Mass Litigation in Times of Corona and Developments in the Netherlands

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Introduction

As is illustrated in a series of blog posts on this website, the current pandemic also has an impact on the administration of justice and on international litigation. As regards collective redress, Matthias Weller reported on the mass litigation against the Austrian Federal State of Tyrol and local tourist businesses. The Austrian Consumer Protection Association (Österreichischer Verbraucherschutzverein, VSV) has been inviting tourists that have been in the ski areas in Tyrol – which turned into Corona infection hotspots – in the period from 5 March 2020 and shortly afterwards discovered that they were infected with the virus, to enrol for claims for damages against the Tyrolean authorities and the Republic of Austria. Hundreds of coronavirus cases in Iceland, the UK, Germany, Ireland, Norway, Denmark and the Netherlands can be traced back to that area. Currently over 4,000 (including nearly 400 Dutch nationals) have joined the action by the VSV.

It may be expected that other cases will follow as the global impact of the pandemic is overwhelming, both in terms of health and economic effects, and it seems that early warnings have been ignored. Like for instance the *Volkswagen* emission case, these events with global impact are those in which collective redress mechanisms – apart perhaps from piggybacking in pending criminal procedures – are the most suitable vehicles. This blog will address mass litigation resulting from the corona crisis and use the opportunity to bring a new Dutch act on collective action to the attention.

Late Response

After the WHO declared the coronavirus a global emergency on 30 January 2020,

and after the virus made landfall in Europe in February, the beginning of March still saw plenty of skiing and partying in Tyrolean winter sports resorts such as Ischgl and Sankt Anton. It later turned out that during that period thousands of winter sports tourists were infected with the corona virus and who, upon returning to their home countries, spread the virus throughout Europe. A group of Icelandic vacationers had already returned sick from Ischgl at the end of February. In response, Iceland designated Tyrol as a high-risk zone. They warned other countries in Europe, but these did not follow the Icelandic example.

The first alarm bells in Tyrol itself rang on 7 March 2020 when it became known that a bartender from one of the busiest and best-known après-ski bars in Ischgl, Café Kitzloch, had tested positive for the corona virus. A day later it appeared that the entire waiting staff tested positive. Still, the bar remained open until 9 March. Other bars, shops, restaurants were open even longer, and it took almost a week for the area to go into complete lockdown. The last ski lifts stopped operating on 15 March.

The public prosecutor in Tirol is currently investigating whether criminal offenses were committed in the process. The investigation started as early as 24 March, at least in part after German channel ZDF indicated that at the end of February there was already a corona infection in an après ski bar in Ischgl and that it had not been made public. Public officials in Tyrol might thus face criminal proceedings, and civil claims are to be expected later in the year. For instance Dutch media have reported that Dutch victims feel misinformed by the Austrian authorities and nearly 400 Dutch victims have joined the claim.

Corona-related Damage as Driver for International (Mass) Litigation

It is unlikely that COVID-19 related mass claims will be confined to the case of Tirol, and to damages resulting directly from infections and possible negligent endangerment of people by communicable diseases. The fall-out from the wide-spread lockdown measures and resulting economic impact on businesses and consumers alike, has been called a ‘recipe for litigation’ for representative organizations and litigation firms.

With the coronavirus upending markets, disrupting supply chains and governments enacting forced quarantines, the fallout from lockdowns as well as the general global economic impact will provide fertile grounds for lawsuits in a

host of areas. Some companies are already facing legal action. For instance, GOJO, the producer of *Purell* hand sanitizer, is being accused of 'misleading claims' that it can prevent '99.9 percent of illness-causing germs' (see for instance this NBC coverage), and law suits have been brought for price gouging by *Amazon* for toilet paper and hand sanitizer, and for sales of face masks through *eBay* (see here for a brief overview of some of the cases).

Further down the line, manufacturers may sue over missed deadlines, while suppliers could sue energy companies for halting shipments as transportation demand dwindles. Insurers are likely to find themselves in court, with businesses filing insurance claims over the coronavirus fallout. And in terms of labor law, companies may be held liable in cases where work practices have led to employees being exposed and infected with the virus. For instance, this March, in the US the nurses' union filed a law suit against the New York State Department of Health and a few hospitals for unsafe working conditions (see for instance this CNN coverage). Already at the end of January, the pilots' union at American Airlines Group Inc. took legal action to prevent the company from serving China, thereby putting its employees at risk (see for instance this CBS coverage).

Private care facilities too, like nursing homes that have seen disproportionate death rates in many countries, could face claims that they didn't move quickly enough to protect residents, or didn't have proper contingency plans in place once it became clear that the virus posed a risk especially to their clientele. Similarly, states have a responsibility for their incarcerated population and may face liability claims in case of outbreak in prison facilities. Airlines that have spent years in EU courts fighting and shaping compensation rules for passengers may well again find themselves before the Court of Justice pleading extraordinary circumstances beyond their control to avoid new payouts to consumers. And finally, governments' careful weighing of public health against individual rights could result in mass claims in both directions.

Developments in the Netherlands: the WAMCA

Dutch collective redress mechanisms have been a subject of discussion in the EU and beyond. While we are not aware of cases related to COVID-19 having been brought or being prepared in the Netherlands so far, the latest addition to the Dutch collective redress mechanisms could prove to be useful. In the Netherlands, a procedure for a collective *injunctive* action has been in place since

1994. This was followed by a collective settlement scheme in 2005 (the Collective Settlement Act, WCAM) which facilitates collective voluntary settlement of mass damage. Especially the *Shell* and *Converium* securities cases have attracted widespread international attention. The decision by the Amsterdam Court of Appeal – having exclusive competence in these cases – has been criticized for casting the international jurisdiction net too wide in the latter case in particular (see for a discussion of private international law aspects Kramer 2014 and Van Lith 2010). These, and a number of other Dutch collective redress cases, have spurred discussions about the alleged risk of the Netherlands opening itself up to frivolous litigation by commercially motivated action groups, a problem that has often been associated with the US system. In an earlier blog post our research group has called for a nuanced approach as there are no indications that the Dutch system triggers abuse.

At the time of enacting the much discussed WCAM, the Dutch legislature deliberately chose not to include the possibility of bringing a collective action for the compensation of damages in an attempt to avoid some of the problematic issues associated with US class actions. However, last year, after many years of deliberating (see our post of 2014 on this blog on the draft bill) the new act enabling a collective *compensatory* action was adopted. The Collective Redress of Mass Damages Act (*Wet afwikkeling massaschade in collectieve actie,* WAMCA) entered into force on 1 January 2020. It applies to events that occurred on or after 15 November 2016.

As announced in an earlier post on this blog, this new act aims to make collective settlements more attractive for all parties involved by securing the quality of representative organizations, coordinating collective (damages) procedures and offering more finality. At the same time it aims to strike the balance between better access to justice in a mass damages claim and the protection of justified interests of persons held liable. The WAMCA can be seen as the third step in the design of collective redress mechanisms in the Dutch justice system, building on the 1994 collective injunctive action and the 2005 WCAM settlement mechanism. An informal and unauthorised English version of the new act is available here.

The new general rule laid down in Article 3:305a of the Dutch Civil Code, like its predecessor, retains the possibility of collective action by a representative association or foundation, provided that it represents these interests under the articles of association and that these interests are adequately safeguarded by the

governance structure of the association or foundation. However, stricter requirements for legal standing have been added, effectively raising the threshold for access to justice. This is to avoid special purpose vehicles (SPVs) bringing claims with the (sole) purpose of commercial gain. In addition to a declaratory judgment a collective action can now also cover compensation as a result of the new act. In case more representatives are involved the court will appoint the most suitable representative organisation as *exclusive* representative. As under the old collective action regime, this has to be a non-profit organisation. The Claim Code of 2011 and the new version of 2019 are important regulatory instruments for representative organisations. Should parties come to a settlement, the WCAM procedural regime will apply, meaning that the settlement agreement will be declared binding by the Court of Appeal in Amsterdam if it fulfils the procedural and substantive requirements. This is binding for all parties that didn't make use of the opt-out possibility.

Limited territorial scope and the position of foreign parties

To meet some of the criticism that has been voiced in relation to the extensive extraterritorial reach of the WCAM, the new act limits the territorial scope of collective actions.

First, the new Article 3:305a of the Dutch Civil Code contains a scope rule stating that a legal representative only has legal standing if the claim has a *sufficiently close relationship* with the Netherlands. A sufficiently close relationship with Dutch jurisdiction exists if:

(1) the legal person can make a sufficiently plausible claim that the majority of persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or

(2) the party against whom the legal action is directed is domiciled in the Netherlands, and additional circumstances suggest that there is a sufficiently close relationship with Dutch jurisdiction; or

(3) the event or events to which the legal action relates took place in the Netherlands

Though this is not an international jurisdiction rule – that would be at odds with the Brussels I-bis Regulation – this scope rule prevents that the Dutch court can

decide cases such as the *Converium* case in which the settling company was situated abroad and only 3% of the interested parties were domiciled in the Netherlands. In fact, it is a severe restriction of the international reach of the Dutch collective action regime.

Second, another often debated issue is the opt-out system of the WCAM. While this makes coming to a settlement obviously much more attractive for companies and increases the efficiency of collective actions, an exception is made for collective actions involving *foreign* parties. Dutch parties can make use of an opt-out within a period to be set by the court of one month at least. However, for foreign parties the new act provides for a general *opt-in* regime for foreign parties. Article 1018 f (5) of the Dutch Code of Civil Procedure provides that persons who are not domiciled or resident in the Netherlands are only bound if they have informed the court registry within the period set by the court that they agree to having their interests represented in the collective action. There is a little leeway to deviate from this rule. The court may, at the request of a party, decide that non-Dutch domiciles and residents belonging to the precisely specified group of persons whose interests are being represented in the collective action, are subject to the opt-out rule.

The introduction by the WAMCA of a compensatory collective action complementing the injunctive collective action and providing a stick to the carrot of the WCAM settlement offers new opportunities, while increased standards of legal standing provide the necessary safeguards. However, the limitation of the scope of the new regime to cases that are closely related to the Netherlands – on top of the international jurisdiction rules – and deviating from the effective opt-out rule for foreign parties restrict the scope of Dutch collective actions. Time will tell what role the new Dutch collective action regime will play in major international cases, and whether it will be of use to provide redress for some of the culpable damage caused by the present pandemic.

Cross-border Corona mass litigation against the Austrian Federal State of Tyrol and local tourist businesses?

While the Corona Crisis is still alarmingly growing globally, first movers are apparently preparing for mass litigation of ski tourists from all over Europe and beyond against the Austrian Federal State of Tyrol and local businesses. The Austrian Consumer Protection Association (*Österreichischer Verbraucherschutzverein, VSV,* https://www.verbraucherschutzverein.at/) is inviting tourists damaged from infections with the Corona virus after passing their ski holidays in Tyrol, in particular in and around the Corona super-hotspot of Ischgl, to enrol for collective redress against Tyrol, its Governor, local authorities as well as against private operators of ski lifts, hotels, bars etc., see https://www.verbraucherschutzverein.at/Corona-Virus-Tirol/.

In Austria, no real "class action" is available. Rather, the individual claimants need to assign their claims to a lead claimant, often a special purpose vehicle (in this case the Association) which then institutes joint proceedings for all the claims. For foreign claimants who consider assigning their claims to the Association, the Rome I Regulation will be of relevance.

According to Article 14 (1) Rome I Regulation the relationship between assignor and assignee shall be governed by the law that applies to the contract between the assignor and assignee under the Regulation. So far, however, there seem to be only pre-contractual relationships between the Austrian Association inviting "European Citizens only" (see website) to register for updates by newsletters. These pre-contractual relationships will be governed by Article 12 (1) Rome II Regulation. "[T]he contract" in the sense of that provision will be the one between the Association and the claimant on the latter's participation in the collective action which may, but does not necessarily, include the contract on the assignment of the claim and its modalities. It is the Association that is the "service provider" in the sense of Article 4 (1) lit. b Rome I Regulation. Its habitual residence is obviously in Austria, therefore the prospective contract as well as the

pre-contractual relations to this contract will be governed (all but surprisingly) by Austrian law. Art. 6 does not come into play, since the service is to be supplied to the consumer exclusively in Austria, Article 6 (4) lit. a Rome I Regulation.

According to Article 14 (2) Rome I Regulation, the law governing the assigned claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. As far as the Rome II Regulation is applicable *ratione materiae*, i.e. for claims against the businesses, its Article 4 will select (again all but surprisingly) Austrian law – no "distance delict" as the potentially delictual act and its harmful effects on the claimant's health both took place in Austria. Follow-up damages in other states are irrelevant for the law-selecting process.

In respect to delictual claims against Tyrol and its public entities and authorities, Recital 9 of the Rome II Regulation reminds us that, with a view to Article 1 (1) Sentence 2 of the Regulation (no applicability to *"acta iure imperii"*), "[c]laims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation." Rather, an autonomous rule of choice of law for liability of Austrian public entities will apply, and this rule will certainly select Austrian law.

There are certain advantages in bundling a multitude of claims in the "Austrian" way: First, the high amount of damages from the collection of claims allows seeking third-party funding. Second, costs for both the court and the lawyers are structured on a diminishing scale. While the collective proceedings are pending, prescription periods do not proceed in respect to claims participating in the joint action. And of course, the "class" of these active claimants has much more weight for negiations than an individual would have.

On the other hand, the jurisdiction at the consumer's domicile under Art. 18 Brussels Ibis Regulation will no longer be available, once the consumer has assigned his or her claim to another, e.g. a lead claimant. However, this is only relevant in respect to the contractual claims of consumers and only as long as the conditions for directing one's business at the consumer's domicile under Article 17 (1) lit. c Brussels Ibis Regulation are fulfilled. The claims in question here

mainly ground in non-contractual claims against public entities and private businesses, and they seem to be envisaged as independent civil follow-on proceeding after successful criminal proceedings – if these should ever result in convictions.

The allegation is that the respective public agencies and officers did not shut down the area immediately despite having gained knowledge about first Corona infections in the region, in order to let the tourism businesses go on undisturbed. These allegations are extended to local businesses such as ski lifts, hotels and bars etc., once they gained knowledge about the Corona risk. It will be an interesting question (of the applicable Austrian law of public and private liability for torts) amongst many others (such as those on causality) in this setting to what extent there is a responsibility of the tourist to independently react adequately to the risk, of course depending on the time of getting him/herself knowledge about the Corona risk. If there is such responsibility on the part of the damaged, the next question will be whether this could affect or reduce any tortious liability on the part of the potential defendants. Overall, all of that appears to be an uphill battle for the claimants.

Speaking of responsibilities, a more pressing concern these days is certainly how the European states, in particular the EU Member States and the EU itself, might organise a more effective mutual support and solidarity for those regions and states that are most strongly affected by the Corona Pandemic, in particular in Italy, Spain and France, these days. Humanitarian and moral reasons compel us to help, both medically and financially. Some EU Member States have started taking over patients from neighbouring countries while they are still disposing of capacities in their hospitals, but there could perhaps be more support (and there could have perhaps been quicker support). The EU has a number of tools and has already taken some measures such as the Pandemic Epidemic Purchase Programme (PEPP) by the European Central Bank (ECB). The European Stability Mechanism (ESM) could make (better?) use of its precautionary financial assistance via a Precautionary Conditioned Credit Line (PCCL) or via an Enhanced Conditions Credit Line (ECCL). Further, the means of Article 122 TFEU should be explored, likewise the possibilities for ad hoc-funds under Article 175 (3) TFEU. The European Commission should think about loosening restrictions for state aids.

All of these considerations go beyond Conflict of Laws, and this is why they are

not mine but were kindly provided (all mistakes and misunderstandings remain my own) in a quick email by my colleague and expert on European monetary law, Associate Professor Dr. René Repasi, Erasmus University of Rotterdam, https://www.eur.nl/people/rene-repasi (thanks!).

However, cross-border solidarity is a concern for all of us, perhaps in particular for CoL experts and readers. Otherwise, a "European Union" does not make sense and will have no future.

Shell litigation in the Dutch courts – milestones for private international law and the fight against climate change

by Xandra Kramer (Erasmus University Rotterdam/Utrecht Univeristy) and Ekaterina Pannebakker (Leiden University), editors

1. **Introduction**

As was briefly announced earlier on this blog, on 29 January 2021, the Dutch Court of Appeal in The Hague gave a ruling in a long-standing litigation launched by four Nigerian farmers and the Dutch *Milieudefensie*. The Hague Court held Shell Nigeria liable for pollution caused by oil spills that took place in 2004-2007; the UK-Dutch parent company is ordered to install equipment to prevent damage in the future. Though decided almost four months ago, the case merits discussion of several private international law aspects that will perhaps become one of the milestones in the broader context of liability of parent companies for the actions of their foreign-based subsidiaries.

Climate change and related human rights litigation is undoubtedly of increasing

importance in private international law. This is also on the radar of the European institutions as evidenced among others by the ongoing review of the Rome II Regulation (point 6). Today, 26 May 2021, another milestone was reached, both for for private international law but for the fight against global climate change, with the historical judgment (English version, Dutch version) by the Hague District Court ordering Shell to reduce Co2 emissions (point 7). This latter case is discussed more at length in today's blogpost by Matthias Weller.

2. **Oil spill in Nigeria and litigation in The Hague courts**

As is well-known Shell and other multinationals have been extracting oil in Nigeria since a number of decades. Leaking oil pipes have been causing environmental damage in the Niger Delta, and consequently causing health damage and social-economic damage to the local population and farmers. Litigation has been ongoing in the Netherlands and the United Kingdom for years (see Geert van Calster blog for comments on a recent ruling by the English Supreme Court). At stake in the present case are several oil spills that occurred between 2004-2007 at the underground pipelines and an oil well near the villages Oruma, Goi and Ikot Ada Udo. The spilled oil pollutes agricultural land and water used by the farmers for a living.

Shortly after the oil spills, four Nigerian farmers instituted proceedings in the Netherlands, at the District Court of The Hague. The farmers are supported by the Dutch foundation *Milieudefensie*, which is also a claimant in the procedure. The claimants submit that the land and water, which the Nigerian farmers explored for living, became infertile. They claim compensation for the damage caused by the Shell's wrongful acts and negligence while extracting oil and maintaining the pipelines and the well. Furthermore, they claim to order Shell to secure better cleaning of the polluted land and to take appropriate measures to prevent oil leaks in the future.

The farmers summon both the Shell's Nigerian subsidiary and the parent company at the Dutch court. To be precise, they institute proceedings against the Shell's Nigerian subsidiary – Shell Petroleum Development Company of Nigeria Ltd and against the British-Dutch Shell parent companies – Royal Dutch Shell Plc

(UK), with office in The Hague; Shell Petroleum N.V. (a Dutch company) and the 'Shell' Transport and Trading Company Ltd (a British company). It is this corporate structure that brings the Nigerian farmers to the court in The Hague and paves the way for the jurisdiction of Dutch courts.

3. Jurisdiction of Dutch courts: anchor defendant in the Netherlands and sufficient connection

Both the first instance court (in 2009) and the court of appeal at The Hague (in appeal in 2015) hold that the Dutch courts have jurisdiction. The ruling of the Court of Appeal is available in English and contains a detailed motivation of the grounds of jurisdiction of the Dutch courts. See in particular at [3.3] – [3.9].

Claim against Shell parent company/companies. Dutch courts have jurisdiction to hear the claim against Shell Petroleum based on art. 2(1) Brussels I Regulation, as the company has its registered office in the Netherlands. Furthermore, the jurisdiction of Dutch courts to hear the claims against Royal Dutch Shell is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and the jurisdiction over claims to Shell Transport and Trading Company – on art. 6(1) and art. 24 Brussels I Regulation.

Claim against Shell's Nigerian subsidiary. The jurisdiction of the Dutch courts to hear the claim against Shell's Nigerian subsidiary is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and on art. 7(1) of the Dutch Code of civil procedure (DCCP). Art. 7(1) deals with multiple defendants. By virtue of art. 7(1) DCCP, if the Dutch court with jurisdiction to hear the claim against one defendant (in this case this is the Royal Dutch Shell), has also the jurisdiction to hear the claims against co-defendant(s), 'provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing'. The jurisdiction on the claim against the so-called 'anchor defendant' (for instance, the parent company) can thus carry with itself the jurisdiction on the other, connected, claims against other defendants.

Both the first instance court and the court in appeal found that the claims were sufficiently connected, despite the contentions of Shell. The Shell's contentions were twofold. First, Shell stated that the claimants abused procedural law, because the claims against Royal Dutch Shall were 'obviously bound to fail and

for that reason could not serve as a basis for jurisdiction as provided in art. 7(1) DCCP' (at [3.1] in the 2015 ruling). According to Shell, the claim was bound to fail, because the oil leaks were caused by sabotage, in which case Shell would be exempt from liability under the applicable Nigerian law. This contention was dismissed: the claim was not necessarily bound to fail, according to the first instance court. The appellate court added that it was too early to assume that the oil spill was caused by sabotage. Second, Shell contested the jurisdiction of the Dutch courts because the parent companies could not reasonably foresee that they would be summoned in the Netherlands for the claims as the ones in the case. Dismissing this contention the court of appeal at The Hague stated in the 2015 ruling that 'in the light of (i) the ongoing developments in the field of *foreign direct liability claims* (cf. the cases instituted in the USA against Shell for the alleged involvement of the company in human rights violations; *Bowoto v. Chevron Texaco* (09-15641); *Kiobel v Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013), as well as *Lubbe v. Cape Plc*. [2000] UKHL 41), added to (ii) the many oil spills that occurred annually during the extraction of oil in Nigeria, (iii) the legal actions that have been conducted for many years about this (for over 60 years according to Shell), (iv) the problems these oil spills present to humans and the environment and (v) the increased attention for such problems, it must have been reasonably foreseeable' for the parent companies taken to court with jurisdiction with regard to Royal Dutch Shell (see the 2015 ruling at [3.6].

4. Application of (substantive) Nigerian law

Substantive law. All claims addressed in the Court of Appeal ruling of 29 January 2021 are assessed according to Nigerian law. This is the law of the state where the spill occurred, the ensuing damage occurred and where the Shell's Nigerian subsidiary (managed and monitored by Shell) has its registered office. The events that are the subject of litigation occurred in 2004-2007 and fall outside the temporal scope of Rome II. Applicable law is defined based on the Dutch conflict of laws rules on torts, namely art. 3(1) and (2) *Wet Conflictenrecht Onrechtmatige Daad* (see the first instance ruling at [4.10]).

Procedural matters. Perhaps because the case of damage to environment as the one in the discussed case, the application of substantive law is strictly tied to the evidence, the court goes on to specify private international law with further finesse. It mentions explicitly that procedural matters are regulated by the Dutch

code of civil procedure. In the meantime, the substantive law aspects of the procedure, including the question which sanctions can be imposed, are governed by the *lex causae* (Nigerian law). The same holds true for substantive law of evidence, including the specific rules on the burden of proof relating to a particular legal relationship. The other, general matters relating to the burden of proof and evidence are regulated by the *lex fori*, thus the Dutch law of civil procedure (at [3.1]).

5. The ruling of The Hague Court of Appeal

In its the ruling, the Dutch court holds Shell Nigeria liable for damage resulting from the leaks of pipelines in Oruma and Goi. Nigerian law provides for a high threshold of burden of proof that rests on the one who invokes sabotage of the pipelines (in this case, Shell). The fact of sabotage must be (evidenced to be) beyond reasonable doubt. Shell could not provide for such evidence for the pipelines in Oruma and Goi. Furthermore, Shell has not undertaken sufficient steps for the cleaning and limiting environmental damage. Shell Nigeria is therefore liable for the damage caused by the leaks in the pipelines. The amount of the damage to be compensated is still to be decided. The relevant procedure will follow up. The ruling is, however, not limited to this. Shell is also ordered to build at one of the pipelines (the Oruma-pipeline) a Leak Detection System (LDS), so that the future possible leaks could be swiftly noticed and future damage to the environment can be limited. This order is made to Shell Nigeria and to the parent companies.

Spills at Oruma and Goi are are two out of three oil spills. The procedure on the third claim – the procedure regarding the well at Ikot Ada Udo will continue: the reason for the oil spill is not yet clear and the next hearing has been scheduled.

6. Human rights litigation and Rome II

This Shell case at the Dutch court is one in a series of cases where human rights and corporate responsibility are central. Increasingly, it seems, victims of environmental damage and foundations fighting for environmental protection can celebrate victories. In the introduction we mentioned the English Supreme Court ruling in Okpaby v Shell [2021] UKSC 3 of February 2021. In this case the

Supreme Court reversed judgments by the Court of Appeal and the High Court in which the claim by Nigerian farmers brought against Shell's parent company and its subsidiary in Nigeria had been struck out (see also Geert van Calster's blog, guest post by Robert McCorquodale). Also there is a growing body of doctrinal work on human right violations in other countries, corporate social responsibility, due diligence and the intricacies of private international law, as a quick search on the present blog also indicates.

From a European private international law perspective, as also the discussion above shows, the Brussels I*bis* Regulation and the Rome II Regulation are key. The latter Regulation has been subject of an evaluation study commissioned by the European Commission over the past year, and the final report is expected in the next months. Apart from evaluating ten years of operation of this Regulation, one of the focal points is the issue of cross-border corporate violations of human rights. The question is whether the present rules provide an adequate framework for assessing the applicable law in these cases. As discussed in point 5 above, in the Dutch Shell case the court concluded that Nigerian law applied, which may not necessarily be in the best interest of environmental protection. This was based on Dutch conflict rules applicable before the Rome II Regulation became applicable, but Art. 4 Rome II would in essence lead to the same result. For environmental protection, however, Art. 7 Rome II may come to the rescue as it enables victims to make a choice for the law of the country in which the event giving rise to damage occurred instead of having the law of the country in which the damage occurs of Art. 4 applied. In a similar vein, the European Parliament in its draft report with recommendations to the Commission on corporate due diligence and corporate accountability, dated 11 September 2020, proposes to incorporate a general ubiquity rule in art. 6a, enabling a choice of law for victims of business-related human rights violations. In such cases a choice could be made for the law of the country in which the event giving rise to the damage occurred, or the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates. This draft report, which also addresses the jurisdiction rules under the Brussels I*bis* Regulation was briefly discussed on this blog in an earlier blogpost by Jan von Hein.

Shell and climate continued: The Hague court strikes again

Today, all eyes were on the next move of The Hague District Court in an environmental claim brought against Royal Dutch Shell Plc (RDS). It concerns a collective action under the (revised) Dutch collective action act (see earlier on this blog by Hoevenaars & Kramer, and extensively Tzankova & Kramer 2021), brought – once again by *Milieudefensie*, also on behalf of 17,379 individual claimants, and by six other foundations (among others *Greenpeace*). The claim boils down to requesting the court to order Shell to reduce emissions. First, the court extensively deals with the admissibility and representativeness of the claimants as part of the new collective action act (art. 3:305a Dutch Civil Code). Second, the court assesses the international environmental law, regulation and policy framework, including the UN Climate Convention, the IPCC, UNEP, the Paris Agreement as well as European law and policy and Dutch law and policy.

Third, and perhaps most interesting for the readers of this blog, the court assesses the applicable law, as the claim concerns the global activities of Shell. As Weller has highlighted in his blogpost that discussion mostly evolves around Art. 7 Rome II. Milieudefensie pleaded that Art. 7 should, pursuant to its choice, lead to the applicability of Dutch law and, should this provision not lead to Dutch law, on the basis of Art. 4(1) Rome II. In establishing the place where the event giving rise to the damage occurs the court states that 'An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.' Milieudefensie holds RDS liable in its capacity as policy-setting entity of the Shell group. RDS pleads for a restrictive interpretation and argues that corporate policy is a preparatory act that falls outside the scope of Art. 7 as 'the mere adoption of a policy does not cause damage'. However, The Hague Court finds this approach too narrow and agrees with the claimants that Dutch law applies on the basis of Art. 7 and that, in so far as the action seeks to protect the interests of Dutch residents, this also leads to the applicability of Dutch law on the basis of Art. 4.

The judgment of the court, and that's what has been all over the Dutch and international media, is that it orders 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and

with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels'.

To be continued – undoubtedly.

The VW NOx Emissions Group Litigation, [2019] EWHC 783(QB), and (some aspects of) CoL

Yesterday, the High Court of London decided two preliminary issues in a large group action, certified as a Group Litigation Order (sub no. 105), brought by about 91,000 owners or lessees of VW, Audi, Skoda and SEAT cars. The claim is brought, against the manufacturers of the affected vehicles (VW, Audi, Skoda, and SEAT), against the relevant VW financial services arm and against a variety of authorised UK based VW dealers. Article 8 no. 1 of the Brussels Ibis Regulation will have been of relevance to the foreign ones amongst the defendants. No express explanations are offered how claimants eligible for the UK group litigation are determined – presumably it depends on where the car was bought.

The precise personal/territorial scope of the respective mass litigations would have been interesting, since the proceedings in the UK are just some of many by disaffected VW owners around the world, and the outcomes for the claimants seem to differ quite substantially. As early as in 2015, a class-action similar to the UK one was commenced against VW in the Federal Court of Australia, on behalf of around 100,000 VW owners, which was settled for up to AusD 87 million. The total amount may go up to AusD 127 million, depending on the ultimate number of claimants. On 1 April 2020, the Federal Court of Australia approved the settlement of the Australian class actions. The settlement was approved on the

basis of a Settlement Scheme developed by the solicitors for the applicants and made public here, that sets out the process by which claims can be registered, assessed and paid, and the Deed of Release and Settlement that was agreed between the parties, made publicly available by those solicitors here. In Germany, proceedings under the (quite restrictive) collective redress mechanism of the "*Musterfeststellungsklage*" were settled recently as well, in this case for up to € 830 Million in total in relation to around 400.000 claimants. These claimants still need to accept individually the offered sums until 20 April 2020 after receiving offers from VW based on the remaining value of their cars these days. Individual litigations outside the *Musterfeststellungsklage* about the influence of the amount of kilometres that the respective car has already run (amongst other issues) are reaching the German Federal Court of Justice these days (the hearings will take place on 5 May 2020). In addition, the Court of Justice of the European Union is dealing with other aspects of the VW case, see on CoL here.

The claim in the UK proceedings alleges a variety of causes of action against the Defendants, including fraudulent misrepresentation in relation to the sale of the affected vehicles. A number of those causes of action proceed upon the basis that the software function of the Engine amounts to a "defeat device" within the particular meaning of Article 3 (10) of EU Parliament and Council Regulation 715/2007 dated 20 June 2007. If so, then one consequence is that its use in the engine and thus, the sale of the affected vehicles, was unlawful, being prohibited by Article 5 (2) of the Regulation.

Thus, the question arose whether Brexit altered anything in this respect. This question is easy to answer at the moment, see para. 12: "Brexit makes no difference here because EU Law (including the jurisdiction of the CJEU) will continue to have effect as if the UK was still a Member State until the end of the transition period which is 31 December 2020".

A further issue relates to the Claimants' reliance on formal letters to VW, issued by the "competent authority" in Germany for these purposes, being its Federal Motor Transport Authority, the German "*Kraftfahrtbundesamt*" ("the KBA") dated 15 October, 20 November, and 11 December 2015 ("the KBA Letters"). The Claimants contended that these letters constitute decisions that the software function is a defeat device, that those decisions bind the courts in Germany as a matter of German law, that they also bind other authorities in other Member States, including English courts, either as a matter of EU law or as a matter of

German law and by reason of EU and/or English law, there is a conflicts rule to the effect that the question as to whether they bind the UK court must be decided by reference to their binding effect or otherwise under German Law, being the law of the seat of the KBA.

For a number of reasons, including analogies to competition law, the Court decided that the KBA's finding binds all Member States (including their courts) as a matter of EU law. This is why the Court abstained from taking a decision on the alternative grounds advanced by the Claimants.

At the same time and independently from the binding effects of the KBA's finding, the Court found on its own account that the affected vehicles did contain defeat devices. Another bad day for VW.

The full text of the judgment is available here.

Summer School on Transnational Tort Litigation

Written by Michele Angelo Lupoi, Civil Procedural Law and European Judicial Cooperation, University of Bologna

The Department of Juridical Sciences of the University of Bologna, Ravenna Campus, has organized a Summer School on *Transnational Tort Litigation: Jurisdiction and Remedies*, to be held in Ravenna, on July 15-19, 2019.

The Summer School deals with transnational jurisdiction, private international law and remedies available in tort cross-border litigation, with both a theoretical and a practical approach. The Faculty includes experts from US and EU in order to provide a comparative perspective to the participants.

The US perspective will be centered on procedural remedies for mass-torts (class actions) and on the assumption of jurisdiction in transnational toxic tort litigation (e.g. asbestos and tobacco tort disputes). The EU part of the programme will

address the Brussels I-bis Regulation as regards jurisdiction in tort claims, and the Rome II Regulation, in relation to the law applicable to transnational tort disputes.

The Summer School is aimed at law students as well as law graduates and lawyers who want to obtain a specialised knowledge in this area of International Civil Procedure.

Deadline for inscriptions: **28 June 2019**. Programme and further information can be found here

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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*)."

Summer School on Transnational Commercial Agreements, Litigation, and Arbitration in Vicenza, Italy

Pitt Law's CILE will once more be co-sponsoring the Summer School in Transnational Commercial Agreements, Litigation, and Arbitration in Vicenza, Italy, beginning June 4 and ending June 8, 2018.

All classes will be in English, and as in prior years we expect to have the School approved for up to 24 hours of Pennsylvania Continuing Legal Education credit (22 substantive and 2 ethics). The instructors include Isabella Bdoian (Whirpool Corp.- EMEA), Massimo Benedettelli (Univ. of Bari), Ronald A. Brand (Univ. of Pittsburgh), Serena Corongiu (Lawyer, Representative, AIGA and AIJA),

Francesco Cortesi (Judge, Italian Supreme Court), Charles De Monaco (Fox Rothschild, Italy-America Chamber of Commerce), Aldo Frignani (Univ. of Turin), Chiara Giovannucci Orlandi (Univ. of Bologna), Paul Herrup (Department of Justice, USA), David Hickton (Univ. of Pittsburgh), Federica Iovene (Public Prosecutor, Court of Bolzano) Luigi Pavanello (PLLC, ABA International Law Commission), Fausto Pocar (Univ. of Milan, Judge at the International Court of Justice), Francesca Ragno (Univ. of Verona), Dawne Sepanski Hickton (Former CEO, RTI International Metals), Marco Torsello (Univ. of Verona), Matteo Winkler (Univ. HEC Paris).

The program is available here and here: Programma Summer School VI_2018_FINAL

New Trends in Collective Redress Litigation: International Seminar in Valencia

Professor Dr. Carlos Esplugues Mota (University of Valencia) has organized an international seminar on new trends in collective redress litigation that will take place on 25 November 2016 at the University of Valencia (Spain). The seminar will be held in English and Spanish. Topics and speakers will include:

Collective actions in private international law and Spanish legal practice (Prof. Dr. Laura Carballo Piñeiro, Universidad de Vigo)

International Mass Litigation in Product Liability Cases (Prof. Dr. Jan von Hein, University of Freiburg)

Protection of mortgagors (consumers) in the EU (Prof. Dr. Blanca Vila Costa, Universitat Autònoma de Barcelona)

Class actions and arbitration (Prof. Dr. Ana Montesinos García, Universitat de

València)

The New European Framework for ADR and ODR in the area of consumer protection (Prof. Dr. Fernando Esteban de la Rosa, Universidad de Granada)

An Approach to Consumer Law and Mass Redress from Civil Law (Prof. Dr. Mario Clemente Meoro, Universitat de València).

The panels will be chaired by Professor Dr. Esplugues Mota and Professor Dr. Carmen Azcárraga Monzonís. Participation is free of charge, but requires prior registration with Prof. Maria Jose Catalán Chamorro (Maria.Jose.Catalan@uv.es). The full programme with further details is available here.

UK court on Tort litigation Against Transnational Corporations

Ekaterina Aristova, PhD in Law Candidate, University of Cambridge authored this post on 'Tort litigation Against Transnational Corporations: UK court will hear a case for overseas human rights abuses'. She welcomes comments.

On 27 May 2016, Mr Justice Coulson, sitting as a judge in the Technology and Construction Court, allowed a legal claim against UK-based mining corporation Vedanta Resources Plc ("**Vedanta**") and its Zambian subsidiary Konkola Copper Mines ("**KCP**") to be tried in the UK courts. These proceedings, brought by Zambian citizens alleging serious environmental pollution in their home country, is an example of the so-called "foreign direct liability" cases which have emerged in several jurisdictions in the last twenty years. Other cases currently pending in the UK courts include a claim by a Colombian farmer alleging environmental pollution caused by Equion Energia Ltd (formerly BP Exploration), two environmental claims arising from oil spillages against Shell, litigation against iron ore producer Tonkolili Iron Ore Ltd for alleged human rights violations in Sierra Leone and a dispute between Peruvian citizens and Xtrata Ltd involving

grave human rights abuses of persons involved in environmental protest against the mining operations.

Transnational corporations ("**TNCs**") have frequently been involved in various forms of corporate wrongdoing in many parts of the world. Severe abuses, reported by non-governmental organisations, range from murder to the violation of socio-economic rights. To date there has been only modest success in developing theoretical and practical solutions for legal enforcement of international corporate accountability. In the absence of an international legally binding instrument addressing human rights obligations of private corporations and the various regulatory problems in host states, a few jurisdictions have evidenced a growing trend of civil liability cases against TNCs. These cases are examples of private claims brought by the victims of overseas corporate abuse against parent companies in the courts of the home states. While US courts continue to debate issues of jurisdiction over extraterritorial human rights corporate abuses, the UK courts have recently being consistent in allowing claims against local parent companies of TNCs. The case against Vedanta is the most recent example of this trend.

A. Facts of the case

On 31 July 2015, 1,826 Zambian citizens, residents of four communities in the Chingola region, commenced proceedings against Vedanta and KCM in the Technology and Construction Court of the High Court of England, alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land. The majority of the claimants are farmers who rely on the land and local rivers as their primary source of livehood. They also rely on the local waterways as the main source of clean water for drinking, washing, bathing and irrigating farms. The claimants' communities are located close to the Nchanga Copper Mine that is operated by KCM, an indirect subsidiary of Vedanta. The mine commenced operations in 1937, but Vedanta acquired a controlling share in KCM in 2004. KCM operates a mine as a holder of a mining licence in accordance with the local legislative requirements that operations be run through a locally domiciled subsidiary. The claimants allege that from 2005 they have been suffering from pollution and environmental damage caused by the mine's operations. They allege that the discharge of harmful effluent in the waterways has endangered their livelihoods and physical, economic and social wellbeing.

In September and October 2015, both defendants applied for a declaration that the English court does not have jurisdiction to hear the claims. The defendants argued that Zambia was an appropriate forum to try the claims since it is the place where the claimants reside and where the damage is said to have occurred. In the course of a three-day hearing in April 2016 both parties presented their arguments. The judgement allowing a legal claim against both defendants to be tried in England was delivered on 27 May 2016.

B. Jurisdiction over the Parent Company (Vedanta)

The claimants argued that Vedanta breached the duty of care it owed to them of ensuring that KCM's mining operations did not cause harm to the environment or local communities. The allegations are based on evidence that the parent company exercised a high level of control and direction over the mining operations of its subsidiary and over the subsidiary's compliance with health, safety and environmental standards (para 31). In their argument, the claimants relied on the Court of Appeal's decision in *Chandler v Cape*, which recognised the possibility of parent company responsibility for injuries of its subsidiary's employee and set a test for the establishment of the parent company's duty of care. Based on their submission on the breach of the duty of care by Vedanta, the claimants argued that the English court has jurisdiction over the parent company "as of right" by virtue of Article 4 of the Brussels I Regulation recast ("**Brussels I**"). Vedanta claimed that the court should apply the *forum non conveniens* argument and stay proceedings in favour of Zambia. Furthermore, the parent company claimed that a case against Vedanta is "a device in order to ensure that the real claim, against, KCM, is litigated in the United Kingdom rather than in Zambia" (para 51). Finally, the parent company sought to establish that there is either no real issue between Vedanta and claimants or, alternatively, the claim is weak and it should impact court's decision on the jurisdiction over the case (para 52).

The judicial response to the arguments of the parties was straightforward and explicit. It was held that Article 4 provided clear grounds to sue Vedanta as a UK-domiciled company in the UK (para 53). Mr Justice Coulson placed considerable weight on the decision of the Court of Justice of European Union ("**CJEU**") in

Owusu v Jackson preventing UK courts from declining jurisdiction on the basis of the *forum non conveniens,* when the defendant is domiciled in the UK. In the view of the judge the different facts of the present case and any criticism of CJEU's reasoning did not make *Owusu* judgement less binding (para 71). Finally, the judge considered the claimants' arguments on the overall control exercised by Vedanta over Zambian mining operations and ruled that there is a real issue to be tried between the claimants and Vedanta (para 77). It was recognised that, although the claimants' argument against Vedanta was a challenging one, the pleadings set out a careful and detailed case on the breach of duty of care which was already supported by some evidence (para 128).

C. Jurisdiction over the foreign subsidiary (KCM)

KCM also challenged jurisdiction of the UK court by applying for an order setting aside service of the claim form on it out of the jurisdiction. The defendant company claimed that the entire focus of the litigation was in Zambia, and the claim against Vedanta was "an illegitimate hook being used to permit claims to be brought [in the UK] which would otherwise not be heard in the UK" (para 93). In response, the claimants argued that it was reasonable to try claims against both companies in the UK and, alternatively, the claimants would not have access to justice in Zambia (para 94).

Once again the decision of the court did not leave any ambiguity about the jurisdiction of an English court to hear the case about Zambian operations. It was first held that the claim against KCM undoubtedly had a real prospect of success (para 99). It was then established that the claim against Vedanta was arguable under both English and Zambian law (para 124). Furthermore, the judge ruled that it was reasonable for the court to try the claim against Vedanta, who, as a holding company of the group, had "the necessary financial standing to pay out any damages that are recovered" (para 146). Therefore, it was concluded that KCM was a necessary and proper party to the claim against Vedanta (para 147).

Finally, the court unconditionally established that England is the proper forum in which to bring the claim against KCM in accordance with the tests established by *The Spiliada* decision and *Connelly v RTZ* case. The judge decided that the assessment of England as the appropriate forum should be considered in light of

the claims against Vedanta (para 160). Following this conclusion, and the earlier finding of the real issue to be tried between the claimants and Vedanta, it was held that England is an appropriate place to hear the claims against two legal entities of the major international company (para 163). Moreover, it was established that the claimants would not obtain access to justice in Zambia should the trial take place there (para 184). In particular, the judge took into account evidence that the Zambian legal system is not well developed (para 176); that the vast majority of the claimants would be unable to afford legal representation (para 178); that there was an insufficient number of local lawyers able to proceed with a mass tort action of such scale (para 186); and that KCM will be likely to prolong the case (para 195).

D. Significance of the decision

The *Vedanta* decision represents another significant achievement for foreign victims and their lawyers struggling with the jurisdictional hurdles of foreign direct liability cases in the courts of the home states. Following decisions in such cases as *Connelly v RTZ, Lubbe v Cape* and *Ngcobo v Thor Chemicals,* the present case contributes to the development of the law relating to the jurisdiction of English courts over foreign violations of human rights by UK-based TNCs. First, the decision clearly confirmed the mandatory application of Article 4 in tort litigation concerning extraterritorial abuses of TNCs. The first tort liability claims in England were intensely litigated for several years on the *forum non conveniens* issue. However, the trial judge's insistence that *Owusu* decision constitutes a binding authority for all cases involving defendants domiciled in UK, now makes it more difficult for defendant corporations to mount arguments over inadmissibility of the extraterritorial adjudicatory jurisdiction over corporate overseas activities.

Secondly, although at this stage of the proceedings the judge did not consider the case on the merits, there is nonetheless acceptance that the parent company may be held responsible for the human rights abuses committed to the members of the community at the place where the subsidiary runs its operations. The judge considered the claimants' "single enterprise" submission about Vedanta being "the real architects of the environmental pollution" (para 78). Moreover, it was recognised that the argument that "Vedanta who are making millions of pounds out of the mine, […] should be called to account […] has some force" (para 78). The acknowledgement of the economic reality of the TNCs and the decisive role of

the parent corporation in the overseas operations of the subsidiary speaks in favour of the increasing awareness about the legal gaps in the international corporate accountability. However, a final determination of the liability of TNCs awaits in future decisions.

Another set of issues is raised by the court's reliance on the decision in *Chandler v Cape*. Despite the fact that the case did not have any foreign element, some commentators have already concluded that the ruling may have an influence in the context of TNCs. The reasoning of Mr Justice Coulson has left no doubts that *Chandler* should be considered as an authority for the resolution of the tort liability cases involving foreign operations of UK-based parent companies. Moreover, it was once again confirmed that invoking duty of care is strategically beneficial for the claimants since: (1) the claim against the parent company provides the required connecting factor of the claim with the UK; and (2) framing the case through the duty of care doctrine provides a means by which the extraterritoriality concerns may be addressed. These arguments are consistent with the judge's finding that arguing breach of the duty of care by the parent company "could have a direct impact on jurisdiction grounds" (para 44). This approach and claimants' success may result in an increase in foreign direct liability cases in the UK courts.

The judgement also provides interesting material for the analysis with respect to the evaluation of the patterns of corporate behaviour in the host states and weak remedies available for the victims of abuses in their states of residence. The judge put considerable weight on the findings about KCM's financial position. Evidence submitted by the claimants provided that there was a real risk that KCM on its own would be unable to meet the claims (para 24). Indeed, undercapitalisation of the subsidiary remains a significant risk for claimants in the tort litigation against TNCs. The limited liability principle in corporate law creates an incentive for shareholders to engage in high risk projects, which plausibly have the possibility to result in moral hazard. Specifically for mass tort actions involving TNCs, the obtainment of final judgment against a subsidiary with no real assets will effectively mean losing the case. By establishing the case against the parent company, the claimants automatically target a pool of assets that would not otherwise be available were litigation to be commenced against the subsidiary in the host state. The compensational nature of the foreign direct liability claims is what makes them most valuable for the claimants

To date English courts have been consistent in treating the parent company and the subsidiaries as distinct legal entities in the context of allocating responsibility within the corporate groups. Similarly, the case law did not derogate from the conventional concept of corporate legal form. However, the fact that Mr Justice Coulson considered the financial position of the subsidiary as raising "legitimate concerns" (para 82) while deciding on the jurisdiction over the parent company, coupled with the increasing number of cases against parent companies allowed in the courts of their home states, suggests that there may be a shift from the traditional approach to the nature of the corporate groups to the more realistic reflection of the economic reality of these complex structures.

Finally, the decision in *Vedanta* case to restrain from the policy judgement on the assessment of the Zambian legal system (para 198) is in line with the previous practice of the UK courts. First, in *Connelly v RTZ*, the House of Lords avoided making any assessment on the ability of the South African justice system to guarantee the claimants access to justice. Instead, its judgment focused on the personal ability of the claimant to obtain financial assistance of pursuing complex and expensive litigation. Later, in the *Lubbe v Cape* the House of Lords again decided to refrain from considering the influence of such public interest factors in the private interests of the parties and the ends of justice. Similarly, Mr Justice Coulson held that "criticism of the Zambian legal system" was not "the intention or purpose" of the judgement and, therefore, could not be regarded as "colonial condescension". Nevertheless, findings on the court about weak remedies available for the claimants in Zambia have been already questioned by Zambian President Edgar Lungu, which again raises the issue of judicial imperialism of the developed states through exercise of the extraterritorial jurisdiction over overseas operations of local TNCs.

Whether the English courts will take the ground breaking decision to rule that the parent company should be held liable for the overseas operations of its subsidiary is open to debate. It may not even be answered in this case, with settlement remaining a real possibility. Martin Day, a partner at the firm representing the Zambian farmers, has already called for the defendants to "engage in meaningful discussions and try to resolve these claims". An out-of-court settlement will again leave legal practitioners, academics and human rights activists without a single UK precedent on parent company liability in tort litigation against TNCs.

Publication book Resolving Mass Disputes

An interesting book entitled **Resolving Mass Disputes. ADR and Settlement of Mass Claims**, edited by Christopher Hodges (Centre for Social-Legal Studies, Oxford/Erasmus University Rotterdam) and Astrid Stadler (University of Konstanz/Erasmus University Rotterdam) has just been published (Edward Elgar, 2013).

The blurb reads:

> *The landscape of mass litigation in Europe has changed impressively in recent years, and collective redress litigation has proved a popular topic. Although much of the literature focuses on the political context, contentious litigation, or how to handle cross-border multi-party cases, this book has a different focus and a fresh approach.*
>
> *Taking as a starting-point the observation that mass litigation claims are a 'nuisance' for both parties and courts, the book considers new ways of settling mass disputes. Contributors from across the globe, Australia, Canada, China, Europe and the US, point towards an international convergence of the importance of settlements, mediation and alternative dispute resolution (ADR). They question whether the spread of a culture of settlement signifies a trend or philosophical desire for less confrontation in some societies, and explore the reasons for such a trend.*
>
> *Raising a series of questions on resolving mass disputes, and fuelling future debate, this book will provide a challenging and thought-provoking read for law academics, practitioners and policy-makers.*

Contributors include: I. Benöhr, N. Creutzfeldt-Banda, M. Faure, D.R. Hensler, C.

Hodges, J. Hörnle, J. Kaladjzic, X. Kramer, M. Legg, R. Marcus, A. Stadler, I. Tzankova, S. Voet, Z. Wusheng.

More information is available here.