages in 2017 then Ingham’s waiver argument may have had some force.

President Bell’s dicta on dispute resolution clauses

In his dissenting reasons, Bell P provided the following gift to private international law teachers and anyone trying to understand dispute resolution clauses:

*Dispute resolution clauses may be crafted and drafted in an almost infinite variety of ways and styles. The range and diversity of such clauses may be seen in the non-exhaustive digest of dispute resolution clauses considered by Australian courts over the last thirty years, which is appended to these reasons. [The Appendix, below, sets out a table of example clauses drawn from leading cases.]*

*Dispute resolution clauses may be short form or far more elaborate, as illustrated by the cases referred to in the Appendix. They may be expressed as service of suit clauses... They may provide for arbitration... They may be standard form... They may be bespoke... They may be asymmetric... They may and often will be coupled with choice of law clauses... They may be multi-tiered, providing first for a process of mediation, whether informal or formal, or informal and then formal,*
before providing for arbitral or judicial dispute resolution...

Dispute resolution clauses are just as capable of generating litigation as any other contractual clause, and the law reports are replete with cases concerned with the construction of such clauses. The cases referred to in the Appendix supply a sample.

Such clauses have also spawned specialist texts and monographs...

The question raised by this appeal is purely one of construction. It is accordingly desirable to begin by identifying the principles applicable to the construction of a dispute resolution clause. ...

It has been rightly observed that “the starting point is that the clause should be construed, just as any other contract term should be construed, to seek to discover what the parties actually wanted and intended to agree to”...

In short, the orthodox process of construction is to be followed...

In the context of dispute resolution clauses, whether they be arbitration or exclusive jurisdiction clauses, much authority can be found in support of affording such clauses a broad and liberal construction...

In Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions cf [some other jurisdictions]. Thus, in [Rinehart v Welker (2012) 95 NSWLR 221] at [122], Bathurst CJ, although not eschewing the liberal approach that had been adumbrated in both Francis Travel and Comandate to the construction of arbitration clauses, rejected the adoption of a presumption ... the presumption was that the court should, in the construction of arbitration clauses, “start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal”, and that the clause should be construed in accordance with that presumption, “unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction...

In [Rinehart v Hancock Prospecting Pty Ltd (2019) 93 ALJR 582], the plurality indicated that the appeals could be resolved with the application of orthodox
principles of construction, which required consideration of the context and purpose of the Deeds there under consideration... In his separate judgment, Edelman J described as a “usual consideration of context” the fact that “reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing ‘one-stop adjudication’ as far as possible”... This may have been to treat the considerations underpinning [leading] cases... as stating a commercially commonsensical assumption...

The proper contemporary approach was eloquently articulated in the following passage in [Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442] (at [167]) which I would endorse:

“The existence of a ‘correct general approach to problems of this kind’ does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument... another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as ‘under’ or ‘arising out of’ or ‘arising from’. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same commonsense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it.” (Citations omitted.)

Bell P’s appendix

<p>| Schedule of Jurisdiction and Arbitration Clauses |
|-------------------------|-----------------|------------------|</p>
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Citation</th>
<th>Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citation</td>
<td>Case Name</td>
<td>Relevant Text</td>
</tr>
<tr>
<td>----------</td>
<td>-----------</td>
<td>---------------</td>
</tr>
</tbody>
</table>
| [1996] 39 NSWLR 160 | Virgin Atlantic Airways Co Ltd v Ocean Marine Indemnity Association | "ARTICLE 19

Arbitration

Any dispute or difference arising out of this Agreement shall be submitted to arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or, in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The said the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply (sic).

ARTICLE 20

Applicable Law

This Agreement shall be governed and construed in accordance with the laws of England." |
| [1996] 39 NSWLR 133 | Francis Travel Marketing Pty Ltd v Virgin Atlantic Airway Lf | "ARTICLE 20

Arbitration:

Any dispute or difference arising out of this Agreement shall be submitted to arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or, in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The said the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply (sic).

ARTICLE 21

Applicable Law

This Agreement shall be governed and construed in accordance with the laws of England." |
| [1997] 41 NSWLR 117 | Arai Pty Ltd v People’s Insurance Co Ltd | "ARTICLE 19

Arbitration

Any dispute or difference arising out of this Agreement shall be referred to the arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or, in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The said the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply (sic).

ARTICLE 20

Applicable Law

This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England." |
| [1996] 50 FCR 1; [1996] 159 ALJR 142 | Hi-Fert Pty Ltd v Kiukiang Maritime Marketing Pty Ltd v Comandate Marine Laboratories Inc v Corporation v Pan Mercantile & Shipping Exchange | "ARTICLE 19

Arbitration

Any dispute or difference arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the Commercial Arbitration Act, 1984 (as amended). The decision of the arbitrator(s) will be final and binding." |

This Agreement will be construed in accordance with and governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the Commercial Arbitration Act, 1984 (as amended). The decision of the arbitrator(s) will be final and binding." |
| [1990] HCA 8 | Hettinga | "Any dispute or difference arising out of this Agreement shall be submitted to arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or, in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The said the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply (sic).

ARTICLE 20

Applicable Law

This Agreement shall be governed and construed in accordance with the laws of England. Any dispute arising from this Agreement shall be referred to the Courts of England." |

Arbitration

Any dispute or difference arising out of this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the Commercial Arbitration Act, 1984 (as amended). The decision of the arbitrator(s) will be final and binding." |

SERVICE OF SUIT

The Reinsurers hereinafter agree that:

i. In the event of a dispute arising under this Agreement, the Reinsurers at the request of the Company will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.

ii. Any summons notices or process to be served upon the Reinsurer may be served upon MESSRS. FREEHILL, HOLLINGDALE & PAGE M.L.C. CENTRE, MARTIN PLACE, SYDNEY, N.S.W. 2000 AUSTRALIA who has authority to accept service and to enter an appearance on the Reinsurer’s behalf, and who is directed, at the request of the Company to give a written undertaking to the Company that he will enter an appearance on the Reinsurer’s behalf.

iii. If a suit is instituted against any one of the Reinsurers all Reinsurers hereinafter will abide by the final decisions of such Court or any competent Appellate Court.

ARTICLE XIX

ARBITRATION

Disputes arising out of this Agreement or concerning its validity shall be submitted to the decision of a Court of Arbitration, consisting of three members, which shall be as follows:

The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies. Each party shall nominate one arbitrator. In the event of one party failing to appoint its arbitrator within four weeks after having been required by the other party to do so, the second arbitrator shall be appointed by the President of the Chamber of Commerce in Australia. Before entering upon the reference, the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within four weeks of their own appointment, the umpire shall be nominated by the President of the Chamber of Commerce in Australia. The arbitrators shall reach their decision within four months of the appointment of the umpire. The decision of the Court of Arbitration shall not be subject to appeal.

The costs of Arbitration shall be paid as the Court of Arbitration directs. Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts." |
| [2006] 48 NSWLR 683; [2006] NSWSC 1150 | Commodate Marine Corporation v Pan Australia Shipping Pty Ltd | "ARTICLE 19

Arbitration

Any dispute or difference arising out of this Agreement shall be submitted to arbitration at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitral tribunal of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law." |
<table>
<thead>
<tr>
<th>Case</th>
<th>Reference</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Container Corporation v Smurfit Stone Container Corporation</td>
<td>(2008) 248 ALR 573; (2008) FCA 592</td>
<td>21.3.1. This Agreement must be read and construed according to the laws of the state of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensee and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia. 21.3.2 In the event that there is a conflict between the laws of the State of New South Wales, Australia and the jurisdiction in which the Equipment is located, then the parties agree that the laws of the State of New South Wales shall prevail. 21.3.3 If the licensee is in breach of this Agreement, the Licensee must pay to the Licensee on demand the amount of any legal costs and expenses incurred by the Licensee for the enforcement of its rights under this Agreement and this provision shall prevail despite any order for costs made by any Court.</td>
</tr>
<tr>
<td>BHPB Freight Pty Ltd v Convex Generics Chartering Pty Ltd</td>
<td>(2008) 368 FCR 169; (2008) FCA 551</td>
<td>“(b) Any dispute arising out of this Charter Party or any Bill of Lading issued hereunder shall be referred to arbitration in accordance with the Arbitration Acts 1996 and any statutory modification or re-enactment in force. English law shall apply...” (c) The arbitrators, umpire and mediator shall be commercial persons engaged in the shipping industry. Any claim must be made in writing and the claimant’s arbitrator nominated within 12 months of the final discharge of the cargo under this Charter Party, failing which any such claim shall be deemed to be waived and absolutely barred.”</td>
</tr>
<tr>
<td>Expana Endorsement</td>
<td>(2008) WASCA 110</td>
<td>[Background: “Clause 22 of the contract provides that when any dispute arises between the parties any party may give to the other party a notice in writing that a dispute exists. Clause 22 then sets out a process by which the parties are to endeavour to resolve the dispute. If they are unable to do so, Paramount (as Principal) at its sole discretion:”] “[S]hall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined by either litigation or arbitration.” “Dispute” means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration or a dispute concerning a direction given under the Contract or failing which any such claim shall be deemed to be waived and absolutely barred.”</td>
</tr>
<tr>
<td>Ace Insurance Ltd v Moose Enterprise Pty Ltd</td>
<td>(2008) NSWSC 724</td>
<td>“Should any dispute arise concerning this policy, the dispute will be determined in accordance with the laws of Australia and the State and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia.” Expana Endorsement “Provided that all claims which fall under the terms of this endorsement, it is agreed (i) the limits of liability are exclusive of costs as provided under supplementary payment in this policy. (ii) that should any dispute arise between the insured and Ace over the application of this policy, such dispute shall be determined in accordance with the law and practice of the Commonwealth of Australia.”</td>
</tr>
<tr>
<td><strong>Global Partners Fund Ltd v Babcock &amp; Brown Ltd (in liq)</strong></td>
<td><strong>Limited Partnership Agreement</strong></td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>----------------------------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>“This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceedings brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court.”</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Faxtech Pty Ltd v ITL Optronics Ltd</strong></th>
<th><strong>Deed of Adherence</strong></th>
</tr>
</thead>
</table>
|                                        | “14. This Deed of Adherence and the rights, obligations and relationships of the parties under this Deed of Adherence and the Partnership Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England.  
15. The Applicant irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments shall be brought in such courts. The Applicant hereby waives, to the extent not prohibited by applicable law, and agrees not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that the Applicant is not subject personally to the jurisdiction of such courts, that any such proceedings brought in such courts is improper or that this Deed of Adherence, the Partnership Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court.” |

| **Faxtech Pty Ltd v ITL Optronics Ltd** | **“the agreement shall be interpreted, construed and enforced in accordance with the laws of England, and the parties submit to the jurisdiction of the competent courts of England (London).”** |

**Note:** The text above is a natural representation of the document content. The citations and page numbers are not included in the natural text.
## Asset Sale Agreement

"16.2 Governing Law and Dispute Resolution

(a) This agreement is governed by the laws of Western Australia.

(b) Subject to clause 16.2(d), the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this agreement.

(c) If any dispute arises out of or in connection with this agreement, including any question regarding the existence, validity or termination of this agreement:

1. within ten Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;

2. failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation:

   (A) at the Singapore Mediation Centre (SMC) in Singapore;
   (B) under the SMC Mediation Procedures;
   (C) with English as the language of the mediation; and

3. failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration:

   (A) at the Singapore International Arbitration Centre (SIAC) in Singapore;
   (B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

   (C) to the extent, if any, that the UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration;

4. with each party bearing its own costs of the mediation; and

(B) with each party bearing its own costs of the arbitration.

(C) the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this document.

(d) Nothing in this clause 16:

1. prevents any party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 16; or

2. requires a party to do anything which may have an adverse effect on, or compromise that party’s position under, any policy of insurance effected by that party.

## Guarantee Agreement

"9.9. Governing law and jurisdiction

(a) This document is governed by the laws of Western Australia.

(b) Subject to clause 9.9(iii)(G), the procedures prescribed in this clause 9.9 must be strictly followed to settle a dispute arising under this document.

(c) If any dispute arises out of or in connection with this document, including any question regarding the existence, validity or termination of this document:

1. within 10 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;

2. failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation:

   (A) at the Singapore Mediation Centre (SMC) in Singapore;
   (B) with one mediator;
   (C) with English as the language of the mediation; and

3. failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:

   (A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong;
   (B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

   (C) to the extent, if any, that UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration;

4. with each party bearing its own costs of the mediation; and

(B) with each party bearing its own costs of the arbitration.

(C) the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this agreement.

(d) Nothing in this clause 9.9:

1. prevents any party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 16; or

2. requires a party to do anything which may have an adverse effect on, or compromise that party’s position under, any policy of insurance effected by that party.

## Supply Agreement

"The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore.

## Conditions of Purchase

"This contract shall be construed in accordance with and governed in every respect by the laws of Singapore, and all disputes arising out of or in connection with this agreement shall be brought in the courts of Singapore."
“This Deed shall be governed by and shall be subject to and interpreted according to the laws of the State of Western Australia, and the parties hereby agree, subject to all disputes hereunder being resolved by confidential mediation and arbitration in Western Australia, to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this Deed.”

<table>
<thead>
<tr>
<th>Section</th>
<th>Deed Details</th>
</tr>
</thead>
</table>
| 20.1 Confidential Mediation | In the event that there is any dispute under this deed then any party to this deed who has a dispute with any other party to this deed shall forthwith notify the other party or parties, whom there is the dispute and all other parties to this deed ("Notification") and the parties to this deed shall attempt to resolve such difference in the following manner.
| (a) | the disputing parties shall first attempt to resolve their dispute by confidential mediation subject to Western Australian law to be conducted by a mediator agreed to by each of the disputing parties and GRHR (or after her death or non-capacity, HPPL); |
| (b) | each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation; |
| (c) | the mediation will be conducted with a view to:
| (i) | identifying the dispute; |
| (ii) | developing alternatives for resolving the dispute; |
| (iii) | exploring these alternatives; and |
| (iv) | seeking to find a solution that is acceptable to the disputing parties; |
| (d) | any mediation will not impose an outcome on the disputing parties. Any outcome must be agreed to by the disputing parties; |
| (e) | any mediation will be abandoned: |
| (i) | (the dispute parties agree; |
| (ii) | or any other of the disputing parties request the abandonment. |

20.2 Confidential Arbitration: (a) Where the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause within fourteen (14) days of the date of the Notification or in the event any mediation is abandoned then the dispute shall on that date be automatically referred to arbitration for resolution ("Reference Date") and the following provisions of this clause shall apply:

(i) | in the event that no agreement on the arbitrator can be reached within three (3) weeks of the Reference Date, the arbitrator will be Mr Tony Fitzgerald QC (provided he is willing to perform this function and has not reached 74 years of age at that time), or at the event Mr Tony Fitzgerald QC is unwilling or unable to act, the Honourable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court and provided he has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event that neither is willing or able to act, |
| (ii) | subject to paragraph (iv) below by confidential arbitration with one (1) party to the dispute nominating one (1) arbitrator, and the other party to the dispute nominating another arbitrator and the two (2) arbitrators selecting a third arbitrator within a further three (3) weeks, who shall together resolve the dispute pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties; |
| (iii) | if the arbitrators nominated pursuant to paragraph 20.2(a)(ii) are unable to agree in the selection of a third arbitrator within the time provided in paragraph 20.2(a)(iii), the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practise in the State of Western Australia of not less than twenty (20) years standing; |
| (iv) | in the event that a disputing party does not nominate an arbitrator pursuant to Clause 20.2(b)(ii) within twenty-one (21) days from being required to do so it will be deemed to have agreed to the appointment of the arbitrator appointed by the other disputing party. |

(b) The dispute shall be resolved by confidential arbitration by the arbitrator agreed to by each of the disputing parties or appointed pursuant to paragraph 20.2(a)(ii) above (or if more than one is appointed pursuant to paragraph 20.2(a)(ii) then as decided by not less than a majority of them) who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties.

c) The arbitration will take place at a location outside of a Court and chosen to endeavour to maintain confidentiality and mutually agreed to by the disputing parties and failing agreement in Western Australia and the single Arbitrator or the Chairman of the Arbitral Tribunal as the case may be will fix the time and place outside of a Court for the purposes of the confidential hearing of such evidence and representations as any of the disputing parties may present. If any of the parties request their/their access, this will be taken into account in the premises and parking needs. Except as otherwise provided, the decision of the single arbitrator or, if three arbitrators, the decision of any two of them in writing will be binding on the disputing parties both in respect of procedure and the final determination of the issues.

d) The arbitrators will not be obliged to have regard to any particular information or evidence in reaching its determination and in its discretion may proceed and consider such information and evidence in such form as it/they sees fit; |

(e) The award of the arbitrator(s) will be to the extent allowed by law non-appealable, conclusive and binding on the parties and will be specifically enforceable by any Court having jurisdiction.

21. the deed shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia.”

August 2009 Deed of Further Settlement

16. The CS Deed and this Deed will be governed by the following dispute resolution clause:

(i) the parties shall first seek to resolve any dispute or claim arising out of, or in relation to this Deed or the CS Deed by discussions or negotiations in good faith; |
<p>| (ii) | any dispute or claim arising out of or in relation to this Deed or the CS Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force. There will be three arbitrators (&quot;JHL&quot;) who shall appoint one arbitrator; HPPL shall appoint the other arbitrator and both arbitrators will choose the third Arbitrator. The place of arbitration shall be in Australia and the exact location shall be chosen by HPPL. Each party will be bound by the Arbitrator’s decision. |
| (iii) | a party may not commence court proceedings in relation to any dispute arising out of or in relation to this Deed or the Original Deed or the CS Deed; |
| (iv) | the costs of the arbitrators and the arbitration venue will be borne equally as to half by JHL and the other half by the non-JHL party. Each party is responsible for its own costs in connection with the dispute resolution process; and |
| (v) | Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed.” |</p>
<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mobis Parts Australia Pty Ltd v XL Insurance Company SE</td>
<td>[2016] NSWSC 1170</td>
<td>“The place of jurisdiction for any dispute arising out of this Policy shall be Bratislava”, with an anterior clause: “This Policy shall be governed exclusively by Slovakian law. This also applies to Insured Companies with a foreign domicile.”</td>
</tr>
<tr>
<td>Parnell Manufacturing Pty Ltd v Lonza Ltd</td>
<td>[2017] NSWSC 562</td>
<td>“16.5 Governing Law/Jurisdiction. This Agreement is governed in all respects by the laws of the State of Delaware, without regard to its conflicts of law principles. The Parties agree to submit to the jurisdiction of the courts of Delaware.”</td>
</tr>
<tr>
<td>Royal Bank of Scotland plc v Babcock &amp; Brown</td>
<td>[2017] VSCA 138</td>
<td>“This Letter Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that State. Each of the parties hereto (a) consents to submit itself to the personal jurisdiction of the United States District Court for the Southern District of New York or any court of the State of New York located in such district in the event any dispute arises out of this Letter Agreement or any of the transactions contemplated by this Letter Agreement, (b) agrees that it will not attempt to deny or defeat such personal jurisdiction or venue by motion or other request for leave from any such court and (c) agrees that it will not bring any action relating to this Letter Agreement or any of the transactions contemplated by this Letter Agreement in any court other than such courts sitting in the State of New York. THE PARTIES HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER IN ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT.”</td>
</tr>
<tr>
<td>Australian Health &amp; Nutrition Association Ltd v Hive Marketing Group Pty Ltd</td>
<td>[2019] NSWCA 61</td>
<td>Risk Transfer Agreement “The parties shall strive to settle any dispute arising from the interpretation or performance of this Agreement through friendly consultation within 30 days after one party asks for consultation. In case no settlement can be reached through consultation, such party can submit such matter to the court. The English Courts shall have the exclusive jurisdiction for all disputes arising out of or in connection with this Agreement.”</td>
</tr>
<tr>
<td>Promotion Agreement</td>
<td></td>
<td>Promotion Agreement “This Agreement is governed by the law in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales and any courts, which may hear appeals from those courts in respect of any proceedings in connection with this Agreement.”</td>
</tr>
</tbody>
</table>

**Conclusion**

Respectfully, Bell P’s dissenting reasons are to be preferred to those of Meagher JA, with whom Gleeson JA agreed. Bell P’s reasons are more consistent the weight of authority on construction of arbitration and choice of court agreements in Australia and abroad. On the other hand, the majority approach shows that Australian courts often do not feel bound to follow the solutions offered by foreign courts to common private international law problems.

*Michael Douglas co-authored this post with Mhairi Stewart. This post is based on their short article first published by Bennett + Co.*

---

**Corona and Private International Law: A Regularly Updated Repository of Writings, Cases and**
The coronavirus has created a global crisis that affects all aspects of life
everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

Private international law has not (yet?) consolidated discussions of the relevance of the crisis for the field, and of the field for the crisis (though the new EAPIL blog is running a very valuable series). But of course, private international law matters are crucial to countless issues related to the epidemic - from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

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

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

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

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

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

The Secretary General of the Hague Conference provided an online message from his home. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

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

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

**Online Workshops and Conferences**

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

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

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions will be the topic of an online conference (in German) on August 19 to 20, 2020. To participate register here.

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


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

A Mexican conference about Civod-19 and its impacts on private international Law was on June 25, 2020 on Zoom.

There was an online-workshop on “COVID-19 und IPR/IZVR” by Matthias Lehmann on Tuesday June 2, 2020 at 11:00 a.m.

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

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

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

State Liability

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

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

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China’s sovereign immunity, as do Sophia Tang and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-)actions by the Chinese Government. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. Tom Ginsburg lays out the legal issues in an interview in German. Fabrizio Marrella discusses the Italian perspective. Brett Joshpe analyzes China’s private and public liability in the domestic and international framework.

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

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

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of them in public international law, but also including suits in Chinese, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

**Contract Law**

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here.

The UNIDROIT Secretariat has just released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.
Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as lex contractus, as lois des police and through consideration within the applicable law.

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

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

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

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

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

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

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.
Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

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

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

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

**Tenancy**

Caused by fear of loss of tenancy and the resulting evictions several countries have altered their tenancy laws accordingly. An overview of some jurisdictions can be found in the current issue of the “Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung“ (ZfVR 2020, Vol. 3)(German).

**Tort**

Next to state liability, a lively but less political discussion on civil liability in international tort law has evolved.

An extensive overview about damages and Corona under Indian international tort law is given by Saloni Khanderia.

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

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

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

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

Family Law

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

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

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

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

A recent webinar also discussed the impact on the Hague Abductions Convention.

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

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

**Economic Law**

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

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

**Intellectual Property**

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

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

**Public Certification**

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

**Dispute Resolution**
Regulations against social contact and lockdowns make physical presence in court rooms impossible and thereby put pressure on courts. Some courts suspend their activities except for urgent matters (one international abduction case in which this becomes prevalent is discussed in the family law section.) Developments in Italy are discussed here, developments in English law here.

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

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

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

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

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

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

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.
Gilberto A. Guerrero-Rocca analyses the impacts of COVID-19 on international arbitration in relation to the CISG.

Bibliography

General and Workshops


State Liability


C.D. Davidsmeyer, Strip China’s Sovereign Immunity and Sue for Damages Caused by Coronavirus, 03 April 2020, https://cddavidsmeyer.org/latest-news/


Georg Fahrion, Reparationen für Coronavirus: “Soll China dem Rest der Welt einen Scheck über zehn Billionen Dollar ausstellen?”, SPIEGEL Online, 05 May 2020, https://www.spiegel.de/politik/ausland/corona-donald-trump-forder-entschaedigung-von-china-ohne-aussicht-auf-erfolg-a-5c6b7517-0ab6-4a14-b1a2-7f77b4c5b18a


Chimène Keitner, Don’t Bother Suing China for Coronavirus, Just Security, 31
March 2020,
https://www.justsecurity.org/69460/dont-bother-suing-china-for-coronavirus/

José Antonio Briceño Laborí, Maritza Méndez Zambrano, El Derecho Internacional Privado ante el COVID-19, Derecho y Sociedad Blog, March 2020,

Matthias Lehmann, Corona Virus and Applicable Law, EAPIL Blog, 16 March 2020,
https://eapil.org/2020/03/16/corona-virus-and-applicable-law/

Fabrizio Marrella, La Cina deve risarcire i danni transnazionali da Covid-19? Orizzonti ad oriente, SIDIBlog, 17 May 2020,

Hollie McKay, How China can be held legally accountable for coronavirus pandemic, Fox News Channel, 20 March 2020,
https://www.foxnews.com/world/china-legally-accountable-coronavirus

Frank Morris, The Coronavirus Crisis: Missouri Sues China, Communist Party Over The Coronavirus Pandemic, National Public Radio, 21 April 2020,

Missouri Attorney General Eric Schmitt, Missouri Attorney General Schmitt Files Lawsuit Against Chinese Government, 21 April 2020,

Zhong Sheng, U.S. practice to claim compensation for COVID-19 outbreak a shame for human civilization, People’s Daily Online, 03 May 2020,


Marc A. Thiessen, China should be legally liable for the pandemic damage it has


Contract Law


Claire Debourg, Covid-19 | Lois de police et ordonnances 2020, GIDE 7 May 2020,


2020,


Tort Law
Florian Heindler, Schadenersatz mit Auslandsberührung wegen COVID-19 ZAK 2020/237


Family Law


**Personal Data**


**Economic Law**

Sophie Hunter, Competition Law and COVID 19, CoL Blog 09 April 2020,

**Intellectual Property**


**Public Certification**


**Dispute Resolution**


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: Völkerrechtliche Anforderungen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 185 et seq.