**Panel V sub theme 2**

The relation between the UN Guiding Principles and the elaboration of an internationally binding legal instruments on TNCs

1. For any binding treaty to be practically meaningful, it needs to improve: victims' access to a court; victims' access to effective legal representation to pursue complex and lengthy litigation against MNCs; in circumstances where MNCs will be represented by armies of the best lawyers and experts who are determined to fight tooth and nail to defend.

2. Expressed another way, legal remedies and procedures must be sufficiently effective in practice - particularly financially and reputationally - to deter HR violations by MNCs

3. Any binding treaty should contain provisions that will deliver the greatest practical benefit. Obtaining access to justice locally is obviously crucial but the practical obstacles in developing countries are generally so huge that overcoming the challenges in the near future seems generally unrealistic. Employers' organisations like to focus on local access to justice for precisely this reason.

4. So from my perspective any treaty should focus on improving access to remedy in MNC home states where there is real potential, in practice, to fill enforcement gaps. Whilst there are gaps, not necessary to re-invent the wheel. There is already plenty of material in existing national laws that can be utilised effectively.

**The starting point is that there are interrelated** **legal, procedural and practical barriers to access to remedy**

5. In my areas of practise - tort law claims against MNC parent companies - these are:

Jurisdiction (fnc); the corporate veil; access to documents/information; the absence of class action mechanisms; legal representation and funding; costs; levels of damages. Each of these issues alluded to in the commentary section of para 26

6. I say these issues are Interrelated because it is the totality and combined effect of these barriers that is important. For example, the easier it is to overcome the legal and procedural barriers, the less cost and risk a case will entail and the more likely it is that lawyers will agree to act for victims. Similarly, the lower the financial disincentives for lawyers, the more likely they are to act.

**Jurisdiction in MNC home courts**

7. Two problems:

(a) *forum non conveniens :* US, Canada, Aus and ?UK post Brexit. Eg Cape case. Under Article 4 Brussels Recast mandatory jurisdiction if defendant domiciled there. Treaty should stipulate the same in HR cases

(b) joinder of of foreign subsidiary - permissible under UK where real issue to be tried against parent. (Issue in Vedanta/Zambia case). Claim against operating subsidiary easier to prove, less complex- Treaty should cover

**Corporate veil**

6. The GPs HR due diligence duty broadly equates to the common law tort duty to take reasonable steps to avoid foreseeable harm. The question is how this would translate into an enforceable law? One proposal by Prof Doug Cassel is a business duty of care to exercise due diligence through the medium of common law tort suits.

7. However, one would want any such duty to also be enforceable in civil law states. The bill currently before the French parliament relating to the duty and vigilance of parent and sub-contracting parties is noteworthy. Would apply to companies with more than 5000 employees and impose criminal sanctions and civil liability.

8. Moreover, even if a duty was imposed automatically would still need to prove, through largely the same factual evidence, the precise relationship between the MNC parent and the locally operating entity. Otherwise it would not be possible to evaluate what constitutes "reasonable" steps or what level of "due diligence" is required and whether the standard has been met.

**Access to documents**

9. Contrast discovery procedures between eg UK vs Netherlands/Germany. Need proper access in order to prove role of MNC parent.

**Reversal of the burden** **of proof**

10. Would assist in relation to problem of access to documents. However Rome II (Article 22). Treaty could provide for this.

**Class actions**

11. By enabling collective claims to be pursued by one or a small number of representative claimants, can dramatically reduce costs, time and resources. This is vitally important in mass cases comprising small individual claims. Treaty could stipulate provision for class actions.

**Damages**

12. Amount is important to (a) deterrence; (b) victim redress

13. Inconsistencies will encourage "double standards" Rome II (article 15)

14. Treaty could stipulate MNC home state damages.

**Costs**

15. Loser pays principle should be abolished where it applies

16 . In the UK, QOCs.

**Funding**

14. Always put this issue last but it is the most important.

15. In cases of such complexity and requiring extensive resources, and where opponents are so powerful, effective legal representation for victims is critical

16. Victims cannot afford to pay. Therefore lawyers act on contingency but this entail high financial risk

(a) cash flow during protracted cases

(b) risks of losing and not getting paid

17. Big firms conflicted. Small firms can't take on risk. Explains why LD is virtually alone.

18. In terms of access to remedy latest UK Govt action plan is devoid of any measures even though signed up to the GPs. Measures limited to non judicial grievance mechanisms and supporting other states.

19. In the meantime, since endorsing the GPs the UK has passed legislation relating to costs in civil cases which positively undermines access to remedy - and they were fully warned of this beforehand.

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