Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims

On 11 September 2020, the European Parliament's Committee on Legal Affairs presented a draft report with recommendations to the Commission on corporate due diligence and corporate accountability. This report has already triggered first online comments by Geert van Calster and Giesela Rühl; the present contribution aims both at joining and at broadening this debate. The draft report consists of three proposals: first, a directive containing substantive rules on corporate due diligence and corporate accountability; secondly, amendments to the Brussels I*bis* Regulation that are designed to grant claimants from third states access to justice in the EU Member States; and thirdly, an amendment to the Rome II Regulation on the law applicable to non-contractual obligations. The latter measure would introduce a new Art. 6a Rome II, which codifies the so-called principle of ubiquity for business-related human rights claims, i.e. that plaintiffs are given the right to choose between various laws in force at places with which the tort in question is closely connected. While the basic conflicts rule remains the place of damage (*lex loci damni*) under Art. 4(1) Rome II, Art. 6a of the Rome II-draft will allow plaintiffs to opt for the law of the country in which the event giving rise to the damage occurred (the place of action or *lex loci delicti commissi* in the narrow sense), the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates.

The need for having a conflicts rule on the law applicable to business-related human rights claims derives from the fact that the draft report proposes a directive which only lays down minimum requirements for corporate due diligence concerning human rights, but which does not contain an independent set of rules on civil liability triggered by a violation of such standards. Thus, domestic corporate and tort laws will continue to play an important role in complementing the rules of the directive once they have been transposed into domestic law. In theory, this problem might be avoided by trying to pass a

wholesale EU Regulation containing both rules on corporate due diligence as well as on related issues of civil liability. The EU has already passed the Regulations on Timber and Conflict Minerals, which deal with fairly specific issues and which are limited in their scope. Taking into account, however, that both domestic corporate law and tort law are very intricate bodies of law, the EU legislature so far has, in the overwhelming number of cases, opted for the less intrusive and more flexible instrument of a directive (see, e.g., the Directive [EU] 2017/1132 relating to certain aspects of company law or the Product Liability Directive). The regulatory choice made in the draft report is thus fully consistent with established modes of EU legislation and the principle of subsidiarity.

The fundamental conflicts problem arising in cross-border human-rights litigation is well-known: Art 4(1) Rome II leads to the application of the law in force at the place of damage, which is frequently located in a third world country having a "weak legal system and enforcement (cf. Recital 2 of the draft directive). Starting a suit in such a forum frequently results not in a "home-court advantage" for plaintiffs, but rather diminishes their prospects of success. Insofar, suing a multinational corporation in the EU becomes attractive. While the hurdle of international jurisdiction can be surmounted rather easily in most cases, e.g. by suing the defendant at its general jurisdiction (Art. 4(1) Brussels I*bis*), a Member State court will nevertheless, under Art. 4(1) Rome II, apply a third state law. In the discussion about domestic due diligence laws, the widely preferred, if not the only viable solution so far has consisted in characterising such laws as being of an overriding mandatory nature within the meaning of Art. 16 Rome II, thus ensuring their application in spite of the otherwise applicable tort law. Seen from the national perspective, this is of course a sound approach because a Member State legislature simply has no mandate to tinker with the Rome II Regulation itself. Once the question of corporate due diligence and liability is answered at the EU level itself, however, there is no practical need for limiting the doctrinal discussion to a unilateral approach within the narrow framework of Art. 16 Rome II. In light of this fact, it is not surprising that the draft report explores another conflicts tool that has been developed in order to strengthen the protection of weaker parties or general interests, i.e. the principle of applying the law more favourable to a party in a given case. This approach, which nowadays mostly consists in letting the plaintiffs choose which law they consider more favourable to them, is well-known, for example, in the domestic PIL codes of Italy and Germany. In those countries, it even is the general rule in international tort law –

a hardly convincing solution, because the victim is not the weaker party in every case (for an in-depth treatment of this issue, see here). Therefore, the more modern Rome II Regulation opted for a more differentiating approach: *lex loci damni* is the general rule (Art. 4(1) Rome II), whereas the principle of ubiquity – i.e. that a tort may be located in more than one place – is only codified in groups of cases where a specific interest legitimises deviating from this rule: first, environmental damage (Art. 7 Rome II), and secondly, multi-state cases involving cartel damages (Art. 6(3) Rome II). Moreover, while Rome II is not applicable to violations of personality rights, the CJEU's case law on Art. 7(2) Brussels I*bis* has frequently been emulated in domestic conflicts law as well. In sum, the principle of ubiquity has always remained a part of the doctrinal toolbox of EU choice of law.

Insofar, the question must be answered as to whether the ubiquity approach has major advantages compared with the mandatory rule approach. The first factor in favour of applying the principle of ubiquity to business-related human rights claims as well is that it considerably reduces the need for the frequently difficult delineation between human rights violations (Art. 6a Rome II draft) and environmental damages (Art. 7 Rome II). Thus, intricate problems of characterisation and, if necessary, adaptation, are avoided at the outset. In addition, tortious human rights claims may also be rooted in a violation of ILO labour standards (see the definition of "human rights risk" in Art. 3 of the proposed directive). In light of the fact that Art. 8(1) Rome I favours the employee as well by providing for an alternative connection of contractual claims, having a *favor laboratoris* for labour-related human-rights claims fits into the normative framework of EU law, too.

A second advantage is that the ubiquity approach respects party autonomy (Art. 14 Rome II), whereas the parties could not derogate from a truly mandatory rule (Art. 16 Rome II). Thus, the ubiquity approach facilitates settlements, particularly in human rights cases that involve a large number of claimants.

Thirdly, claimants from the Global South are frequently compelled by the "weak legal systems and enforcement" of their home country to seek their fortune abroad rather than by weaknesses of their own substantive laws. In many former colonies, the Common Law or the French Code Napoléon are still in force (with modifications) and would in principle allow a successful suit based on a tortious claim. In this regard, giving claimants the option to sue a company in a Member

State, while at the same time applying their own law if they so wish, avoids a paternalistic, neo-colonialist stance that rests on the implicit assumption that our Western laws are inherently better than those of developing countries.

A fourth factor arguing for giving plaintiffs the right to choose the applicable law is that the mandatory rule approach will frequently not sufficiently cover the risks inherent in cross-border litigation. In the German *Rana Plaza* case, the claims of the plaintiffs failed because, under the law of Pakistan, they were barred by the statute of limitations, which was extremely short (just one year) compared with German standards, particularly for a cross-border case (see OLG Hamm NJW 2019, 3527). In light of the CJEU case law on Art. 16 Rome II, however, German limitation periods could hardly be characterised as being of an overriding mandatory nature (ECLI:EU:C:2019:84). Under Art. 6a Rome II-draft, the claimants could simply have chosen German law to govern their case.

On the other hand, the ubiquity approach has been criticised as leading to an impairment of foreseeability because the question of the applicable law remains unanswered until the plaintiffs have made their choice. However, under the mandatory rule approach as well, foreseeability of the applicable law is not necessarily guaranteed. Only a Member State court would apply the due diligence standard as a part of its own *lex fori* (Art. 16 Rome II), but a company would always face the risk of being sued in a third state where it would not be ensured that a local court would take a foreign mandatory rule into account. Even among the Member States, such a courtoisie could not be taken for granted because, unlike Art. 9(3) Rome I, the Rome II Regulation contains no rule on the applicability of *foreign* overriding mandatory rules. One might argue that this concern is purely academic because the proposed directive would harmonise the standards of corporate due diligence in the EU anyway. Yet this would be a serious error because the proposal (Art. 1(1) subpara. 2) only establishes *minimum* requirements.

Thus, the advantages inherent in the ubiquity approach clearly outweigh those of the mandatory rule approach. Nevertheless, it is certainly true that there can be too much of a good thing. Allowing the plaintiffs to choose between *four* different laws is hardly practical and sets up a very dangerous liability trap for lawyers who would have to perform extremely difficult studies in comparative law before advising their clients on where to sue a defendant. Thus, the number of options should simply be reduced to two: either the place of damage or the habitual

residence of the defendant.

The latter option should refer to the habitual residence of a corporation because this is the connecting factor commonly used in the Rome II Regulation (Art. 23 Rome II). There is no practical need to replace it with “domicile” which is a concept deployed in European civil *procedure* (Art. 63 Brussels I*bis*), but not in EU choice-of-law Regulations.

In sum, Article 6a Rome II-draft certainly leaves room for further refinement, but its basic approach rests on a sound doctrinal rationale and has major practical advantages compared with the mandatory rule model so far favoured in domestic due diligence laws. Thus, the EP draft deserves an appropriate and thorough consideration rather than a hasty judgment.