New Article on Current Developments in Forum access: European Perspectives on Human Rights Litigation

Prof. Dr. Dr. h.c. Burkhard Hess and Ms. Martina Mantovani (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) recently posted a new paper in the MPI*Lux* Research Paper Series, titled *Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation*.

The paper will appear in F. Ferrari & D. Fernandez Arroyo (eds.), *The Continuing Relevance of Private International Law and Its Challenges* (Elgar, 2019).

Here is an overview provided by the authors.

"The paper analyses the legal framework governing the exercise of civil jurisdiction over claims brought before European courts by victims of mass torts committed outside the jurisdiction of European States.

The first part of the paper focuses on the private international law doctrine of the forum of necessity, often used by foreign plaintiffs as a "last resort" for accessing a European forum. Ejected from the final version of the Brussels I^{bis} Regulation and thus arguably unavailable in cases involving EU-domiciled defendants, this doctrine has recently been subjected, in domestic case law, to formalistic interpretations which further curtail its applicability *vis-à-vis* non-EU domiciled defendants. The *Comilog* saga in France and the *Naït Liman* case in Switzerland are prime examples of this approach.

Having taken stock of the *Naït Liman* judgment of the Grand Chamber of the European Court of Human Rights, which leaves an extremely narrow scope for reviewing said formalistic interpretations under article 6 ECHR, the second part of the paper assesses alternative procedural strategies that foreign plaintiffs may implement in order to bring their case in Europe.

A first course of action may consist in suing a non-EU domiciled defendant (usually a subsidiary) before the courts of domicile of a EU domiciled co-defendant (often the parent company). Hardly innovative, this procedural strategy is recurrent in recent case law of both civil law and common law courts, and allows therefore for a comparative assessment of the approach adopted by national courts in dealing with such cases. Particular attention is given to the sometimes-difficult coexistence between the hard-and-fast logic of the Brussels I^{bis} Regulation, applicable vis-à-vis the anchor defendant, and the domestic tests applied for asserting jurisdiction over the non-domiciled co-defendant, as well as to the ever-present objections of *forum non conveniens* and of "abuse of rights".

A second course of action may consist in suing, as a single defendant, either a EU domiciled contractual party of the main perpetrator of the abuse (as it happened in the *Kik* case in Germany or in the *Song Mao* case in the UK), or a major player on the international market (e.g. the *RWE* case in Germany). In these cases, where the Brussels I^{bis} Regulation and its hard-and-fast logic may deploy their full potential, the jurisdiction of the seised court is undisputable in principle and never disputed in practice.

Against this backdrop, the paper concludes that, where the Brussels I^{bis} Regulation is triggered, establishing jurisdiction and accessing a forum is quite an easy and straightforward endeavor. Nevertheless, the road to a judgment on the merits remains fraught with difficulty for victims of an extraterritorial harm. Firstly, there are several other procedural hurdles, concerning for example the admissibility of the claim, which may derail a decision on the merits even after jurisdiction has been established. Secondly, the state of development of the applicable substantive law still constitutes a major obstacle to the plaintiff's success. In common law countries, where the existence of a "good arguable case" shall be proven already at an earlier stage, in order to establish jurisdiction over the non-EU domiciled defendant, the strict substantive test to be applied for establishing a duty of supervision of the parent company, as well as its high evidentiary standard, have in most cases determined to the dismissal of the entire case without a comprehensive assessment in the merits, despite the undisputable existence of jurisdiction *vis-à-vis* the domiciled parent company. In civil law countries, the contents of the applicable substantive law, e.g. the statute of limitations, may finally determine an identical outcome at a later stage of the

proceedings (as proven by the extremely recent dismissal of the case against *Kik*)."