Suing TNCs in the English courts: the challenge of jurisdiction

By Ekaterina Aristova, PhD in Law Candidate, University of Cambridge

On 26 January 2017, Mr Justice Fraser, sitting as a judge in the Technology and Construction Court, ruled that a claim against Royal Dutch Shell plc, an English-domiciled parent company ("**RDS**"), and its Nigerian operating subsidiary Shell Petroleum Development Company of Nigeria Ltd ("**SPDC**") will not proceed in the English courts. These proceedings represent one of the many private claims brought by the foreign citizens in the courts of the Western states alleging direct liability of parent companies for the overseas human rights abuses. Despite an increased number of such foreign direct liability cases in the English courts, the issue of jurisdiction still remains one of the principle hurdles faced by the claimants and their lawyers in pursuing civil litigation against transnational corporations ("**TNCs**") outside the territory of the state where main events leading to the alleged crime took place and damage was sustained.

Last year, Mr Justice Coulson allowed a legal claim against English-based mining corporation Vedanta Resources plc and its Zambian subsidiary to be tried in England. The overall analysis of the judgement in *Lungowe v Vedanta Resources plc* suggested that (i) the claims against the parent company in relation to the overseas operations of the foreign subsidiary can be heard in the English courts; and (ii) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state. Although Mr Justice Fraser has not questioned any of the conclusions reached by his colleague, he made it very clear that establishing an arguable claim on the liability of the English-domiciled parent company for the foreign operations of its overseas subsidiary is a challenging task.

The claimants in *Okpabi v Shell* were Nigerian citizens who commenced two sets of proceedings against RDS and SPDC. The first claim was brought on behalf of the Ogale community, while the second was initiated by the inhabitants of the Bille Kingdom in Nigeria. Both claims alleged serious and ongoing pollution and environmental damage caused by oil spills arising out of the Shell operations in

and around the claimants' communities. The claimants argued that RDS breached the duty of care it owed to them to ensure that SPDC's operations in the Niger Delta did not cause harm to the environment and their communities. The claims against SPDC were brought on the basis that it was a necessary or proper party to the proceedings against RDS. The defendants argued that both claims have nothing to do with England and should proceed in Nigeria. They claimed that RDS was used as an "anchor defendant" and a device to ensure that the real claim against SPDC was also litigated in England.

Mr Justice Fraser has responded to these arguments by raising several questions which should have been answered in order to assert jurisdiction of the English courts over both claims (at [20]). It was agreed by both of the parties that the principal question was whether the claimants had legitimate claims in law against RDS. In the opinion of the judge, the claimants failed to provide evidence that there was any duty of care upon RDS as an ultimate holding company of the Shell Group for the acts and/or omissions of SPDC, and the claims against RDS should not proceed (at [122]). In the absence of the proceedings against RDS, the claims against SPDC did not have any connection with the territory of England as they were brought by the Nigerian citizens against Nigerian company for the breach of Nigerian law for acts and omissions in Nigeria (at [119]). Hence, application of SPDC also succeeded (at [122]).

Analysis of the Shell Group corporate structure and its relevance to the existence of the duty of care of the parent company represents the core of the judgement. The judge relied on the fact that RDS was a holding company with no operations whatsoever (at [114]). He took into account that only two officers of RDS were members of the Executive Committee of the Shell Group; RDS only dealt with the financial matters of the group's business that affect it as the ultimate holding company; it did not hold any relevant license to conduct operations in Nigeria; and it did not have specialist knowledge on the oil exploration (at [114-116]). Mr Justice Fraser noted that evidence on the part of the claimants was "extremely thin" and "sketchy" (at [89]). The claimants heavily relied on the public statements by RDS regarding control over SPDC and environmental strategy of the Shell Group (at [99]). The judge did not consider that such evidence could alone demonstrate that RDS owed a duty of care to the claimants. Mr Justice Fraser stated that separate legal personality of the constituent entities of corporate group represents a fundamental principle of English law (at [92]) and

claimants failed to provide evidence of high degree of control and direction by RDS sufficient to meet the three-fold test on the existence of duty of care set by *Caparo Industries plc v Dickman* and clarified by *Chandler v Cape*.

The judgment raises several sets of issues. First of all, it clearly confirmed the dominance of the entity-based approach to the nature of TNCs. It was established that certain powers of RDS such as adoption of the group policies does not alone put it in any different position than would be expected of an ultimate parent company (at [102, 106]). In this sense, decision of Mr Justice Fraser is in line with previous practice of the UK courts on the rules of jurisdiction in cases involving TNCs. Thus, in *Young v Anglo American South Africa Limited*, the Court of Appeal ruled that the powerful influence of the parent company does not by itself causes legal consequences, and should not have any impact on the determination of the domicile of the subsidiaries. Secondly, the judge argued that any references to Shell and Shell Group made by RDS in public statements do not dilute the concept of separate legal personality. This finding is of utmost importance since "common legal persona" is often considered to be not only a particular feature of TNC itself but the factor evidencing that parent company and the subsidiary operate as a single economic unit.

Moreover, attention should be paid to the note of warning expressed by Mr Justice Fraser with respect to the scale of the litigation against Shell. It was stated that approach of the parties to produce an extensive amount of witness and expert statements, authority bundles and lengthy skeleton arguments is "wholly self-defeating and contrary to cost-efficient conduct of litigation" (at [10]). It is inevitable, however, that mass tort actions against TNCs raise a number of complex legal and factual issues which require examination of the considerable amount of evidence, authorities and data. Given the fact that UK Parliament is currently in the process of Human Rights and Business inquiry, including access to effective remedy in the UK, the burden of litigation against TNCs on the English courts could easily become a policy argument.

The judgement in *Okpabi v Shell* definitely has an impact on the development of the tort litigation against TNCs in the English courts. Amnesty International has suggested that it "gives green light for corporations to profit from overseas abuses". Although the judge did not fundamentally challenged the *Vedanta* decision, the strict adherence to the entity-based legal concepts suggests that the novel foreign direct liability cases are still far from advancing to the new level.

Leigh Day, solicitors representing the Nigerian communities, have already confirmed that their clients will appeal the decision of Mr Justice Fraser. Even if the Court of Appeal reverses the ruling, the claimants would still struggle in establishing direct liability of the parent company for environmental pollution in Nigeria, since the jurisdictional test is easier to meet as opposed to a liability one. It has become known that *Vedanta* decision is itself being appealed by the corporate defendants. In any case, 2017 promises to be a momentous year for the victims of corporate human rights abuses looking at the English courts as their last hope for justice.

Supreme Court of Latvia: Final Outcome of "flyLAL Lithuanian Airlines"

By Baiba Rudevska

On 23 October 2014 the European Court of Justice (hereinafter referred to as the "ECJ") delivered its judgment in the case "**flyLAL Lithuanian Airlines AS v. Starptautiska lidosta Riga VAS (Riga International Airport)**" (C-302/13). The request for a preliminary ruling was made by the Supreme Court of Latvia (*Latvijas Republikas Augstaka tiesa*) in proceedings concerning recognition and enforcement of a Lithuanian court's judgment (ordering provisional and protective measures) in the territory of Latvia. This request concerned the interpretation of Articles 1, 22(2), 34(1) and 35(1) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

The ECJ answered the questions in the following way:

- Article 1(1) of the Brussels I Regulation must be interpreted as meaning that an action seeking legal redress for damage resulting from alleged infringements for EU competition law, **comes within the notion of**

"civil and commercial matters";

- Article 22(1) must be interpreted as meaning that an action seeking legal redress for damage resulting from alleged infringements of EU competition law, **does not constitute proceedings** having as their object the validity of the decisions of organs of companies within the meaning of that provision;
- Article 34(1) must be interpreted as meaning that **neither** the detailed rules for determining the amount of the sums which are the subject of the provisional and protective measures granted by a judgment in respect of which recognition and enforcement are requested, **nor** the mere invocation of serious economic consequences constitute grounds for refusal of recognition and enforcement of a judgment based on **public policy** of the Member State in which recognition is sought.

On 20 October 2015 the Supreme Court of Latvia delivered its decision (which is final) in this case (No SKC 5/2015) deciding neither to recognise nor to enforce the judgment of the Lithuanian court in Latvia (two lower courts of Latvia had previously decided to recognise and to enforce the judgment). The legal ground for the non-recognition was the *public policy* clause of Article 34(1) of the Regulation.

Let us look at the main reasoning of the Supreme Court of Latvia in this case.

Reasoning No 1 (Article 1 of the Constitution of the Republic of Latvia)**: State security**. The defendant, "*Starptautiska lidosta Riga*" ("Riga International Airport"), also owns a property which is necessary for the purpose of the Latvian state security. If the judgment of the Lithuanian court is recognised and enforced in Latvia, then the preventive attachment order regarding this property will probably be enforced. From Article 1 of the Constitution of the Republic of Latvia it follows that property which is necessary for the state security interests cannot be transferred or subject to a private law burden that might, even hypothetically, hinder, weaken or otherwise threaten the fulfilment of the State functions in guaranteeing the security of the State and the society.

Reasoning No 2 (Article 91 and 105 of the Constitution of the Republic of Latvia)**: the insolvent Lithuanian company**. The Lithuanian company "flyLAL Lithuanian Airlines" is an insolvent company which has lodged a claim for an amount of EUR 58,003,824. This company has no property or assets to

compensate the defendant's possible losses in the case if the claim later appears to be unsubstantiated. This creates an important disproportion of rights and of the provisional and protective measures applied in the case. Such possible damages sustained by the defendant may seriously endanger not only its economic activities but even its existence as a company.

Additional reasoning (Article 91 and 105 of the Constitution of the Republic of Latvia)**: the length of the main proceedings before the Lithuanian court.** The Lithuanian court had issued an order for sequestration, on a provisional and protective basis, of the movable/immovable assets and property rights of "Air Baltic" and "*Starptautiska lidosta Riga*" ("Riga International Airport") seven years ago; until now the case has not yet been resolved and there is no further information about when this case could be resolved. For the provisional and protective measures this period of time is too long and might aggravate the violation of the defendant's property rights in this case. As the Lithuanian company is insolvent, there cannot be an adequate protective measure to secure the payment of damages. It can be considered as a potentially disproportionate interference with the defendant's property rights within the meaning of Articles 91 and 105 of the Latvian Constitution

In this case, the Supreme Court of Latvia has established that, **firstly**, state security constitutes one of the most important elements of the public policy of Latvia (Article 1 of the Constitution); **secondly**, fundamental rights laid down in the Constitution of the Republic of Latvia also is a part of the Latvian public policy. In this case these were the equal rights of the parties before the law and the courts (Articles 91 and 105 of the Constitution). For this reason such a judgment of the Lithuanian court is manifestly contrary to the Latvian public policy. Therefore the recognition and enforcement of the Lithuanian judgment in Latvia must be denied on the basis of Article 34(1) of the Brussels I Regulation.

For information:

Constitution of the Republic of Latvia:

Article 1 – "Latvia is an independent democratic republic".

Article 91 – "All human beings in Latvia shall be equal before the law and the

courts. Human rights shall be realised without discrimination of any kind".

Article 105 – "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation".

26th Meeting of the European Group for Private International Law, Milan 2016

Many thanks to Hans van Loon for this piece of information.

At its 26th meeting, which took place in Milan last September, the European Group on Private International Law worked further on the establishment of common rules of conflict of laws in company law, on the basis of the achievements of the Florence and Luxembourg meetings. As a result the Draft rules on the law applicable to companies and other bodies were agreed upon.

Moreover, a *Resolution on the Commission Proposal for a recast of the Brussels IIa Regulation, concerning parental responsibility and child abduction* was adopted to support the Commission proposal of 30 June 2016 for a recast of the *Brussels II a* Regulation.

Besides a exchange of information on the current state of law of the Union, the Hague Conference and the the jurisprudence of the European Court of Human Rights took place. Finally, various papers were presented on the evolution of Italian civil union law, on the impact of the Brexit on private international law, on the follow-up to the Luxembourg Resolution concerning the legal status of

applicants for international protection, and on the principles of interpretation of uniform substantive law.

The report was elaborated in collaboration with Marie Dechamps, Faculty of Law and Criminology of the Catholic University of Louvain, and can be fully read here.

Young Scholars' PIL Conference: "Politics and Private International Law (?)" – Program

The following invitation regarding the upcoming young scholars' PIL conference in Bonn 2017 (see our previous post here) has been kindly provided by Dr. Susanne Gössl, LLM (Tulane), University of Bonn.

We cordially invite all young scholars interested in questions of Private International Law (PIL) to the first young scholars' PIL conference which will be held on April 6th and 7th 2017 at the University of Bonn.

The conference will be held in German.

The general topic will be

Politics and Private International Law (?)

As our call for papers elicited a large number of highly qualified and interesting responses, selecting the presentations for the conference programme was not easy. In a double-blind peer review procedure, we finally identified nine contributions leading to the following program:

Thursday, 6 April, 2017

2:00 pm: welcome

2:15 pm: opening address

Prof. em. Dr. Dagmar Coester-Waltjen, LL.M. (Mich.), University of Göttingen

3:00 pm: Panel I – Arbitration

3:00 pm: Politics Behind the "ordre public transnational" (Focus ICC Arbitral Tribunal)
Iina Tornberg, Helsinki

3:30 pm: Between Unleashed Arbitral Tribunals and European Harmonisation: The Rome I Regulation and Arbitration
Masud Ulfat, Marburg

4:00 pm: The Applicable Law in Arbitration Proceedings – A *responsio*
Dr. Reinmar Wolff, Marburg

4:10 pm: discussion

4:40 pm: coffee break

5:00 pm: Panel II – Procedural Law and Conflict of Laws/Substantial Law

5:00 pm: How Does the ECJ Constitutionalize the European PIL and International Civil Procedure? Tendencies and Consequences
Dominik Düsterhaus, Luxemburg

5:30 pm: Proceedings in a Foreign forum derogatum, Damages in a Domestic forum prorogatum – Fair Balancing of Interests or Unjustified Intrusion into Foreign Sovereignty?
Dr. Jennifer Lee Antomo, Mainz

6 pm: discussion (until ca. 6:30 pm)

8:00 pm: dinner

Friday, 7 April, 2017

9:30 am: opening

9:45 am: Panel III – Protection of Individual Rights and Conflict of Laws

9:45 am: Private International Law and Human Rights – Questions of Conflict of Laws Regarding the Liability for "Infringements of Human Rights"

Friederike Pförtner, Konstanz

10:15 am: Cross-Border Immissions in the Context of the Revised Hungarian Regulation for Private International Law
Reka Fuglinszky, Budapest

10:45 am: discussion

11:15 am: coffee break

11:45 am: Panel IV – Public Law and Conflict of Laws

11:45 am: Long Live the Principle of Territoriality? The Significance of Private International Law for the Guarantee of Effective Data Protection
Dr. Martina Melcher, Graz

12:15 pm: Economic Sanctions in Private International Law
Dr. Tamás Szabados, Budapest

12:45 pm: discussion

1:15 pm: final discussion and conclusion of the conference

ca. 2:00 pm: closing

Participation is free, but a registration is required.

In order to register for the conference, please use this link: https://nachwuchstagungipr.typeform.com/to/qy1Obh. The registration deadline is February 28th 2017. Please be aware that the number of participants is limited and registrations will be processed in the order in which they are received. For reserving a hotel from our hotel contingent, please use the following link (http://www.bonn-region.de/events/nachwuchs-ipr.html).

For more information, please visit https://www.jura.uni-bonn.de/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/ipr-tagung/.

If you have any further questions, please contact Dr. Susanne Gössl (sgoessl@uni-bonn.de).

We are looking forward to welcoming many participants to a lively and thought-provoking conference!

Yours faithfully,
Susanne Gössl, Rafael Harnos, Leonhard Hübner, Malte Kramme, Tobias Lutzi, Michael Müller, Caroline Rupp, Johannes Ungerer

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Fourth Issue of 2015's Rivista di diritto internazionale privato e processuale – Proceedings of the conference "For a New Private International Law" (Milan, 2014)

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

- The fourth issue of 2015 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released.

This issue of the Rivista features the texts – updated and integrated with a comprehensive bibliography – of the speeches delivered during the conference "For a New Private International Law" that was hosted at the University of Milan in 2014 to celebrate the Rivista's fiftieth anniversary.

The speeches have been published in four sections, in the order in which they were delivered.

The first section, on "**Fundamentals of Law No 218/1995 and General Questions of Private International Law**", features the following contributions:

Fausto Pocar, Professor Emeritus at the University of Milan, **'La *Rivista* e**

l'evoluzione del diritto internazionale privato in Italia e in Europa' (The *Rivista* and the Evolution of Private International Law in Italy and Europe; in Italian).

> *Fifty years after the foundation of the Rivista, this article portrays the reasons that led to the publication of this journal and its core features, in particular its unfettered nature and the breadth of its thought with respect to the definition of private international law. In this regard the Rivista – by promptly drawing attention to the significant contribution provided by the law of the European Union in the area of jurisdiction and conflict of laws – succeeded in anticipating the subsequent developments, which resulted in the impressive legislation of the European Union in the field of private international law since the entry into force of the Treaty of Amsterdam in 1999. These developments have significantly affected the Italian domestic legislation as laid down in Law No 218 of 1995. As a result of such impact, the Italian system of private international law shall undergo a further revision in order to harmonize it with the European legislative acts, as well as with recent international conventions adopted in the framework of the Hague Conference on Private International Law, to which the European Union – a Member of the Conference – is party.*

Roberto Baratta, Professor at the Scuola Nazionale dell'Amministrazione, **'Note sull'evoluzione del diritto internazionale privato in chiave europea'** (Remarks on the Evolution of Private International Law in a European Perspective; in Italian).

> *National sovereignties have been eroded in the last decades. Domestic systems of conflict of laws are no exceptions. While contributing with some remarks on certain evolving processes that are affecting the private international law systems, this paper notes that within the EU – however fragmentary its legislation in the field of civil justice may be – the erosion of national competences follows as a matter of course. It then argues that the EU points to setting up a common space in which inter alia fundamental rights and mutual recognition play a major role. Thus, a supranational system of private international law is gradually being forged with the aim to ensure the continuity of legal relationships duly created in a Member State. As a result, domestic systems of private international law are deemed to become complementary in character. Their conceptualization as a kind of inter-local rules, the application*

of which cannot raise obstacles to the continuity principle, appears logically conceivable.

Marc Fallon, Professor at the Catholic University of Louvain, **'La révision de loi italienne de droit international privé au regard du droit comparé et européen des conflits de lois'** (The Recast of the Italian Private International Law with Regard to Comparative and European Conflict of Laws; in French).

The comparison of the present state of Italian choice-of law rules with the overall revision process at stake abroad and with the new European Union policy in civil matters shows the need for a profound recast, in particular in family law matters. First, several European and international instruments have precedence over national rules, namely in the field of parental responsibility, divorce, maintenance obligations, succession, and shortly matrimonial property. Due to their universal application, these instruments leave no place to national choice-of law rules in the subject matters falling into their scope. Second, a recast of the Italian rules on private international law would give the opportunity to adapt some current rules to new values and objectives. For example, the Kegel's ladder giving priority to nationality as a connecting factor should be inverted, giving priority to habitual residence. To achieve such result, a small group of scholars representative of the main ·streams in Italian private international law should prepare a draft and persuade political stakeholders that updating national law promotes legal certainty and a positive image of society. The European context of the approximation of choice-of-law rules should not withhold them from starting such project, so long as the Union delays the adoption of a globalized private international law code. On the other hand, one must be aware of the changing nature of law in modern society, and accept that enacting new rules requires a continuous reappraisal process.

Hans van Loon, Former Secretary General of the Hague Conference on Private International Law, **'The Transnational Context: Impact of the Global Hague and Regional European Instruments'** (in English).

As a result of the growing impact of global and EU choice of law instruments, modern private international law statutes in Europe increasingly tend to have a "layered" structure, with norms derived from (1) global (Hague) and (2) regional (EU) instruments, completed by supplementary, or residual (3)

domestic private international law rules. Law No 218/1995 already gives prominence to international conventions (Article 2), to which the new law should obviously add EU regulations. Consideration might be given to the inclusion by reference in the new law of three Hague Conventions not yet ratified by Italy (on the Recognition of the Validity of Marriages, Protection of Adults and Access to Justice). This would enhance certainty, predictability and respect for private rights in cross-border situations. The new law should maintain the method of incorporation by reference to regional and global instruments. Currently such references are few in number, but in the new law they are bound to expand considerably. This article discusses how the reference method could best be applied to, on the one hand, instruments on applicable law, and, on the other, instruments on jurisdiction, recognition and enforcement of decisions as well as administrative cooperation. As globalization and regional integration unfold, Italy will be facing many more foreign decisions and situations created abroad than foreseen in the 1995 Law. Articles 64 and following probably go a long way to respond to this challenge in respect of foreign decisions. In respect of foreign legal situations – not established or confirmed by a judicial or administrative decision – Article 13 of the Law No 218/1995 on renvoi may have been thought of a way of facilitating the task of the Italian authorities and of bringing international harmony. But, partly as a result of the growing weight of international and regional instruments which generally reject renvoi, this technique tends to become an anomaly in modern private international law codes. Instead, other ways of introducing the flexibility needed might be considered, such as Article 19 of the Belgian Code on Private International Law, or Article 9 Book 10 of the Dutch Civil Code.

The second section, on "**Personal Status**", features the following contributions:

Roberta Clerici, Professor at the University of Milan,**'Quale futuro per le norme della legge di riforma relative allo statuto personale?'**(Which Future for the Provisions on Personal Status of the Italian Law Reforming the Private International Law System?; in Italian).

Since its first year of publication, the Rivista has devoted ample space to the personal status of the individual (including the right to a name), family matters, maintenance obligations and successions. In fact, both the relevant international treaties and the Italian provisions, including of course those laid

down in Law No 218 of 31 May 1995 reforming the Italian private international law system – which has introduced significant modifications especially in the aforementioned areas of the law – were examined and commented. However, the regulations of the European Union and the international conventions that entered into force after the adoption of the Italian law reforming private international law designate habitual residence as the principal connecting factor. One may therefore wonder whether nationality, which is the connecting factor laid down in most of the provisions in Law No 218/1995, should not be replaced with that of habitual residence. An additional question stems from the "incorporation" in Law No 218/1995 of the 1961 Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (Article 42 of Law No 218/1995) and of the 1973 Hague Convention on maintenance obligations (Article 45 of Law No 218/1995), which have been replaced by the 1996 Hague Convention and the 2007 Protocol, respectively. With respect to the 1961 Hague Convention, a legislative proposal is currently being discussed, however it raises some questions concerning interpretation. The same proposal puts forth a general provision on the replacement of the "nationalized" Conventions with the new Conventions ratified by the European Union. However, quite surprisingly, the proposal does not mention the regulations of the European Union that have replaced other conventions that are referred to in Law No 218/1995.

Alegría Borrás, Professor Emeritus at the University of Barcelona,**'La necessità di applicare strumenti convenzionali e dell'Unione europea: l'ambito della persona, della famiglia e delle successioni. La situazione spagnola e quella italiana a confronto'** (The Need to Apply International and European Union Instruments: Persons, Family, and Successions. A Comparison between the Italian and Spanish Systems; in Italian).

This article examines the characteristics and evolution of the Spanish system of private international law in questions related to persons, family and successions taking into account the need to apply European Union instruments and international Conventions. The main points addressed in this article are related to the absence of a law of private international law and the fact that Spain has a non-unified legal system.

Luigi Fumagalli, Professor at the University of Milan**, 'Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni : spazi residui per la legge interna?'** (The Italian System of Private International and Procedural Law and Regulation (EU) No 650/2013 on Successions: Is There Any Room Left for the Italian Domestic Provisions?; in Italian).

> *Regulation No 650/2012 has a pervasive scope of application, as it governs, in an integrated manner, all traditional fields of private international law: jurisdiction, governing law, recognition and enforcement of foreign judgments. As a result, the entry into force of the Regulation leaves little, if any, room for the application of domestic legislation, and chiefly of the provisions of Law No 218/1995, in the same areas. With respect to jurisdiction, in fact, an examination of the rules in the Regulation shows that they apply every time a dispute in a succession matter is brought before a court in a Member State: no room therefore remains for internal rules, which, as opposed to the situation occurring with respect to Regulation No 1215/2012, cannot ground the exercise of jurisdiction in the circumstances in which the Regulation does not apply: not even the Italian rule on lis pendens seems to apply to coordinate the exercise of Italian jurisdiction with the jurisdiction of non-Member State. The same happens with respect to the conflict-of law rules set by the Regulation, since they have a universal scope of application. The only remaining area in which internal rules may apply is therefore that concerning the recognition and enforcement of decisions rendered in non-Member States. The opportunity for a revision of internal rules is therefore mentioned.*

Costanza Honorati, Professor at the University of Milan**–**Bicocca, **'Norme di applicazione necessaria e responsabilità parentale del padre non sposato'** (Overriding Mandatory Rules and Parental Responsibility of the Unwed Father; in Italian).

> *The recently enacted Italian Law on the Status Filiationis (Law No 219/2012 and subsequent Legislative Decree No 154/2013) inserts a new PIL rule stating that the principle of shared parental responsibility is mandatory in nature (Article 36-bis). While in the Italian legal system such principle is rooted in the principle of non discrimination among parents, the situation appears to be more controversial in other legal systems, especially in regards of the unmarried*

father. Several decisions of the ECtHR (from Balbotin to Sporer) have indeed declared the legitimacy of the different treatment for the unmarried father, as long as he has the possibility to claim such right before a judicial court. In the light of the same value underlying these different approach to parental responsibility – to be found in the aim to pursue the best interest of the child in each given case – the present paper questions the opportunity of the new Article 36-bis of the Italian PIL and reflects on the effects of the subsequent Italian ratification of the 1996 Hague Convention.

Carlo Rimini, Professor at the University of Milan**, 'La rifrazione del conflitto familiare attraverso il prisma del diritto internazionale privato europeo'** (The Refraction of Family Conflict through the Prism of the European Private International Law; in Italian).

The prism built up by the European Regulations relating to family law has the effect to refract the family conflict in several different aspects that are supposed to be dealt before different courts and with different laws. As a matter of facts, the rules concerning jurisdiction and applicable law do not have the aim to concentrate (or to try to concentrate) the whole conflict arising from the family's crisis in the hands of a single judge who applies a single law. This choice has large costs both for the parties who needs to have lawyers in each jurisdiction involved, and for the efficiency of the legal system. Moreover, it often leads to an irrational and unfair solution of the family conflict. This is especially evident dealing about the patrimonial effects of the family's breaking.

Ilaria Viarengo, Professor at the University of Milan**, 'Sulla disciplina degli obblighi alimentari nella famiglia e dei rapporti patrimoniali tra coniugi'** (On the Regulation of Family Maintenance Obligations and Matrimonial Property; in Italian).

This article examines the provisions of the Italian Private International Law Act (Law 31 May 1995 No 218) on maintenance obligations and matrimonial property regimes. It analyses these provisions in the prospect of a possible reform of Law No 218/1995. With particular regard to maintenance obligations, currently regulated by a common harmonized system of conflicts of law rules, this article underlines how Article 43 of Law No 218/1995, which refers to the 1973 Hague Convention, appears to be no longer relevant. With respect to

matrimonial property, a new EU regulation is forthcoming, which will replace the current Article 30 of Law No 218/1995. In this regard, this article examines the amendments deemed to be necessary in the Italian law in the view of the new Regulation, focusing in particular on the need to protect the interests of third parties.

Franco Mosconi, Professor Emeritus at the University of Pavia, **'Qualche considerazione in tema di matrimonio'** (Some Remarks on Marriage; in Italian).

Assuming that no revolutionary change is foreseen in the approach of the Italian legal system regarding same sex marriages – also in light of the case law of the Corte Costituzionale and the European Court of Human Rights – this paper considers several issues bound to arise from foreign same sex marriages. The paper also criticizes the excessive competitive character of some States' legislation in favour of same sex marriages.

The third section, on "**Companies, contractual and non-contractual obligations**", features the following contributions:

Riccardo Luzzatto, Professor Emeritus at the University of Milan, **'Introduzione alla sessione: Società, obbligazioni contrattuali ed extracontrattuali'** (Opening Remarks: Companies, Contractual and Non-Contractual Obligations; in Italian).

The fiftieth anniversary of the Rivista provides an important opportunity to share some thoughts to the current status of the law in this complex sector of the conflict of laws, with particular regard to the prevailing situation in Italy. Actually, this anniversary prompts to consider the present status of the law in comparison with that existing at the time when the Rivista was first published, i.e. fifty years ago. From this point of view it is certainly appropriate to qualify the changes occurred in this period as a true conflict-of laws revolution, borrowing an expression frequently used with reference to the United States. The Italian revolution originates from two different factors: the adoption in 1995 of a new Act on private international law and the massive intervention of European Community law into this sector of the legal systems of the Member States. The problems faced by the lawmaker, the judge and any other

interpreter are as a consequence rather complex. The national, domestic character of the rules of private international law has not been cancelled by the new powers conferred to the EU institutions by the Treaty of Amsterdam, thus obliging to carefully review and determine the relationship and reciprocal interferences of national and supranational sources in any given field where European common rules have been enacted. This is a necessary, but complex exercise that cannot be avoided, and can bring to very different results depending on the specific features of the legal institutions under consideration. Two interesting and significant examples are offered by the subject matters considered in this Session, i.e. the law of companies and other legal entities on the one part, and the law of obligations, both contractual and non-contractual, on the other.

Ruggiero Cafari Panico, Professor at the University of Milan**, 'Società, obbligazioni contrattuali ed extracontrattuali. Osmosi fra i sistemi, questioni interpretative e prospettive di riforma della legge n. 218/1995'** (Companies, Contractual and Non-Contractual Obligations. Osmosis between Systems, Questions of Interpretation, and Prospect of a Recast of Law No 218/1995; in Italian).

This paper focuses on the need for reform of the Italian private international law rules in order to adapt them to the principles of the European internal market. The continuous development of judicial cooperation in civil matters having cross-border implications has progressively reduced the scope of application of national conflict of law rules and deeply influenced the domestic regulation of matters not yet harmonized. This process of osmosis is not free from difficulties. The application of the criteria indicated in European private international law regulations to cases not pertinent to the internal market may be questionable. Similar concepts, when used in different European instruments, may lead to different results in connection with the choice of applicable law and of appropriate jurisdiction. Achieving a parallel ius and forum, although desirable, especially in employment relationships, may thus be difficult. All this has to be taken into account in any reform of the Italian private international law rules, which should be consistent with the proper functioning of the internal market.

Cristina Campiglio, Professor at the University of Pavia, **'La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della *privacy*)'** (The Law Applicable to Non-Contractual Obligations (with Particular Regard to Violations of Privacy); in Italian).

> *Among the areas where EU private international law has curtailed the scope of application of the Italian Statute on Private International Law of 31 May 1995 No 218 is the area of non-contractual obligations (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, Rome II). However, while Article 63 of Law No 218/1995 on product liability has been repealed by Article 5 of the Rome II Regulation, Articles 58 and 59 of Law No 218/1995 – on non-contractual obligations arising out of unilateral promise and under bills of exchange, cheques and promissory notes, respectively – are to be considered still in force, and Articles 60 and 61 of Law No 21811995 – on representation and ex lege obligation – preserve a limited scope of application. In this context, the fate of Article 62 of Law No 218/1995 on torts, which is also applicable to obligations arising out of violations of rights relating to personality, is rather dubious; while, indeed the Regulation expressly excludes these obligations from its scope, de iure condendo it may be envisaged that Article 62 of Law No 218/1995 be adapted to the EU principles and to the case law of the Court of Justice relating to (jurisdiction in case of) violations of rights relating to personality which have been carried out through the mass media, including online defamation.*

Domenico Damascelli, Associate Professor at the University of Salento, **'Il trasferimento della sede sociale da e per l'estero con mutamento della legge applicabile'** (The Transfer of a Company's Seat Abroad and from Abroad with the Change of the Applicable Law; in Italian).

> *After having distinguished the case where the applicable law changes as a result of the transfer abroad of the company seat from that in which such change does not take place (either as a result of the shareholders' will or as a consequence of the conflict of law rules of the State of origin and/or the State of destination), this article analyzes this issue from the standpoint of EU Private International Law – considering, in particular, the case law of the Court of Justice – and it puts forth a series of suggestions to reform the Italian conflict of law and substantive law rules to make the cross-border mobility of Italian*

companies more efficient.

Paola Ivaldi, Professor at the University of Genoa, **'Illeciti marittimi e diritto internazionale privato: per una norma *ad hoc* nella legge n. 218/1995?'** (Maritime Torts and Private International Law: Does Law No 218/95 Need *Ad Hoc* Provisions?; in Italian).

Due to their intrinsically international character and very frequent cross-border implications, maritime torts typically involve private international law matters. Therefore, with regard to cases and issues falling outside the scope of application of the relevant uniform law Conventions, the problem arises of determining the applicable law according to the conflict-of law rules – which are mostly based on territorial connecting/actors – laid down, at EU level, in the Rome II Regulation (Regulation (EC) No 864/2007). The implementation of such rules, however, is sometimes critical, in particular in presence of "external torts" (i.e., torts which produce damage either on several ships or outside a ship) occurring on the High Seas; with respect to these cases, some national legislations (e.g., the Dutch civil code) have introduced ad hoc rules providing/or the application of the lex fori. In the light of the above, the present contribution assesses the opportunity to adopt the same solution on the occasion of the envisaged revision of the 1995 Italian legislation on private international law (Law No 218/1995), concluding, however, that such integration ab externo of the Regulation is not ultimately required.

Peter Kindler, Professor at the University of Munich, **'L'amministrazione centrale come criterio di collegamento del diritto internazionale privato delle società'** (The Place of Administration as Connecting Factor in Conflict of Laws in Company Matters; in Italian).

This article reviews and analyses the case law of the Court of Justice of the European Union since the Cadbury Schweppes case (2006) and the principles laid down in secondary European legislation with specific reference to Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings. The author proposes to use the Centre of main interests (COMI) of the company as a connecting factor not only in the field of European insolvency law (Articles 3 and 7 of Regulation No 2015/848), but also in a future Regulation on the law applicable to companies and other bodies. Since the COMI is identical to the

company's central administration (recital 30 of Regulation No 2015/848), this term should be used by such a Regulation. The Author rejects the incorporation theory (Griindungstheorie) and favours the real seat theory (Sitztheorie), instead. In his view, thus, the substantive corporate law of the country applies where most of the company's creditors and the bulk of the company's assets are located. At the same time, regulatory arbitrage opportunities are restricted.

Finally, the fourth section, on "**International Civil Procedure Law**", features the following contributions:

Sergio M. Carbone, Professor Emeritus at the University of Genoa, **'Introduzione alla sessione: il diritto processuale civile internazionale'** (Opening Remarks: International Civil Procedural Law; in Italian).

This article has been conceived and prepared with a view to providing an overview of the specific features which have characterized the first fifty years of our Rivista: such features were namely devoted to fostering the development of the Italian system on the resolution of cross-border disputes and the recognition of foreign judgments so as to avoid possible differentiations in their treatment in respect of the corresponding national situation.

Mario Dusi, Attorney at Law in Milan and Munich, **'La verifica della giurisdizione all'atto dell'emissione di decreto ingiuntivo: regolamenti comunitari, norme di diritto internazionale privato italiano e necessità di riforma del codice di procedura civile italiano?'** (The Assessment of Jurisdiction while Issuing a Payment Order: EC Regulations, Italian Private International Law Provisions, and the Need to Amend the Italian Civil Procedure Code?; in Italian).

With the entry into force of Legislative Decree No 231 of 9 October 2002, Italian companies can finally apply for an injunction order against their contractual partners in Europe, who are defaulting their payment obligations. Such provision however did not specify that the court before which the application is filed must assess the existence (or nonexistence) of the prerequisites related to its international jurisdiction, pursuant to various applicable regulations, including the Italian Private International Law No 218/1995, which is the object of this important conference dedicated to the

fiftieth anniversary of the Rivista di diritto internazionale privato e processuale. Before starting an ordinary court proceeding in Italy against a foreign party, in particular a European party, all regulations establishing the Italian jurisdiction must be analyzed, starting from the application of EU Regulation No 44/2001, now replaced by EU Regulation No 1215/2012, continuing with Article 3 of the above mentioned Italian law. These two Regulations notoriously state in Article 26 (of EU Regulation No 44/2001) that "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation". Article 28 of EU Regulation No 1215/2012, currently applicable to these cases, states that the verification ex officio of the jurisdiction applies not only when the defendant decides not to appear in Court, but also to injunction proceedings, although this is not expressly mentioned in the provision. Therefore, in the event of non-appearance in court, or of injunction proceedings, as well as in some ordinary cases, the court must verify on its own initiative whether or not it has international jurisdiction and possibly declare ex officio its lack of jurisdiction; otherwise the injunction order will be declared invalid (see the Italian Supreme Court judgment No 10011/2001). According to the Italian Code of Civil Procedure, the application for an injunction order should expressly indicate the reason why such Court is considered to be competent (Article 637 Italian Code of Civil Procedure). If the Italian legislator wanted to prescribe more precisely all necessary requirements for the file of an application for an injunction order, it could refer to EU Regulation No 1896/2006, namely Articles 7 and 8, on the obligation of the court to "examine" all conditions, before issuing the injunction order. Basically, in order to promote the implementation of a United European Jurisdiction, we need to either establish a greater focus on judges while issuing injunction orders, or promulgate a clear internal rule, which imposes the above verifications on Italian judges.

Alberto Malatesta, Professor at the University Cattaneo-LIUC, **'L'Article 7 della legge n. 218/1995 dopo il regolamento Bruxelles I-*bis*: quale ruolo in futuro?'** (Article 7 of Law No 218/1995 after Regulation Brussels I-a: Which Future Role?; in Italian).

This Article deals with the residual scope of Article 7 of Law No 218/1995 on lis pendens after the adoption, in recent past years, of numerous EU acts. In fact,

the national provisions of Member States have progressively reduced their importance especially after the entry into force of the Brussels I-a Regulation, whose Articles 33 and 34 provide for rules applicabile to proceedings pending before judges of third States. The Author first examines such new regime and its underliyng reasons, secondly its impact on Article 7 of Law No 218/1995, and finally discusses the option of a future revison of the same rule, in line with the content of the European rule.

Francesco Salerno, Professor at the University of Ferrara, **'L'incidenza del regolamento (UE) n. 1215/2012 sulle norme comuni in tema di giurisdizione e di efficacia delle sentenze straniere'** (The Impact of Regulation (EU) No 1215/2012 on the Italian Provisions on Jurisdiction and Recognition and Enforcement of Foreign Judgments; in Italian).

This paper examines the impact of Regulation (EU) No 1215/2012 (Brussels I Recast) on the Italian rules governing international litigation, as embodied in the Statute of 1995 that reformed the Italian system of private international law. As regards jurisdiction, almost no consequences derive from the Regulation. Article 3(2) of the 1995 Statute does make a reference to uniform European provisions in this area (so as to extend their applicability beyond their intended scope) but it still refers, for this purpose, to the 1968 Brussels Convention. The Author contends that if a legislative reform of the Statute provided for a forum of necessity, this would ultimately give a suitable basis to the trend of Italian courts in favour of a broad interpretation of the heads of jurisdiction resulting from the said reference, no matter whether such broad interpretation departs from the usual interpretation of the corresponding heads of jurisdiction laid down in the Convention. By contrast, the Regulation has a mixed bearing on the domestic regime for the recognition and enforcement of judgments. On the one hand, differently from national rules, the European rules now allow foreign judgments to be enforced internally merely by operation of law. On the other hand, the Regulation, if compared with domestic rules, provides more broadly for the opportunity of scrutinising whether individual judgments are entitled to recognition or not.

Lidia Sandrini, Research Fellow at the University of Milan, **'L'Article 10 della legge n. 218/1995 nel contesto del sistema italiano di diritto**

internazionale privato e della cooperazione giudiziaria civile dell'Unione' (Article 10 of Law No 218/1995 in the Framework of the Italian System of Private International Law and of the Judicial Cooperation in Civil Matters in the European Union; in Italian).

This article addresses Article 10 of Italian Law No 218 of 1995 on private international law. It is submitted that the provision governing jurisdiction with regard to the situation in which Italian judges lack jurisdiction on the merits represents a crucial mechanism in the application of the relevant rules on provisional and protective measures provided for by the EU regulations on jurisdiction and enforcement of judgments. Nevertheless, the practice reveals some difficulties as to the interpretation of the specific connecting factor provided for by the Italian rule. The analysis of the jurisprudence makes it clear that this unsatisfactory situation is due to the drafting, which does not reflect the variety of the instruments in connection with which the rule has to be applied and to the number of modifications of the domestic procedural rules that have been enacted after its entrance into force. In light of that, this article aims to contribute to the debate on the need of a reform of the Italian system of private international law by suggesting the introduction of some more detailed solutions with regard both to the jurisdictional criteria and to the characterization of provisional measures. These suggestions are primarily intended to ensure the consistency of the solutions in the European judicial area, in light of the jurisprudence of the Court of Justice, but also to preserve the coherence of the Italian system of private international law.

Francesca C. Villata, Associate Professor at the University of Milan, **'Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell'Articolo 4 della legge n. 218/1995'** (On the Law Governing the Substantial Validity of Jurisdiction Clauses: Remarks with a View to a Recast of Article 4 of Law No 218/1995; in Italian).

This article tackles the question whether the wording of Article 4 of Law No 218 of 1995 and, even more, its critical exegesis are (to date) adequate (a) with respect to the transformed legislative context of the European Union (which refers to such domestic legislation when the court seised is Italian), and (b) even more, to meet the needs of practitioners. Furthermore, this article aims to assess whether the solution adopted under the Brussels I-bis Regulation and

the 2005 Hague Convention on Choice of Court Agreements – which both identify the law that governs the substantive validity of the choice of court agreements in the law of the State allegedly designated (including its conflict-of-law provisions) – may (or should) prompt an overall recast of the Italian law or, rather, require a more detailed provision which shall coordinate with the provisions on lis pendens.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Corporations between International Private and Criminal Law

The most recent issue of the German „Zeitschrift für Unternehmens- und Gesellschaftsrecht" (ZGR, Journal of Enterprise and Corporate Law) has just been released. The volume is based on presentations given at a conference in Königstein/Taunus in January 2016. It contains several articles dealing with the relationship between private and criminal law and its impact on corporate governance. In particular, two articles approach the subject from a conflict-of-laws perspective. Here are the English abstracts:

Marc-Philippe Weller, Wissenszurechnung in internationalen Unternehmensstrafverfahren, ZGR 2016, pp. 384–413

The article deals with the imputation of knowledge in legal entities from a private and a criminal law perspective. Several foreign criminal proceedings against domestic companies induce this question. Firstly, the article demonstrates the different ways to determine the applicable law to this imputation. Secondly, it discusses measures to limit the imputation via knowledge governance.

Jan von Hein, USA: Punitive Damages für unternehmerische Menschenrechtsverletzungen, ZGR 2016, pp. 414–436

While German Law traditionally neither accepts universal civil jurisdiction for violations of customary international law nor a penal responsibility of corporations, foreign companies have in the past been frequently sued in the United States on the basis of the Alien Tort Statute of 1789 for the payment of punitive damages for alleged human rights violations. However, the U.S. Supreme Court has severely curtailed the reach of this jurisdiction in its groundbreaking Kiobel judgment of 2013. The present article analyzes, in light of the subsequent jurisprudence, the impact of this decision on German-American legal relations and the defenses available to German corporations.

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.

CJEU Rules on the Recognition of Names in the EU: Bogendorff von Wolfersdorff

On 2 June 2016 the CJEU came down with its long awaited judgment in Nabiel Peter Bogendorff von Wolfersdorff v. Standesamt der Stadt Karlsruhe. Dealing (once more) with the question whether the freedoms conferred under Article 21 TFEU require Member States to recognize names of private individuals registered in another Member State the Court held that the refusal, by the authorities of a Member State, to recognise the forenames and surname of a national of that Member State, as determined and registered in another Member State of which he also holds the nationality, constitutes a restriction on the freedoms conferred under Article 21 TFEU on all citizens of the EU. However, the Court also found that such a restriction may be justified by considerations of public policy.

David de Groot from the University of Bern (Switzerland) has kindly prepared the following note:

Mr Bogendorff von Wolffersdorff was born as a German national named Nabiel Bagadi. After an adoption his name changed to Peter Nabiel Bogendorff von Wolffersdorff. He moved to Britain and acquired, while being habitually resident there, the British nationality and subsequently changed his name by deed poll to 'Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff'. The German authorities did not want to recognise his new name as it contained the words 'Graf' and 'Freiherr', which used to be titles of nobility in Germany. According to Article 109 of the Weimar Constitution – which is still applicable based on Article 123 Basic Law – any creation of new titles of nobility is prohibited in Germany. However, the titles of nobility at the time of abolition

became an integral part of the surname. Thus in Germany there are still persons who have a former title of nobility in their name. The same issue his daughter had where the German authorities did not want to recognise her name 'Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff'. In that case, though, the *Oberlandesgericht Dresden* had decided that the German authorities had to recognise the name established in the United Kingdom.

The District Court of Karlsruhe referred the following question to the CJEU:

> *Are Articles 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name?*

A refusal by the authorities of a Member State to recognise a name of its national established while the person exercised his free movement rights in another Member State is likely to hinder the exercise of the free movement rights enshrined in Article 21 TFEU. Furthermore confusion and serious inconvenience at administrative, professional and private levels are likely to occur. This is due to the fact that the divergence between documents gives rise to doubt to the person's identity and the authenticity of the documents and the necessity for the person to each time dispel doubts as to his identity. Therefore, it is a restriction of Article 21 TFEU which can only be justified by objective considerations which are proportionate to the legitimate objective of the national provisions.

The German authorities had brought several reasons to justify the restriction on the recognition of the name. The first justification brought forward was the immutability and continuity of names. The Court stated that although it is a legitimate principle, it is not a that important principle that it can justify a refusal to recognise a name established in another Member State. The second justification concerned the fact that it was a singular name change, meaning that the name changed independent of another civil status change. Therefore, the

name change was dictated on personal reasons.

The Court referred to the case *Stjerna v. Finland* from the European Court of Human Rights of 1994 where it was stated that there may exist genuine reasons that might prompt an individual to wish to change his name, however that legal restriction on such a possibility could be justified in the public interest. The Court, however also stated that the voluntary nature of the name change does not in itself undermine the public interest and can therefore not justify alone a restriction of Article 21 TFEU. Concerning the personal reasons to change the name the Court also referred to the *Centros* ruling on abuse of EU law, but did not state whether it actually applied to the case. Concerning the German argument that the name was too long, the Court stated that "such considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement."

The most important point made by the German authorities concerned the fact that the name established in the UK entailed former German titles of nobility. The Government argued that the rules on abolishment of nobility and therefore refusal to recognise new titles of nobility were a part of the German public policy and intended to ensure equal treatment of all German citizens. Such an objective consideration relating to public policy could be cable of justifying the restriction; however it must be interpreted strictly. This means that it can only apply when it is a genuine and sufficiently serious threat to a fundamental interest of society.

In *Sayn-Wittgenstein* the Court had held that it was not disproportionate for Austria to attain the objective of the principle of equal treatment "by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such rank." However the German legal system is different in that there is not a strict prohibition on maintaining titles of nobility as a part of the family name and it is also possible to acquire it through adoption. It would though not be in the interest of the German legislature if German nationals could under application of the law of another Member State adopt abolished titles of nobility and that these would automatically have to be recognised by the German authorities.The Court was though not sure whether the practice of the German authorities to refuse a name including former titles of nobility, while allowing some persons in Germany to bear such a name, is appropriate and necessary to ensure the protection of the public policy and the principle of equality before the law of all German

citizens. As this is a question of proportionality it would be for the referring court to decide upon this.

The Court however marked certain factors that have to be taken into consideration while not being justifications themselves. First of all that Mr Bogendorff von Wolffersdorff exercised his free movement rights and holds double German and British nationality. Secondly, that the elements at issue do not formally constitute titles of nobility in either Germany or the United Kingdom. Thirdly, that the *Oberlandesgericht Dresden* in the case of the daughter of Mr Bogendorff von Wolffersdorff did not consider the recognition of a name including titles contrary to public policy. However, the court would also have to take into consideration that it concerned a singular name change which is based purely on personal choice and that the name gives impression of noble origins. The Court concluded, however, that even if the surname is not recognised based on the objective reason of public policy, it cannot apply to the forenames, which would have to be recognised.

As such it is not that much a surprise that the Court referred the case back as it concerned a matter of proportionality. But still the Court's judgment is a bit disappointing as some issues of the referred question are unsolved. For example the Court did never go into the part of the referred question concerning "the future substantial link" of the British nationality. The Court states that Mr Bogendorff von Wolffersdorff is dual German and British national, but it could also have stated that the future substantial link does not matter due to the *Micheletti* case. Also Article 18 TFEU got lost after the rephrasing of the question and the Court then only concentrated on Article 21 TFEU.

What is though very surprising is that the Court only mentions the case law on abuse of law, but then leaves it open whether it is applicable or not. Considering that Mr Bogendorff von Wolffersdorff lived in the United Kingdom for four years and even acquired British citizenship makes it rather doubtful whether one could consider it an abuse; especially if one compares it for example to the facts of the *Torresi* case.

It is thus now up to the national court to decide whether all German citizens are equal, or whether some are more equal than others – and all of these are former nobility.

Summer Schools 2016, Greece

The Jean Monnet Center of Excellence and the UNESCO Chair at the Department of International and European Studies, University of Macedonia, Thessaloniki, Greece, is organising a Summer academy on European Studies and Protection of Human rights in Zagora, on Mount Pelion, Greece, consisting of two summer schools in English. The academic faculty in both summer schools are University professors and experts from all over Greece and the EU (Great Britain, Spain and Poland).

The first summer school is on **"Freedom, Security and Justice in the EU**". It will be held **from Friday July 8, afternoon until Monday, July 11, 2016, afternoon.** In particular, the summer school will last **25 hours.** The main areas of study will be:

- Institutional Structure and Development (EU institutions, Frontex, Eurojust, European Attorney) which will be analyzed by Prof. Chrysomallis,
- European Citizenship and the protection of fundamental rights in the Area of Freedom Security and Justice by D. Anagnostopoulou,
- Internal and External Security by Prof. F. Bellou,
- Immigration and asylum policies by Prof. V. Hatzopoulos and I. Papageorgiou,
- EU Private International Law by M. Gardenes – Santiago (Autonomous University of Barcelona),
- European criminal law (N. Vavoula, Queen Mary)

For further information in this summer school click here.

The second summer school will begin on **Thursday, July 14 afternoon and will**

end on Tuesday, July 19. It will last **40 hours** with a focus on the **protection of human rights in Europe**:

- International human rights protection mechanisms (International Covenants and International Conventions), taught by f. Professor P. Naskou Perraki (University of Macedonia)
- European Convention on Human Rights by Dr. Dagmara Dajska, expert of the Council of Europe, who will discuss the right for fair trial and the right to asylum,
- Freedom of Expression by Prof. I. Papadopoulos (University of Macedonia),
- Protection of Personal Data by Prof. E. Alexandropoulou (University of Macedonia),
- EU Charter of Fundamental Rights by Prof. L. Papadopoulou (Aristotle University of Macedonia),
- Prohibition of discrimination by Prof. D. Anagnostopoulou (University of Macedonia),
- LGBT Rights by Prof. Alina Tryfonidoy (Reading University),
- Protection of minorities and cultural rights by Dr. Nikos Gaitenidis, Head of the Observatory on Constitutional Values of the Jean Monnet Centre of Excellence, and
- Workshop on intercultural skills by Prof. I. Papavasileiou (University of Macedonia)

For further information on this summer school click here.

A Certificate of attendance will be issued to all while a Certificate of Graduation will be awarded to all those passing a multiple choice examination.

For additional information and applications to any of the schools, please refer to the links below or contact:

Assistant Professor Despina Anagnostopoulou, danag@uom.gr

or *Ms. Chrysothea Basia, chrybass@yahoo.com*

Reminder: ILA 77th Biennial International Conference 2016

The International Law Association (ILA) invites you to join the ILA 77th Biennial International Conference 2016 which will take place from **7 to 11 August 2016** at the Sandton Convention Centre in Johannesburg, South Africa.

The main theme of the conference will be **'International Law and State Practice: Is there a North – South Divide?'**

The keynote address at the opening session will be given by **Judge Navi Pillay**, the former UN High Commissioner for Human Rights. Programme details as well as further information on the illustrious panel of renowned speakers from across the globe are available at the conference website.

The regular registration closes **30 June 2016**. If you have not yet registered you can do so by clicking here.

The ILA looks forward to seeing you in Johannesburg!