

# Conference Report: 9th Transnational Commercial Law Teachers' Meeting at Radboud University, Nijmegen

On 2 and 3 November 2017, the Radboud University at Nijmegen hosted the 9<sup>th</sup> Transnational Commercial Law Teachers' Meeting. In these meetings, teachers of transnational commercial law from all over the world gather to discuss fundamental issues and core instruments of unified or harmonized commercial law as laid down in the "bible" of transnational commercial law by Roy Goode, Herbert Kronke and Ewan McKendrick (see here), but also current trends and teaching methods.

This time, the meeting focused on "Transnational Commercial Law and Natural Resources". After the opening by the President of the University Daniel Wigboldus, Herbert Kronke (Iran-US Claims Tribunal, emeritus of Heidelberg University, former Secretary-General of UNIDROIT) and Thomas Keijser (Radboud University), in a first panel chaired by Charles Mooney, University of Pennsylvania Law School, several speakers addressed the latest developments of UNIDROIT's Cape Town Convention on International Interests in Mobile Equipment and its latest Protocol on Mining, Agriculture and Construction Equipment (MAC Protocol) as well as further potential areas of application such as e.g. renewable energy machinery but also with a view to other types of cross-border secured transactions (Howard Rosen, Rail Working Group, Benjamin von Bodungen, German Graduate School of Management and Law, Teresa Rodríguez de las Heras Ballell, Universidad Carlos III de Madrid, Ole Börger, Judge at the *Oberlandesgericht* at Bremen, Peter Winship, Southern Methodist University School of Law, Louise Gullifer, University of Oxford/Radboud University, Jeffrey Wool, Aviation Working Group, University of Washington School of Law, University of Oxford).

A second panel chaired by Anna Veneziano, Secretary-General of UNIDROIT ad interim, University of Teramo, dealt with UNIDROIT's projects on contract farming, in particular its Legislative Guide, discussed by Henry Gabriel, Elon

School of Law and Bruno Zeller, University of Western Australia.

In the following Athanassios Kaissis (Aristotle University and International Hellenic University of Thessaloniki) shortly presented the concept and the didactics of his LL.M. in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law, and the author of these lines did likewise on the semester abroad program of EBS University in Wiesbaden “EBS Law Term: Transnational Commercial Law”.

Chaired by Herbert Kronke, Hector Tsamis (PhD student of the International Hellenic University), Hannah Buxbaum (Indiana, Maurer School of Law), and Charles Mooney presented legal and regulatory approaches towards sustainable finance and sustainability reporting and securities disclosure regimes. It became clear that sustainability is being more and more supported on all levels including capital markets regulation (financial disclosure requirements) and corporate governance (non-financial accounting standards). The first day closed with an inspiring dinner speech by Roy Goode.

The second day focused on private law in general in respect to responsibilities, liabilities and litigation. On the first panel chaired by Hannah Buxbaum, Hans van Loon (Former Secretary-General of the Hague Conference) presented principles and building blocks for a global legal framework for civil litigation in environmental matters. He referred to international instruments bringing about a shift of paradigm such as e.g. the UN 2030 Agenda for Sustainable Development or the Ruggie Principles taken up more and more in strategic litigation such as the lawsuit against RWE in Germany by a Peruvian farmer at the city of Huaraz on the delictual responsibility for contributing to climate change and thus threatening the livelihood of the claimant. This case (see e.g. the report by the NGO Germanwatch) will be decided upon appeal by the Upper Regional Court of Hamm on 13 November 2017, a timely moment during the UN Climate Change Conference in Bonn. Jaap Spier (retired Advocate-General in the Supreme Court of the Netherlands, Universities of Amsterdam and Stellenbosch) continued the topic with a view on enterprise principles. Marc Loth (Tilburg University) drew some lessons from the Urgenda case, a Dutch case raising the issue of state liability for climate change (Urgenda Foundation v. The State of the Netherlands, see e.g. here) and Jan van Dunné, Erasmus University Rotterdam, analyzed liability issues in gas and coal mining for damages caused by soil subsidence, earthquake and subsoil water management under Dutch law. Finally, Tedd Moya

Mose (PhD student of Queen Mary University of London), presented on international financing of renewable energy.

After a second interlude on didactics by Camilla Anderson (University of Western Australia) and Caslav Pejovic (Kyushu University), Athanassios Kaissis took the chair for the afternoon panel on dispute resolution. Pauline Ernst (Radboud University) and Gerard Meijer (NautaDutilh) presented on experiences from practice on arbitration and energy sector, both commercial and investor-state. Anna Marhold (Tilburg University) reported on dispute resolution mechanisms and the role of the industry in European regulatory agencies for energy. Vesna Lazic (Utrecht University) spoke about the “enforcement” of annulled arbitral awards in light of the Pemex and (one of the several) Yukos cases. Finally, the author of these lines presented on a recent type of cases in environmental litigation in which claimants seek to draw the foreign, in particular African, subsidiaries of European groups of companies into European courts in order not only to get damages but also to get injunctive relief against the subsidiary to stop them from further pollution or to have them taking measures immediately to protect the local population.

The primary example at the moment is Royal Dutch Shell and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd. In the UK, this is the case of *Okpabi & Ors v Royal Dutch Shell Plc & Anor*, [2017] EWHC 89 (TCC), 26 Jan 2017, appeal pending. Similar case against other UK parents are *Lungowe & Ors v Vedanta Resources Plc & Anor*, [2016] EWHC 975 (TCC), 27 May 2016, appeal dismissed 13 October 2017, [2017] EWCA Civ 1528, and *AAA & Ors v Unilever Plc & Anor*, [2017] EWHC 371 (QB), 27 February 2017. For the respective litigation against Shell in the Netherlands see *A.F. Akpan v. Royal Dutch Shell, plc*, District Court of the Hague (*Rechtbank*), 30 January 2013, confirmed on the jurisdictional issues by the Court of Appeal (*Gerechtshof*) of the Hague, judgment of 17 December 2015). As opposed to most English decisions, the Dutch Court of Appeal signalled a willingness to further develop the applicable Nigerian tort law in light of (the similar) English law on the parent’s duties of care for its subsidiaries towards a liability, but the appeal on the merits is still pending. This evolving case law meets with legislative initiatives (e.g. France, the Netherlands, Switzerland, EU in respect to conflict minerals) that seek to establish more clearly a direct delictual liability of the parent company that in turn is the key requisite for establishing “annex” jurisdiction (“forum

connexitatis”) under a “real case” or proximity analysis for the foreign subsidiary located in third states to which Article 8 no. 1 Brussels Ibis Regulation does not apply, but rather the respective for a connexitatis under national jurisdictional law. Such forum connexitatis does not exist under German national procedural law which might be the explanation why this type of case has not arisen in Germany, but one might of course think of delictual jurisdiction for both the parent and the foreign subsidiary by mutual attribution of delictual actions as joint tortfeasors, a concept that is interpreted broadly under section 32 German Code of Civil Procedure but of course again requires such a delictual claim against the parent under the applicable tort law in the first place.

After some input on space law by Frans van der Dunk (University of Nebraska-Lincoln, College of Law) the conference was closed by Dean Steven Bartels. The conference expressed its gratitude and appreciation to him and in particular to Thomas Keijser and his splendid team for inviting the 9<sup>th</sup> TCL Teachers’ Meeting to Radboud University and for the great hospitality of one of the best universities of the country (at [one of?] the oldest cities in what is today the Netherlands and a Member of the Hanse, i.e. the Hanseatic League, as of 1402).