

# Human rights in global supply chains: Do we need to amend the Rome II-Regulation?

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The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies - and companies operating in Europe - to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However, from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss - and criticize - the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

## **Victims' unilateral right to choose the applicable law**

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place

of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

- 1) the law of the country in which the damage occurred, i.e. the law of the place of injury,
- 2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,
- 3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,
- 4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply - and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* - while certainly good for victims - is conceptually ill-conceived because it results in legal uncertainty for all companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four - potentially - different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not completely) fallen out of favour.

### **Alternative roads to European law**

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European

standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts - irrespective of the provisions of the Rome II Regulation. However, even if the European legislature prefers to adopt a European instrument in the form of a Directive - for political or competence reasons -, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks - and then abandons - the proposed Article 6a Rome II Regulation.

*Note: This post is also available via the blog of the European Association of Private International Law.*