Book Reviews

Juan José Álvarez Rubio and Katerina Yiannibas (editors), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Abingdon, UK: Routledge, 2017) ISBN 978-1-138-28418-0, i–xii, pp.146 and index.

This timely book arises out of a 2013 Civil Justice Action Grant from the European Union (EU). Following the lead set by the UN Guiding Principles on Business and Human Rights (UNGPs), the book examines the right to a remedy in the EU for human rights abuses committed by EU companies in non-EU states. The research was conducted by a consortium of leading European scholars and human rights practitioners coordinated by the Globernance Institute for Democratic Governance. It focuses primarily on 'judicial remedies, both jurisdictional barriers and applicable law barriers; non-judicial remedies, both company-based grievance mechanisms and international arbitration; and substantive law barriers concerning the corporate responsibility to respect human rights vis-à-vis a legal duty of care, with the goal of providing feasible legal recommendations for the EU and Member States' (p. 5). Each issue is dealt with in a specialized chapter, written by designated members of the research team, which contains specific policy recommendations. The book ends with a conclusion by the editors.

Chapter I, by Daniel Augenstein and Nicola Jagers, covers jurisdictional issues in judicial remedies. The chapter grounds jurisdiction in the demands of human rights law and then shows the limitations of current rules for access to justice by victims of corporate human rights abuses. It posits reforms based on a comparative analysis of EU rules and relevant rules from Member State jurisdictions. The principle of defendant's domicile under the Brussels I Regulation forms the centrepiece of EU rules, but it has its limitations. Alternatives exist in European practice. In particular, the principle of *forum necessitates*, rejected from the reforms of Brussels I, but used by certain Member States, offers a real avenue for progress, as does the joining of subsidiaries as co-defendants in actions against EU domiciled parents and the use of criminal jurisdiction. The conclusion reached is that Member State laws need to acknowledge access to an effective remedy. This requires greater willingness to accept the joining of parent and subsidiary, the use of *forum necessitates* and the introduction of a rebuttable presumption of control by the parent over its subsidiary. This creates a form of enterprise liability that underlies the concept of joint parent–subsidiary action. It could have done with some further theoretical analysis. The chapter includes discussion of US law. This does not appear to impact on the conclusions and is included only, it appears, because, until the recent narrowing of US jurisdiction in this field, it was a preferred forum for such litigation. Arguably, the US experience is marginal to the EU reform project except as a warning over the risk of legal backlash against corporate human rights litigation.

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Chapter II, by Lisbeth Enneking deals with the applicable law. The focus is on tort law, as this is the usual basis of foreign direct liability claims against multinational enterprise (MNE) parents for the acts of their subsidiaries. The chapter offers a clear and concise summary of the applicable law principles emanating from the Rome II Regulation and of their application to such claims. Enneking concentrates on possible difficulties arising from the core rule, that the law of the country where the damage occurs applies. In foreign direct liability cases this makes host country law the applicable law. Where this country's law and procedure is not up to the demands of such litigation it would be preferable to assert the law of the home country of the EU-based MNE. Enneking notes that the UNGPs require states to reduce barriers to judicial remedies and that Article 6 of the European Convention on Human Rights (ECHR) furthers the right to a fair and accessible judicial remedy for human rights abuses. Enneking argues that this may require the development of Rome II principles and exceptions to the host country law contained therein, such as the environmental damage, health and safety damage and public policy exceptions, in a way that facilities home country law as the applicable law where it offers a higher standard of accountability. Equally she notes attempts by some EU states to adopt domestic laws establishing parent company liability for acts of overseas subsidiaries and the possibility of applying home country law.

Chapter III, by Katharina Hausler, Karin Lukas and Julia Planitzer, shifts to non-judicial remedies covering company-based grievance mechanisms and international arbitration. In contrast to the preceding chapters, the approach is empirical rather than doctrinal, consisting of three case studies: the company-based grievance mechanisms established by Siemens AG and Statoil, and the Permanent Court of Arbitration (PCA) as a possible venue for human rights based claims against corporations.

As regards the company-based grievance mechanisms, the authors make clear that these may not be easy to study and that two studies do not make for a strong representative sample (a reason given for the relative absence of strong recommendations at the end of the chapter), but they can illustrate the possible potential and challenges involved. The authors, and researchers who conducted the case studies, have made a very good effort to document what are nascent mechanisms set up only in recent years. Each study is based on desk research and interviews. Each offers a clear and interesting example of what may be done. It is striking how much faith is invested in intra-firm or external whistleblowing as a core feature of these mechanisms. The authors point out the well-known pitfalls of such an approach. One is left with the impression that these schemes still leave a lot to be desired in terms of a real reduction in human rights risks as might arise from, for example, a stronger corporate disciplinary system applicable to company officers who fail to exercise human rights due diligence that leads to abuses.

As for the PCA, the choice is a little baffling. This institution is not known for conducting human rights-oriented arbitrations, nor for being a major forum for investor–state arbitrations, which raise human rights questions and which would offer the closest real-life examples of the problems involved. However, the PCA is seen as a potential forum for developing human rights-oriented arbitrations, presumably as an alternative to foreign direct liability litigation. This appears rather misguided. First, it is debatable whether international arbitration outside a specialist human rights-oriented forum would work. This is why proposals for a specialized forum have been made

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in recent years.[1] The PCA simply lacks the relevant expertise. Secondly, it is doubtful whether such arbitration would be any less costly, time consuming and technical than domestic litigation. The weakness of this case study is reinforced by the recommendation that EU Member States give the PCA a mandate over the adoption of arbitration rules covering business-related human rights abuses (how long would that take?), and offer financial assistance to non-state parties (presumably claimants?) emphasizing its unsuitability and costliness.

Chapter IV, by Cees van Dam and Filip Gregor with contributions from Sandrine Brachotte and Paige Morrow, assesses how to develop a binding duty of care on parent companies for the human rights abuses of their overseas subsidiaries and other business partners. The chapter is based on some twenty replies obtained from an international sample of legal experts. It offers three scenarios for legal reform: first, a disclosure obligation regarding the control exercised by a company over its business partners; second, a rebuttable presumption of control over business partners; and third, a statutory duty for a company to conduct human rights due diligence. Each scenario is discussed in detail and comparisons are made between the three scenarios and the reform proposals currently under discussion in France, Switzerland and Germany and the UK Bribery Act section 7 which contains a due diligence defence. The discussion is again clear and easy to follow and it is hard to disagree with the proposed reforms. Each would help to turn the non-binding responsibility to respect human rights in the UNGPs into a binding duty. Equally, the proposals avoid the difficult issue of lifting the corporate veil in company law, by concentrating on the law of tort. In all, it is a useful contribution.

Finally, the book offers a brief conclusion by the editors, which summarizes the chapter authors main recommendations. It ends with the assertion that, in these uncertain times, 'Europe must respond to the challenges of the twenty-first century courageously and innovatively ... the EU is in a unique position to promote a model for social and political organisation based not on interest but, above all, on values' (p. 143). The development of stronger remedies for business abuses of human rights may be one area where this courage and innovation should appear. The issue is not high on any political agenda these days and is unlikely to be. 'Interest' – presumably code for business interests – does matter in EU affairs, and, most probably, the recommendations in the book will be officially acknowledged and then ignored. However, every small step towards developing a doctrine of human rights liability for business enterprises is useful. This volume represents such a step and is, indeed, a useful contribution.

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[1] See https://business-humanrights.org/en/proposals-for-intl-tribunal-on-corporate-liability-for-human-rights-abuses.

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