Private International Law for Corporate Social Responsibility

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Abstract: This report examines Corporate Social Responsibility (CSR) in Germany. To this aim, it first takes a closer look at the German definition of CSR as well as the enforcement of CSR rules by the German government and its agencies (at A.). It then assesses the ways in which CSR standards are or may be safeguarded in different areas of the law (at B.), and how, if issues arise, CSR disputes may be resolved outside of court proceedings (at C.). If court proceedings may, however, not be avoided, a number of issues arise. These are the focus of the last three sections of this report: It explores when German courts will have jurisdiction to adjudicate CSR cases (at D.), which law will be applicable (at E.), and, finally, under which circumstances foreign judgments on CSR issues may be recognised and enforced in Germany (at F.).

A. Definition and Sources

I. Defining Corporate Social Responsibility

There is no clear-cut legal definition of Corporate Social Responsibility in Germany. Instead, the German CSR system draws upon existing definitions of Corporate Social Responsibility. As the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*) puts it: CSR refers to "a company's responsibility for its impact on society" which includes "social, environmental and economic aspects, as for example outlined in the internationally recognised reference documents on CSR, chief among them the fundamental ILO declaration on multinational enterprises and social policy, the OECD

[1] The following is primarily based on *Weller/Kaller/Schulz*, AcP 216 (2016), 387. Additional information was drawn from *Thomale/Hübner*, JZ 2017, 285 and *Weller/Thomale*, ZGR 2017, 509.

Guidelines for Multinational enterprises, the UN Guiding Principles on Business and Human Rights, the UN Global Compact and ISO 26000."[2]

The German government thereby follows the 'revised' CSR definition pronounced by the EU in 2011.[3] Until then, the EU[4] (and the German[5]) definition had described CSR as something entirely voluntary. The new definition, in contrast, formulates the (non-legally binding) expectation that companies not only comply with the legal standards set by statute, such as the CSR-Directive[6] or the Conflict Minerals-Regulation[7],[8] but also implement compliance systems that ensure the protection of human rights standards as well as other social, environmental and ethical standards beyond those legal standards.[9]

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[2] http://www.csr-in-deutschland.de/EN/What-is-CSR/Background/Sustainability-and-CSR/sustainability-and-csr-article.html (last retrieved: 09/07/2017), cf. for further information (in German only) *Wissenschaftliche Dienste des Deutschen Bundestages*, Corporate Social Responsibility (CSR) – Aktueller Stand in Deutschland, 2016, https://www.bundestag.de/blob/424954/76374d447099012620a493400ba0001c/wd-5-032-16-pdf-data.pdf (last retrieved: 15.07.2017).

[3] COM(2011) 681, 25 October 2011, p. 5, 6: "The Commission has identified a number of factors that will help to further increase the impact of its CSR policy, including: [...] The need to acknowledge the role that complementary regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility."

[4] COM(2001)366, 18 July 2001, p. 6.

[5] Cf. particularly the Resolution of the National CSR-Forum from 28 April 2009 on a common understanding of CSR in Germany: "Corporate Social Responsiblity (CSR) bezeichnet die Wahrnehmung gesellschaftlicher Verantwortung durch Unternehmen über gesetzliche Anforderungen hinaus. CSR steht für eine nachhaltige Unternehmensführung im Kerngeschäft, die in der Geschäftsstrategie des Unternehmens verankert ist. CSR ist freiwillig, aber nicht beliebig." (http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a397-csr-empfehlungsbericht.pdf?__blob=publicationFile, last retrieved: 19/07/17). The national CSR-Forum was founded by the Federal Ministry of Labour and Social Affairs in 2009. 41 experts from the private sector, trade unions, NGOs, academia and representatives of Federal Ministries meet on a biannual basis to discuss and advise the Federal Government on the development of its CSR Strategy. For further information, cf. http://www.csr-in-deutschland.de/EN/Policies/CSR-national/National-CSR-Forum/national-csr-forum-article.html (last retrieved: 18.07.17).

[6] Directive 2013/34/EU of 26 June 2013, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014.

[7] Regulation (EU) 2017/821 of 17 May 2017 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas; cf. *Heße/Klimke*, EuZW 2017, 446 ff.

[8] Hauschka/Moosmayer/Lösler/*Spießhofer*, Corporate Compliance, 3rd ed. 2016, § 11 Compliance and Corporate Social Responsiblity, para. 5–6.

[9] Hauschka/Moosmayer/Lösler/*Spießhofer*, Corporate Compliance, 3rd ed. 2016, § 11 Compliance and Corporate Social Responsiblity, para. 5.

II. OECD membership and the National Contact Point

Germany is one of the founding members of the OECD.[10] As required by the OECD Guidelines for Multinational Enterprises, Germany's National Contact Point was established in 2000. It is housed in the Federal Ministry for Economic Affairs and Technology (*Bundesministerium für Wirtschaft und Technologie*). Within the Ministry, it has been directly attached to the Directorate General for External Economic Policy (*Geschäftsstelle für Außenwirtschaftspolitik*) since 2016.[11] Five people are currently working for the NCP, three of them legal staff and two clerks.[12] The NCP now also has an own budget assigned to it on an annual basis.[13]

Decisions are taken by the NCP in consultation and accordance with the decisions of the Interministerial Steering Group for the OECD Guidelines (*Ressortkreis "OECD-Leitsätze"*). This Steering Group consists of representatives of the Federal Ministry of Economic Affairs and Technology that houses the NCP and of other ministries, including, amongst others, the Federal Foreign Office (*Auswärtiges Amt*), the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*), the Federal Ministry of Finance (*Bundesfinanzministerium*) and the Federal Ministry of Justice and Consumer Protection (*Bundesministerium für Justiz und Verbraucherschutz*).[14]

Additionally, the NCP is supported by the Working Group on the OECD Guidelines (*Arbeitskreis "OECD Leitsätze"*), an advisory board composed of members of several ministries, business organisations, trade unions and NGOs. The Working Group is not involved in the decision-making process of the NCP but serves as a forum to discuss fundamental issues with regard to the OECD Guidelines and to cooperate with the NCP in applying the OECD Guidelines.

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[10] http://www.oecd.org/germany/germany-and-oecd.htm (last retrieved: 19/07/17).

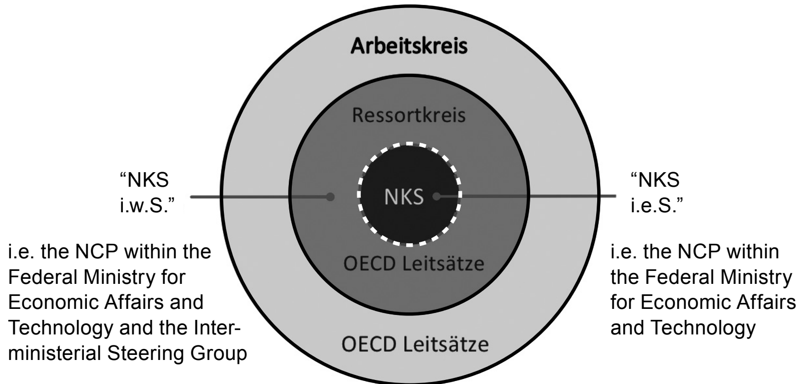
[11] https://www.bmwi.de/Redaktion/EN/Downloads/M-O/organisationsplan-bmwi.pdf?__blob=publicationFile&v=3 (last retrieved 18.07.17) and National Contact Point Reporting Questionnaire, 2016, p. 3, http://www.bmwi.de/Redaktion/EN/Downloads/nks-jahresbericht-2016.pdf?__blob=publicationFile&v=5 (last retrieved 18.07.17).

[12] This information has generously been provided to the authors on their request by the German NCP.

[13] https://www.bmwi.de/Redaktion/DE/Artikel/Aussenwirtschaft/oecd-leitsaetze-nationale-kontaktstelle.html (last retrieved: 18.07.17). Until 2016, budgetary issues were decided on an ad hoc basis, cf. National Contact Point Reporting Questionnaire, 2016, pp. 5–6, http://www.bmwi.de/Redaktion/EN/Downloads/nks-jahresbericht-2016.pdf?__blob=publicationFile&v=5 (last retrieved 18.07.17).

[14] This information has generously been provided to the authors on their request by the German NCP. Equally, *Wissenschaftliche Dienste des Deutschen Bundestages*, Struktur und Arbeitsweise der Nationalen Kontaktstellen für die OECD-Leitsätze für multinationale Unternehmen, WD 2 – 3000 – 206/14 vom 17. November 2014, p. 6, https://www.bundestag.de/blob/412818/30fc974f3b637f16993fe821de4313f4/wd-2-206-14-pdf-data.pdf (last retrieved 18.07.17).

The structure of the NCP may, thus, be depicted as follows:[15]



Further information on the German NCP may be found at http://www.bmwi.de/Redaktion/DE/Textsammlungen/Aussenwirtschaft/oecd.html (for information in German) and at http://www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/oecd-guidelines.html (for information in English).

Cases accepted for consideration within the past three years:
- UNI/ITF against DP-DHL/Bonn (2012)[16]
- Uwe Kekeritz, Member of the German Bundestag, against KiK Textilien und Non-Food GmbH, C&A Mode GmbH & Co., and Karl Rieker GmbH & Co. KG (2013)[17]
- European Center for Constitutional and Human Rights (ECCHR), Reporters without borders, Bahrain Center for Human Rights, Bahrain Watch, and Privacy International against trovicor GmbH, Munich (2013)[18]

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[15] This diagram has been provided by the German NCP.

[16] *National Contact Point*, Joint final statement by the German National Contact Point for the OECD Guidelines for Multinational enterprises (NCP), UNI Global Union (UNI) and International Transport Workers' Federation (ITF) and Deutsche Post DHL (DP- DHL) on the complaint by UNI/ITF against DP-DHL/Bonn, 2014, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-itf-dhl.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

[17] *National Contact Point*, Final Statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises regarding a complaint by Uwe Kekeritz, Member of the German Bundestag, against KiK Textilien und Non-Food GmbH, C&A Mode GmbH & Co., and Karl Rieker GmbH & Co. KG, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-kik.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

[18] *National Contact Point*, Final statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a complaint by European Center for

- Indocement Union, SP-ITP, the Federation of Indonesian Cement Industry (FSP-ISI), by the Confederation of Indonesian Trade Unions (CITU-KSPI) and by IndustriALL Global Union against PT Indocement Tunggal Prakarsa, Indonesia and HeidelbergCement AG, Germany (2013)[19]
- Mr. Dominic Whiting against NORDEX SE (2014)[20]
- Industriegewerkschaft Metall (IG Metall) against Hyundai Motor Europe Technical Center GmbH (HMETC) in Rüsselsheim, Germany (2014)[21]
- Anonymous complaint against Audi AG (2014)[22]
- Metro Habib Employee Union, Karachi Pakistan (on behalf of the employees of METRO Habib Cash & Carry Pakistan) against METRO Cash & Carry (2014)[23]

Constitutional and Human Rights (ECCHR), Reporters without borders, Bahrain Center for Human Rights, Bahrain Watch, and Privacy International against trovicor GmbH, Munich about violations of the OECD Guidelines for Multinational Enterprises, 21 May 2014, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-ecchr.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

[19] *National Contact Point*, Joint statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a complaint by Indocement Union, SP-ITP, the Federation of Indonesian Cement Industry (FSP-ISI), by the Confederation of Indonesian Trade Unions (CITU-KSPI) and by IndustriALL Global Union against PT Indocement Tunggal Prakarsa, Indonesia and HeidelbergCement AG, Germany, 21 May 2014, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-nks-indonesien.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

[20] *National Contact Point*, Final statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a complaint by Mr. Dominic Whiting against NORDEX SE, 31 August 2016, http://www.bmwi.de/Redaktion/EN/Downloads/abschlusserklaerung-nks-dominic-whiting-gegen-nordex-se.pdf?__blob=publicationFile&v=2 (last retrieved: 18.07.17).

[21] *National Contact Point*, Final statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises relating to a complaint by Industriegewerkschaft Metall (IG Metall) against Hyundai Motor Europe Technical Center GmbH (HMETC) in Rüsselsheim, Germany, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-hyundai.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

[22] *National Contact Point*, Final declaration of the German National Contact Point for the OECD Guidelines for Multinational Enterprises in response to a complaint against Audi AG for violating the OECD Guidelines for Multinational Enterprises, 21 October 2014, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-audi.pdf?__blob=publicationFile&v=2 (last retrieved: 18.07.17).

[23] *National Contact Points*, Final statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a complaint by Metro Habib Employee Union, Karachi Pakistan (on behalf of the employees of METRO Habib Cash & Carry Pakistan) against METRO Cash & Carry about violations of the OECD Guidelines for Multinational Enterprises, 21 May 2014, http://www.bmwi.de/Redaktion/EN/Downloads/oecd-ac-final-statement-metro.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

- Mr. Yogesh KN against Robert Bosch GmbH and Bosch Limited (India) (2015)[24]

III. Action taken under the 2011 Guiding Principles and ISO standards in Germany

A National Action Plan (NAP) was passed by the Federal Government (Cabinet of Ministers/*Bundeskabinett*) on 21 December 2016.[25] In the NAP, the Federal Government formulates its – non-legally binding – expectation towards companies to respect human rights and to implement due diligence measures along supply chains to ensure the protection of those rights. No legislative measures are planned so far. The government intends to further observe the situation and take legislative action, if necessary, after the evaluation of the NAP in 2020.[26] This was confirmed in the 2018 coalition agreement between the CDU and SPD.[27]

An outline of the ISO standards may be found on the website of the Federal Ministry of Labour and Social Affairs.[28] No examples of its application could, however, be found.

B. Characterisation of the CSR Rules

I. Company Law

Human rights standards as well as other social, environmental and ethical standards may be safeguarded through a number of legal principles (*Rechtsinstitute*) within the company law. CSR considerations become relevant inter alia

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[24] *National Contact Point*, Final statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a complaint by Mr. Yogesh KN against Robert Bosch GmbH and Bosch Limited (India), 29 May 2017, http://www.bmwi.de/Redaktion/EN/Downloads/abschlusserklaerung-nks-yogesh-kn-gegen-robert-bosch-gmbh.pdf?__blob=publicationFile&v=1 (last retrieved: 18.07.17).

[25] The National Action Plan (only in German) is available at http://www.csr-in-deutschland.de/SharedDocs/Downloads/DE/NAP/nap-im-original.pdf?__blob=publicationFile&v=2 (last retrieved: 18.07.17).

[26] For further information (available in German only): http://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Ueber-den-NAP/Ziele-des-NAP/ziele-des-nap.html (last retrieved: 18.07.17).

[27] Coalition Agreement 2018 between CDU and SPD, p. 158: https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1 (last retrieved: 14/03/18).

[28] See above at 1 and at https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a395-csr-din-26000.pdf?__blob=publicationFile or http://www.bmub.bund.de/fileadmin/Daten_BMU/Pools/Broschueren/csr_iso26000_broschuere_bf.pdf (information in German only) (last retrieved: 18.07.17).

within a) the duty of care, b) the doctrine of piercing the corporate veil and c) the new reporting obligation established in ss. 289b, 289c of the German Commercial Code (*Handelsgesetzbuch – HGB*) – which, in turn, implement provisions of the CSR-Directive.

a) The *duty of care* of the management and supervisory board includes the *duty of legality* (*Legalitätspflicht*), i.e. the duty to comply with the applicable laws when conducting a business.[29] The recent landmark decision *Siemens/Neubürger*[30] relating to a complex corruption system within the Siemens group surprised management boards, their consultants and the research community alike.[31] It was one of the first cases in which a public civil court awarded damages to a company whose director (*Vorstandsmitglied*) had violated his duty to (effectively) monitor the subsidiaries' conduct.[32] In a nutshell, the court held the director accountable for the non-existing or at least non-functioning compliance system and missing control of the foreign (Nigerian) subsidiary.[33] The decision was novel in that it extended the duty of legality of the parent company (Siemens AG), firstly, to a *separate legal entity* (subsidiary) and, secondly, to a company subject to a *foreign lex societatis* (Nigerian Company Law).

Although *Siemens/Neubürger* was a case on corruption, it might be possible to apply its ratio to CSR cases. After all, if protecting free competition justified such far-reaching modifications of the general PIL/company law rules, the protection of CSR standards makes an even stronger case for such modification.[34] There is, however, no case law yet indicating that the ratio of *Siemens/Neubürger* may be expanded in such a way.

However, any liability originating from a breach of the duty of legality only establishes internal liability. *In concreto*, it only establishes liability of the director vis-à-vis the company.[35] Conversely, third parties (such as victims of human rights violations or other stakeholders) are not entitled to claim damages for any violation of the management board's duty to control the company's subsidiaries (*Legalitätskontrollpflicht*). Establishing liability on the basis of a breach of the

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[29] Spindler/Stilz/*Fleischer*, AktG, 3rd ed. 2015, § 93 Rn. 15 ff.; MünchKommAktG/*Spindler*, 4th ed. 2014, § 93 Rn. 74.

[30] LG München, NZG 2014, 345.

[31] *Bachmann*, ZIP 2014, 579; *Fleischer*, NZG 2014, 321; *Harbarth/Bechtel*, ZIP 2016, 241; *Paefgen*, WM 2016, 433; *Seibt/Cziupka*, DB 2014, 766.

[32] Hennsler/Strohn/*Dauner-Lieb*, Gesellschaftsrecht, 3rd ed. 2016, § 76 AktG Rn. 7: "problematic judgment"; *Fleischer*, NZG 2014, 321; *Paefgen*, WM 2016, 433.

[33] LG München, NZG 2014, 345.

[34] *Hübner*, Human Rights Compliance und Haftung im Außenverhältnis, in: Krajewski et al., Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen, 2018, pp. 61, 73 et seq.

[35] *Weller/Kaller/Schulz*, AcP 2016 (2016), 413; *Hübner*, Human Rights Compliance und Haftung im Außenverhältnis, in: Krajewski et al., Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen, 2018, pp. 61, 75 et seq.

duty of legality, therefore, is often of only limited use to the people directly affected by CSR – and particularly human rights – breaches.

b) Alternatively, one could consider generally allowing a *piercing of the corporate veil* in the case of tortious liabilities of the subsidiary (*Deliktsdurchgriffshaftung*).[36] CSR violations may, after all, generate tortious liability.[37] However, a general piercing of the corporate veil in the case of tortious liabilities is, so far, not recognised under German law. Albeit it is an approach widely discussed for CSR cases, it is still restricted to few scenarios, such as the so-called *Vermögensvermischung*[38] or *Existenzvernichtungshaftung*[39].[40] None of them appear relevant in the CSR context. A general piercing of the corporate veil in order to establish such liability of the mother company would require legislative intervention, or a fundamental evolution in the jurisprudence of the German courts. Especially *Thomale* advocates such evolution; he has established prerequisites for piercing the corporate veil.[41] The prevailing opinion, however, still negates the possibility of piercing the corporate veil in the case of tortious liabilities of the daughter company.

c) Other relevant provisions are the newly introduced *sections 289b and 289c of the German Commercial Code* (*HGB*).[42] They were introduced on

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[36] A number of scholars promote transferring this school of thought from the sphere of economics into the law, cf. within the English literature, *Hansmann/Kraakman*, Toward Unlimited Shareholder Liability for Corporate Torts, 100 Yale L.J. (1991), 1897 et seq., *Stone*, 90 Yale L.J. (1980), 1 (67 et seq.) and *Siliciano*, Michigan Law Review (1987), 1820 (1834 et seq.) or, within the German literature, *Thomale*, Kapital als Verantwortung, 2018; *Bitter*, Konzernrechtliche Durchgriffshaftung, 2000, pp. 181 et seq., 200 et seq. and *Meyer*, Haftungsbeschränkung im Recht der Handelsgesellschaften, 2000, pp. 1031 et seq.

[37] For further detail on the tortious liability stemming from CSR breaches cf. B. III.

[38] I.e. cases in which it is impossible for an obligee to differentiate between the assets of the company and that of the shareholders. This may be caused by obscure bookkeeping or other factors. As a result, assets of the company are unduly attributed to the shareholders or other companies within the group.

[39] I.e. cases in which the shareholders, in reversal of the general rule, are accountable for the insolvency of the company. It, in essence, requires an improper withdrawal of company assets, without compensation, that causes or aggravates the company's insolvency. Cf. BGH, Urteil vom 16. Juli 2007 – II ZR 3/04.

[40] *Weller/Kaller/Schulz*, AcP 2016 (2016), 407–409.

[41] *Thomale*, Kapital als Verantwortung, 2018; in more detail *Weller/Kaller/Schulz*, AcP 2016, 387 (407 et seq.).

[42] There is, as of yet, no official translation of these sections of the Commercial Code. Therefore, we took the liberty of translating the relevant provisions ourselves:
s. 289b of the Commercial Code:

"(1) A capital company must include in its management report [according to ss. 264, 289 of the Commercial Code] a non-financial statement, if the company exhibits the following characteristics:

1. the capital company fulfils the requirements of s. 267 para. 3 sen. 1 [i.e. is a large capital company within the meaning of that provision],

2. the capital company is capital market oriented [kapitalmarktorientiert; within the meaning s. 264d of the Commercial Code] and

19 April 2017[43], in order to implement the provisions of Art. 19a of the European CSR-Directive[44]. According to ss. 289b, 289c, certain large public-interest companies must include a so-called non-financial statement (*nichtfinanzielle Erklärung*) in their annual management report.

Some scholars claim that these provisions could cause a "revolution via the law of accounting."[45] A company would no longer be able to exclusively focus on profit-maximisation but would now also have to take non-financial goals into account in its business decisions. It is, however, too early to judge whether such a "revolution" will actually occur.[46]

The question remains whether and, if yes, how violations of ss. 289b, 289c could or should be sanctioned:

aa) The directive itself does not specify sanctions; it leaves the decision to the national legislator entirely (minimum harmonisation).

bb) S. 331 and s. 334 of the German Commercial Code impose criminal liability on individuals who consciously falsify the content of the non-financial statement.[47] The non-financial statement constitutes a statement of facts about

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3. the capital company had on average more than 500 employees during the financial year. […]."

s. 289c of the Commercial Code:

"(1) In the non-financial statement within the meaning of s. 289b, the capital company must elaborate its business model briefly.

(2) The non-financial statement must furthermore at least cover the following aspects:

1. environmental issues […],

2. employee matters, […] including information on, for example, measures taken to ensure gender equality, […] the protection of the rights of employees to be informed and consulted, […] the protection the rights of trade unions […],

3. social matters […],

4. the respect for human rights, including information on, for example, preventive measures against human rights violations, and

5. measures against corruption and bribery […].

[…]

(4) If a capital company does not pursue a strategy in relation to one or more of the aspects named in paragraph 2, it must explicitly declare and elaborate on this in its non-financial statement […]."

For the official text of these provisions (in German) cf. https://www.gesetze-im-internet.de/hgb/BJNR002190897.html#BJNR002190897BJNG000300300 (last retrieved: 20.07.17).

[43] Gesetz vom 11.04.2017 (BGBl. I p. 802).

[44] Directive 2013/34/EU of 26 June 2013, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014.

[45] *Hommelhoff*, Festschrift Bruno Kübler, 2015, p. 291 (296 et seq.); cf. equally *Roth-Mingram*, NZG 2015, 1341 (1341 et seq.).

[46] Reserved in this context, *Fleischer*, AG 2017, 509 (525); *Schön*, ZHR 180 (2016), 279 (281 et seq.).

[47] Cf. particularly s. 331 (1) no. 1 of the Commercial Code (non-official translation):

"A prison sentence of up to three years or a fine will be imposed on someone who

1. as a member of the body authorised to represent the company or as a member of the supervisory board of a capital company gives a false account of or obscures the situation of

the human rights standards, environmental concepts, etc. implemented by the company. For example, the statement may declare that no children work in the production process. If children do, in fact, work in the production process, the non-financial statement is false and criminal liability may accordingly be imposed.

cc) Furthermore, s. 331 (1) no. 1 Commercial Code constitutes a rule intended to protect other persons (*Schutzgesetz*) within the meaning of s. 823 (2) of the German Civil Code.[48] Hence, members of the management and supervisory board may be civilly liable for producing a false non-financial statement, i.e. they may be liable for any material or immaterial damages that the company has suffered due to the false non-financial statement.[49]

However, a factually false non-financial statement does not always constitute a breach of duty and does, thus, not always lead to civil liability. While the human rights, environmental, social, etc. concepts stipulated in the non-financial statement do describe a company's commitment to these goals, this commitment may, to our minds, not be regarded as a commitment to a particular outcome (*obligation de résultat*[50]) but rather a *commitment to undertake the appropriate efforts* to reach these goals (*obligation de moyens*).[51] Classifying the stipulations of the non-financial statements as pure *obligations de moyens* creates a suitable parallel to the obligations imposed by s. 76 (4) of the German Stock Corporation Act[52] on women's quotas in management positions of capital companies.[53] Therefore, only if the management board has not taken the appropriate measures to implement the goals of the non-financial statement, a breach of duty may be found. Members of the supervisory board may, in turn, only breach their duties if they recognise the incorrectness of the non-financial

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the capital company […] in the management report, including the non-financial statement, [or] in the separate non-financial statement […]."

Cf. furthermore s. 334 (1) no. 3 of the Commercial Code (non-official translation):

"A regulatory offence is committed by someone who as a member of the body authorised to represent the company or as a member of the supervisory board of a capital company […]

1. when preparing the management report or a separate non-financial statement breaches one of the provisions of ss. 289 to 289b (1), ss. 289c […]."

For the official text of these provisions (in German) cf. https://www.gesetze-im-internet.de/hgb/BJNR002190897.html#BJNR002190897BJNG000300300 (last retrieved: 20.07.17).

[48] Baumbach/Hopt/*Merkt*, HGB, 37th ed. 2016, § 331, para. 1; EBJS/*Böcking/Gros/Rabenhorst*, HGB, 37th ed. 2016, § 331, para. 8.

[49] Reserved in this context, *Thomale/Hübner*, JZ 2017, 385 (395).

[50] This differentiation is based on Art. 1137, 1147 of the French Code Civil of 1804. The German academic discussion on civil obligations has adopted this differentiation, cf. Jauernig/*Mansel*, BGB, 14th ed. 2015, § 241, para. 9.

[51] Equally, *Roth-Mingram*, NZG 2015, 1341 (1343 et seq.).

[52] According to s. 76 (4), the management board must set targets as to the number of women in its top-management to be reached by a certain date.

[53] Similarly, *Hommelhoff*, NZG 2015, 1329 (1331).

statement and fail to accordingly take appropriate measures against the management board.

d) At the same time, producing a false non-financial statement constitutes a violation of law (*Gesetzesverstoß*). This violation may gain such significance that the annual shareholders' meeting (*Hauptversammlung*) may be barred from discharging the members of the management and supervisory board according to s. 120 of the German Stock Companies Act (*AktG*).[54] If the general meeting nevertheless discharges them, its decision will be defective and, therefore, voidable according to s. 243 of the German Stock Companies Act.[55]

II. Contract Law

a) German contract law is based on the *freedom of contract*, constitutionally guaranteed by Art. 2 (1) of the German Basic Law (*Grundgesetz*).[56] This implies that the parties are, in principle, free to determine whether, when, how and with whom to conclude a contract. In short, they are free in determining the particularities of their contract – even if they, through their agreement, deviate from statute. Such deviation from statute is possible as German contract law is, for the most part, non-mandatory (*dispositives Recht*).[57]

There are few exceptions to this rule. The probably most important one are those rules of German contract law that are in fact mandatory (*zwingendes Recht*). However, none of the OECD Guidelines are mandatory law. As such, the parties are not bound by the OECD Guidelines. Nevertheless, contractual provisions violating CSR rules may in some cases also violate public morality (s. 138 Civil Code) or a statutory provision (s. 134 Civil Code), and be void for this reason. Therefore, although not mandatory law within the civil law, CSR rules may indirectly influence the content of a contract.

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[54] Schmidt/Lutter/*Drygala*, AktG, 3rd ed. 2015, § 111, para. 67j et seq.

[55] *Roth-Mingram*, NZG 2015, 1341 (1343 et seq.); *Weller/Kaller/Schulz*, AcP 216 (2016), 412.

[56] Maunz/Dürig/*Di Fabio*, GG, 79. EL December 2016, Art. 2, para. 101. But even before the implementation of the German Basic Law – the German Civil Code is older than the Basic Law, particularly within the law on contracts –, the idea of autonomous parties shaped the German Civil Code. It was drafted in an environment of economic liberalism. Thus, the original document almost entirely refrained from monitoring contractual content, safe for the limits imposed by s. 134 (breach of statute – *Gesetzesverstoß*), s. 138 (unconscionability – *Sittenwidrigkeit*) and s. 242 (performance in good faith – *Leistung nach Treu und Glauben*). Over time, this has changed, particularly under the influence of EU law which introduced a multitude of provisions on the protection of weaker parties, for example consumers, leading to an, at times, far-reaching review of private-law contracts. Cf. in detail MünchKommBGB/*Säcker*, Einleitung, 7th ed. 2015, para. 33 et seq.; MünchKommBGB/*Busche*, Vor § 145, 7th ed. 2015, para. 5–7; MünchKommBGB/*Emmerich*, § 311, 7th ed. 2016, para. 1 et seq.

[57] *Köhler*, BGB Allgemeiner Teil, 40th ed. 2016, § 3, para. 23 et seq.

b) Anti-corruption provisions are not part of the contract law but of the criminal law[58], the law on regulatory offences[59] and the public law[60]. Nevertheless, contracts aiming at corrupting (foreign) public authorities will also be void according to s. 138 Civil Code since they violate the principle of morality.[61]

c) The parties are, of course, *free to agree upon CSR clauses*. Since numerous German companies implement own CSR-strategies, they regularly enshrine anti-corruption- and CSR-clauses into their contracts with suppliers, subcontractors, and other business partners.[62] Such clauses are usually enforced via contractual penalties, liquidated damages or auditing rights.[63] Regularly, they also seek to secure those standards along the entire supply chain by obliging their contractual partners to enforce those standards vis-à-vis their subcontractors as well.[64]

d) Furthermore, provisions on *liability for product defects* may be said to be CSR-related or, to put it differently, may indirectly create incentives for controlling the value chain with a view to CSR standards. Ss. 437, 434 (1) 3 of the Civil Code[65] may gain relevance here. These sections impose liability on a seller for inaccurate product descriptions (*Mängelhaftung wegen fehlerhafter Anga-*

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[58] Cf. in particular s. 108e, s. 299 and ss. 332–336 Criminal Code, Art. 2 IntBestG and Art. 1 EUBestG.

[59] Cf. in particular s. 130 (1), (3) in combination with ss. 9, 29a and 30 of the Act on Regulatory Offences.

[60] Cf. inter alia, United Nations Convention against Corruption of 31 October 2003, ratified by the German Bundestag on 27 October 2014 (BGBl. 2014 II p. 762, 763).

[61] BGH NJW 1985, 2406; Palandt/*Ellenberger*, BGB, 75th ed. 2016, § 138 Rn. 43.

[62] Walden/Depping/*Janke*, CSR und Recht, 2015, p. 248.

[63] Walden/Depping/*Janke*, CSR und Recht, 2015, p. 248.

[64] Walden/Depping/*Depping*, CSR und Recht, 2015, p. 130. Such clauses are particularly common within the refinement of raw matierials industry. Cf. also Hauschka/Moosmayer/Lösler/*Herb*, Corporate Compliance, 3rd ed. 2016, § 19 Compliance in der Einkaufsorganisation, para. 30; Walden/Depping/*Depping*, CSR und Recht, 2015, p. 130.

[65] s. 434 Civil Code (official translation):

"(1) The thing is free from material defects if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been agreed, the thing is free of material defects […]

2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing.

Quality under sentence 2 no. 2 above includes characteristics which the buyer can expect from the public statements on specific characteristics of the thing that are made by the seller, the producer (section 4 (1) and (2) of the Product Liability Act [Produkthaftungsgesetz]) or his assistant, including without limitation in advertising or in identification, unless the seller was not aware of the statement and also had no duty to be aware of it, or at the time when the contract was entered into it had been corrected in a manner of equal value, or it did not influence the decision to purchase the thing."

s. 437 Civil Code (official translation):

"If the thing is defective, the buyer may, provided the requirements of the following provisions are met and unless otherwise specified,

1. under section 439, demand cure,

ben). For example, if sellers advertise their products by claiming that particular environmental or human rights standards were safeguarded in the production process, the seller will be liable for the accuracy of this statement. If it is false, it constitutes a product defect within the meaning of s. 434 Civil Code.[66]

However, only buyers of such products are able to assert rights under ss. 437, 434 (1) 3 Civil Code. Victims of CSR breaches within the production process, in contrast, are unable to do so. As such, these provisions may only contribute to establishing an effective CSR system to a limited degree. This is a general problem of implementing CSR standards under contract law, as contractual rules may only benefit or oblige the parties involved in a contract.[67]

III. Tort Law

a) Victims of human rights violations, neighbouring residents of polluted rivers and land and other people whose rights and interests protected under s. 823 (1) Civil Code[68] have been infringed may claim reparation or other compensation

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2. revoke the agreement under sections 440, 323 and 326 (5) or reduce the purchase price under section 441, and

3. under sections 440, 280, 281, 283 and 311a, demand damages, or under section 284, demand reimbursement of futile expenditure."

The full text of these sections may be found at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726 (last retrieved: 21.07.17).

[66] *Weller/Kaller/Schulz*, AcP 216 (2016), 398–399.

[67] Safe for contracts protecting third parties (*Verträge mit Schutzwirkung zugunsten Dritter*): Under certain circumstances, parties not involved in the agreement may claim protection under the agreement (cf. instead of many BGH NJW 1995, 92). Only breaches of contractual duties of care (*Schutzpflicht*) may be invoked – not breaches of the primary duty of performance (*Leistungspflicht*). For a third party to be protected under a contract in such a way, the following requirements must be met: (1) There must be a (not necessarily effective) contractual relationship between two parties (*Schuldverhältnis*), (2) the third party must come into contact with the risks of breaches of duties of care in the same way as the obligee (*Leistungsnähe*), (3) there must be a relationship of proximity between the obligee and the third party (*Gläubigerinteresse*), (4) both requirements (2) and (3) must be apparent to the obligor (*Erkennbarkeit für den Schuldner*), and (5) the third party must be in need of protection (*Schutzbedürfnis*), i.e. the third party must not have own comparable contractual claims against the obligor. Hereto in more detail, cf. Jauernig/*Stadler*, BGB, 16th ed. 2016, § 328, para. 19 et seq.

[68] s. 823 Civil Code (official translation):

"(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault."

Accessible at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726 (last retrieved: 24.07.17).

from a company[69] inflicting that damage upon them. Unlike contractual duties that are owed only towards the contracting parties, tortious duties are owed towards everyone (*neminem laedere*-principle). The protection offered by German tort law is, nevertheless, at present limited.

b) Firstly, only erga omnes rights (*absolute Rechtsgüter*) are protected under s. 823 (1) Civil Code, including life, body, health or property. This limited protection – and the therefore limited risk of liability – in essence protects the freedom of action.[70]

aa) Hence, human rights violations give rise to damages claims only if they coincide with a violation of the abovementioned erga omnes rights. This will not always be the case. For example, inhuman working conditions as such do not necessarily damage health. However, once people are in fact injured, damages under s. 823 (1) Civil Code may be granted.

bb) To avoid having to establish an injury to body, health, property and the like, one could consider including at least human rights – as part of the CSR rules – as *other rights* within the meaning of s. 823 (1) Civil Code.[71] There are, however, two obstacles to this solution:

First, human rights traditionally only bind nation states, not individuals. It would need to be determined whether individuals, including transnational companies, could be regarded as additional addressees of the human rights regimes (*unmittelbare/mittelbare Drittwirkung*).[72] There is, in fact, a current tendency in academia to acknowledge this possibility.[73] However, no case law supports this view yet.

Second, even if transnational companies were bound by human rights, another issue would remain: It is not at all clear which of the numerous human

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[69] Liable under the law of tort is the company itself, not its managing body, cf. MünchKommBGB/*Wagner*, 6th ed. 2013, § 823, para. 85; for remarks on legal persons liable under the law of tort, cf. already *Medicus*, ZGR 1998, 570 (573 et seq.).

[70] *Kötz/Wagner*, Deliktsrecht, 12th ed. 2013, para. 94 et seq.; *Weller*, FS Hoffmann-Becking, 2013, pp. 1341 et seq.

[71] At first, it may appear that human rights fit into the category developed by the courts for the protection of the so-called general right of personality (*Allgemeines Persönlichkeitsrecht*), cf. inter alia BGHZ 13, 334 (*Leserbrief*) and BGHZ 26, 349 (*Herrenreiter*). This right has, so far, primarily served to protect the free development of one's own personality (*freie Entfaltung der Persönlichkeit*) or the protection and preservation of one's personal space (*Gewährleistung der engeren persönlichen Lebenssphäre und der Erhaltung ihrer Grundbedingungen*), cf. BVerfG NJW 2008, 39, para. 75; BVerfG NJW 2006, 207, para. 25; BVerfG NJW 1980, 2070, para. 13. As such, the *Allgemeine Persönlichkeitsrecht* shows some overlaps with the human rights protection but does not per se cover human rights in their full scope.

[72] Cf. *Hennings*, Über das Verhältnis von Multinationalen Unternehmen zu Menschenrechten, 2009, p. 43. Similar to the indirect validity of fundamental rights guaranteed in the German Basic Law in the private law (*mittelbare Drittwirkung der Grundrechte im Privatrecht*). Hereto in more detail, cf. MünchKommBGB/*Säcker*, 7th ed. 2015, Einleitung, para. 60 et seq.

[73] *Weller/Thomale*, ZGR 2017, 509, 515 et seq.

rights conventions would be determinative of the content of those *other rights* in s. 823 (1).[74] Or who would conclusively interpret the applicable convention.[75]

Third, human rights are formulated in such a vague manner, that one may hardly deduce precise liability for damages in case of their violation.[76] Thus, because of that vagueness, a clear point of reference is, as of yet, lacking.

c) If one of the protected rights is infringed, liability under s. 823 (1) furthermore requires a *breach of duty*. Within the law on contracts, the duties of each party are determined, defined and limited by the agreement. Such contractual determination is not possible within the law of tort. Nor is there a general duty to protect other people from harm.[77] What is required is a breach of a tortious duty of care (*Verkehrspflicht*).

aa) Generally speaking, those who create risks, dangers or hazards are under the obligation to take reasonable measures to protect third parties from harm.[78] Therefore, if a company creates a particular danger in the process of sourcing raw materials or when producing a product, that company has to take reasonable preventive measures to avoid accidents, prevent fire outbreaks or ensure only authorised personnel comes into contact with hazardous substances/machinery.

bb) (1) However, according to the prevailing opinion in academia, this tortious duty of care does generally not apply across the *value chain* – neither in the case of subsidiaries nor in the case of independent contractors[79]: Tortious liability for actions of subsidiary companies is barred by the corporate veil (*konzernrechtliches Trennungsprinzip*).[80] The same is said to hold true for independent legal entities like subcontractors or suppliers.

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[74] *Weller/Kaller/Schulz*, AcP 216 (2016), 400.

[75] *Weller/Kaller/Schulz*, AcP 216 (2016), 400.

[76] *Weller/Thomale*, ZGR 2017, 509, 515 et seq.

[77] Staudinger/*Hager*, BGB, 2009, § 823, E 25.

[78] BGHZ 65, 221. In more detail to the historical development of duties of care, cf. *Kötz/Wagner*, Deliktsrecht, 12th ed. 2013, para. 16 et seq.; *v. Bar*, Gemeineuropäisches Deliktsrecht, Band 1 (1996), § 2 II, para. 104 et seq.

[79] The question of duties of care applying across legal subjects is to be differentiated from the cases where someone has already created a danger, delegated its control onto a third party and the selection or supervision of that third party was deficient (*Delegationsfälle*). In those cases, liability is imposed on the basis that a party may not free itself from its responsibilities and duties by delegating them onto a third party without ensuring that that third party will take the appropriate measures to prevent harm to others. Cf. Prütting/Wegen/Weinreich/*Schaub*, BGB, 9th ed. 2014, § 823, para. 129; Jauernig/*Teichmann*, 15th ed. 2014, § 823, para. 33, 36.

[80] Cf. MünchKommAktG/*Heider*, 3rd ed. 2008, § 1, para. 46; BeckOGK/*Wilhelmi*, GmbHG, Stand: 15.08.2015, § 13, para. 2 et seq.; *Mühlhens*, Der sogenannte Haftungsdurchgriff im deutschen und englischen Recht, 2006, p. 23 et seq.; dissenting *Weller/Thomale*, ZGR 2017, 509, 522 et seq.

(2) This view proves *unconvincing*. First, one may find a company liable across the value chain if the ratio of the English case of *Chandler v Cape*[81] was applied in Germany. In that case, a duty of care resulted from an assumption of responsibility of the company vis-à-vis the employees of its subsidiary. Alternatively, the German courts could generally extend the *tortious duty of care of the parent company* to its subsidiaries and subcontractors whenever the parent company has decisive influence on the management, especially within the risky business of those legal entities.[82]

cc) Yet another problem associated with establishing tortious liability in international cases is whether *duties of care apply across borders* and, if they do, which *standard* – domestic or foreign – is determinative for the legal entity (subsidiary or subcontractor) doing business abroad. In general, the standard applicable at the place of the harmful act is determinative.[83] However, in the case of CSR-standards – particularly human rights standards that are aimed to apply universally without greater variation between countries[84] – this appears problematic. Which standard, in fact, would or should be applicable, needs to be inquired further.

d) Other norms within the law of tort, such as s. 823 (2) or s. 831[85] Civil Code, are unsuitable to establish general CSR-liability.

aa) Human rights can especially not be interpreted as protective laws (*Schutzgesetz*) pursuant to s. 823 (2) Civil Code. As established, human rights are, so far, only applicable between the state and the individual and do not oblige

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[81] *Chandler v Cape* [2016] EWCA Civ 525. For an analysis of this case, cf. inter alia *Petrin*, Assumption of Responsibility in Corporate Groups [2013] MLRev 603 and *Sanger*, Crossing the corporate veil: the duty of care owed by a parent company to the employees of its subsidiary [2012] CLJ 478. The scope of this case was, however, subsequently limited in *Thompson v The Renwick Group* [2014] P.I.Q.R P18 – as, for example, *Grusic*, Responsibility in groups of companies and the future of international human rights and environmental litigation (2015) CLJ 74(1), 30 rightly points out.

[82] In more detail *Weller/Thomale*, ZGR 2017, 509, 520 et seq.

[83] Cf. generally BGHZ 195, 30; *Jauernig/Teichmann*, BGB, 15th ed. 2014, § 823, para. 36; *Kötz/Wagner*, Deliktsrecht, 12th ed. 2013, para. 183 et seq. With regard to duties of care of tour operators, cf. MünchKommBGB/*Tonner*, 6th ed. 2012, § 651f, para. 21.

[84] *Bergmann*, "Menschenrechte" in Handlexikon der Europäischen Union, 5th ed. 2015.

[85] s. 831 Civil Code (official translation):

"(1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.

(2) The same responsibility is borne by a person who assumes the performance of one of the transactions specified in subsection (1) sentence 2 for the principal by contract."

Accessible at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726 (last retrieved: 24.07.17).

individuals.[86] S. 823 (2) Civil Code might, however, offer an opportunity to establish CSR-liability *de lege ferenda* if CSR-responsibility was determined in a statutory norm intended for the protection of individuals against harm within the meaning of that section.[87]

bb) S. 831 Civil Code may gain importance if a company has acted through a vicarious agent (*Verrichtungsgehilfe*). However, independent legal entities are not qualified as vicarious agents of the mother company.

IV. Do CSR rules fall under public policy or are they characterised as mandatory rules?

CSR rules are – to date – classified neither as international mandatory rules nor do they fall under public policy (*ordre public*) since they have not yet become part of the German law.[88] However, if the legislator chose to take action, such legislative enactment of CSR principles might be regarded as establishing mandatory rules pursuant to Art. 9 para. 1 Rome I. This happened, for example, in France[89].[90] In Germany, in contrast, legislative incorporation of CSR rules into German law is not yet sufficiently comprehensive for mandatory rules to be found.

C. Alternative methods of dispute resolution

Parties may choose to submit their civil law claims concerning CSR to *arbitration*, cf. ss. 1025 et seq. Civil Code, particularly s. 1029 Civil Code on the requirement of an arbitration agreement between the parties.

Mediation in the case of civil law claims may be initiated pursuant to s. 278a Code of Civil Procedure (*ZPO*)[91], either outside of court proceedings – as re-

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[86] *Weller/Kaller/Schulz*, AcP 216 (2016), 406; *Wagner*, RabelsZ 80 (2016), 756.

[87] Hereto in further detail, *Weller/Kaller/Schulz*, AcP 216 (2016), 417 et seq.

[88] BeckOGK/*Stürner*, Stand: 01.03.2018, EGBGB Art. 6, para. 249; cf. MünchKommBGB/*v. Hein*, 6th ed. 2015, EGBGB Art. 6, para. 145 et seq.

[89] Law n°2017–399 of 27 March 2017 on the duty of vigilance of parent and outsourcing companies; cf. *Weller/Kaller/Schulz*, AcP 216 (2016), 387, 417 et seq.

[90] BeckOGK/*Stürner*, Stand: 01.03.2018, EGBGB Art. 6, para. 249.

[91] s. 278a Code of Civil Procedure (official translation):

"(1) The court may suggest that the parties pursue mediation or other alternative conflict resolution procedures.

(2) Should the parties to the dispute decide to pursue mediation or other alternative conflict resolution procedures, the court shall order the proceedings stayed."

Accessible at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1021 (last retrieved 29.07.17).

gulated in the Mediation Act (*Mediationsgesetz*) – or within court proceedings, as allowed in s. 278 (5) Code of Civil Procedure.[92]

Conciliation in the case of civil law claims is mandatory under s. 15a Introductory Act to the German Code of Civil Procedure[93] (*EGZPO*) if the German state in which the claim is submitted has chosen to declare a legal action inadmissible unless a governmental conciliator has been contacted and attempts to achieve an unanimous, out-of-court settlement have proven unsuccessful.[94] However, this only applies to a limited number of civil proceedings. In the case of CSR-claims, s. 15a proceedings will have little significance. Generally, the judge is "[i]n all circumstances of the proceedings" under an obligation to act "in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue", s. 278 (1) Code of Civil Procedure.[95]

Finally, a dispute may be submitted to the *National Contact Point*, see above.

D. Jurisdiction

I. Civil jurisdiction

For civil law cases, *Art. 4*, *63 Brussels Ia-Regulation* determine whether a German court has jurisdiction for claims against companies or legal persons[96]. It will have jurisdiction if the defendant company has its statutory seat, central administration or principal place of business in Germany.[97] It is, then, irrelevant whether the act of causation or the damage has occurred abroad.

Besides, the *forum non conveniens* doctrine is not applicable in the realm of the Brussels Ia-Regulation due to the ECJ's judgment in *Owusu*.[98]

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[92] Cf. hereto in more detail BeckOK ZPO/*Bacher*, Stand: 15.6.2017, § 278a, para. 1; Musielak/Voit/*Foerste*, ZPO, 14th ed. 2017, § 278a, para. 1 et seq.; MünchKommZPO/*Ulrici*, 5th ed. 2016, § 278a, para. 1 et seq.

[93] Accessible at http://www.gesetze-im-internet.de/zpoeg/__15a.html (last retrieved: 29.07.17), available only in German.

[94] Hereto in more detail MünchKommZPO/*Prütting*, 5th ed. 2016, § 278, para. 57 et seq.

[95] Official translation available at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1021 (last retrieved: 29.07.17). Hereto in more detail MünchKommZPO/*Prütting*, 5th ed. 2016, § 278, para. 9 et seq.

[96] *Brussels Ia-Regulation* is another term for the Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[97] *Stürner*, Festschrift Coester-Waltjen, 2015, 843 (844).

[98] ECJ Case 281/02 *Owusu v Kackson* [2005] ECLI:EU:C:2005:120, para. 36 et seq.

II. Judicial rulings on breaches of CSR

a) One of the most notable CSR cases being heard at the moment is the case against the textile discounter *KiK* before the regional court (*Landgericht*, *LG*) Dortmund.[99] In this case, surviving victims and relatives of deceased of the *devastating fire in a textile factory* in Karachi, Pakistan, in 2012[100] claim reparation from KiK. KiK neither runs the factory itself nor does it own a share in the subcontracting company (Ali Enterprises) that ran the factory. However, the claimants argue that KiK, as main customer of Ali Enterprises, was able to notably influence the business practices and the production process and was, accordingly, under an obligation to ensure the safety of the employees of Ali Enterprises. According to the claimants, KiK breached this obligation.

No ruling has so far been given. However, the LG Dortmund granted legal aid to the claimants (*Prozesskostenhilfe*). While this procedure usually indicates whether the Court believes the case to have any merit, this does, broadly speaking, not apply if foreign law is applicable.[101] The court does emphasise that little may be taken from granting legal aid in this particular case since Pakistani law is applicable and an expert's opinion on the rights of the claimants may only be obtained within the main proceedings.[102]

b) Another notable case is the case before the higher regional court (*Oberlandesgericht*, *OLG*) Hamm at the appeal stage.[103] A Peruvian farmer asserts that the electric utilities company *RWE* is, alongside many others, responsible for *global warming*. Because of the glacial melting it causes, the lake just above the city of Huaraz is about to overflow and flood Huaraz. It threatens the people living there and may destroy their livelihoods. The claimant, therefore, demands that RWE pays for measures needed to protect the city, the contribution being proportionate to RWE's share in causing global warming.

The outcome of this case is, as in the case of KiK, uncertain. The court of first instance dismissed the claim since the claimant was, in the eyes of the court, unable to establish a causal relationship between the defendant's conduct (production of greenhouse gases) and the potential risk of flooding Huaraz.[104] However, the higher regional court showed some sympathy for the claimant's line of reasoning at its first oral hearing on 13 November 2017. Accordingly, the Court issued an order to hear evidence on 30 November 2017. Expert witnesses

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[99] LG Dortmund – Az. 7 O 95/15.

[100] http://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html (last retrieved: 29.07.17).

[101] MünchKommZPO/*Wache*, 5th ed. 2016, § 114 Rn. 58.

[102] http://www.lto.de/recht/nachrichten/n/lg-dortmund-prozesskostenhilfe-kik-brand-schadensersatz-pakistanisches-recht/(last retrieved: 29.07.17).

[103] https://germanwatch.org/de/13837, Pressemitteilung vom 12.05.2017 (last retrieved: 30.07.17).

[104] LG Essen, BeckRS 2016, 114262.

will now have to establish whether it is, in fact, scientifically possible to prove causality between the imminent flooding of Huaraz and RWE's greenhouse emissions.

c) Another way of tackling human rights issues in the supply chain might be competition law. In 2003, Nike was defendant in a lawsuit due to "misleading advertisements".[105] In the same fashion, the Hamburg Consumers' Office, supported by two NGOs, filed a competition law suit against the German discounter *LIDL* for *misleading advertisements* based on the German Fair Trade Practices Act (*UWG*).[106] The claim was based on allegations that LIDL's suppliers, despite various fair trade advertisements by LIDL, committed a number of CSR offences, including excessive working hours, unfair payroll deductions, prohibition of trade unions, and discrimination against women.[107] LIDL was therefore accused of intentional deceit of consumers as prohibited by s. 5 (1) no. 1 and 3 UWG. 10 days after the claim was filed at the Local Court of Heilbronn (*Landgericht Heilbronn*), LIDL surrendered and issued a statement that it would no longer publish such fair trade advertisements. As a consequence, the proceedings were discontinued. It, thus, seems that competition law might be an alternative for CSR-based lawsuits.

E. Applicable law

I. Applicable company law

The *lex societatis* determines questions of a company's establishment, organisation, its internal and external relations as well as its dissolution – in short "under which circumstances a legal person originates, lives and passes."[108]

Since both *Rome I* and *Rome II* generally exempt company law from their scope of application, cf. Art. 1 (2) lit. f Rome I and Art. 1 (2) lit. d Rome II, national conflict law will regularly determine the applicable law.

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[105] *Joseph*, Corporations and Transnational Human Rights Litigation, 2004, p. 101.

[106] For further information: https://www.ecchr.eu/de/unsere-themen/wirtschaft-und-menschenrechte/arbeitsbedingungen-in-suedasien/bangladesch-lidl.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Arbeitsbedingungen%2C%20Lidl%2C%20Juristischer%20Hintergrund%2C%202010-04.pdf (last retrieved: 30.07.17).

[107] *Osieka*, Zivilrechtliche Haftung deutscher Unternehmen für menschenrechtsbeeinträchtigende Handlungen ihrer Zulieferer, p. 221.

[108] BGH NJW 1957, 1433 (1434) – translated by the authors.

The determination of the *lex societatis* is split between EU-/EEA-companies and those from third countries,[109] as established by the case law of the European Court of Justice and the jurisprudence of the courts of the member states.[110]

a) In Germany, the *lex societatis* is, in general, determined according to the '*real seat theory*' (*Sitztheorie*).[111] Thus, the law of the country is applicable in which the company factually has its centre of administration (i.e. its 'real seat').[112] Its location may, accordingly, not be changed by will. Consequently, the law of the country will be applicable to which the company has its closest link.[113] Through its purely objective approach, the real seat theory not only allows states to effectively control the companies based in its territory but also prevents a 'race to the bottom' that might occur if companies were free to choose the law applicable to them.[114]

b) In contrast, within the scope of EU law, the applicable law will be determined on the basis of the '*incorporation theory*' (*Gründungstheorie*),[115] i.e. the law of the country where the company was founded. The great advantage of this theory is that it is consistent with the freedom of establishment, Art. 49, 54 TFEU.[116]

The incorporation theory usually also applies in the case of international conventions, like the Treaty of Commerce and Friendship between the United States of America and Germany of 1954.[117]

It is disputed which act shall be determinative as "act of foundation", whether it should be (1) the act of establishment, (2) the statutory seat, (3) the place of registration, (4) a place freely chosen by the company founders, or (5) the place at which the company was granted legal personality.[118]

c) Recent developments within and reform proposals of the PIL on CSR and company law issues demonstrate that the inconsistent determination of the *lex societatis* remains a pressing issue. The EU Commission, for example, considers

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[109] *Weller*, IPRax 2017, 167; *Hübner*, ZGR 2018, 148 ff.

[110] *Weller*, IPRax 2017, 167.

[111] BGH NJW 2009, 289, para. 21 et seq. (*Trabrennbahn*); MünchKommGmbHG/*Weller*, 2nd ed. 2015, Einleitung (Int. GesR), para. 338 et seq.

[112] BGHZ 97, 272. In more detail on the determination of this 'real seat' cf. MünchKomm GmbHG/*Weller*, 2nd ed. 2015, Einleitung (Int. GesR), para. 321 et seq., with further references.

[113] *v. Bar*, Internationales Privatrecht, Band II – Besonderer Teil, 1991, para. 621.

[114] *Gesell*, Gesellschaftsrechtliche Umsetzung grenzüberschreitender Umwandlungen, in: Prinz, Umwandlungen im Internationalen Steuerrecht, 2013, para. 2.3.

[115] MünchKommGmbHG/*Weller*, 2nd ed. 2015, Einleitung (Int. GesR), para. 350.

[116] MünchKommGmbHG/*Weller*, 2nd ed. 2015, Einleitung (Int. GesR), para. 340.

[117] MünchKommGmbHG/*Weller*, 2nd ed. 2015, Einleitung (Int. GesR), para. 341.

[118] MünchKommGmbHG/*Weller*, 2nd ed. 2015, Einleitung (Int. GesR), para. 333, with further references.

introducing a Rome V-Regulation, unifying the PIL framework on the law applicable to companies across the EU.[119]

aa) A first proposal was made by the GEDIP group in 2016.[120] It suggested that the incorporation theory should be introduced as *loi uniforme*. In that respect it would overcome the split determination of the applicable law in Germany.

bb) In addition the GEDIP-proposal also contains a rule on CSR. Art. 1 (3) of the draft proposal states that the rules „do not prejudice the fulfilment of the obligations deriving from social responsibility of companies (corporate social responsibility) as defined by national, European or international norms". Initially, the GEDIP group had intended to come up with the far-reaching rule that the legal order should be applicable that offered the strongest CSR protection.[121] It, however, refrained from implementing this idea for various reasons: The concept of CSR was considered too vague and the potential costs for enterprises incalculable. In fact, the GEDIP generally considered PIL regulations as unsuitable for such a rule. Instead, it recommended that the issue of ensuring the strongest possible CSR protection should rather be addressed within the substantive law.[122]

II. Applicable contract law

The applicable law for rules within the law of contract is determined by the so-called *Rome I Regulation* (in German: *Rom I-VO*) as *loi uniforme*. Art. 3 (1) Rome I declares that the will of the parties shall be the determinative. If the parties did not choose the applicable law (cf. Art. 3 Rome I), Art. 4 (2) Rome I declares that the contract will, in principle, be governed by the law of the country where the party required to effect the characteristic performance of the contract has its habitual residence. This means, for example, that in a contract of sale, the law of the country in which the seller has its habitual residence gov-

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[119] Study on the Law Applicable to Companies – Final report, 2016, accessible at https://bookshop.europa.eu/en/study-on-the-law-applicable-to-companies-pbDS0216330/, last retrieved: 14.08.2017; cf. *Hübner*, ZGR 2018, 148 ff.

[120] Groupe européen de droit international privé (GEDIP), Draft rules on the law applicable to companies and other bodies (accessible at http://www.gedip-egpil.eu/documents/Milan%202016/GEDIPs%20Proposal%20on%20Companies.pdf, last retrieved: 14.08.2017).

[121] GEDIP, Vingt-sixième réunion Milan, 16–18 septembre 2016, Compte rendu des séances de travails, p. 23: «Nonobstant l´article 3, les questions liées à la responsabilité sociétale des entreprises, à partir du moment où elles affectent l´organisation de la société, sont soumises à la loi la plus protectrice soit du siège social statutaire, soit de l´incorporation, soit du siège social réel, soit des activités de la société.»

[122] GEDIP, Vingt-sixième réunion Milan, 16–18 septembre 2016, Compte rendu des séances de travails, p. 23.

erns the contract; in the case of a contract on the provision of services, it will be the law of the country where the service provider has its habitual residence.[123]

Therefore, if a buyer of a product wanted to bring an action against a domestic seller of goods that have been produced under conditions that breach human rights standards, German law would be applicable.

In contrast, a victim of a CSR breach will usually, at most, have a contractual relationship to a subsidiary (*Tochtergesellschaft*) or a supplier based abroad, such as a contract of employment. This relationship will usually be governed by the respective foreign law. Thus, victims of CSR breaches will rarely be able to invoke German law.

III. Applicable tort law

If a CSR-breach constitutes a tortious act, the applicable law is determined by the *Rome II-Regulation* (in German: *Rom II-VO*)[124].

a) Art. 4 (1) Rome II determines that, in principle, the law of the country in which the damage occurs (*Ort der Rechtsgutsverletzung*) is applicable. Where the event giving rise to the damage occurred (*Handlungsort*) or where indirect consequences of that event occur is, accordingly, irrelevant.[125] Rome II, thus, implements the general principle of European law that legal relationships arising out of tortious acts are to be governed by the law applicable at the place of the tort/delict (*lex loci delicti*), precisely the *lex loci damni*[126].

Thus, German tort law will be applicable if the damage arises in Germany. However, victims of CSR breaches that were committed abroad by subsidiaries and independent contractors of the domestic mother company will usually only be able to invoke foreign law, as they will usually only have suffered harm abroad.

b) Two exceptions apply to the rule of *lex loci damni* according to Art. 4 (1): Firstly, if the person inflicting the harm and the person harmed have their habitual residence in the same country, the law of that country will be applicable, Art. 4 (2). Secondly, if there is a manifestly closer connection with a country than that indicated by para. 1 or para. 2, the law of that other country will be applicable.

aa) The prevailing opinion approves of this system. After all, legal relations arising out of a tort were usually not much more than a coincidental clashing of separate legal spheres of two or more people. Thus, the *lex locus delicti* appeared

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[123] Cf. also Art. 4 para. 1 Rome I.

[124] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[125] Palandt/*Thorn*, 75th ed. 2016, Art. 4 Rom-I-VO, Rn. 1.

[126] Cf. Recital no. 18 to Regulation (EC) No 864/2007.

as the most obvious connecting factor.[127] Furthermore, by usually declaring the *lex loci damni* applicable, the victim's interest in being able to claim compensation according to the law of a jurisdiction generally predictable for him or her was protected.[128]

bb) However, some authors argue that at least *victims of human rights violations should be able to choose the law applicable* to their case: either the law of the country in which the damage occurred, Art. 4 (1) Rome II, or the law of the country in which the *event* giving rise to the damage occurred.[129] This right to choose could be justified by recourse to Art. 4 (3) Rome II. The underlying argument is: The current connecting factors (*Anknüpfungspunkte*) in the Rome II-Regulation were established to protect the victim. However, it may, in some cases, turn out to be more favourable to the victim if the law of the country of the tortious event was applicable. Therefore, the victim should be able to choose.

This view would also pay regard to the fact that the *tortious event* may not only occur in the foreign state of the subsidiary or subcontractor. It may – in addition – occur in the state of the *parent company*. This may, for example, be the case if the tort committed by the parent company is a tort committed by *omission*, i.e. if the parent company – contrary to its tortious duty of care – did not take the necessary measures to prevent CSR-breaches of its subsidiaries and subcontractors. If this omission of the mother company was relevant in determining the connecting factor, the domestic tort law of the mother company would be applicable. However, this entails extending tortious duties of care across legal persons, as we would suggest, and to assume that the mother company has a duty of care to prevent CSR-breaches of its subsidiaries and subcontractors in the first place.[130]

c) German tort law could also become applicable if the parties subsequently chose German law as the *lex fori*.[131] After all, the wrongdoer and the victim may agree on the applicable law after the event which gave rise to the claim took place, Art. 14 (1) lit. a Rome II Regulation. It is, however, unlikely that a company will subsequently subject itself voluntarily to a more stringent CSR regime.

d) Lastly, the *ordre public* rule in Art. 26 Rome II might lead to the application of the *lex fori*. However, this would be limited to a very small number of cases.[132]

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[127] BeckOK BGB/*Spickhoff*, Stand: 01.02.2013, VO (EG) 864/2007 Art. 4, para. 1.

[128] MünchKommBGB/*Junker*, 6th ed. 2015, Rom II-VO Art. 4, para. 3; similarly, already BGH NJW 1983, 1972 (1973).

[129] *Weller/Thomale*, ZGR 2017, 509, 523 et seq.

[130] In more detail *Weller/Thomale*, ZGR 2017, 509, 520 et seq.

[131] *Thomale/Hübner*, JZ 2017, 385 (392).

[132] Cf. hereto in further detail E.IV. and V.

e) For *environmental torts*, the Rome II Regulation contains a specific rule in Art. 7. If the CSR breach has led to an environmental damage, the victim may choose between the *lex loci delicti* or the law of the country in which the event giving rise to the damage occurred. Art. 7, thus, already implements the suggested development of the Rome II system within human rights cases.

IV. Ensuring conformity of the applicable law with international human rights law, the ILO Conventions, and other mandatory rules of international law

Art. 6 Introductory Act to the Civil Code[133], as well as Art. 21 Rome I[134] and Art. 26 Rome II[135] enable the judge to question whether a rule, applicable according to Art. 4 (1) Rome II, would determine an outcome that was manifestly incompatible with the public policy of the forum, i.e. the German *ordre public*. The discrepancy between the outcome provided for by the applicable law and the considerations of justice that the German statutory rules are based upon must be so pronounced that simply applying the foreign rules appears intolerable.[136] Thus, not every inconformity with public policy may lead to a non-application according to Art. 6 Introductory Act to the Civil Code.

What exactly encompasses a sufficiently manifest inconformity needs to be determined on a case by case basis. Generally, the German *ordre public* encompasses not only the in Art. 6 sen. 2 Introductory Act to the Civil Code expressly named rights granted by the German Basic Law. It also includes European and international human rights, such as those granted by the Charta of Fundamen-

[133] Art. 6 Introductory Act to the Civil Code (official translation):

"A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights."

Accessible at https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html #p0038 (last retrieved: 30.07.17).

[134] Art. 21 Regulation (EC) No 593/2008:

"The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum."

Accessible at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX: 32008R0593&from=EN (last retrieved: 30.07.17).

[135] Art. 26 Regulation (EC) No 864/2007:

"The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum."

Accessible at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX: 32007R0864&from=DE (last retrieved: 30.07.17).

[136] BGH IPrax 2001, 586 (587); Hüßtege/Mansel/*Schulze*, Rom-Verordnungen, 2nd ed. 2015, Art. 26, para. 14.

tal Rights of the European Union, the European Convention on Human Rights, the ILO Conventions or the Universal Declaration of Human Rights, as well as other conventions of international law.[137] The rights granted by these conventions are binding within German law, either as federal law according to Art. 59 (2) Basic Law[138] or, as far as they are general rules of international law, according to Art. 25 Basic Law[139].

V. Application of ethical rules instead of, or as a complement to, the applicable law

Soft law rules, although non-binding, may be taken into consideration within the German *ordre public*. However, these soft law rules must in some way have gained authority within the domestic legal system, i.e. they must belong to the fundamental principles of German law.[140] This will usually be the case if they have become part of the national legal system in one way or the other, or if their basic considerations are in some way reflected in the national legal system.

The OECD Guidelines or the *Ruggie Principles*, therefore, have the potential of becoming part of the national *ordre public* in the long run. While they have not yet become part of the German law in any way, this may change if according legislative measures are taken.[141]

F. Recognition and enforcement of judgments

The law on recognition and enforcement of foreign judgments is scattered around various sources including EU law, international public law and national law.

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[137] Cf. in detail MünchKommBGB/*v. Hein*, 6th ed. 2015, EGBGB Art. 6, para. 132 et seq.; BeckOGK/*Stürner*, Stand: 01.05.2017, EGBGB Art. 6, para. 176 et seq.

[138] Art. 59 para. 2 Basic Law (official translation):

"Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law […]."

Accessible at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0141 (last retrieved: 31.07.17).

[139] Art. 25 Basic Law (official translation):

"The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

Accessible at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0141 (last retrieved: 31.07.17).

[140] BeckOGK/*Stürner*, Stand: 01.05.2017, EGBGB Art. 6, para. 246.

[141] BeckOGK/*Stürner*, Stand: 01.05.2017, EGBGB Art. 6, para. 247.

a) S. 328 Act on Civil Procedure[142] provides an autonomous rule for the recognition of foreign judgments. However, s. 328 may only apply if there are no EU regulations (especially the Brussels Ia-Regulation[143]) or inter-state agreements (such as the Lugano-Convention[144]) taking precedence. Thus, s. 328 applies only to foreign judgements that have been issued (1) by a court of a non-EU member state, (2) by a court of a country with which Germany has no inter-state agreement on the recognition of judgments, or (3) if the applicable rules allow for recourse to s. 328.[145]

Even if Art. 36 et seq. Brussels Ia-Regulation and the autonomous German law (ss. 328, 722–723 Act on Civil Procedure) exhibit fundamental similarities, such as the principle of *ipso iure* recognition, the maxim of *favour executionis*, as well as the prohibition of the *révision au fond*, there are at least two relevant differences: The autonomous law is more restrictive in the recognition of foreign judgments (cf. Art. 45 Brussels Ia-Regulation and s. 328 Act on Civil Procedure), and s. 328 (1) no. 5 Act on Civil Procedure requires reciprocity whereas

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142 s. 328 Code of Civil Procedure (official translation):

"(1) Recognition of a judgment handed down by a foreign court shall be ruled out if:

1. The courts of the state to which the foreign court belongs do not have jurisdiction according to German law;

2. The defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself;

3. The judgment is incompatible with a judgment delivered in Germany, or with an earlier judgment handed down abroad that is to be recognised, or if the proceedings on which such judgment is based are incompatible with proceedings that have become pending earlier in Germany;

4. The recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights;

5. Reciprocity has not been granted.

(2) The rule set out in number 5 does not contravene the judgment's being recognised if the judgment concerns a non-pecuniary claim and if, according to the laws of Germany, no place of jurisdiction was established in Germany."

Accessible at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p2455 (last retrieved: 31.07.17).

s. 328 Act on Civil Procedure does not apply to judgments within the criminal or public law. However, a judgment may still be classified as civil law judgment even if it has been obtained in an adhesion procedure or if the judgment contains punitive elements – such as an award of punitive damages (BeckOK ZPO/Bach, Stand: 15.06.2017, § 328, para. 6).

143 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] O.J. L 351/1.

144 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2007] O.J. L 339/3.

145 In this manner, BeckOK ZPO/*Bach*, Stand: 15.06.2017, § 328, para. 9 et seq. For a full list of relevant international legal framework taking precedence over s. 328, cf. MünchKomm ZPO/*Gottwald*, 5th ed. 2016, § 328, para. 17 et seq.

the Brussels Ia-Regulation does not.[146] Notwithstanding, both regimes resemble one another in most ways.

A foreign judgment may be recognised according to s. 328 if the following requirements are met:[147]

(1) The issuing court was internationally competent to judge on the matter (s. 328 para. 1 no. 1).

(2) The right of the defendant to a fair trial has been respected (s. 328 para. 1 no. 2).

(3) No contradicting judgment has been handed down or been recognised in Germany (s. 328 para. 1 no. 3).

(4) The judgment does not infringe the German *ordre public* (s. 328 para. 1 no. 4).

(5) Reciprocity is granted – except under the conditions of s. 328 para. 2. This means that a foreign judgment will only be recognised in Germany if a German judgment would equally be recognised in the issuing state (s. 328 para. 1 no. 5).

One should note that s. 328 uses the word 'judgment' (*Urteil*). This terminology is in some way misleading as not only judgments in the formal sense may be recognised but any final decision of a foreign court in a civil law matter.[148]

On top of the explicitly mentioned requirements, there are two not expressly stated requirements that must also be met:[149]

(1) The judgment may not be void or for any other reason ineffective (*Wirksamkeit der Entscheidung*). Otherwise the act of recognition would grant the claimant more rights than he would domestically have. If the judgment is merely voidable, it may be recognised for as long as it has not, in fact, been voided.[150]

(2) The court must have had jurisdiction to issue a judgment at all (*Gerichtsbarkeit*). This is, for example, to be negated if a judgment has been issued against a member of the diplomatic corps, cf. s. 18 Courts Constitution Act (*GVG*)[151]. This requirement is implicitly based on the requirements of competency, s. 328 (1) no. 1, and of compatibility with the German *ordre public*, s. 328 (1) no. 4.

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[146] *Junker*, Internationales Zivilprozessrecht, 3rd ed. 2016, p. 343–344.

[147] Cf. to the requirements of s. 328 in more detail MünchKommZPO/*Gottwald*, 5th ed. 2016, § 328, para. 57 et seq.; BeckOK ZPO/*Bach*, Stand: 15.06.2017, § 328, para. 10 et seq.

[148] Musielak/Voit/*Stadler*, ZPO, 14th ed. 2017, § 328, para. 5.

[149] BeckOK ZPO/*Bach*, Stand: 15.06.2017, § 328, para. 12, 14; Musielak/Voit/*Stadler*, ZPO, 14th ed. 2017, § 328, para. 7, 8.

[150] Prevailing opinion, cf. MünchKommZPO/*Gottwald*, 5th ed. 2016, § 328, para. 66 with further references.

[151] s. 18 Courts Constitution Act (official translation):

"The members of the diplomatic missions established in the territory of application of this Act, the members of their families and their private servants shall be exempt from German jurisdiction […]."

Accessible at https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0040 (last retrieved: 01.08.17).

The recognising court is under the obligation to enquire *ex officio* whether these written and unwritten conditions are met.[152] Otherwise, the court may not review the foreign judgment, neither to its facts nor its application of the law (*no révision au fond*).[153]

By providing a conclusive list of cases where foreign judgments may *not* be recognised, s. 328 *e contrario* provides for the general recognition of foreign judgments in Germany.[154] Although it is disputed whether these foreign judgments are, through s. 328, put on a par with domestic judgments (*Gleichstellung*)[155] or whether, as the prevailing opinion promotes, merely the effects of the judgment are said to be binding within the domestic legal order (*Wirkungserstreckung*)[156], this is, for our purposes, not decisive. The parties may invoke the rights granted by the judgement in either case.

b) The recognition of foreign judgments must be distinguished from their enforcement, particularly in the case of judgments granting performance of a specific act.

aa) Enforcement under the Brussels Ia-Regulation is easier than under the German autonomous procedural law. In particular, the declaration of enforceability has been abolished in the realm of this regulation, Art. 39 Brussels Ia-Regulation (recast).[157]

bb) Ss. 722 to 723 of the German Code of Civil Procedure[158] lay down the rules on enforcement of foreign judgments in Germany. In contrast to the *ipso iure* recognition of foreign judgments in Germany (if the requirements of s. 328

[152] Saenger/*Dörner*, ZPO, 7th ed. 2017, § 328, para. 20.

[153] MünchKommZPO/*Gottwald*, 5th ed. 2016, § 328, para. 116.

[154] BeckOK ZPO/*Bach*, Stand: 15.06.2017, § 328, para. 10.

[155] *Kropholler*, IPR, 6th ed. 2006, § 60 V 1b.

[156] Cf. inter alia BGH NJW 1992, 3096 (3098); OLG Hamm FamRZ 1993, 213 (215); Musielak/Voit/*Stadler*, ZPO, 14th ed. 2017, § 328, para. 2 with further references.

[157] Procedures initiated before 10 January 2015 are subject to the Art. 33 et seq. Brussels Regulation 2001.

[158] s. 722 Code of Civil Procedure (official translation):

"(1) Compulsory enforcement may be pursued under the judgment of a foreign court if such compulsory enforcement is ruled admissible by a judgment for enforcement.

(2) That local court (Amtsgericht, AG) or regional court (Landgericht, LG) shall be competent for entering the judgment on the complaint filed for such judgment with which the debtor has his general venue, and in all other cases, that local court or regional court shall be competent with which a complaint may be filed against the debtor pursuant to section 23."
s. 723 Code of Civil Procedure (official translation):

"(1) The judgment for enforcement is to be delivered without a review being performed of the decision's legality.

(2) The judgment for enforcement is to be delivered only once the judgment handed down by the foreign court has attained legal validity pursuant to the laws applicable to that court. The judgment for enforcement is not to be delivered if the recognition of the judgment is ruled out pursuant to section 328."

Accessible at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p2455 (last retrieved: 31.07.17).

are met), there is no such *ipso iure* enforceability. In fact, a judgment for enforcement is necessary (so called *Exequatur*),[159] unless there is a European enforcement order as according to ss. 1079 et seq. and particularly s. 1082 and ss. 1110 et seq. Code of Civil Procedure.

To the requirements of enforcement: In contrast to the recognition of foreign judgments, s. 723 (2) 1 expressly establishes the requirement of legal validity of the judgment, i.e. no enforcement will be possible if legal remedies are still available to the parties (appeals procedure, voidability of the judgment, etc). Meanwhile, a *révision au fond* is equally prohibited.[160] Most importantly, a judgment for enforcement may only be issued if the requirements of s. 328 are met, s. 723 (2) 2.

c) With particular regard to judgments on CSR breaches, soft law or ethics, this means: If a civil judgment given abroad holds a company liable for breaching the rules on CSR, soft law or ethics, the content of the foreign judgment will not be reviewed, except for its compatibility with the European or German *ordre public* (no *révision au fond*).

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[159] MünchKommZPO/*Gottwald*, 5th ed. 2016, § 722, para. 1 et seq.
[160] MünchKommZPO/*Gottwald*, 5th ed. 2016, § 723, para. 2.