

Summary

Private international law requirements for the effective enforcement of human and social rights by Prof. Dr. Tanja Domej, Zürich

1. It is essential for the effective enforcement of human and workers' rights to create effective local institutions and procedures. This encompasses functioning, trustworthy and accessible civil courts, but also other public, private and criminal institutions and mechanisms (e.g. permission, licencing or inspection procedures to ensure safety in the workplace; accident insurance; trade unions). Civil litigation cannot be a substitute for such mechanisms – particularly if it takes place far away from the place where the relevant events occurred.
2. This, however, is not a reason against ensuring effective enforcement mechanisms, including judicial mechanisms, for private law claims arising from violations of human rights or claims aiming to prevent or to terminate such violations. Such judicial proceedings can also help to promote the establishment of effective local mechanisms for preventing and remedying violations.
3. The usual difficulties arising in cross-border litigation tend to be aggravated in cases concerning human rights violations in developing countries. In addition to issues of jurisdiction and choice of law, there are often considerable challenges particularly with respect to litigation funding, fact-finding and establishing the content of foreign law, if required.
4. Legal aid alone usually is not a viable financial basis for corporate human rights litigation. The funding of such claims largely depends on market mechanisms, particularly on success-based lawyers' fees or commercial litigation funding. Because of the moral hazard that may arise in this context, it is desirable to promote the establishment of public-interest litigation funders. Nevertheless, "entrepreneurial litigating" in the field of corporate human rights cases cannot be considered as per se abusive. There seems to be a need, however, to monitor practices in this field closely to assess whether further regulation is required.
5. Where cross-border judicial cooperation is not functioning, taking of evidence located in a foreign state without involving authorities of the state where such evidence is located becomes increasingly important. A generous approach should be adopted in cases where "direct" taking of evidence neither violates legitimate third-party interests nor involves the use or threat of compulsion in the territory of a foreign state.
6. In cases where liability for damage inflicted by the violation of human rights standards depends on a business's internal operations, it is essential for an effective access to remedy that either the burden of proof with respect to the relevant facts is on the business or that there is a disclosure obligation that ensures access to relevant information. Where such disclosure could endanger legitimate confidentiality interests (particularly with respect to trade secrets), appropriate mechanisms to protect such interests should be put in place.
7. Collective redress mechanisms can improve access to justice with respect to corporate human rights claims. Meanwhile, reducing an excessive burden on the courts that could result from a large number of parallel proceedings currently does not seem to be as important a consideration in practice in the field of corporate human rights litigation as it can be in other fields of mass tort litigation. Appropriate safeguards have to be put in place to protect both the legitimate interests of defendants and those of the members of the claimant group. When designing such safeguards, it is important to ensure that they do not lead to the obstruction of legitimate claims. Particularly in collective redress proceedings, the court should have strong case management

and control powers, both during the proceedings and in the case of a settlement.

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

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