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Review of Karsten Thorn's The Protection of Small and Medium-Sized Enterprises in Private International Law: Analyzing Legal Challenges and Reform Initiatives

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Abstract: Karsten Thorn's *The Protection of Small and Medium-Sized Enterprises in International Private Law* critically examines the legal challenges faced by SMEs in international transactions. The existing legal framework in international private law, designed to meet big companies' needs, frequently fails to offer adequate protection to SMEs, the structurally weaker party in B2B contracts compared with big companies, leaving them to face unfair practices and imbalanced contractual relationships.Thorn advocates for reforms in conflict of law and jurisdictional rules to safeguard SMEs, drawing parallels with existing protection frameworks. However, legislative disparities across countries—such as varying subcontractor protections in France and India—undermine uniform safeguards, creating inequitable outcomes. This review highlights the tension between equitable protection proposals and practical enforcement, summerizing the content of the book and trying to find a solution to protect SMEs.

Keywords: Book review, SMEs, International private law

1. Introduction

Although the importance of small, medium, and micro enterprises has been increasingly recognized, there has been no literature posing an in-depth discussion of this topic until Karsten Thorn's The Protection of Small and Medium-Sized Enterprises. Thorn's advocacy for protecting small and medium-sized enterprises had pioneering significance, shifting our attention to protect the structurally weaker parties in B2B contracts. The Protection of Small and Medium-Sized Enterprises in International Private Law offers a thorough and unique exploration of the challenges faced by SMEs in international private law, published in Volume 433 of the Collected Courses of the Hague Academy of International Law in 2021. The work is not only a critical assessment of current legal practices but also a forward-looking guide for policymakers, legal practitioners, and scholars seeking to create a more inclusive and supportive legal environment for SMEs in international private law.

Karsten Thorn is a renowned German scholar in private international law, international commercial law, and conflict of laws. He currently serves as a professor at the Faculty of Law at Bielefeld University and enjoys a prestigious reputation in European and international private law. His researches focus on cross-border commercial disputes, protecting small and medium-sized enterprises (SMEs), and international contract law. SMEs play a crucial role in the global economy and international trade. They are not only the main drivers of economic growth but also create a

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significant number of job opportunities. However, the existing framework of private international law is primarily designed to meet the needs of large enterprises and multinational corporations, while SMEs are often at a disadvantage. When discussing the protection of structurally weaker parties in private international law, the focus is typically on non-business parties such as consumers or employees. This research aims to provide recommendations for future private international law frameworks to protect small and medium-sized enterprises (SMEs). The study was initially published as an article in Rabels Zeitschrift für ausländisches und internationales Privatrecht (Rabels Journal of Foreign and International Private Law), Volume 83, Issue 4 (2019), titled The Protection of Small and Medium-sized Enterprises in Private International Law. This article laid the foundation for subsequent expanded research. Based on his research findings, Karsten Thorn was invited to deliver related courses at the Hague Academy of International Law. These courses were compiled and published in Volume 433 of the Collected Courses of the Hague Academy of International Law in 2021. This version is more systematic and comprehensive, covering various aspects of the protection of SMEs in private international law.

2. Content summary

The book begins by emphasizing SMEs' crucial role in the global economy, especially their contribution to economic growth, innovation, and employment rate. However, although SMEs are essential to the worldwide market, they are often structurally disadvantaged in international transactions because of their limited bargaining power. The existing legal framework in international private law, designed to meet big companies' needs, frequently fails to offer adequate protection to SMEs, the structurally weaker party in B2B contracts compared with big companies, leaving them to face unfair practices and imbalanced contractual relationships. Thorn first explores the existing framework that can protect the structurally weaker party and further absorbs some experience into his proposal. He critically examines how mandatory provisions in substantive law, such as those protecting consumers or employees, could be extended or adapted to safeguard SMEs. Then, the book delves into the conflict-of-laws rules in B2B contracts, particularly in cases where the choice of applicable law may disadvantage SMEs. In the next, Thorn introduces the jurisdiction rules in B2B contracts, emphasizing the need for accessible and fair dispute resolution mechanisms for SMEs, including the role of arbitration and the potential risks of forum shopping. Throughout the book, Thorn advocates for a more balanced and equitable legal framework that recognizes the specific needs of SMEs. He proposes practical reforms, such as developing specialized conflict-of-laws rules and enhancing jurisdictional provisions to ensure SMEs have access to fair and efficient dispute resolution. Thorn's rigorous analysis, combined with his clear and accessible writing style, makes this book an essential resource for anyone interested in the intersection of international private law and the protection of structurally weaker parties.

3. Text analysis and evaluation

3.1. Current legal framework and its limitations for SMEs

Chapter I refers to a brief introduction, pointing out the theme and structure of this book (p.111). Chapter II introduces the protection of structurally weaker parties in the present legal framework, taking consumer contracts as an example (p.112). Mandatory legislation limits the contractual agreements between parties to prevent the stronger party from abusing its dominant position. Each country has varying levels of protection for consumers or weaker parties in contracts. When international elements are involved, the choice of applicable law by the parties directly impacts the level of consumer protection. To safeguard the interests of weaker parties, it is necessary to establish relevant conflict-of-laws rules to prevent parties from selecting unfavorable laws to the weaker party.

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As the Rome I Regulation sets a minimum threshold for consumer protection, ensuring that the chosen applicable law can only provide equal or more excellent protection than the law of the consumer's habitual residence, this method provides a reference for SME protection (p.114). However, in principle, conflict-of-laws rules are not uniform, and the protection of weaker parties varies depending on the applicable conflict rules, which are determined by the forum court (p.115). This means that when parties not only choose the applicable law but also agree on a forum, the protection of the weaker party may differ depending on the location due to the application of different conflict rules. To mitigate this risk, the European Union ensures, through the jurisdiction provisions of the Brussels Ibis Regulation, that EU consumers have at least one judicial venue within the EU (p.116). Effectively protecting structurally weaker parties requires a delicate interplay between substantive law, conflict-of-laws rules, and jurisdictional rules.

Chapter III evaluates existing conflict rules that protect enterprises as the structurally weaker party (p.118). There are two ways to protect structurally weaker parties under a conflict of law. Either one develops a concise system of subjective (choice of law) and objective conflict of law rules, or one relies on overriding mandatory provisions. The contracting parties are free to choose the applicable law. However, in some special situations, to protect the structurally weaker parties, some legal techniques limit such freedom. Firstly, the choice of the law might be restricted by exact provisions such as insurance contracts and passenger transport contracts related provisions regulated in Rome I Regulation (p.120). Secondly, although parties can choose the applicable law freely, such a choice might become invalid (p.123). As Article 6 of Rome I Regulation mentioned, it sets out the minimum protection, which is afforded by the law determined by objective conflict rules to the structurally weaker party. In other words, the chosen law takes precedence only when it offers a higher level of protection. Thirdly, if a party is considered to be abusing the law—such as fraud, the freedom of choice can be challenged (p.126). When the parties' choice of law is invalid, the applicable law shall be determined by objective conflict of rules (p.130). Finally, A tool traditionally used by many jurisdictions to protect structurally weaker parties in B2B relations is internationally mandatory rules, which are regulations that a country deems crucial for safeguarding its public interests, like political, social, or economic stability, and they apply regardless of the otherwise applicable contract law (p.135).

3.2. Jurisdictional challenges and forum shopping risks

Chapter IV refers to jurisdiction rules safeguarding substantive public policy to prevent forum shopping and promote procedural public policy (p.157). Jurisdiction rules determine which court has jurisdiction over international litigation. For a B2B contract, to protect the structurally weaker party, present methods normally are protective jurisdictions and form requirements. Protective jurisdictions refer to some jurisdiction rules that offer the structurally weaker party a protective venue to safeguard the mandatory compensation claim. Though Rome I Regulation remains silent with regard to B2B contracts, some jurisdiction rules in other countries show a different attitude concerning the issue. It establishes an exclusive jurisdiction of a domestic court, as the Panamanian Code on Private International regulated (p.161). Another example is specific jurisdiction rules deriving from overriding mandatory rules in US law (p.162). Regarding form requirements, such as the requirement that it must be in writing, once the form requirements are met, a jurisdiction agreement will be deemed legal unless it violates public policy. However, since form requirements only warn parties about certain provisions, they do not eliminate an imbalance in bargaining power and thus are not able to protect the structurally weaker party (p.165).

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3.3. Defining the "structurally weaker party"

Chapter V aims to address the problem of under what conditions a party can be considered the structurally weaker party (p.170). This issue shall be handled with through economic analysis. Regarding the term “structurally”, in most cases, there is an extensive imbalance between the parties. There are different methods for establishing an imbalance between parties. The traditional method of determining the structurally weaker party is through the evaluation of economic power. A party cannot assert its interest when it will be replaced easily, which is called exchangeability. In addition, information asymmetries can also lead to a party to be a structurally weaker one (p.172). This can be reflected in various aspects, such as the size of the enterprise, annual revenue, turnover, or the number of employees (p.175). However, it does not necessarily mean that an enterprise is a structurally weaker party simply because it qualifies as an SME. The core criterion for determining whether a party is structurally weaker lies in comparing the bargaining power of both sides. The size of an enterprise can be an indication of its market power, yet it is not always the decisive element (p.176). A small- or medium-sized enterprise might be the globe’s market leader due to its specialization and innovative capacity, and thus possess stronger bargaining power. This finding leaves us with a case group-oriented approach as the only workable solution, an approach that should be supplemented by limitations based on enterprise size (p.177).

3.4. Proposed reforms and legislative challenges

3.4.1. Thorn’s proposal

Based on findings and conclusions in previous parts, chapter VI puts forward a proposal for future rules to protect certain small and medium-sized enterprises (p.178). In terms of conflict of laws, an efficient way to protect the legitimate interests of the structurally weaker party without unduly interfering with party autonomy is to remain the parties’ freedom of choosing the applicable law while limiting its effect by provisions. This approach must combine with the objective conflict rules that are in favor of the structurally weaker party by providing a more friendly and close factor. For the personal and/or substantive scope of application of such a rule, there is no need for multilateral conflict rules, and the issue can be addressed by overriding mandatory provisions. Finally, to limit the protection to business parties not exceeding a certain size, certain criteria should be introduced. As for jurisdiction rules, two possible solutions are discussed in Chapter I, depending on the type of codification envisaged (p.179).

3.4.2. Legislative disparities

Large corporations leverage their bargaining power to impose conflict of laws rules and jurisdictional rules that favor their interests in their contracts with the structurally weaker parties (SMEs in this book). Under these provisions, when disputes arise, the designated conflict of laws rules typically direct the applicable law to a jurisdiction offering minimal or no protections for the weaker parties, while jurisdictional clauses designate courts unlikely to apply laws safeguarding the structurally weaker party. This situation underscores the necessity of establishing mechanisms to protect the structurally weaker party in B2B contracts by redirecting disputes to legal frameworks that ensure substantive protections for the weaker party.

In Chapter VI, the author proposes a conflict of law rule inspired by the consumer contract provisions under the Rome Regulation. Specifically, for subcontracts—widely recognized across the world as structurally imbalanced—the rule permits parties to freely choose the applicable law while mandating that the protections afforded to the weaker party cannot fall below those provided by the law of either the place of contractual performance or the party’s habitual residence. This approach

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guarantees a baseline level of protection determined by the legal standards of these jurisdictions. However, this framework leads to a critical result that SMEs from different countries receive varying degrees of protection due to disparities in national legislative frameworks.

Notably, national approaches to regulating contractual imbalances diverge significantly [1]. Certain countries, such as France, enact specialized statutes to protect subcontractors [2]. In contrast, others may rely on regulatory measures through other laws that indirectly prohibit contractual imbalances, such as antitrust or unfair competition laws. These discrepancies often derive from nations' different economic development levels [3-4]. According to Djankov et al [5]., 89% of high-income countries have specialized subcontractor protection laws, whereas only 12% of low-income countries have similar laws. Developed countries, as capital-exporting economies, tend to prioritize the interest of their domestic SMEs. In contrast, developing nations are more eager to attract foreign investment and often refrain from imposing specific restrictive protections on foreign investors. According to Thorn, this asymmetry creates inequitable outcomes. For instance, a French corporation (Party A, the main contractor) contracting with an SME from India (Party B, the subcontractor) for the long term could avoid obligations of subcontractor-specific protection if Party B has no such protection. That is because even though in France, termination of long-term subcontracts could bring the counter-party a claim for compensation, the lack of protection in the counter-party's country (such as Party B's country, India) could result in the denial of such compensation right. In a different scenario, a French SME (Party C, the subcontractor) entering a subcontract with an Indian big company (Party D, the main contractor) could invoke French law as its habitual residence to seek protection. Here, the different outcomes result mostly from the different legal protections in different jurisdictions.

3.5. Arbitration and the protection of SMEs

Chapter VII discusses the protection of the structurally weaker party in international commercial arbitration (p.181). While arbitration is entirely based on party autonomy, protection of the structurally weaker party still exists. The first issue is arbitrability, which involves the question of which types of disputes can and cannot be submitted to arbitration (p.187). Some countries place limitations on the scope of arbitration to protect structurally weaker parties. The second issue is the form requirement of the arbitration agreement (p.188). However, form requirements are designed to prevent parties from rushing the conclusion of a contract but they do not have a direct bearing on protecting the weaker party with inferior bargaining power. Finally, arbitration agreements may be invalidated on a case-by-case basis for the purpose of public policy protection (p.189). Specifically, an arbitration agreement or arbitration clause may be deemed invalid if it is found to circumvent mandatory provisions and thus harm public interests. Alternatively, an arbitration agreement may be invalidated if it violates procedural public policy.

4. Conclusion

Given the inherent differences in national legislative models, regulatory maturity, and levels of contractual protection, harmonizing protections for vulnerable parties remains profoundly challenging [6]. I suggest expanding the baseline of minimum protections to include the habitual residence of the dominant party, thereby aligning the protective standards applicable to both contracting parties and offering SMEs an alternative avenue for recourse. Nevertheless, this extension carries risks. Applying the law of the dominant party's country— where the stronger party inherently possesses greater familiarity with local legal frameworks—could exacerbate informational asymmetries and further disadvantage weaker entities [7]. This paradox highlights the tension

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between ensuring equitable protections and avoiding unintended consequences in cross-border contractual governance.

References

[1] *Gillian Hadfield. (2009), Contract Law and Social Norms in Market Economies, The economics of contracts: Theories and applications (pp. 47-67). Cambridge University Press.*

[2] *Loi n° 75-1334 du 31 décembre 1975 relative à la sous-traitance [Law No. 75-1334 of 31 December 1975 on subcontracting], Version consolidée au 14 novembre 2017 [Consolidated version as of 14 November 2017]. Journal Officiel de la République Française [Official Gazette of the French Republic], 1 January 1976, p. 171.*

[3] *Paul G. Mahoney. (2022), Legal Origins and Contractual Rigidity: How Economics Shapes Law, in Journal of Legal Analysis, Vol. 14. 1-36.*

[4] *Simeon Djankov et al. (2003), Law and Economic Development: Evidence from Contract Enforcement, World Bank Policy Research Paper.*

[5] *Djankov, S., La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (2008), Legal Origins and Contract Enforcement, in Journal of Political Economy, 116(6).*

[6] *Schmidt-Kessel, M. (2020). Protection of Weaker Parties in European Private Law. Intersentia.*

[7] *Calliess, G.-P., & Hoffmann, H. (2021). The Dark Side of Party Autonomy: Asymmetric Information in Cross-Border Contracts. Oxford Journal of Legal Studies, 41(3), 678-705.*