Tort Litigation against TNCs in the English Courts

Ekaterina Aristova, a PhD in Law Candidate at the University of Cambridge, has made available on SSRN her article "Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction". Published earlier this month in the Utrecht Law Review the article discusses a recent trend of private claims alleging direct liability of parent companies for overseas human rights abuses ('Tort Liability Claims') focusing on the rules of civil jurisdiction applied by the English courts. It demonstrates how jurisdictional issues arising in Tort Liability Claims challenge the traditional value-neutralism paradigm of private international law as an abstract and technical disciplineby necessitating increasing involvement of domestic courts in the regulation of transnational corporations ('TNCs').

The author has kindly provided us with a brief summary of her key findings:

> *1) Tort Liability Claims are typically initiated in England by private partiesaffected by the activities of TNCs in the host (foreign) state.These arecivil liability cases in which the cause of actionagainst English-domiciled parent companiesis framed through the tort law concept of duty of carerather than the corporate law doctrine of piercing the corporate veil or customary international law on human rights. The allegations are based on the common law principles which provide that in certain circumstances the parent company may be found to have assumed a duty of care, owed to the claimants, to ensure their safety.The article explainsthat duty of care is invoked by the claimants in order to: (1) attribute liability for the overseas abuse to the parent company; (2) establish the necessaryterritorialconnection between the alleged tort and England; and (3) weaken the extraterritoriality concerns raised by the judgment of the English courtswith respect to the events occurred on the territory of the host(foreign)state.*
>
> *2) To date, the application of Brussels I and English common law by English courts to Tort Liability Claims has resulted in the development of a jurisdictional solution for claims brought against English-domiciled parent companies and their foreign subsidiaries as co-defendants. The concept of duty of care allows claimants to bring claims against English-domiciled parent*

companies as anchor defendants so as to allow the joinder of the foreign subsidiary as a necessary or proper party under common law. Following the CJEU's decision in Owusu, the general rule of domicile under Article 4 of Brussels I has a mandatory effect in the proceedings against English-domiciled parent company and claimants cannot rely onthe doctrine of forum non conveniens under English traditional rules. As a result, claims brought against foreign subsidiaries are also likely to survive the forum conveniencescontrol. The overall analysis of the rules of jurisdiction in this article suggests that: (1) claims against the English-domiciled parent company in relation to the overseas operations of its foreign subsidiary can be heard in the English courts; and (2) the existence of an arguable claim against an English-domiciled parent company also establishes jurisdiction of the English courts over the connected claims against the subsidiary even if the factual basis of the case occur almost exclusively in the foreign state.

3) One of the most recent successful attempts of foreign citizens to establish English jurisdiction over legal entities of TNC is litigation against English-based mining corporation Vedanta Resources Plc ('Vedanta') and its Zambian subsidiary Konkola Copper Mines ('KCM') in relation to the environmental pollution in Zambia resulting from the KCM's operations. Both the High Court (discussed by the author earlier on this blog) and the Court of Appeal (also refer to author's earlier post) confirmed that Zambian citizens can pursue in England claims against Vedanta and KCM. Decisions of the English courts inVedanta allow making few important observations. Firstly, if the parent company merely held shares in the capital of a foreign subsidiary this would not lead to the establishment of a duty of care and additional circumstances are required to conclude whether the parent company could be held responsible. Second, the parent's direct and substantial oversight of the subsidiary's operations in question, including specific environmental and technical deficiencies of the infrastructure in the host state, is likely to give rise to the duty of care. Third, engagement in a mini-trial on the substantive liability issues is not appropriate at the early jurisdictional stage of proceedings, before full disclosure of the relevant documents. Fourth, in the context of applying the 'necessary or proper party' gateway, the practical objectives of avoiding two trials on similar facts and events in different parts of the world outweigh the need for the existence of a territorial connection between England and the claim against a foreign subsidiary of the English-domiciled parent company.

4) Unlike in Vedanta, the foreign claimants in Okpabi v Shellfailed to establish jurisdiction of the English courts over claims against Royal Dutch Shell, an English-domiciled parent company ('RDS'), and its Nigerian operating subsidiary Shell Petroleum Development Company of Nigeria Ltd ('SPDC') for the ongoing pollution and environmental damage caused by the oil spills in Nigeria. In 2018, the Court of Appeal in a split decision concluded that the claimants had not established an arguable duty of care assumed by RDS in relation to SPDC's operations and that, hence, there was no real issue to be tried by RDS and the claimants. As a result, claims against RDS and SPDC were dismissed. The article criticises the Court of Appeal decision for two major shortcomings. First of all, it is submitted that the court took a highly restrictive approach for the imposition of the duty of care on English-domiciled parent companies in relation to the overseas activities of their subsidiaries. The second serious shortcoming of the Court of Appeal's majority decision in Okpabiis an unreasonably high burden on the claimants to establish an arguable case on the duty of care at the jurisdictional stage of proceedings. Arguably, such approach blurs the boundary between jurisdictional inquiry and resolution of the case on the merits.

5) Finally, the article also discusses the Anglo American Group litigation, where the South African claimants contended that they had suffered from silicosis and silico-tuberculosis in the course of their employment by AASA, the South African company. The claimants argued that the central administration of AASA was in London, since this was the location of Anglo American plc, its English-based parent company, and that it followed that AASA was domiciled in England under the meaning of Brussels I. The Court of Appeal, who defined 'central administration' as the place 'where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company's operations', declined to find that decisions of the English-domiciled parent company with respect to the operations of the group had any relevance in determining the domicile of the foreign subsidiary. As a result, it is challenging for the claimants in the Tort Liability Claims, if not impossible, to assert jurisdiction over a foreign subsidiary directly without also commencing proceedings against an English-domiciled parent company. The article further criticised Court of Appeal decision for the lack of jurisdictional analysis of the integrated nature of TNCs and their managerial organisation.

6) The overall conclusion of the article is that Tort Liability Claims offer the discipline an opportunity to reconsider its role of the neutral mediator in international litigation and contribute to the debate on international corporate accountability. Itis notargued that private international law should close the gap in group liability through unilateral transformation of judges into agents of justice by substituting the norms of public international law and substantive domestic law governing overseas operations of business actors. Rather,the disciplinemay engage where appropriate and the uniform rules of jurisdiction are capable of balancing the regulatory impact of these jurisdictional rules with its potential to cause inter-state jurisdictional conflicts.

Extraterritoriality: Outstanding Aspects (Contribution to a Collective Book)

Prof. Zamora Cabot has just made available on SSRN his contribution to the collective book *Implementing the UN Principles on Business and Human Rights. Private International Law Perspectives* (F. Zamora, L. Heckendorn, S. de Dycker, eds.), Shulthess Verlag, Zurich, 2017. The abstract reads as follows:

"For some time, the changing concept of extraterritoriality has been associated in a variety of ways with the international protection of Human Rights. It is, for example, linked to efforts to make the reparation mechanisms of the UN's Guiding Principles accessible. Similarly, the notion is relevant to the States' formal Extraterritorial Obligations (ETOS), which pressure States to fulfil the framework established in the International Covenant on Economic, Social and Cultural Rights. In both cases, the volume and quality of the technical contributions that have been produced are remarkable and worth taking into consideration.

In the context of this contribution and its focus on private international law, I will

however limit my remarks to this particular field. In Section I, I will address questions that are arising in the United States following the US Supreme Court's decision in the Kiobel case. Following that, in Section II, I will introduce a cross section of extraterritorial laws that particularly impact the fields under consideration here – corporations and human rights – before summing up with some concluding remarks."

(You can access to the ToC of the book itself here)

What protection for unaccompanied minors ? Colloquium in Paris on June 21

Thanks to Héloïse Meur, Lilia Aït Ahmed and Estelle Gallant for this post.

On June 21, 2018 a full-day colloquium will take place in Paris on the protection of unaccompanied minors at the former Courthouse. The colloquium will see the participation of prestigious speakers from institutions dealing with the issue of unaccompanied minors :

• French public authorities (French authority to protect human rights and civil liberties, French national consultative committee on human rights),
• French Supreme Court,
• The Paris Bar,
• Major civil associations (GISTI, ECPAT, La Cabane juridique),
• French and Belgian professors and Phd candidates in law and geography.

The speakers will discuss the root causes of the migration flows of unaccompanied minors, the limits of their treatment by French authorities, the difficulties to coordinate with other EU member States, and envisage the possible room for improvements, notably vis-à-vis what is done abroad, and especially in Belgium.

The program is available here. For registration send an email to

colloquemna@gmail.com.

Private-Public Divide in International Dispute Resolution. A 2017 Hague Lecture, Out Now

The 2017 Hague Lecture of Prof. Burkhard Hess, just published in the *Recueil des Cours*, addresses dispute resolution in international cases from the classical perspective of the private-public divide. This distinction is known in almost all legal systems of the world, and it operates in both domestic and in international settings. The main focus of the Lecture relates to overlapping remedies available under private international and public international law; it maps out the growing landscape of modern dispute resolution, where a multitude of courts and arbitral tribunals operating at different levels (domestic, international and transnational) is accessible to litigants in cross-border settings. Today, a comprehensive study of these developments is still missing. This Lecture does not aim to provide the whole picture, but focusses instead on some basic structures, revealing three main areas where the distinction between private and public disputes remains applicable today:

First, the divide delimitates the jurisdiction of domestic courts in cases against foreign states and international organisations (immunities); it equally limits the possibilities of foreign and international public entities to enforce public law claims in cross-border settings. As a matter of principle, public law claims cannot be brought before civil domestic courts of other states. However, this rule has been challenged by recent developments, especially by the private enforcement of (public) claims and by the cross-border cooperation of public authorities. Moreover, the protection of human rights and the implementation of the rule of law in cross-border constellations entail a growing need for a judicial control of

acta iure imperii – even if only by the courts of the defendant state.

The second area of application of the divide relates to the delineation between domestic and international remedies. In this field, the distinction has lost much of its previous significance because nowadays individual commercial actors may bring their claims directly (often assisted by experienced actors like litigation funders) before international arbitral tribunals, claims commissions and human rights courts. In this area of law, individuals' access to international dispute resolution mechanisms has been considerably reinforced. Here, Prof. Hess argues that it would be misleading to qualify parts of the current dispute resolution system as purely "commercial" and other parts as purely "public or administrative". There are revolving doors between the systems and the same procedures are often applied; what really matters is the proper delineation of different remedies which functionally protect the same interests and rights.

The third area relates to the privatization of dispute settlement, especially in the context of private ordering. At present, powerful stakeholders often regulate their activities *vis à vis* third parties (including public actors) by globalized standard terms. Pertinent examples in this respect are financial law (i.e. ISDA), the organization of the internet (i.e. ICANN) and sports law (i.e. CAS). In this context, there is a considerable danger that the privatization of law-making and of the corresponding dispute settlement schemes does not sufficiently respect general interests and the rights of third parties. A residual judicial control by independent (state) courts is therefore needed. Data protection in cyberspace is an interesting example where the European Union and other state actors are regaining control in order to protect the interests of affected individuals.

Finally, the Lecture argues that the private-public divide still exists today and – contrary to some scholarly opinions – cannot be given up. At the same time, one must be aware that private and public international law have complementary functions in order to address adequately the multitude of disputes at both the cross-border and the international level. In this context the private-public divide should be understood as an appropriate tool to explain the complementarity of private and public international law in the modern multilevel legal structure of a globalized world.

The Lecture has been published in vol. 388 of the *Recueil*, pg. 49-266. A pocket book will be available in the coming months.

Meanwhile, on the other side of the Atlantic…

Delaware's governor *John Carney* signed a bill prohibiting marriage before age 18, making it the first US state to ban all child marriage, on May 9, 2018. *Heather Barr* from Human Rights Watch has more on that topic here.

Towards an EU external strategy against early and forced marriages

The *Committee on Women's Rights and Gender Equality* of the European Parliament has, on 18 April 2018, adopted an opinion entitled "Towards an EU external strategy against early and forced marriages – next steps" (2017/2275(INI), PE616.622v03-00).

The Committee stresses that "child, early and forced marriage is a violation of the human rights enshrined in international standards such as the Beijing Declaration and Platform of Action, the International Conference on Population and Development Programme of Action and the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and which form part of the core principles embodied in the European Union as an area of security, freedom, justice and human rights, including women's and girls' rights". Although "child marriage is ingrained in some traditions and cultures, […] no culture or religion can justify such a practice, particularly when human rights and the rights of children are at stake." The Committee "[n]otes that many parents living in distress and extreme poverty in refugee camps feel the need to protect their daughters from the threat of sexual violence by marrying them to older men; stresses however that the EU and its Member States should be united

and consistent in their dismissal of the requests of refugees for legal recognition of marriages where one of the alleged spouses is a child or teenager; underlines that refugee status cannot be used as a legal backdoor to recognition of child marriages in Europe".

The full text of the opinion is available here. For a more detailed report, see here.

The Foundation of Choice of Law: Choice and Equality

The Foundation of Choice of Law: Choice and Equality by Dr Sagi Peari has been published by OUP recently. Please find the abstract below:

> *This book focuses on the subject of choice of law as a whole and provides an analysis of its various rules, principles, doctrines and concepts. It offers a conceptual account of choice of law, called "choice equality foundation" (CEF), which aims to flesh out the normative basis of the subject. The author reveals that, despite the multiplicity of titles and labels within the myriad choice of law rules and practices of the U.S., Canadian, European, Australian, and other systems, many of them effectively confirm and crystallize CEF's vision of the subject. This alignment signifies the necessarily intimate relationship between theory and practice by which the normative underpinnings of CEF are deeply embedded and reflected in actual practical reality.*
>
> *Among other things, this book provides a justification of the nature and limits of such popular principles as party autonomy, most significant relationship, and closest connection. It also discusses such topics as the actual operation of public policy doctrine in domestic courts, and the relation between the notion of international human rights and international commercial dealings, and makes some suggestions about the ability of traditional rules to cope with the advancing challenges of the digital age and the Internet.*

Please click to download the Flyer.

International Law Association: Biennial Conference in Sydney and Annual Meeting of the German Branch

In 2018, the Australian Branch of the International Law Association (ILA) will be hosting the biennial ILA conference. The conference, which is being held in Sydney, Australia, from 19-24 August 2018, is a major international event that will bring together hundreds of judges, academics, practitioners and officials of governments and international organisations from all around the globe. To register please follow this link. Please note that he *early bird rate* is available until **31 May 2018.** The *draft* conference programme is now available on the ILA website here.

The German branch of the ILA will hold its annual meeting on 22 June, 2018, in Frankfurt (Main). This year's topic is „International Dispute Resolution in Times of Crisis". The list of distinguished speakers will include the Vice-President of the European Court of Human Rights, Professor Dr. *Angelika Nußberger* (Strasbourg/Cologne), Professor Dr. *Giesela Rühl* (University of Jena), and Professor Dr. *Stephan Schill* (University of Amsterdam). You may find the full programme and further information here.

The ILA was founded in Brussels in 1873. Its objectives, under its Constitution, are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law". The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies. For further information and a welcome address from ILA chairman *Lord Mance*, please click here.

Krombach: The Final Curtain

Readers of this blog may be interested to learn that the well-known (and, in many ways, quite depressing) *Krombach/Bamberski* saga appears to have finally found its conclusion with a decision by the European Court of Human Rights (*Krombach v France*, App no 67521/14) that was given yesterday.

Krombach – who, after having been convicted for killing his stepdaughter, had successfully resisted the enforcement of the French civil judgment in Germany (Case C-7/98 *Krombach*) and, equally successfully, appealed the criminal sentence (*Krombach v France*, App no 29731/96), before he had famously been kidnapped, brought to France, and convicted a second time – had brought a new complaint with regard to this second judgment. He had argued that his conviction in France violated the principle of *ne bis in idem* (as guaranteed in Art 4 of Protocol No 7) since he had previously been acquitted in Germany with regard to the same event.

Yesterday, the Court declared this application inadmissible as Art 4 of Protocol No 7, according to both its wording and the Court's previous case law, 'only concerned "courts in the same State"' (see the English Press Release).

> *[35.] … [L]a Cour constate que cette thèse [du requérant] se heurte aux termes mêmes de l'article 4 du Protocole no 7, qui renvoient expressément au « même État » partie à la Convention plutôt qu'à tout État partie à la Convention. …*
>
> *[36.] La Cour a ainsi jugé avec constance que l'article 4 du Protocole no 7 ne visait que les « juridictions du même État » et ne faisait donc pas obstacle à ce qu'une personne soit poursuivie ou punie pénalement par les juridictions d'un État partie à la Convention en raison d'une infraction pour laquelle elle avait été acquittée ou condamnée par un jugement définitif dans un autre État partie … .*

It also pointed out that 'the fact that France and Germany were members of the European Union did not affect the applicability of Article 4 of Protocol No. 7'

(ibid).

> *[38.] La Cour estime par ailleurs que la circonstance que la France et l'Allemagne sont membres de l'Union Européenne et que le droit de l'Union européenne donne au principe ne bis in idem une dimension trans-étatique à l'échelle de l'Union européenne … est sans incidence sur la question de l'applicabilité de l'article 4 du Protocole no 7 en l'espèce.*

The Strasbourg Court thus appears to have added the final chapter to a case that has occupied the courts in Germany, France, and Luxembourg for almost 35 years, raising some pertinent questions as to mutual trust and judicial corporation in the process.

Now online: Report on the IC²BE Workshop on Setting up a European Case Law Database

On 26 February 2018, a well-attended, high-level workshop on the organization of databases on European civil procedural law took place at the Max-Planck-Institute (MPI) Luxembourg that was organized by Prof. Dr. Dr. h.c. *Burkhard Hess* and our fellow conflictoflaws.net-editor Prof. Dr. *Marta Requejo Isidro*.

The event gathered contributions of experts from the European Commission, the European Court of Human Rights and the Court of Justice of the European Union. The workshop was part of a research project in which the MPI is participating together with major European Universities (Antwerp, Complutense, Freiburg [coordinator], Milan, Rotterdam, Wroclaw), the so called IC²BE study (Informed Choices in Cross-Border Enforcement). The final aim of this endeavor is to assess the working in practice of the "second generation" of EU regulations on procedural law for cross-border cases, i.e., the European Enforcement Order, Order for Payment, Small Claims (as amended by Regulation [EU] 2015/2421) and

the Account Preservation Order Regulations. *Marta Requejo Isidro* has written a detailed report on the workshop that is available at the MPI's website here.