Mass Litigation in Times of Corona and Developments in the Netherlands

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Introduction

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

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

Late Response

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

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

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

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

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

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

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

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

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

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

Developments in the Netherlands: the WAMCA

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

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

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

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

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

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

Limited territorial scope and the position of foreign parties

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

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

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

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

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

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

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

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

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

Israeli Requirement of Good Faith Conduct in Enforcement of Foreign Judgments

Written by Haggai Carmon, Carmon & Carmon, an international law firm with offices in Tel Aviv and a front office in New York.

The requirement of parties' good faith conduct is fundamental in Israeli law and jurisprudence. However, only recently the Supreme Court has applied that doctrine to enforcement of foreign judgments as thus far, only lower courts have followed that doctrine.

In **Civil Appeal X [Name removed upon request of Claimant, General Editors of CoL, 26 October 2022] v. Bankruptcy Office Geneva**, the Supreme Court (per Esther Hayut, Chief Justice,) on August 27, 2019, unanimously denied an appeal over a District Court's earlier finding that procedural bad faith is independently sufficient grounds to rule against a party whose conduct during proceedings to enforce a Swiss judgment, was so egregious that it warranted such extreme measure.

"In the course of the proceedings in the case, the appellant demonstrated contempt for the court's proceedings, the counterclaimant's rights and the duties imposed on him under the Rules of Civil Procedure and the judicial decisions given in his case. In doing so, the appellant violated his duty to act fairly and reasonably to enable proper judicial proceeding. In light of all the foregoing, there is no escaping of the conclusion that the appeal before us is one of those rare instances where the appellant's bad faith conduct, who has taken practical measures to thwart the enforcement of the judgment rises to an abuse of court proceedings. Under these exceptional circumstances, in my opinion, it is justified to use the authority given to us and order the appeal be denied in limine."

Although lack of good faith or unacceptable conduct do not, pursuant to the Israeli Foreign Judgments Enforcement Law, provide independent cause to refuse recognition or enforcement of a foreign judgment, "however certainly this carries weight in the court's considerations together with all other conditions"[1] for such recognition or enforcement. [Judge Keret-Meir's ruling in **Bankruptcy File**

(T.A.) 2193/08 First International Bank of Israel Ltd. v. Gold & Honey (1995) L.P. et al.

Earlier, the Jerusalem District Court's judgment in D.C.C. (Jm.) 3137/04 **Ahava (USA) Inc. v. J.W.G. Ltd (Ahava)**[2]concerned whether a U.S. judgment precluding an Israeli company from marketing Israeli products in the United States through a website was a foreign judgment enforceable pursuant to the Enforcement Law. The court held that "the filter of 'public policy' allows us to uproot unjust outcomes that may arise from the application of a foreign law,"[3] and addressed at length the essence of public policy:[4]

What is public policy? It is a broad term, "flexible and not entirely definable" …. Some will emphasize the local nature of public policy… but it seems that the basic requirements of law, including good faith, equity, and human rights, do not carry national identities, nor do they evaporate at international borders. Recognition of this approach grew with the erosion of "the archaic definition of the sovereignty doctrine, and as territorial sovereignty boundaries between legal systems blurred" (I. Canor, *Private International Law and the Decay of Sovereignty in the Globalization Age: The Application of Foreign Public Law on International Contracts*… p. 491). This process expanded the definition of public policy and imparted it with a quality of *tikkun olam* (bettering society) in its literal sense, such that appropriate applications are made from the public and private law of foreign legal systems to a domestic forum. In this context, we can even identify certain international rules which obligate even the parties of a **purely domestic** contract (Canor, id. 513). The inclination to apply rules of **global** public policy will increase as the link between the contract and local law weakens. A component of this global public policy is the very need to enforce foreign judgments.

The District Court held essentially that the protection of intellectual property does not in and of itself violate public policy in Israel, as this includes as well the principle that prohibits taking another's work or basing one's work on it, and this principle also applies to trademark law and other protections related to the appearance of the product. In these circumstances, the court ruled that the prohibition placed by the U.S. court, on the basis of internal U.S. trademark law, did not conflict with public policy in Israel.

In D.C.C. (T.A.) 22673-07-10 **Nader & Sons LLC et al v. Homayon Antony**

Namvar (Nader),[5] the District Court rejected arguments that a summary judgment by the Supreme Court of the state of New York was unenforceable in Israel as having been rendered in unjust and improper proceedings, so that it conflicted with the public policy of Israel. The respondent argued that the choice of such proceedings in a suit of such broad scope constituted lack of good faith and an attempt to evade thorough investigation of the claims, as well as that significant details and facts withheld from the New York court might have affected the outcome of the proceedings.

The court dismissed these arguments:[6]

As stated, external public policy, in the sense of Article 3(3) of the Foreign Judgments Enforcement Law, refers to conformance with the basic principles of Israeli law, and the argument of the respondent regarding the flaws that, in his opinion, characterize the proceedings in New York, as decisive as they may be, do not testify to any conflict with these basic principles (regardless of the validity of these claims) and are not directly connected to the content of the judgment.

In Justice Procaccia commented in C.A. 5793/05 **The Great Synagogue Shone Halachot Association v. Netanya Municipality**:[7]

It is true that the Arbitration Law, 5728-1968 does not set a binding deadline on the prevailing party in an arbitration award to file a motion for its confirmation.... Nevertheless, this does not signify that there exists no limit whatsoever for filing a motion for the confirmation of an arbitration award and that the procedural rights of the holder of such an award are everlasting. A party who prevailed in arbitration is required by procedural good faith to submit the award for confirmation within a reasonable time period, given the special circumstances of the relevant incident. A party who for years ignored the award, did not act on it, and appeared to no longer have any intention of enforcing it, is liable to face a procedural estoppel claim (Ottolenghi, *Arbitration: Law and Procedure*, 4th ed., 2005, 914-916). Like any other complaint filed with a court, a motion for confirmation of an arbitration award is also subject to the rules of procedural good faith and reasonability regarding the timing, form, and content of the filing. The civil rules of laches apply to the timing of filing, as they apply to civil suits in the framework of statutory periods of limitations.

The question of whether this judgment, which deals with a 30-year delay in filing

a motion for the confirmation of an Israeli arbitration award, will also apply to an arbitral award issued abroad under the New York Convention, remains open and has not been addressed. Because the New York Convention and the regulations for its execution make no mention of laches, it is unclear if the application of the Convention should be restricted and subjected to those principles, thus bypassing the absence of deadline for filing for confirmation under the Convention. In general, foreign arbitration takes place between commercial entities or countries, and at times, the difficulty in enforcing arbitration awards for various reasons is universal. There are many cases in which enforcement in one country encounters protracted difficulties, and then, upon locating debtor's assets in another country, the award holder applies for enforcement of the award in that country. This may be many years after the award was issued. Blocking the procedural path of the holder through laches is unjust, at least under such circumstances, and it appears that the New York Convention's silence in this context is not for naught. Presumably for the same reason, the Convention does not list laches among the grounds for refusal to recognize or enforce an award, nor does it impose a time limit for filing a motion for the confirmation of an arbitration award under the Convention.

For more informaiton, see Haggai, *Foreign Judgements in Israel — Recognition and Enforcement*, published in Hebrew by the Israeli Bar Association. Springer published an English translation.

[1] See Judge Keret-Meir's ruling in Bankruptcy File (T.A.) 2193/08 First International Bank of Israel Ltd. v. Gold & Honey (1995) L.P. et al.

[2]P.M. 5763 (2) 337 (2004).

[3] Id. at 343.

[4] Id. at 344.

[5]Nevo (May 5, 2011).

[6]Id. at 9.

[7]Nevo (Sep. 11, 2007).

Arbitration in Smart Contracts – Code Naïve v Code-Savvy

Written by Hetal Doshi & Sankalp Udgata

Combining law, computer science and finance in unprecedented ways, “Smart Contract” is the latest addition to the unending list of Internet of Things. Unlike a traditional contract, which only lays out the terms of agreement for subsequent execution, a smart contract autonomously executes some or all of the terms of the agreement as it are usually based on Block-chain. It has the potential to reshape our understanding of contract and technology law. The shift from the code naïve to the code-savvy, has surfaced problems in dispute resolution beyond the existing legal perception which this article aims at analysing and resolving.

Working of the Smart Contract

By removing the need for direct human involvement, a smart contract is deployed on to a distributed Trustless Public Ledger. However, in order for the smart contract to work efficiently, exactly specified conditions for the execution of the contract are necessary, otherwise, it will be impossible to automate the process. Also, smart contracts receive information from outside block-chain platform through the use of ***Oracle*** programs that mediate with external databases and are entered into the block-chain technology.

A Hornet’s Nest

Smart contract come with their own sets of limitation and drawbacks. Following are few of the many problems, inevitable in resolving disputes over smart contracts. Interestingly however, although these problems may be encountered by an Arbitral Tribunal, arbitration (with requisite checks) is the most efficient mechanism to deal with such problems.

Enforceability Quandary

1. A) Formal Enforcement

A very fundamental and critical impediment, Courts and Tribunals are consistently skeptical in enforcing such unconventional contracts. Although the use of automated communication or system to conclude contracts or make it binding on the parties has been long accepted by the business community, a Tribunal is often troubled with disparity in validity of smart contracts over conflicting jurisdictions.

Secondly, Article 2.1.1 of UNIDROIT (PICC) undoubtedly includes automated contracting. However, problems may arise in relation to codes meeting the *in writing* requirement of UNCITRAL and the New York Convention.

1. B) Substantive Enforcement

The artificial nature of contracting deprives actions of the human touch. Complexities arise when there a subsequent smart contracts. For example, if there is a supplementary smart contract, consent for which is sought from the parent contract. Since it is the codes in the parent smart contract that initiate the subsequent contracts and transactions and the performance, can consent be said to have been given by a mere code and is such consent valid and enforceable against such code.

A Hitch in the Seat

Given the distributed nature of block-chain i.e. a ledger which is spread across the network among all peers in the network and the operation of Smart Contracts, it is important to agree a seat for the arbitration to avoid satellite disputes about the applicable seat and/or procedural law.

Problems in Execution- Irreversibility and Irremediability

Since they are theorized to be complete contract by focusing on *ex ante* rather than *ex post*, they eliminate the act of remediation, by admitting no possibility of breach. However, the *DAO case* was incomplete as it failed to anticipate the possibility that coding errors could result in unexpected wealth transfers. In addition, smart contract may deal with commercial scenarios so complex and unpredictable that the code will fail to embed all possible answers to all possible questions.

Further, if the smart contract contains a mistake, security flaw, or does not

accurately capture the parties' intent, the smart contracts will be difficult to modify or change, due to a block-chain's resilient and tamper resistant nature. The program will continue to blindly execute its code, regardless of the intent of the parties or changed circumstances. When the transaction is more complex, involving multiple players (humans or machines), multi-component assets and diverse jurisdictions, computer code *smartness* may easily turn into plain *dumbness*.

Needless to mention, a Tribunal or a Court will encounter several problems in executing a decision vis-à-vis a smart contract such as:

1. Lack of in-rem jurisdiction- Reversing a transaction on a decentralised ledger with several contributors that may not even be parties before the Tribunal.
2. Excusing future performance or specific performance- Since they operate automatically and are not flexible.

The Truth about Consent

Contracting also has issues such as duress, fraud, forgery, lack of legal capacity and unconscionability which require human judgement and cannot be scrutinised by a smart contract which simply functions on a series of binary inputs. Moreover, though it provides guarantee of execution to certain extent, it cannot verify whether the contracting parties have the legal capacity to get into legal relationships or business capacity to make an agreement.

It also does not care whether there truly exists *consensus as idem* between contractual parties, there is no possibility for the contract to be void or voidable. However, although codes are not natural language that might be vague or ambiguous, leaving space for interpretation. For a consensual dispute resolution mechanism like arbitration, the indispensable requirement of free consent and the evaluation of intention of parties cannot be comprehended by a smart contract that stands deprived of reason and morale.

This may be an issue in circumstances where the Smart Contract is entered into by a computer, is in code and/or and does not create legally binding contractual obligations under the applicable law. The solution to this can be that the Arbitration clause can become part of the *Ricardian contract* which like any other similar contract is a hybrid form of smart contract which is partly in human

readable form.

The Catch in Imputing Liability in a Dispute

The code smart is sadly not insusceptible to security vulnerabilities and exploits like *forking*, which could cause a smart contract to operate unexpectedly and invalidate transactions, or worse, enable a third-party to siphon digital currency or other assets from contracting parties accounts. Scary, isn't it?

However, since a Tribunal is only an *in personam* jurisdiction, it can barely inspect or issue directions against such third parties. Such vulnerabilities might also jeopardise the secrecy that arbitration aims to achieve.

It is not unjust to say that such a contract is dangerous enough to attract *strict liability* in case of any harm caused due to an error in coding. That, juxtaposed with the existence of foreseeable risk in execution of smart contracts poses a potentially huge hurdle to the exponentially growing use of block-chain technology.

Furthermore, disputes, to summarize, may arise:

1. between the parties of a smart contract, or
2. between two conflicting smart contracts.

Since the code smart is a form of artificial intelligence replacing human involvement, it is the second set of disputes where a Tribunal or Court will be troubled with the attachment of liability.

Cutting the Gordian knot – checks and suggestions

Given our shift from *not so smart contracts,* we must keep an eye for the following checklist while dealing with dispute resolution in smart contracts.

Formality requirements

Parties should therefore ensure the arbitration agreement meets any formality requirements under the governing law of the arbitration agreement and Smart Contract, the law of the seat and wherever the award is likely to be enforced.

Choice of seat

Parties should base check whether in their chosen seat,

1. Domestic law does not render a Smart Contract illegal or unenforceable
2. The disputes likely to arise are arbitrable
3. The codified arbitration agreement in question will be upheld and enforced by the supervisory courts.

Tribunal with specialist technical knowledge

Some Smart Contract disputes will be fairly vanilla contract law disputes, but others will be of a highly technical nature, for example, where the code does not operate as expected. Pursuant to the novel nature of the smart contract the importance of having a tribunal familiar with the technology against the importance of having the dispute decided by experienced arbitrators becomes crucial.

Severable arbitration clause

Although the *doctrine of separability* protects the validity of an arbitration clause, the dispute resolution clause should always be kept independent of any smart codes.

Localised Termination Clause

Given the automated and perpetual nature of smart contracts, there should be an option to terminate the contract. Although non-amenability is an essential feature of a smart contract, the option to cede away from the distributed ledger (terminate the contract) should be sole switch available the each of the contributors. The code may prescribe conditions for pulling the plug, i.e. create joint switches. Therefore, a party shall not be able to terminate its obligations without assent from any of its debtor on the ledger. As a result, once the debt is settled either by payment of dues or by an award of a Tribunal, the parties may pull the plug.

Power of Pardon

Each party to a smart contract should be at liberty to excuse payment by a debtor in under a direction by a tribunal or a Court in case of a *force majeure* or any other scenario where performance is liable to be excused.

This list, although non-exhaustive, will certainly sustain best practices in arbitration until the next great invention in the sphere of technology and business will live to fight another day.

Three Tickets, One Seat – A Methodological Anatomy Of The Indian Practice Of Determination Of Seat Of Arbitration

Written by Sankalp Udgata & Hetal Doshi, National Law University (NUSRL), Ranchi

The choice of arbitration as the default system of resolution of commercial disputes, which was initially restricted to the foreign parties is now being reciprocated by even the Indian parties, thus setting the stage for India being a global hub for commercial arbitration. Surprising as it is, commercial agreements worth billions have but a succinct recording of a seat of arbitration. Sloppy as they are, these poorly drafted dispute resolution clauses open the doors to a tsunami of litigation which simply intervene and delay the entire resolution process thereby defeating the very virtue arbitrations proclaim to instil.

Since arbitrations are out-of-court proceedings, they do not by themselves command the authority of the sovereign. Therefore, every arbitration must be guided and overseen by a Court that has supervisory jurisdiction over it. This Court is the Juridical Seat of the arbitration as determined by the parties and the most important concept that the territorial situs of the Seat denotes. In absence of a positive determination by the parties in the arbitration agreement, the

Tribunal or a Court whose supervisory jurisdiction is sought must first determine the Seat and consequently whether it has the jurisdiction, as the Juridical Seat, to hear the matter.

However, arbitration in India has been a Hornet's nest if not a Pandora's box to say the least. Admittedly, the vast majority of problems associated with international commercial arbitrations taking place in India revolve around the uncertainty in the Courts' approach to determination of the seat when the parties have failed to choose one. The Indian Courts, much rather the Supreme Court of India ("**SCI**") has shown a consistent disparity in applying any particular method for determination of the Seat in such situations. This article aims to reconcile the various tests that the Supreme Court of India has applied over the years and attempts to plot their reasoning into three distinct methods for determination of a seat when the arbitration agreement fails to explicitly document one. This article also discusses the various factors relevant in each method with examples and can therefore serve as a catalogue for practitioners as well as valuable literature to the academia.

I. Seat <=> Venue Method

Representing the most widely accepted view, this method is applicable when parties have at least chosen a particular geographic location as the venue for the arbitration to take place without specifically designating a Seat. Finally, setting the clock straight and reconciling to the globally accepted rules, the SCI in Soma JV case held that the venue of arbitration shall be the default Seat in absence of any *contrary indica*. (¶63)

For it to be the default Seat, the venue must exist in absence of any of the following factors that, over the years, the Court has found to be *contrary indications* to venue being the Seat.

- Designation of an alternate place as Seat

When there is an *express designation of the arbitration venue,* combined with a supranational body of rules governing the arbitration the venue shall be the seat unless the parties have designated *any alternative place as the seat*. (Shashoua, ¶34,42)

- Existence of a national set of *lex arbitri* or proper law

Despite having designated London as the venue of arbitration, the SCI held Bombay to be the Seat in the 2014 Enercon Case. In making this determination, the Court was heavily swayed by the fact that the laws specifically chosen by the parties in the contract to apply to different aspects of the dispute were Indian laws.

- Existence of an alternate place of making of award

Since it is necessary for the arbitral award to be made and signed at the place of arbitration as determined by Section 20 of the 1996 Arbitration Act ("**Act**"), an award made at one of the two designated venues resulted in the venue where the award was not signed was not the Seat in the Soma JV case.

- Venue of an arbitration proceeding

The Court has on several occasions differentiated between the venue of arbitration proceedings from the venue of an arbitration proceeding for the later cannot be construed as anything but a convenient location for the conduction of a meeting. (2012 Enercon case)

II. Inverse Closest & Most Real Connection Method ("**Inverse-CMRC**")

The globally acclaimed CMRC test is used to determine either *lex arbitri* or the *proper law governing the arbitration agreement* when the *place of arbitration* has been decided as the same would be the law most closely connected to the choice of place. While the English Courts in Peruvian Insurance Case applied the law of the place of arbitration as the *lex arbitri*, in the Sulamerica Case, applied it to the proper law governing the arbitration agreement as they had the most real connection to the place chosen by the parties. India has also used the test in a peculiar way to apply the *lex arbitri* to the whole of the agreement. This proximity is essentially based on the *legal localisation of the place*.

However, India has been applying the above test somewhat inversely based on the *geographic localisation of the law* instead. Bemusing everyone, the SCI in Enercon Case applied the Inverse CMRC Method to determine the Seat to be India as it was most closely and intimately connected to the lex arbitri and the proper law of the contract, both of which were Indian. The Indian model seems to presume that the parties could not have contemplated a delocalised *lex arbitri* or proper law. Be that as it may, where a supranational set *lex arbitri* or proper law

exists, the first method will prevail as these laws will not be sufficient *contrary indications*.

III. Cause of Action Method

This is an unsuitable method of determination of seat. In this case, if the arbitration agreement does not reveal a Seat then the Courts of the place where the *cause of action* arose will be considered as the Juridical Seat of the arbitration. This is derived from the definition of 'Court' under Section 2(1)(e) of the Act which also includes the Court that would have jurisdiction over the question if it formed the subject matter of a suit.

Understanding this to mean that the legislature has intended to give jurisdiction to both the Court of arbitration and the Court having territorial jurisdiction over the place where the cause of action arose, concurrently, the SCI has caused tremendous controversy by in *Paragraph 96* of BALCO judgment. However, when read wholly and not in isolation, BALCO judgment very distinctly states that if *concurrent jurisdiction* were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer and therefore Courts were intended to exercise *supervisory jurisdiction* to the *exclusion* of other Courts as provided under Section 42. (Soma JV case, ¶51)

Therefore, since the application referred to under Section 42 can only be legitimately made to the Court of the Seat, this method is only useful where seat could not be determined by any of the above methods maybe owing to lack of any territorial nexus.

Conclusion

The contradictory judgments of the English and Indian Courts over the determination of Seat in the Enercon case caused a delay of two years and has painted a Medusa of how the incongruous views of Courts across jurisdictions terrorise the development of international commercial arbitration. Therefore, arbitrations anchored in India or involving Indian parties must be planned in a manner eliding with the recent set of "pro-arbitration" trends in determination of Seat.

Although there is no specific order of precedence for application of these methods, their very nature and the manner of their application till date suggest

that the Seat-Venue method takes precedence over the other two owing to its strong territorial nexus. Ideally thus, upon failure of this method owing to the presence of a sufficient *contrary indica*, should the Inverse-CMRC method be applied followed by the Cause of Action method as the last resort in this three-fold method for determination of Seat.

‘Force majeure certificates’ issued by the Russian Chamber of Commerce and Industry

The Russian Chamber of Commerce and Industry is issuing ‘force majeure certificates’, like some of their homologues in other countries, as discussed earlier in this blog. Although this practice has existed in Russia since 1993, the number of requests for the certificates has recently increased. The requests come not only from Russian companies but also from foreign entities. While the increase is understandable in these times of the coronavirus pandemic, under Russian law, the ‘force majeure certificate’ can (only) form a part of evidence in possible future disputes, as its impact on the outcome of the dispute is ultimately defined by the (Russian or foreign) courts or arbitration tribunals.

The Russian Chamber of Commerce and Industry (CCI) is issuing ‘force majeure certificates’, like some of their homologues in other countries. Although this practice exists in Russia since 1993, the CCI has recently noticed an increase in the number of requests for the certificates, due to the coronavirus pandemic. The requests come not only from Russian companies but also from foreign entities. What could be the practical value of the certificate in a contractual dispute relating to the consequences of the pandemic?

The legal basis for the CCI’s competence to issue the ‘force majeure certificates’ is laid down in the law ‘On the chambers of commerce and industry in the Russian Federation’ of 7 July 1993. Article 1 of the law defines the CCI as a non-state non-

governmental organisation created to foster business and international trade. Along with other competences, the CCI may act as an 'independent expert' (art. 12) and may provide information services (art. 2) in matters relating to international trade. One of the services is the issuing of 'force majeure certificates'. The Rules for issuing the certificates are defined by the CCI's governing council. These Rules entrust the CCI's legal department with assessing requests and advising whether the certificate should be issued. The advice is given on the basis of the documents that a party submits to substantiate their request, following the Rules.

Notably, the list of documents includes (a copy of) the contract, 'which contains a clause on force majeure' (point 3.3.2 of the Rules). This requirement is not accidental; it has to do with the non-mandatory character of the legal provision on force majeure. Article 401(3) of the Russian Civil Code provides for exoneration of liability for non-performance of a contractual obligation, if the party proves that the non-performance was due to the force majeure. This provision applies by default, if 'the law or the contract does not provide otherwise' (art. 401(3)). The parties may provide otherwise by including a clause about unforeseen circumstances, hardship, frustration, force majeure, or similar circumstances in the contract. This is, at least, the way Russian courts have applied art. 401(3) up to the present time. The Russian CCI does not appear to deviate from this approach. More than 95% of the requests submitted to the Russian CCI for 'force majeure certificates' have so far been rejected, according to the head of the Russian CCI (even though some decrees deliberately label the COVID-19 pandemic 'force majeure' as, for example, the Decree of 14 March 2020 does, this decree is adopted by the municipality of Moscow to prevent the spread of the virus by various measures of social distancing).

Thus, the legal basis of the CCI's competence to issue a 'force majeure certificate' implies that the certificate is the result of a service provided by a non-state non-governmental organisation. The application of Article 401(3) implies the need to interpret the contract, more specifically, the provision on force majeure it possibly includes. If the parties disagree on the interpretation, a dispute may arise. The competence to resolve the dispute lies with the courts or arbitration tribunals. In this way, the ICC's decision (taken upon the advice of the CCI's legal department) to confirm by issuing a certificate that a particular event represents a force majeure in the context of the execution of a specific contract can have

persuasive authority in the context of the application of Art. 401 (3). However, it remains the competence of the courts or arbitration tribunals to apply art. 401(3) to the possible dispute and to establish the ultimate impact of the relevant events on the outcome of the dispute. Under Russian law, one would treat the 'force majeure certificates' issued by the CCI (and possibly a refusal to issue the certificate) as a part of evidence in possible future disputes. A (Russian or foreign) court or arbitration tribunal considering this evidence is free to make a different conclusion than that of the Russian CCI or may consider other evidence.

Child abduction in times of corona

By Nadia Rusinova

Currently large increases in COVID-19 cases and deaths continue to be reported from the EU/EEA countries and the UK. In addition, in recent weeks, the European all-cause mortality monitoring system showed increases above the expected rate in Belgium, France, Italy, Malta, Spain, Switzerland and the United Kingdom.

It is not unreasonable to predict that COVID-19 will be used increasingly as a justification in law for issuing non-return order by the Court in international child abduction proceedings, return being seen as a "grave risk" for the child and raised as an assertion under Article 13(b) of the Hague Convention.

What would be the correct response to these challenging circumstances, when the best interest of the child in child abduction proceedings calls for restoration of *status quo ante* under the Hague convention on the Civil Aspects of International Child Abduction (hereinafter: the Convention)? This post will focus on the recent judgment [2020] EWHC 834 (Fam), issued on 31 March 2020 by the High Court of England and Wales (Family Division) seen in the light of the ECtHR case law on the child abduction, providing brief analysis and suggesting answer to the question if the return of the child to the state of its habitual residence in the outbreak of COVID-19 can constitute grave risk for the child under Article 13(b) of the Convention, and how the practitioners and the Court should approach these

assertions in the present pandemic situation.

The facts of *Re PT [2020] EWHC 834 (Fam)*

PT (the abducted child) and both of her parents are all Spanish nationals. PT was born in 2008 and had lived all of her life in Spain, until she was brought to England by her mother, HH, in February 2020. She is the only child of the parents' relationship. They separated in 2009. Following the parents' separation, legal proceedings were brought in Spain by the mother concerning PT's welfare. A judgment was issued in these proceedings by the Spanish Courts on 25 May 2012, providing for the mother to have custody and for parental responsibility for the child to be shared by both parties. The order provided for the father to have contact with PT on alternate weekends from after school on Friday until Sunday evening. In addition, she was to spend half of each school holiday with each parent. The order also required that the parents should inform each other of any change in address thirty days in advance.

On or about 13 February 2020, the mother travelled to England with PT. The mother's partner (with whom she is expecting a child the following month) lives in the South East of England, and they have moved in with him. The evidence on behalf of the father is that the child was removed from Spain by the mother without his knowledge or consent.

The father asked the mother to return PT to Spain, but she refused to do so. The father travelled to the UK and met with the mother and PT at a shopping centre. However, the mother again refused to permit the child to return to Spain. She did however permit PT (and S) to spend a night with the father at his hotel in England.

The case first came before the Court on 10 March 2020 on a "without notice" basis. At that hearing the mother attended in person, and indicated that she would be seeking to defend the application on the basis of (1) the father's consent and / or acquiescence and (2) Article 13(b) of the Hague convention – claiming existence of a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

On that occasion PT was, as directed by the judge, present in the Court vicinity to be interviewed by the CAFCASS (Children and Family Court Advisory and Support Service) Officer. She told CAFCASS that she had not wanted to come to England,

and that she wanted to be with her father, although she did not want to be separated from her mother either. PT's clear wish was that she wanted to return to Spain with her father rather than stay in England.

The judgment

The Court is entirely satisfied on the evidence that PT is habitually resident in Spain as she had lived there all of her life until she was recently brought to the UK. In this case the Court ruled that PT has been wrongfully removed from Spain within the terms of Article 3 of the Convention and that none of the Article 13 defences have been made out. Therefore, return order for the summary return of PT to Spain has been made.

Comments

First of all, in such cases the Court should unavoidably take the challenge to identify the risks for the child in case of return in the context of the pandemic situation. Indeed, in the present case the formulation is rather simplified. Therefore and due to the lack of case law on this issue, and in order to be able to answer the question if the return of the child would pose a grave risk, we should take a look also at the recently published Guide to Good Practice on Article 13(1)(b) (hereinafter: the Guide) by the Hague Conference On Private International Law (HCCH) and the concept of "grave risk" in child abduction proceedings in general, as set by the ECtHR in its case law.

In general, the grave risk exception in child abduction cases is based on "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation", as stated in the § 29 of the Explanatory report to the Hague Convention. The general assumption that a prompt return is in the best interests of the child can therefore be rebutted in the individual case where an exception is established. It is important to note that the exception provided for in Article 13(b) concerns only situations which go beyond what a child might reasonably be expected to bear (Ushakov v. Russia § 97, X v. Latvia § 116, Maumousseau and Washington v. France §§ 69 and 73, K.J. v. Poland §§ 64 and 67)

In § 46-48 of the discussed judgment the Court points final argument relates to the risk of physical harm that is presented by the current coronavirus pandemic in the following way:

"…This risk presents itself in two ways:

(1) The pandemic is more advanced in Spain than in the UK. As at the date of the preparation of this judgment (29 March) the official death toll stood at 1,228 in the UK and 6,528 in Spain. It could therefore be argued that PT would be at greater risk of contracting the virus in Spain than in the UK.

(2) The increased risk of infection that is posed by international travel at this time."

Did the Court explore all possible harm that the return order can bring, and since it is recognized that the risk is present, what specific kind of risk the return of the child would constitute in the context of the pandemic situation – physical or psychological danger, or being placed in an intolerable situation?

The way the Court approached this issue is a very basic attempt to identify the risks that a return order in the outbreak of COVID-19 can bring to the child. As the Guide points in § 31, although separate, the three types of risk are often employed together, and Courts have not always clearly distinguished among them in their decisions. It is clear that the return could bring physical danger of contamination with COVID-19 together with all possible complications, despite the fact that child is not in the at-risk groups as are the elderly or other chronically ill people. But we should not underestimate the psychological aspect of the pandemic situation. As the coronavirus pandemic rapidly sweeps across the world, the World Health Organisation has already, a month earlier, stated that it is inducing a considerable degree of fear, worry, and concern in the population. It is therefore out-of-the-question that for a relatively mature child (in this case of 12 years old), whether the ability to watch, read or listen to news about COVID-19 can make the child feel anxious or distressed and therefore can, and most likely will, bring also psychological harm to it. In this sense the potential psychological harm is inevitable and whilst the physical harm can or cannot happen, and indeed the contamination cannot be foreseen, in any case with the return order (especially to a state with significant risk of increasing community transmission of COVID-19) the psychological integrity of the child will be put at immediate risk.

In order to explore how this risk can be adequately assessed in child abduction proceedings in the context of the COVID-19, we should look at § 62 of the Guide,

where HCCH explicitly discusses risks associated with the child's health, stating that *"In cases involving assertions associated with the child's health, the grave risk analysis must focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State"*. How is this applicable to the pandemic situation, if at all? It seems like the only adequate response in these fast-changing unprecedented circumstances would be that the Court should indeed not compare the situations in both states, but still having in mind the nature of the COVID-19, to try to foresee the developments, relying on the general and country-specific health organizations reports, accessible nowadays online in a relatively easy way.

As a first step the Court should consider whether the assertions are of such a nature, with sufficient detail and substance that they could constitute a grave risk, as overly broad or general assertions are unlikely to be sufficient. In this situation, without precedent in the history of the Convention's application, holding that *"Although the course of the pandemic is clearly more advanced in Spain than in the UK, I do not have any evidence from which I can draw a conclusion that either country is any more or less safe than the other… I am simply not in a possession to make any findings as to the relative likelihood of contracting the virus in each country. On the material before me, all that I can conclude is that there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain."* does not fulfil the obligation of the Court to assess the risk in full, in all its possible implications. The Court is obliged to conduct the step-by-step analysis, prescribed by and explained in the Guide, and to examine the types of risk for the child, assessing it separately and in the context of their deep interrelation in these specific circumstances.

Secondly, the wording of Article 13(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk. Therefore, ECtHR is clear that in any case (regardless the context and for sure not only in cases with history of domestic violence), where such assertions have been raised, the Courts should satisfy themselves that adequate safeguards and tangible measures are available in the country of return (Andersena v. Latvia §118, Blaga v. Romania §71).

In addition, as the Guide points in § 53, Article 13(b) analysis should be always be highly factually specific. Each Court determination as to the application or non-

application of the exception is therefore unique, based on the particular circumstances of the case. A careful step-by-step analysis of an asserted grave risk is therefore always required, in accordance with the legal framework of the Hague convention, including the exception as explained in the Guide. When we discuss this issue, not only the Convention, but also Article 11(4) of Brussels IIa applies in answering the question of, what in the case of COVID-19 are "adequate safeguards". This is, without a doubt, a question difficult to answer to with certainty, as the case law of the ECtHR and the Guides do not contain any directions or good practices on the behaviour of the domestic authorities in times of pandemic.

In the present case the judge estimated as "tangible safeguards" the following "number of undertakings", offered by the father, effective until the matter could be brought before the Spanish Court, and intended to support PT's return to Spain. They include: *(1) Lodging the final order in Spain; (2) Not pursuing any criminal charges against the mother for her wrongful removal of PT from Spain to England; (3) Seeking to mediate with the mother on PT's return in relation to the mother's access; (4) Agreeing to unrestricted indirect contact between PT and her maternal family (especially with the mother and S):(5) Agreeing to direct contact for PT with her mother in Spain and England, to the extent that is possible or appropriate from a public health perspective given the current global pandemic;(6) Meeting with the mother only at neutral and/or public places when picking or dropping PT off;(7) To pay PT's maintenance and school fees pending any further determination about maintenance by the Spanish Courts; and (8) To pay all the travelling costs (flights) for PT of travelling to and from England for the purposes of contact with the mother."*

It looks like the Court is indeed satisfied with the undertakings, but unfortunately, these examples are far from adequate protective measures when we consider the grave risk induced by return in the current pandemic situation. None are directed to prevention of the grave risk as raised by the mother, and none are related to the child's health. Better examples remain to be seen from the upcoming case law of the Courts, but in the current situation, a strong focus should remain on comprehensive testing and surveillance strategies (including contact tracing), community measures (including physical distancing), strengthening of healthcare systems and informing the public and health community. Therefore, following the Guide, such measures should at the minimum include rapid risk assessment upon

arrival at the state of habitual residence, application of different types of available COVID-19 Rapid Tests, ensuring social distance and exploring online education possibilities, providing guarantees that the child will be isolated and distanced from potentially infected people (through evidence for appropriate living conditions upon return), etc. Strong focus should also be put on the possibilities for mental support for the child, bearing in mind the extremely stressful situation, related not only the COVID-19 but also to additional factors such as the separation from the other parent and the mental consequences from the forced social isolation which, as pointed above, would inevitably affect the mental wellbeing of the child.

The next question is who should prove the risk, and its gravity in this specific situation? Following the ECtHR case law, the burden of proof traditionally lies with the party opposing the child's return (Ushakov v. Russia, § 97). In this case the abducting parent indeed shall prove the grave risk, but it is true that the COVID-19 situation itself and the wide-spread precautions and information contribute a lot to proving this risk. Yet, what in the current pandemic circumstances is still to be proved by the abducting parent?

According to § 49 of the Guide, even if a Court *ex officio* gathers information or evidence (in accordance with domestic procedures), or if the person or body which has lodged the return application is not actively involved in the proceedings, the Court must be satisfied that the burden of proof to establish the exception has been met by the party objecting to return. However, in these specific circumstances, the national and international situation is developing at such speed that any evidence that could be gathered would be likely to be immediately outdated. Something very convenient for the abducting parent, it would be almost enough if the Court *ex officio* conducts check on the actual COVID-19 information regarding the state of habitual residence of the child, ensuring it is current when issuing the return or non-return order. However, this does not relieve the opposing party from the procedural obligation to present evidence as accurately as possible, and it remains important that arrangements regarding the "tangible safeguards", discussed above, are offered and supported by evidence by the party which claims the return order.

There is a further discretionary ground in the Convention which permits a refusal of a return in certain circumstances where the child objects. According to Article 12 UNCRC, the child has the right to express its views freely, these views to be

given due weight in accordance with age and maturity, and the Court should carefully examine them together with the other evidence (and not to provide stereotyped reasoning). The COVID-19 limitations raise the question should the child still be heard in this context and, if yes, how this should happen such that the risk for is minimised? Obviously, this right cannot and should not be waived in times when many procedural actions can take place online. It is worth to note that next to the existing legislation, Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision – Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. No minimum age is prescribed, but also no rules who can conduct the hearing of the child, how it must happen and where it should be conducted are set. Therefore, the hearing of the child should take place following the general conditions, and while the personal impression will indeed be reduced, and the possibilities to manipulate the child could potentially increase, the unlimited online tools to conduct the hearing eliminate the risk of contamination and offers acceptable solution for this emergency situation.

To get back to the discussed case – Re PT [2020] EWHC 834 (Fam), the Court is satisfied that the Art 13(b) defence has not been made out in this case. Many more comments could be made on the Courts assessment – the best interest of the child is not touched upon, the domestic violence is not discussed at all as an additional assertion, etc. One positive conclusion from procedural point of view is that the urgency has been taken into account, and that the Court made full use of the opportunities to conduct the proceedings online. Of course we cannot say that the return of a child during the COVID-19 pandemic constitutes a grave risk in all child abduction cases– but we can at least begin to build the good practices in this unprecedented time, when the "lockdown" will bring brand new meaning to the notion of "grave risk" under the Convention.

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The Hague Convention on Child Abduction and UK Overseas Territories: VB v TR

Written by Elijah Granet

In a recent decision of the Family Division of the English and Welsh High Court—*VB v TR (Re RR)* [2020] EWFC 28, Mr Justice Mostyn highlighted a lacuna in the protection of children from abduction under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). As a result of what Mr Justice Mostyn (at para 7) refers to as a 'colonial anachronism', unconsented removals of children from the British overseas territory of Bermuda to the UK proper fall outside the remit of either the convention or domestic law.

Facts

VB and TR are parents from Bermuda with a young son, RR. In 2019, TR removed RR from Bermuda secretly, without the consent of VB, and in violation of Bermudian court orders. The UK ratified the 1980 Convention on the Civil Aspects of International Child Abduction in 1986 and implemented it domestically by way of the Child Abduction and Custody Act 1985. Section 28(1)(*c*) of that Act enables the UK to extend the effect of the Convention to Overseas Territories by means of an Order in Council. However, Bermuda, which enjoys full internal self-governance (with its own laws, parliament, and courts) instead passed the International Child Abduction Act 1988, which essentially transposed the 1985 Act into Bermudian law. As a consequence, the UK made an Article 39 Notification declaring that the Convention applied to Bermuda, which is now

listed in the annex of authorities required by Article 18 of the Convention.

Decision

As both Bermuda and the UK are signatories to the Convention, one would expect that arrangements for the return of RR could be easily carried out. Mr Justice Mostyn notes (at para 12), if TR had gone to the USA (or indeed, any state other than the UK), the Convention would unquestionably applied as Bermuda is listed in the aforementioned annex of authorities. The problem arises because, for the purposes of the Convention, the UK and Bermuda are a single state party; therefore, because there is no 'international' element to child abduction between the UK and Bermuda, the Convention is not considered to apply. This 'counterintuitive' (para 21) state of affairs has caused confusion, including a 2014 ruling which (mistakenly) held that Bermuda is not a party to the Convention.

Of course, there is no inherent problem with the Convention being inapplicable between different British jurisdictions. For example, if a parent who removed a child from Northern Ireland to England against a court order, the English court would automatically recognize the Northern Irish court order under the Family Law Act 1986, s 25, which provides for mutual enforcement of family court orders across the UK. However, that Act does not apply to Bermuda, because Bermuda is not a part of the United Kingdom (whatever the Convention might say). A Bermudian court is, for all intents and purposes, a foreign court in the eyes of the law of England and Wales.

Thus, there is a paradoxical and frustrating outcome: for the purposes of the Convention, Bermuda is part of the UK, but, for the purposes of English and Welsh family law, Bermuda is a foreign country. This is contrary to the intention of both the Bermudian and British Parliaments in implementing the Convention: namely, to prevent the unlawful abduction of children. The result is that Mr Justice Mostyn, rather than beginning with the presumption that RR should be returned (as he would under the Convention) or automatically implementing the Bermudian court's order (as he would with a court from a 'domestic' UK jurisdiction), was forced to essentially ignore the Bermudian court's order, and to circuitously employ a complex legal test under the Children Act 1989, s 1(1) to determine if it would be in the interests of the welfare of RR for him to be returned to Bermuda. Mr Justice Mostyn ultimately held that it was in the child's

best interests to return to Bermuda, albeit at a time more conducive to international travel than the current pandemic. The only alternative route would be to employ the test for the recognition of foreign custodial orders set out by the Privy Council in *C v C (Jersey)* [2019] UKPC 40, which focuses on questions of public policy rather than the child's welfare.

Comment

The lacuna in the UK's regime for protecting against child abduction is, as Mr Justice Mostyn correctly put it (at para 12), 'an embarrassment'. The defect in this very important area of the law was so severe that the judge felt it appropriate to state (in the same paragraphs) , bluntly, 'the law needs to be changed'—either to add Bermuda (and other overseas territories) to the domestic list of recognised Hague Convention authorities, or to extend the automatic recognition of orders under the Family Law Act to all British Overseas Territories. Either option would be a welcome and necessary respite from the current state of affairs, by which abduction from a territory party to the Convention (Bermuda) to another party (the UK) is not covered by the law. In a matter as serious as this, it is astonishing that, two decades after Bermuda joined the Convention, there is still no UK framework for ensuring the swift return of abducted children to their homes.

Choice of Australian Aboriginal Customary Law

The relationship between the conflict of laws and constitutional law is close in many legal systems, and Australia is no exception. Leading Australian conflict of laws cases, including, for example, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which adopted a *lex loci delicti* rule for intra-Australian torts, are premised on public law concepts essential to our federation. These cases illustrate how the conflict of laws bleeds into other disciplines.

Love v Commonwealth [2020] HCA 3 is a recent decision of the High Court of Australia that highlights the breadth and blurry edges of our discipline. Most legal commentators would characterise the case in terms of constitutional law and migration law. The Court considered a strange question: can an Aboriginal Australian be an 'alien'?

Policy background

Australia's disposition to migration is controversial to say the least. Our government's migration policies, which often enjoy bi-partisan support, are a source of embarrassment for many Australians. One controversial migration policy involves New Zealanders. Australia and New Zealand enjoy a very close relationship on several fronts, including with respect to private international law: see the *Trans-Tasman Proceedings Act 2010* (Cth). New Zealanders often enjoy privileges in Australia that are not afforded to persons of other nationality.

Yet recently, Australia began to deport New Zealanders who had committed crimes in Australia no matter how long they had lived in Australia. In February, New Zealand Prime Minister Jacinda Ardern said that the policy was 'testing' our countries' friendship. Australian Prime Minister Scott Morrison replied, '[w]e deport non-citizens who have committed crimes in Australia against our community'. Sections of the Australian community are seeking to change Australia's policy on point, which is effected by the *Migration Act 1958* (Cth).

Facts and issues

The Court heard two special cases together. As Kiefel CJ explained: '[e]ach of the plaintiffs was born outside Australia – Mr Love in Papua New Guinea and Mr Thoms in New Zealand. They are citizens of those countries. They have both lived in Australia for substantial periods as holders of visas which permitted their residence but which were subject to revocation. They did not seek to become Australian citizens'.

Section 501(3A) of the *Migration Act* requires the Minister for Home Affairs to a cancel a person's visa if they have been convicted of an offence for which a sentence of imprisonment of 12 months or more is provided. Each of the plaintiffs committed crimes and had their visas cancelled. The effect of which was that they

became ‘unlawful non-citizens’ who could be removed from Australia.

The plaintiffs’ cases turned on s 51(xix) of the *Commonwealth Constitution*, which provides:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to… naturalization and aliens…*

The plaintiffs contended that they were outside the purview of the *Migration Act*, the *Australian Citizenship Act 2007* (Cth) and s 51(xix) because they each had a special status as a ‘non-citizen, non-alien’. ‘They say that they have that status because although they are non-citizens they cannot be aliens because they are Aboriginal persons’: [3]. Each plaintiff arguably satisfied the tripartite test for Aboriginality recognised at common law and considered below. Thoms was even a native title holder.

The High Court was asked to consider whether each plaintiff was an ‘alien’ within the meaning of s 51(xix) of the *Constitution*. Kiefel CJ clarified that the question is better understood as follows: ‘whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non?citizens for the purposes of the *Migration Act*’: [4].

The High Court split

The High Court’s seven justices departed from usual practice and each offered their own reasons. The majority of four (Bell, Nettle, Gordon and Edelman JJ) answered as follows:

> *The majority considers that Aboriginal Australians (understood according to the tripartite test in Mabo v Queensland [No 2] (1992) 175 CLR 1 at 70) are not within the reach of the “aliens” power conferred by s 51(xix) of the Constitution. The majority is unable, however, to agree as to whether the plaintiff is an Aboriginal Australian on the facts stated in the special case and, therefore, is unable to answer this question.*

Arcioni and Thwaites explain: ‘The majority rested their reasoning on the

connection of Aboriginal Australians with Australian land and waters. Aboriginal Australians were a unique, sui generis case, such that Aboriginality may generate a class of constitutional members (non-aliens) who are statutory non-citizens'. The minority of Kiefel CJ, Gageler and Keane JJ dissented for different reasons. A common theme of those reasons was that 'alien' is the antonym of 'citizen'.

Is this a choice of law case?

The case is about constitutional law. It is also about status. 'Alienage or citizenship is a status created by law': [177] per Keane J. One understanding of the difference between the majority and minority is a difference in opinion as to the applicable law to determine status as 'alien' in this context.

According to Nettle J, 'status [as a member of an Australian Aboriginal society] is inconsistent with alienage': [272]. 'Aboriginal Australians are not outsiders or foreigners – they are the descendants of the first peoples of this country, the original inhabitants, and they are recognised as such': [335] per Gordon J. The majority appealed to the common law's recognition of native title rights underpinned by traditional laws and customs in support of their analyses (see, eg, [339]).

The minority denied that status as Aboriginal could determine whether a person has the status of an 'alien' within the meaning of the *Constitution*.

Recognition of non-state law?

Nettle J quoted (at [269]) the following passage from the native title case *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 [49] (Gleeson CJ, Gummow and Hayne JJ):

> *Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence, 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and*

> *observance of a body of law and customs.*

The status of the laws and customs of Australia's Aboriginal peoples has been the subject of case consideration for decades. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267, for example, Blackburn J said:

> *The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.*

Later, in *Mabo (No 2)*, the High Court finally recognised the significance of those laws to recognition of native title. In that case, the Court articulated a tripartite test for whether a person is an Aboriginal Australian: biological descent, self-identification, and recognition by the relevant Aboriginal community (see [291] per Gordon J). As explained further below, satisfaction of this test depends on application of traditional laws and customs. Arguably, satisfaction of the test requires recognition of the positive force of that non-state law.

Against that, Keane J held, '[t]he common law's recognition of customary native title does not entail the recognition of an Aboriginal community's laws': [202]. Rather, it goes the other way: Aboriginal laws are necessary for recognition of native title. Kiefel J also explicitly rejected recognition of Aboriginal customary law: '[i]t is not the traditional laws and customs which are recognised by the common law. It is native title … which is the subject of recognition by the common law, and to which the common law will give effect. The common law cannot be said by extension to accept or recognise traditional laws and customs as having force or effect in Australia': [37]. Arguably, this means that there is no choice of law at play in this case: there is just one law at issue, being the law of Australia.

Yet even in transnational cases within the traditional domain of the conflict of laws, Australian courts will only apply foreign laws via application of the *lex fori*: *Pfeiffer*, [40]–[41]; *Nygh's Conflict of Laws in Australia*, ch 12. For practical purposes, the majority approach does recognise Aboriginal non-state law as capable of application to resolve certain issues of (non-Aboriginal) Australian law.

A choice of law rule?

Nettle J came close to articulation of a new intra-Australian choice of law rule at [271]:

> *for present purposes, the most significant of the traditional laws and customs of an Aboriginal society are those which allocate authority to elders and other persons to decide questions of membership. Acceptance by persons having that authority, together with descent (an objective criterion long familiar to the common law of status) and self-identification (a protection of individual autonomy), constitutes membership of an Aboriginal society: a status recognised at the "intersection of traditional laws and customs with the common law".*

If there is a choice of law rule in there, its significance might be expressed through this syllogism:

- P1. Whether a person is capable of being deported after committing a serious crime depends on whether they are an 'alien'.
- P2. Whether a person is an 'alien' depends on whether they are 'Aboriginal'.
- P3. Whether a person is 'Aboriginal' depends on whether they satisfy the tripartite test in Mabo [No 2] with respect to a particular Aboriginal society.
- P4. Whether a person satisfies the tripartite test turns on the customary law of the relevant Aboriginal society.

Like questions of foreign law, '[w]hether a person is an Aboriginal Australian is a question of fact': [75] per Bell J. How does one prove the content of the relevant Aboriginal law? Proof of traditional laws and customs often occurs in native title cases. It was considered at [281] per Nettle J:

> *It was contended by the Commonwealth that it might often prove difficult to establish that an Aboriginal society has maintained continuity in the observance of its traditional laws and customs since the Crown's acquisition of sovereignty over the Australian territory. No doubt, that is so. But difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term. It means only that some*

> *persons asserting that status may fail to establish their claims. There is nothing new about disputed questions of fact in claims made by non-citizens that they have an entitlement to remain in this country.*

Minority critique of the choice of law approach

As a dissentient in the minority, Gageler J offered a compelling critique of what I construe to be the choice of law approach of the majority (at [137]):

> *To concede capacity to decide who is and who is not an alien from the perspective of the body politic of the Commonwealth of Australia to a traditional Aboriginal or Torres Strait Islander society or to a contemporary Aboriginal or Torres Strait Islander community, or to any other discrete segment of the people of Australia, would be to concede to a non?constitutional non?representative non?legally?accountable sub?national group a constitutional capacity greater than that conferred on any State Parliament. Yet that would be the practical effect of acceptance of either of the first and second variations of the plaintiffs' argument.*

The choice of non-state law is arguably made more controversial by the character of those laws' content. Nettle J explained at [276]: 'As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with "country", including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations'. Gordon J held at [290], '[t]hat connection is spiritual or metaphysical'. Tacit in the majority's mode of analysis, then, is that a person's spiritual or religious views can have an impact on their status as an 'alien', or otherwise, within the *Commonwealth Constitution*. (A once-Aboriginal non-citizen who lacks those spiritual views and renounces their membership of their Aboriginal society may still be an 'alien' following this case: see [279], [372].) From a secular perspective within an increasingly secular nation, that is a striking proposition.

Conclusion

This is not the first time that the relationship between the conflict of laws and issues affecting indigenous peoples has been considered. More generally, whether non-state law may be the subject of choice of law is a topic that has been considered many times before. One of the factors that makes *Love v Commonwealth* unique, from an Australian legal perspective, is the majority's effective choice of Aboriginal customary law to determine an important issue of status without really disturbing the common law proposition that Aboriginal groups lack political sovereignty within the Australian federation (see [37], [102], [199]). COVID-19 may have stalled sought after changes to the Australian *Constitution* with respect to recognition of indigenous peoples (see (2019) 93 *Australian Law Journal* 929), yet it remains on the national agenda. In any event, Australia's very white judiciary may not be the best forum for recognition of the sovereignty of Australian Aboriginal and Torres Strait Islander peoples.

Competition Law and COVID 19

Written by Sophie Hunter

With more than 200 countries affected to date, the current crisis presents far reaching implications for competition law and policy on a global scale. This crisis is affecting developed and developing countries alike, especially by putting young competition authorities under a stress test of the resilience of their competition rules. As the pandemic of COVID19 spreads to every parts of the world, most recently the African continent, competition authorities are looking at whether relaxing their competition rules to allow for cooperation between key actors of the health sector and other essential economic sectors, like the airline industry. However, full or partial relaxation of competition rules may have adverse effects on industries, business and consumers by resulting in anti-competitive practices such as price fixing, excessive pricing and collusion between competitors.

Competition authorities have responded to this crisis in a piecemeal approach.

While the European Commission was quick to a temporary framework[1] and relied on measures implemented during the 2008 financial crisis[2] , in the US, the FTC and DOJ only recently issued a guidance note based on previous emergency situations (Harvey and Irma hurricanes) to allow cooperation of competitors in the health sector, especially in the development of vaccines.[3] The UK has granted temporary exemptions from anti collusion rules to supermarkets. An approach also adopted by the German competition authority to ensure continuity of food supplies. South Africa promptly enacted an overall sector wide block exemption for the health sector.[4] Some countries like France and China have toughened up their price regulations.[5]

With a surge in excessive pricing of health-related products such as masks and hand sanitizers, competition authorities are currently dealing with ongoing investigations in a wide range of jurisdictions, namely the UK, France, Brazil, Russia, Spain and Italy. Some have announced price controls over high demand items. This has already been done in France through a decree regulating the price of hand sanitizers to prevent retailers and pharmacists engaging in abusive price increases.[6] Enforcement of sanctions against anti-competitive conducts toughened up, especially from competition authorities in Kenya and China, which have already heavily put sanctions on retailers engaged in excessive pricing of health-related products.

In times of crisis, governments can allow specific exceptions for joint research projects because they understand the need for collaborative efforts between firms to, for instance, develop a vaccine. Such exceptions have already been granted during other pandemics such as Swine Flu in 2009, MERS in 2015 and influenza in 2019. Those exceptions may be exempted from competition rules. For instance, the European Commission has called for an increase effort in research and development at the European level to develop a vaccine against COVID 19 within an exceptional regulatory framework (as it already did in 2009). [7] In South Korea, similarly, the government encouraged the main pharmaceutical companies to work together on a vaccine through an emergency use authorisation that was established post MERS in 2015.[8]

Apart from exceptions, certain countries granted exemptions from anti collusion rules to businesses in specific economic sectors. The most far reaching measures were taken by South Africa with the COVID-19 Block Exemption for the Healthcare Sector 2020. It established price controls on everyday goods as well

as a list which exempts hospitals, medical suppliers, laboratories and pathologists, pharmacies, and healthcare funders from engaging in anti-competitive collaboration.[9]Other temporary exemptions have been granted to the airline industry by Norway, the retail sector in Germany, banking in Australia, the distilled spirit industry in the US, education in Denmark and tourisms in Italy and Kazakhstan.

Competition authorities must enforce strict compliance to competition rules, even during this time of pandemic. Despite this, some leverage and legal leeway enacted by certain competition authorities demonstrates a willingness to allow for a temporary flexibility to mitigate the economic impact. This can be achieved through sector specific block exemptions, strict guidance on collaboration in times of emergency or enhanced legislation on price controls. This time of crisis creates a great opportunity for competition authorities around the world to engage in international cooperation to share best practices. Prompt responses to the crisis in developing countries demonstrates the ambition and dynamism of such agencies (Peru, South Africa, Kenya). Nevertheless, it remains to be seen how competition authorities will cope during the crisis with sustaining investigation, enforcement and compliance with competition rules.

[1] François-Charles Laprévote, Theodora Zagoriti, Giulio Cesare Rizza, The EU Commission adopts a Temporary Framework to support the economy in the context of the COVID-19 outbreak, 19 March 2020, e-Competitions Bulletin Preview, Art. N° 93837

[2]
https://www.concurrences.com/fr/bulletin/special-issues/competition-law-covid-19/competition-policy-covid-19-an-overview-of-antitrust-agencies-responses

[3]
https://www.competitionpolicyinternational.com/ftc-and-doj-announce-expedited-antitrust-procedure-for-coronavirus-public-health-efforts/

[4] Minister of Trade and Industry of South Africa, 'Covid-19 Block Exemption for the Health Care Sector, 2020 – South Africa' (2020) 657 Government Gazette 12.

[5] State Administration of Market Supervision (SAMR) of People's Republic of

China, ‘Urgent Notice of the General Administration of Market Supervision on Severely Cracking down on Price Violations in the Production of Preventive and Control Materials during the Epidemic Prevention and Control Period’ (5 February 2020) <http://www.gov.cn/zhengce/zhengceku/2020-02/06/content_5475223.htm> accessed 22 March 2020.

[6] ‘Encadrement Des Prix Pour Les Gels Hydroalcooliques’ (*Economie.gouv.fr*, 2020) <https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliques-voir-la-faq> accessed 22 March 2020.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Pandemic (H1N1) 2009’ (15 September 2009) 1 <http://op.europa.eu/en/publication-detail/-/publication/9ec8052e-c269-4b57-9be9-4b40c5101d15/language-en> accessed 22 March 2020.

[8] https://www.reuters.com/article/us-health-coronavirus-testing-specialrep/special-report-how-korea-trounced-u-s-in-race-to-test-people-for-coronavirus-idUSKBN2153BW

[9] South African Government, ‘Guidelines – Coronavirus Covid-19 in South Africa’ (23 March 2020) <https://www.gov.za/coronavirus/guidelines> accessed 23 March 2020.

Access to justice in times of corona

Access to justice in times of corona

*When COVID-19 makes the case for greater digitalisation of justice**

***Written by Emma van Gelder, Xandra Kramer and Erlis Themeli**, with thanks to Elisabetta Silvestri (University of Pavia), Georgia Antonopoulou, Alexandre Biard and Betül Kas (*Erasmus University Rotterdam, ERC-Co project 'Building EU civil justice: challenges of procedural innovations – bridging access to justice')

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The disruption of society as a result of the pandemic has naturally also affected our justice system. While there is no total lockdown in The Netherlands, as of 16 March people working in non-vital sectors are required to stay at home, schools and universities are closed, and events and social gatherings are forbidden. These measures also meant that courts in the Netherlands had to restrict their daily activities. All courts were closed on 17 March and will stay closed in any case until 28 April 2020. This means that most court proceedings are postponed for the time being. To proceed with continuing obligations and proceedings, thereby ensuring ongoing access to justice, judiciaries around the world are increasingly adopting various forms of technology in their court procedures.

This blogpost sets out the Dutch approach of the judiciary to the COVID-19 crisis, and highlights some global examples of other approaches.

COVID-19's disrupting effect to the functioning of the court system

COVID-19 caused a sudden lockdown of courts. Court hearings are delayed, resulting in complaints that the backlog in the judiciary will grow, and attorneys have urged for more cases to be processed. Against the background of the health safety measures by the RIVM (National Institute for Public Health and the Environment), the public is temporarily no longer allowed to attend the few court hearings that still do take place. The lockdown of courts and offices emphasises the need for remote access to courts and better communication between courts and their constituents.

The adoption of a General Regulation during the COVID-19 crisis

The Dutch Judiciary has taken steps to respond to these problems by adopting a general regulation on case-handling by the Judiciary during the COVID-19 period. The starting point of this regulation is that the courts will continue to deal with *urgent* cases, which are divided into *serious* urgent cases and *other* urgent cases. Urgent cases include certain hearings in criminal cases, insolvency cases, and family cases, particularly those concerning child protection. Judges work with digital files and have secured remote access from home. Law firms are also expected to have their staff working from home whenever possible, though not all law firms are closed.

The General Regulation deals among others with the attendance of courtroom hearings (Para. 1, sub 1.1 General Regulation), the use of secure email (Para. 1, sub 1.2 General Regulation) and closed hearings (Para. 1, sub 1.3 General Regulation). In principle oral hearings with the physical attendance of the parties will not take place during the COVID-19 period, unless the judge decides otherwise. Both *serious* and *other* urgent cases will take place as much as possible in writing or through telephone (video) connection. If the judge decides that an oral hearing with physical presence of the parties should take place, the guidelines of the RIVM are taken into account. Where possible, livestreaming will be used. Procedural guidelines that allow documents and messages to be sent through post or fax, can be sent via a safe email channel of the Judiciary.

Also there is a proposal pending on separate temporary 'urgent' COVID-19 legislation (spoedwetgeving *COVD-19 Justitie en Veiligheid*), proposed by the Minister of Legal Protection, Sander Dekker, and by the Minister of Justice and Security, Ferdinand Grapperhaus. This proposal was submitted to the House of Representatives (*tweede kamer)* on 8 April 2020. It will expire on the 1st of September 2020, but with the possibility to extend it's application. This proposal for legislation allows communication that normally is prescribed to take place physically, to take place through electronic means such as audio or video livestream. This enables annual general meetings to be held online or a testament by a notary to be signed online.

Positive side-effects: enhanced use of technology

Often, radical innovations are dictated by crisis. A positive side effect of the current health crisis is that it may boost the digitisation of the judiciary that has been severely hampered in the Netherlands (see our blogpost on EUCP; more

extensively: Xandra Kramer, Erlis Themeli and Emma van Gelder, e-Justice in the Netherlands: The Rocky Road to Digitised Justice, 2018). To enable the functioning of the General Regulation, the IT department of the judiciary has extended the facilities for a telephone and video connection between the judiciary and external parties. Another side-effect boosting digitisation in the Dutch Judiciary regards the introduction of secure email to be used by parties and for filing procedural documents and communicating messages as of 9 April 2020. Several safeguards are required for the use of email, regarding the subject of the email and the capacity of the attachments to the email. Regarding signatures, no digital signature is prescribed, but a 'wet' signature scanned and uploaded through PDF (see para. 1.2.4 under 6 of the General Ruling). The moment of receipt of the e-mail within the secured email system of the Judiciary counts as the time of receipt (see para. 1.2.5 of the General Regulation).

Perhaps the most important side effect of this crisis would be the experience with these implemented facilities. Using remote access to courts, secure emails, video conferencing and other electronic means for a protracted period will provide the Ministry of Justice and Security important lessons on how to better utilize these. Video conferencing is of course not new in the Netherlands, but it is not used at a wide scale, particularly not in civil cases.

Challenges

While these side-effects must be praised, in reality there are a number of challenges caused by this 'sudden' shift towards digitisation that cannot be neglected. The lack of face-to-face contact results in an absence or lesser extent of non-verbal cues such as body language, tone of voice, facial expression. Especially in family law cases – often involving emotional discussions – this may prove a challenge and can risk miscommunication. Another challenge relates to the identification of parties; if e-mail is used, it can be difficult to ensure that the documents are also received by the correct person. In the Netherlands, judicial officers play an important role in securing the correct service of documents. Another challenge – although less relevant in the Dutch context – relates to vulnerable users having no or limited access to the internet or having minimum skills with digital technology. The absence of an offline channel forms a challenge for access to justice in certain cases.

The exclusion of public attendance during a court hearing, challenges the

principles of a public hearing and transparency. To counter these challenges, attendance of maximum of three journalists is still allowed, and more decisions are published on the website of the judiciary (rechtspraak.nl). For example, the website of the administrative law department (*Afdeling Bestuursrechstpraak)* of the Council of State, states that decisions are temporarily published online and posted on their internal website and *rechtspraak.nl*.

Also, across the Dutch borders, examples of challenges are found. For example, small criminal cases in France – such as 'immediate appearances' (*comparution immédiate*), rarely allow for online hearings or other forms of digitalisation.

In Germany, since 2013 § 128a ZPO (German Civil Procedure Code) gives the possibility of using video-conferences for the oral negotiation and the hearing of evidence in civil litigation. Although all German states have equipped their judiciaries with the necessary technology, they are not widely used in practice. The current approach to face the corona crisis consists rather of the postponement of non-urgent proceedings. However, first signs towards a stronger move of the digitization of justice appears to be driven by the judiciary of Nord-Rhine-Westphalia.

Other global developments

Similar approaches to the COVID-19 crisis can be seen around the globe.

For instance, the UK has adopted the Coronavirus Act 2020 (hereinafter: Act). Regarding provisions on digitisation, Point 53 and 54 of the Act enshrine the expansion of the availability of live links in criminal proceedings and in other criminal hearings. Furthermore, point 55 and 56 of the Act rule that public participation in proceedings will be conducted by video or audio, and live links are used in magistrates' court appeals for requirements or restrictions imposed on a potentially infectious person. The Economist, quotes in a paper of 4 April 2020, that before the COVID-19 crisis, about 200 cases a day were being heard at least partially via conference-call and video link in the UK. By March 31st this number had increased to around 1800 cases.

Richard Susskind, launched a new website at the outset of the corona crisis, in order to create a platform to share experiences of 'remote' alternatives to traditional court hearings. The website provides an overview of interesting

developments on a global level. In any event, Susskind can be delighted as he has noted a *sudden spike of sales* of his recent book 'Online courts and the future of justice'.

Also in Italy extensive measures for the administration of justice during the Covid-19 period are adopted. A recent statutory instrument (18 March 2020),which applies until 15 April 2020, rules that most cases are postponed and all deadlines provided for by laws are suspended. Exceptions apply to certain urgent cases. From 16 April 2020 through June 30, other measures can be taken which comply with the health safeguards concerning COVID-19, for example court access can be limited. The Court of Cassation uses video technology to decide appeal cases. It required an adaption of the procedural rules to allow video connection for the judges unable to travel due to the COVID-19 crisis.

In Canada, some courts are encouraging counsel and the public to use alternative dispute resolution forms in order to reduce delays now that many court hearings are postponed for the time being. The use of technology in out-of-court dispute resolution is more widespread and accepted, resulting in various forms of online dispute resolution (ODR). For example, in the COVID-19 period, ODR procedures offer benefits of virtual hearings centralizing disputes regardless of geographical distances between parties, paperless processes, flexibility and convenience enabling parties to participate from their own home computer. Positive side-effects are cost and time reductions as online procedures eliminate *inter alia* travel costs. In any case, the Covid-19 crisis may lead to a 'wake-up' call among lawyers and parties to consider the ability of ODR/ADR as a viable option of dispute resolution.

In Colombia, on 19 March new procedural rules were enacted to allow for virtual conferences and videoconferencing in Colombian Courts.

In Brazil, Brazilian courts work with the Cisco system enabling videoconference for court proceedings.

Also in Kenya, digitalisation is welcomed, as a Kenyan Judge has used Zoom for remote hearings and is now planning to oversee more than 20 court hearings over video link, including verdicts, rulings on appeals as well as applications.

Conclusion

It remains to be seen if the rapid uptake of digitisation will continue after the COVID-19 crisis comes to an end. In any case, the present health crisis shows the ability to implement emergency legislation and of the judiciary to amend a vast array of procedures in a short period of time.