Chris Thomale on the EP Draft Report on Corporate Due Diligence

Professor Chris Thomale, University of Vienna and Roma Tre University, has kindly provided us with his thoughts on the recent EP Draft Report on corporate due diligence and corporate accountability.

In recent years, debate on Corporate Social Responsibility (CSR) has picked up speed, finally reaching the EU. The Draft Report first and foremost contains a draft Directive on corporate due diligence and corporate accountability, which seems a logical step ahead from the status quo developed since 2014, which so far only consists of reporting obligations (see the Non-Financial Reporting Directive) and sector specific due diligence (see the Regulations on Timber and Conflict Minerals). The date itself speaks volumes: Precisely, to the very day (!), 8 years after the devastating fire in the factory of Ali Enterprises in Pakistan, which attracted much international attention through its follow-up litigation against the KiK company in Germany, the EU is taking the initiative to coordinate Member State national action plans as required under the Ruggie Principles. Much could be said about this new Directive in terms of company law and business law: The balancing exercise of on the one hand, assuring effective transparency of due diligence strategies and, on the other hand, avoiding overregulation in particular with regard to SMEs still appears somewhat rough and ready and hence should see some refinement in due course. The same applies to the private enforcement of those due diligence duties: By leaving the availability and degree of private enforcement entirely to the Member States (Art. 20), the Directive seems to gloss over one of the most pressing topics of comparative legal debate. The question of availability, conditions and extent of private liability imposed on parent companies for human rights violations committed in their value chains abroad, must be addressed by the EU eventually.

To this forum, however, the private international implications of the Draft Report would appear even more important:

As regards the conflicts of laws solution, the proposed Art. 6a Rome II Regulation seeks to make available, at the claimant's choice, several substantive laws as conveniently summarized by Geert van Calster in the terms of lex loci damni, lex loci delicti commissi, lex loci incorporationis and lex loci activitatis. Despite my continuous call for a choice between the first two de regulatione lata, to be reached by applying a purposive reading of Art. 4 para 1 and 3 Rome II (see JZ 2017 and ZGR 2017), the latter two, lex loci incorporationis and lex loci activitatis, seem very odd to me. *First*, they are supported, to my humble knowledge, by no existing Private International Law Code or judicial practice. *Second*, the lex loci incorporationis has no convincing rationale, why it should in any way be connected with the legal *relationship* as created by the corporate perpetrator's tort. Lex loci activitatis is excessively vague and will create threshold questions as well as legal uncertainty. *Third*, I would most emphatically concur with Jan von Hein's opinion of a quadrupled choice being excessive and impractical in and of itself.

The solution proposed in terms of international jurisdiction, I will readily admit, looks puzzling to me. I fail to see, which cases the proposed Art. 8 para 5 Brussels Ibis Regulation is supposed to cover: As far as international jurisdiction is awarded to the courts of the "Member State where it has its domicile", this adds nothing to Art. 4, 63 Brussels Ibis Regulation. In fact, it will create unnecessary confusion as to whether this venue of general jurisdiction is good even when there is no "damage caused in a third country [which] can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship." Thus, we are left with the courts of "a Member State […] in which [the undertaking] operates." As already pointed out, this term itself will trigger a lot of controversy regarding certain threshold issues. But there is more: Oftentimes this locus activitatis will coincide with the locus delicti commissi, e.g., when claimants want to rely on an omission of oversight by the European parent company. In that case, Art. 7 No. 2 Brussels Ibis Regulation offers a venue at the very place, i.e. both in terms of international and local jurisdiction, where that omission was committed. How does the new rule relate to the old one? And, again, which cases exactly are supposed to be captured by this provision? In my view, this is a phantom paragraph that, if anything, can only do harm to the fragile semantic and systematic architecture built up by the Brussels Ibis Regulation and CJEU case law.

The same seems true of the proposed Art. 26a Brussels Ibis: *First*, there is no evident need for such a *forum necessitatis*, rendering Member State courts competent to hear foreign-cubed cases with no connection to the EU whatsoever. To the contrary, recent development of the US Alien Torts Statute point in the opposite direction. *Second*, the EU might be overreaching its legislative jurisdiction: Brussels Ibis Regulation is based on the EU's competence to legislate on judicial cooperation in civil matters (Art. 81 para 2 TFEU). Such a global long-arm statute may not be covered by that competence, if it is legal at all under the public international confines incumbent upon civil jurisdiction (for details, see here). *Third*, it will be virtually anybody's guess what a court seized with a politicised and likely emotional case like the ones we are talking about will deem a "reasonable" Third State venue. In fact, this would be a forum non conveniens test with inverted colours, i.e. the very test the CJEU, in 2005, deemed irreconcilable with the exigencies of foreseeability and legal certainty within the Brussels Ibis Regulation.