The Private International Law of Virtual Zoom Backgrounds

Written by Tobias Lutzi, University of Cologne

One of the biggest winners of the current pandemic (other than toilet paper producers, conspiracy theorists, and the climate) seems to be the former Silicon Valley startup Zoom, whose videoconferencing solutions have seen its number of daily users increase about thirtyfold since the end of 2019. While the company's success in a market otherwise dominated by some of the world's wealthiest corporations has taken many people – including investors – by surprise, it can be attributed to a number of factors – arguably including its software's highly popular virtual-background feature.

With more and more people using the cockpit of the *Millennium Falcon*, the couch from *The Simpsons*, and other iconic stills from movies or TV series as virtual backgrounds in their private and professional Zoom meetings and webinars, the question arises as to whether this may not constitute an infringement of copyright.

Unsurprisingly, this depends on the applicable law. Whereas using a single frame from a movie as a virtual background may often qualify as 'fair use' under US copyright law even in a professional setting (and thus require no permission from the copyright holder), no such limitation to copyright will be available in many European legal systems, with any 'communication to the public' in the sense of Art 3 of the Information Society Directive 2001/29/EC potentially constituting a copyright infringement under the domestic copyright laws of an EU Member State.

As far as copyright infringements are concerned, the rules of private international law differ significantly less than the rules of substantive law. Under the influence of the Berne Convention, the so-called *lex loci protectionis* principle has long become the leading approach in most legal systems, allowing copyright holders to seek protection under any domestic law under which they can establish a copyright infringement. For infringements committed through the internet, national courts have given the principle a notoriously wide application, under

which the mere accessibility of content from a given country constitutes a sufficient basis for a copyright holder to seek protection under its domestic law. Accordingly, using an image on Zoom without the copyright holder's permission in a webinar that is streamed to users in numerous countries exposes the user to just as many copyright laws – regardless of whether the image is used by the host or by someone else sharing their video with the other participants.

Interestingly, the fact that the image is only displayed to other users of the same software is unlikely to mitigate this risk. While Zoom's (confusingly numbered) terms & conditions unsurprisingly prohibit infringements of intellectual property (clause 2.d.(vi)) and – equally unsurprisingly – subject the company's legal relationship with its users to the laws of California (clause 22/20.1), courts have so far been slow to attach significance to such platform choices of law as with regard to the relationship between individual users. In fact, the EU Court of Justice held in Case C-191/15 *Verein für Konsumenteninformation v Amazon* (paras. 46–47) that even with regard to a platform host's own liability in tort,

> *the fact that [the platform host] provides in its general terms and conditions that the law of the country in which it is established is to apply to the contracts it concludes cannot legitimately constitute […] a manifestly closer connection [in the sense of Art. 4(3) Rome II].*
>
> *If it were otherwise, a professional […] would de facto be able, by means of such a term, to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation.*

While the escape clause of Art. 4(3) Rome II is not directly applicable to copyright infringements anyway, the decision illustrates how courts will be hesitant to give effect to a platform host's choice of law as far as the relationship between users – let alone between users and third parties – is concerned. This arguably also applies to other avenues such as Art. 17 Rome II and the concept of 'local data'.

The liability risks described above are, of course, likely to remain purely theoretic. But they are also easily avoidable by not using images without permission from the copyright holder in any Zoom meeting or webinar that cannot safely be described as private under the copyright laws of all countries from where the meeting can be joined.

Corporate responsibility and private (international) law

Written by Giesela Rühl, University of Jena/Humboldt-University of Berlin

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of all contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. Corporate social responsibility has been the subject of lively debates in private international law for many years. These debates revolve around the question of whether companies domiciled in countries of the Global North can be held liable for human rights violations committed by foreign subsidiaries or suppliers in countries of the Global South (so-called supply chain liability).

2. According to the majority view in the public international law literature, companies are not, at least not directly bound by human rights. Although numerous international law instruments, including the UN's 2011 Guidelines for Business and Human Rights (Ruggie Principles), also address companies, liability for human rights violations is, therefore, a matter of domestic law.

3. The domestic law applicable to liability for human rights violations must be determined in accordance with the provisions of (European) private international law. Direct recourse to the *lex fori*, in contrast, is not possible. The legal situation in Europe is, therefore, different from the United States where actions which are brought on the basis of the Alien Tort Claims Act (ATCA) are governed by US-American federal (common) law.

4. Claims for human rights violations committed abroad will usually be claims in tort. Under (European) private international law it is, therefore, the law of the place where the damage occurs (Article 4(1) Rome II Regulation) and, hence, foreign law which governs these claims. Exceptions apply only within narrow limits, in particular if domestic laws can be classified as overriding mandatory

provisions (Article 16 Rome II Regulation) or if application of foreign law violates the *ordre public* (Article 26 Rome II Regulation).

5. In addition to tort law, claims for human rights violations may also be based on company law, namely when directors are directly held liable for torts committed by a foreign subsidiary. According to the relevant private international law provisions of the Member States these claims are governed by the law of the (administrative or statutory) seat of the foreign subsidiary. As a consequence, claims in company law are also subject to foreign law.

6. The fact that (European) private international law submits liability for human rights violations to foreign law is very often criticized in the private international law literature. Claiming that foreign law does not sufficiently protect the victims of human rights violations, a number of scholars, therefore, attempt to subject liability claims *de lege lata* to the domestic law of the (European) parent or buyer company.

7. These attempts, however, raise a number of concerns: first, under traditional (European) private international law, substantive law considerations do not inform the determination of the applicable law. Second, the wish to apply the domestic law of a European country is mostly driven by the wish to avoid poorly functioning court systems and lower regulatory standards in countries of the Global South. Neither of these aspects, however, has anything to do with the applicable tort or company law. Regulatory standards, for example, are part of public law and, therefore, excluded from the reach of private international law. Finally, the assumption that the domestic law of the (European) parent or buyer company provides more or better protection to the victims of human rights violations does not hold true *de lege lata*. Since parent and buyer companies are legally independent from their foreign subsidiaries and suppliers, parent and buyer companies are only in exceptional cases liable to the victims of human rights violations committed abroad by their foreign subsidiaries or suppliers (legal entity principle or principle of entity liability).

8. The difficulties to hold (European) parent and buyer companies *de lege lata* liable for human rights violations committed by their foreign subsidiaries or suppliers raises the question of whether domestic laws should be reformed and their application ensured via the rules of private international law? Should domestic legislatures, for example, introduce an internationally mandatory human

rights due diligence obligation and hold companies liable for violations? Proposals to this end are currently discussed in Germany and in Switzerland. In France, in contrast, they are already a reality. Here, the Law on the monitoring obligations of parent and buyer companies (Loi de vigilance) of 2017 imposes human rights due diligence obligations on bigger French companies and allows victims to sue for damages under the French Civil Code. The situation is similar in England. According to a Supreme Court decision of 2019 English parent companies may, under certain conditions, be held accountable for human rights violations committed by their foreign subsidiaries.

9. The introduction of an internationally mandatory human rights due diligence obligation at the level of national law certainly holds a number of advantages. In particular, it may encourage companies to take measures to prevent human rights violations through their foreign subsidiaries and suppliers. However, it is all but clear whether, under the conditions of globalization, any such obligation will actually contribute to improving the human rights situation in the countries of the Global South. This is because it will induce at least some companies to take strategic measures to avoid the costs associated with compliance. In addition, it will give a competitive advantage to companies which are domiciled in countries that do not impose comparable obligations on their companies.

10. Any human rights due diligence obligations should, therefore, not (only) be established at the national level, but also at the European or – even better – at the international level. In addition, accompanying measures should ensure that the same rules of play apply to all companies operating in the same market. And, finally, it should be clearly communicated that all these measures will increase prices for many products sold in Europe. In an open debate it will then have to be determined how much the Global North is willing to invest in better protection of human rights in the Global South.

Full (German) version: *Giesela Rühl*, Unternehmensverantwortung und (Internationales) Privatrecht, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 89 et seq.

Jurisdiction unbound: extraterritorial measures to ensure corporate responsibility

Written by Nico Krisch, Graduate Institute for International and Development Studies, Geneva

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of all contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. The conceptual framework of jurisdictional boundaries in international law continues to be dominated by the principle of territoriality and its exceptions, even if calls for a reorientation have grown in recent years.

2. The principle of territoriality leads today to far wider jurisdictional claims than in the past, and its limits are being redefined through 'territorial extensions' in a number of areas.

3. These extensions are rarely questioned by states, and clear and consistent jurisdictional boundaries remain hard to define. Contestation arises primarily when states seek to use extraterritorial measures to counteract important policy choices of other states.

4. The result is a far-reaching overlap of different jurisdictional spheres which, if seen in conjunction with the multiple forms of transnational regulation existing today, leads to a multi-layered 'jurisdictional assemblage'.

5. So far, there are no accepted rules governing the relationship of competing jurisdictional spheres in this assemblage. The effective exercise of jurisdiction depends, in large part, on the political and economic power of a country in a given issue area and market.

6. The wider options for action that result from this territorial extension allow for more effective responses to existing societal challenges, especially with a view to the provision of (national and global) public goods, albeit in a limited way.

7. The new jurisdictional regime accentuates hierarchies between countries, interferes with the autonomy of weaker states, and subverts the principle of sovereign equality. Yet under certain circumstances, it also allows actors in weaker states to compensate for their otherwise limited ability to hold multinational companies to account.

8. Existing procedural and substantive proposals only have limited promise for alleviating the tensions resulting from the power imbalance in the exercise of jurisdiction.

9. The territorial principle in the law of jurisdiction has always been sufficiently limited not to overly impede powerful states' pursuit of their interests.

10. Territoriality today appears less as a principle of effective limitations than as the basis of different strategies and tactics through which states seek to hold mobile actors to account and through which they pursue their political aims in a global context.

Full (German) version: *Nico Krisch,* Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 11 et seq.

Jurisdiction for claims against transnational companies for

human rights violations

Written by Anatol Dutta, University of Munich

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. The question of the reach of courts' jurisdiction is highly significant for claims against transnational enterprises based on human rights violations or environmental damages abroad. It does not only determine the applicable law but also the access to a particular justice system.

2. Universal jurisdiction of national courts for human rights and environmental damages claims against enterprises cannot be established, neither on the basis of existing law nor from a legal policy perspective. Rather, such claims have to be handled under the traditional jurisdictional mechanisms.

3. From a global perspective, a remarkable shift regarding jurisdiction can be noted: Whereas the courts in the United States are increasingly limiting access to their justice system in cases with foreign elements, jurisdictional limits are no significant hurdle for human rights and environmental damages claims in the European Union.

4. Domestic enterprises can be sued at their seat. Yet, the *forum non conveniens* doctrine allows US courts – and perhaps soon English courts as well – to decline jurisdiction, also for human rights and environmental damages claims.

5. Yet, human rights and environmental damages claims against foreign enterprises can also only be brought under certain circumstances in the EU.

6. Claims against foreign enterprises for human rights violations and environmental damages abroad can only rarely be brought before domestic courts based on special jurisdiction related to specific subject matters, for example the jurisdiction for tort claims at the place where the harmful event occurred.

7. If human rights and environmental damages claims are simultaneously directed against a domestic enterprise, for example a mother company or a buyer company

in the EU, at least partially, foreign subsidiaries and suppliers can be sued on the basis of special jurisdiction over multiple defendants which can be used strategically.

a) If foreign enterprises have their seat in a third State outside the European Union, the jurisdiction of the domestic courts over the foreign co-defendant is governed by the national law of the forum Member State.

b) However, the current trend to establish a separate liability of domestic enterprises, for example, by extending human rights and environment-related duties of care for the supply chain, could endanger this special jurisdiction over multiple defendants, which, on the other hand, could lose significance.

8. Extending the general jurisdiction at the domicile of the defendant by relying on a personal criterion different to the seat of the defendant enterprise is not a viable solution.

a) Today US courts refuse to exercise jurisdiction based solely on the foreign enterprise 'doing business' within the territory. In some EU Member States, for claims against foreign enterprises at least with a seat in a third State, exorbitant jurisdiction can be established, for example, based on assets of the foreign defendant enterprise within the territory.

b) At the most from a policy perspective, for claims against foreign subsidiaries of a domestic enterprise the introduction of an enterprise jurisdiction could be considered.

9. For claims against foreign enterprises jurisdiction of the domestic courts can often only be based on a *forum necessitatis* if proceedings cannot reasonably and effectively be brought or conducted abroad; the hurdles for such an exceptional jurisdiction are, however, high.

10. To hear human rights and environmental damages claims against enterprises lies within the powers of the domestic courts.

a) Foreign enterprises do not enjoy State immunity even if they violate human rights or damage the environment abroad in collaboration with foreign States.

b) The power to adjudicate is also not limited by the fact that a decision of the court on human rights and environmental damages claims potentially has

implications on the foreign policy relations of the forum State.

c) The domestic courts are often even not barred from deciding on human rights and environmental damages claims of foreign States against enterprises.

Full (German) version: *Anatol Dutta*, Internationale Zuständigkeit für privatrechtliche Klagen gegen transnational tätige Unternehmen wegen der Verletzung von Menschenrechten und von Normen zum Schutz der natürlichen Lebensgrundlagen im Ausland, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 39 et seq.

Jurisdiction to Garnish Funds in Foreign Bank Account

By Stephen G.A. Pitel, Faculty of Law, Western University

Instrubel, N.V., a Dutch corporation, has been attempting in litigation in Quebec to garnish assets of the Republic of Iraq. The difficult issue has been the nature of the assets sought to be garnished and where they are, as a matter of law, located. The assets are funds in a bank account in Switzerland payable to the Republic of Iraq (through the Iraqi Civil Aviation Authority) by IATA, a Montreal-based trade association.

The judge at first instance held the assets were not a debt obligation but in effect the property of the Republic of Iraq and located in Switzerland and so could not be subject to garnishment in Quebec proceedings. The Court of Appeal reversed, holding the assets were a debt due to the Republic of Iraq which it could enforce against the trade association at its head office in Quebec, so that the debt was located in Quebec under the basic rule for locating the *situs* of a debt.

Last December the Supreme Court of Canada denied the appeal for the reasons of

the Quebec Court of Appeal. One judge, Justice Cote, dissented with reasons to follow. On May 1, 2020, she released those reasons: see *International Air Transport Association v. Instrubel, N.V.*, 2019 SCC 61 (available here).

As a Quebec case, the decision is based on the civil law. Justice Cote's dissent hinges on the view that the funds in the account are the property of the Republic of Iraq, not the IATA, and are merely being held by the latter before being remitted to the former (see para. 36). The funds are not part of the "patrimony" of the IATA. This is because the nature of the agreement between the Republic of Iraq and the IATA is one of "mandate" (see paras. 40-41 and 45). As Justice Cote notes (at para. 48) "there is a general principle in the law of mandate that a mandatary's obligation towards a mandator is not a debt". While the payments that went into the bank account were collected and held by the IATA, they were made to the Republic of Iraq (para. 53). Indeed, the account "is for practical purposes equivalent to a trust account" (para. 61).

As noted, the six judges in the majority simply adopted the reasons of the Quebec Court of Appeal (available here). So they did not directly engage with Justice Cote's reasons. The Court of Appeal concluded (at para. 41) that "there is no ownership of or real right to the funds … Rather, there is a creditor/debtor relationship". It also observed that the Republic of Iraq "never owned the debts due it by various airlines in consideration of landing at Iraqi airports. It does not now own the funds collected in satisfaction of those debts and deposited by IATA in its bank account. IATA's obligation is to pay a sum of money not to give the dollar bills received from third parties" (para. 43).

The Court of Appeal noted (at para. 50) a practical rationale for its conclusion: "More significantly it seems that [Instrubel, N.V.] and others in similar positions which seek to execute an unsatisfied claim would be forced into an international "shell game" of somehow discovering (or guessing) where the mandatary/garnishee (IATA), deposited the money – a virtually impossible task. The law, correctly applied, should not lead, in my view, to such unworkable results. As the *in personam* debtor of ICAA, it matters not whether IATA deposited the money it collected and giving rise to such indebtedness in a bank account in Geneva, New York or Montreal. The *situs* of its bank account does not change the *situs* of the debt IATA owes to its creditor. As such, that funds were initially collected in Montreal or at an IATA branch office in another country is inconsequential."

The case is at minimum important for what it does not do, which is authorize the garnishing of assets outside Quebec. All judges take the position that would be impermissible.

Germany's Approach to Cross-border Corporate Social Responsibility of Enterprises: Latest Developments

by Marie Elaine Schäfer

The cross-border expansion of EU companies' economic activities not only leads to a globalised market, but also impacts human rights as well as the environment in countries worldwide. The recent rise of claims against EU companies for the violations committed by their subsidiaries located in third countries is a by-product of that context. With Germany being the world's third largest importing country, the question of corporate responsibility for harmful events abroad is crucial. The present post provides an overview of the most recent legal developments on that topic.

"National Action Plan" and voluntary principle

The central aspect of Germany's approach to prevent human rights violations and environmental damages caused by German companies' foreign subsidiaries is a voluntary – as opposed to binding – principle.

In 2016, the German Government adopted the "Nationaler Aktionsplan Wirtschaft und Menschenrechte" (National Action Plan on Business and Human Rights) to implement the UN guiding principles on Business and Human Rights (Ruggie Principles). This fixed framework is the first of its kind in Germany. The objective of the National Action Plan is to delineate German enterprises' responsibility to

protect human rights: at least 50 per cent of all large companies in Germany (with more than 500 employees) have to implement a system of human rights due diligence by 2020. Accordingly, "[c]ompanies should publicly express their willingness to respect human rights in a policy statement, identify risks, assess the impact of their activities on human rights, take countermeasures if necessary, communicate how they deal with risks internally and externally and establish a transparent complaints mechanism" (see the Report on the National Action Plan).

An inter-ministerial committee (on business and human rights), formed by the Government under the auspices of the German Federal Foreign Office, monitors the status of implementation of human rights due diligence. However, any tangible measures remain optional for companies and inaction entails no consequences yet.

KiK litigation

German courts faced the question of companies' liability to some extent in the KiK litigation, which ended with a judgment issued by the Court of Dortmund (Germany) in 2019.

The facts of that case are the following: the German textile importer and reseller KiK Textilen and Non-Food GmbH (hereafter, KiK) is listed amongst the ten largest providers in the German textile industry and has over 28.000 employees. In September 2012, 259 people died in a fire in a textile factory in Pakistan and 47 more were injured. The main buyer of the factory's goods was KiK. In 2015, relatives of three of the deceased victims and one of the injured workers himself started proceedings against KiK in the Regional Court of Dortmund for damages of 30.000 € each for suffering and the death of the deceased victims.

The court ruled that, based on Art. 4(1) of the Rome II Regulation, Pakistani law was applicable. In the main proceedings, that court retained expert evidence on Pakistani Law and dismissed the lawsuit due to the Pakistani limitation period for such claims that ended even before the proceedings in Germany had started. For further general discussion on Article 4(1) of the Rome II Regulation as well as on the potential relevance of Article 4(3) Rome II Regulation see here.

According to the further holdings of the court, the claimants could alternatively hold KiK liable for the events in Pakistan, had an acknowledgement of liability been written. However, KiK had agreed on a code of conduct with the supplier,

which the court and the expert on Pakistani law evaluated as an agreement to compensate on an **ex gratia** basis and not as an acknowledgement of liability. Furthermore, the court stated that, even if German law was applicable, a code of conduct would then, at most, lead to a legal binding agreement between KiK and the supplier. The suppliers' employees could not file any direct claims against KiK based on the supply contract and the code of conduct, which cannot be seen as a contract to the benefit of a third party under German law (supplementary interpretation of the contract).

In light of this, it is questionable how long the voluntary principle will remain the leading path in Germany's approach to deal with expanding supply chains and the challenges for both environmental and human rights standards.

Current legislative developments

An alliance of non-governmental institutions (similar to the coalition that launched the Swiss *initiative populaire* "entreprises responsables – pour protéger l'être humain et l'environnement" in 2016) has formed the "Initiative Lieferkettengesetz" (Supply chain Law Initiative) with the intention of establishing binding obligations as they can be found in the French Duty of Vigilance Law ("loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre"). Accordingly, German companies shall establish diligence plans to protect human rights and the environment in the states where their subsidiaries are located. Violations of diligence would lead to sanctions in form of shortening of government aids and high fines. In order to ensure the companies' liability for violations in German courts, the law would be formed as an overriding mandatory provision in the sense of Art. 9(1) of the Rome I Regulation.

Applied to the KiK litigation, the problem does not only lie within the applicability of German law. As the Court of Dortmund ruled, only a written acknowledgement of liability would enable employees to start proceedings. Since a mandatory system of due diligence would likely take the form of codes of conduct rather than acknowledgements of liability, violations of German law would lead to the sanctioning of the companies but would not offer a cause of action to suppliers' employees against the German enterprises.

Even though the enactment of a supply chain law remains highly disputed within

the government, recent developments show that a change towards binding obligations may be on its way.
The ministers of labour and of development are of the opinion that the voluntary principle does not lead to the desired result, since only about 20 per cent of the companies affected by the National Action Plan have carried out human rights due diligence in 2019. According to Gerd Müller, the minister of development, legislation will follow if a second survey in 2020 does not show any improvement.

In addition to that, in 2019, more than 40 German companies, ranging from larger enterprises, such as Nestlé Germany to Start-Ups, publicly demanded binding obligations to ensure legal certainty and equal competitive competitions.

As shown, German Companies' responsibility is a question of voluntary implementation of the National Action Plan. In light of the KiK litigation, employees' proceedings against enterprises will likely have no success, although legislation in this field may lead to higher standards that enterprises then would have to impose to their suppliers abroad.

Still, the introduction of legislation remains uncertain as the result of a second survey on the National Action Plan's implementation will determine upcoming developments and the future of the German voluntary principle.

As was reported on this blog here, the Munich Dispute Resolution Day on 5 May 2020 was going to focus on "Human Rights Lawsuits before Civil and Arbitral Courts in Germany", but Covid-19 forced the organisors to reschedule.

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Remote Child-Related Proceedings

in Times of Pandemic – Crisis Measures or Justice Reform Trigger?

by Nadia Rusinova

The coronavirus will have an enormous impact on how we consume, how we learn, how we work, and how we socialize and communicate. It already significantly impacts the functioning of the justice system – the COVID-19 pandemic and social distancing requirements have required courts to be flexible and creative in continuing to carry out essential functions.

Six weeks ago, it was almost difficult to imagine that in a regular child-related proceeding the hearing could be conducted online, and that the child can be heard remotely. Is this the new normal in the global justice system? This post will first provide brief overview regarding the developments in the conduction of remote hearings, and discuss the limitations, but also the advantages, of the current procedures related to children. Second, it will touch upon the right of the child to be heard in all civil and administrative proceedings which concern its interest, pursuant to Article 12 of the United Nations Convention on the Rights of the Child and how this right is regarded in remote proceedings in the context of the COVID-19 situation. It will also highlight good practices, which are without doubt great achievements of the flexibility and adaptability of the professionals involved in child-related civil proceedings, which deserve to be appreciated and which may provide grounds for significant change in the future (e.g. by using remote tools much more often.)

In civil and administrative proceedings, which concern children, strict insistence on personal attendance is unlikely to be feasible during the Coronavirus pandemic, and may contravene current health guidance, putting both families and professionals at unacceptable risk. As a consequence, the number of children's hearings scheduled to take place during the Coronavirus pandemic have globally been reduced to only those required to ensure essential and immediate protection of children or to consider orders relating to restriction of liberty. So long as restrictions regarding social distancing remain in place all over the world, many

children's hearings in the next months will be conducted remotely and digital facilities are being put in place to enable a wide range of people to participate remotely in virtual hearings.

I. What the recent experience on the remote hearings shows

Worldwide, over the past month, thousands of hearings took place remotely, many of them concerning children. How did the authorities comply with the current challenges and also with the right of the child to express its views?

Some countries, like Scotland, issued special rules as an amendment to the existing national law. In the context of the emergency, the provisions in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, issued by the Scottish Parliament as an update to the Coronavirus (Scotland) Bill, are designed to enable best use of very limited resources by local authorities, and the children's hearings system, so that efforts can be focused on safeguarding the welfare of Scotland's most vulnerable children, and on supporting families and careers who need it most. The provisions are also time-limited and will automatically expire within six months, unless the Scottish Parliament extends them for a further period of six month.

The American Bar Association has also prepared detailed rules on "Conducting Effective Remote Hearings in Child Welfare Cases" to distill some best practices and other recommendations for remote or "virtual" hearings, providing special considerations to the judges, and directions for all professionals dealing with child-related proceedings.

The case law of the domestic courts is not less intriguing. In one recent judgment of The Family Court of England and Wales – RE P (A CHILD: REMOTE HEARING) [2020] EWFC 32, delivered by Sir Andrew McFarlane, the issues surrounding the advantages and disadvantages of the remote hearing when the case concerns children are discussed in a very original way. The case concerns ongoing care proceedings relating to a girl who is aged seven. The proceedings are already one year old and they were issued as long ago as April 2019, but the possibilities for multiple appeals in the adversarial proceedings caused immense delay. It has been initiated by the local authority, which have made a series of allegations, all aimed at establishing the child has been caused significant harm as a result of fabricated or induced illness by its mother. The allegations are all fully contested

by the mother, and a full final hearing is to take place in order to be decided if the child should be return to its mother or placed in long term foster care. Since April 2019 the child has been placed in foster care under an interim care order. The 15-day hearing was scheduled to start on Monday, 20 April, but the Covid-19 pandemic has led to a lockdown and most Family Court hearings that have gone ahead are being undertaken remotely, over the telephone or via some form of video platform.

II. Challenges

In this light it might be useful to identify some of the issues that the justice system faced in the attempts to comply with the special measures amid the pandemic and the lockdown order in disputes about children.

Must a hearing take place remotely, or this is just an option to be decided on by the court?

All the guidance available aims mostly at the mechanics of the process. The question whether any particular hearing should, or should not, be conducted remotely, is not specifically discussed. In any case, the access to justice principle should in some way provide for flexibility and practicability. In this sense, the fact that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.

As Sir McFarlane said, *"In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."* Obviously, the question is how to strike a fair balance between keeping the principle of fair trial as paramount while not putting the child into an intolerable situation that might follow as a consequence of the limitations in this pandemic situation.

In which cases it is justified to hold a remote hearing?

Given the Government's imposition of the 'stay at home' policy in many countries, requests for an attended hearing are highly unlikely to be granted unless there is a genuine urgency, and it is not possible to conduct a remote hearing, taken as a cumulative condition together. If one of these elements is not present, the respective judge should assess the emergency in the particular case.

In general, all cases are pressing when the welfare of children is to be

determined. However, some of it indeed call for urgency and it is to be analyzed on a case by case basis, in accordance with the claims of the parties and available evidence. In the discussed case RE P [2020] EWFC 32 the girl was already suffering significant emotional harm by being held "in limbo", and that she could only be released from this damaging situation of simply not knowing where she is going to live and spend the rest of her childhood, at least for the foreseeable future, by the court decision. As the judge says, *"she needs a decision, she needs it now and to contemplate the case being put off, not indefinitely but to an indefinite date, is one that (a) does not serve her interests, because it fails to give a decision now, but (b) will do harm itself because of the disappointment, the frustration and the extension of her inability to know what her future may be in a way that will cause her further harm."*

Another issue to be considered is to which extent the personal impression (for which the face-to-face hearing is best suited to) and the physical presence in the courtroom as a procedural guarantee for fair trial in adversarial proceedings, are decisive in the particular case. In RE P [2020] EWFC 32 sir McFarlane holds that *"The more important part, as I have indicated, for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court."* This is a case for protection from violence, and taking into account the subjective aspect, the personal impression is crucial. Yet, it might be that other type of cases, with less impact on the life of the child, or when the balance between the urgency and the importance of personal attendance might affect the best interest of the child ,might still be held remotely. In the discussed case the judge refers explicitly to the need of the physical presence of the parties, and especially of the mother, for him to get personal impression, and to give her full opportunity to present her defense and to ensure fair trial. The Court therefore finds that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, the judge holds that this hearing cannot "properly or fairly" be conducted without her physical presence in a courtroom.

A similar approach (with different outcome) has been taken in Ribeiro v Wright,

2020 ONSC 1829, Court of Ontario, Canada. The parties, currently in the process of divorce, and the plaintiff wishes to obtain a safeguard order so that the defendant's access rights are modified such that they are suspended and replaced by contacts via technological means (Skype, Facetime, etc.). Due to the ongoing divorce procedure at the stage of the application for the safeguard order, some evidence is available already. The judge recognizes that the social, government and employment institutions are struggling to cope with COVID-19 and that includes the court system. Obviously, despite extremely limited resources, the court will always prioritize cases involving children, but it is stated that parents and lawyers should be mindful of the practical limitations the justice system is facing. If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion under the domestic law – but they should not presume that raising COVID-19 considerations will necessarily result in an urgent hearing. In this case the judge refuses to start emergency proceeding (which would be conducted remotely), takes into account the behavior of the parents and urge them to renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner, asking them to return to court if more serious and specific COVID-19 problems arise.

In order to determine some general criteria to be applied when the emergency assessment is to be done, a good general example can be seen in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions (Scotland). The Scottish Government seeks to empower professional staff and volunteer tribunal members to exercise sound judgment and make decisions to protect and support children and young people, based on available information and in partnership with families. It provides that this exercise of emergency powers should: i. be underpinned by a focus on children's, young people's, and families' human rights when making decisions to implement powers affecting their legal rights; ii. be proportionate – limited to the extent necessary, in response to clearly identified circumstances; iii. last for only as long as required; iv. be subject to regular monitoring and reviewed at the earliest opportunity; v. facilitate, wherever possible and appropriate, effective participation, including legal representation and advocacy for children, young people and family members, and vi. be discharged in consultation with partner agencies.

Furthermore, in the Scottish Children's Reporter Administration update paper on

Children's Hearings System, issued on 20 April 2020, it is stated that the reporter assesses and considers each individual child's case and their unique circumstances, and the panel makes the best possible decision based on the information before them. Priority is given to hearings with fixed statutory timescales, or to prevent an order from lapsing. The UK Protocol Regarding Remote Hearings, issued on 26 March 2020, also sets some general criteria in par. 12 applicable to child-related proceedings, stating that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

What form the "remote" hearing may take?

There is currently no 'single' technology to be used by the judiciary. The primary aim is to ensure ongoing access to justice by all parties to cases before the court, so the professionals and parties involved must choose from a selection of possible IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom, etc.) At present, many courts provide laptops to magistrates with secure Skype for Business and Microsoft Teams installed.

Remote hearings may be conducted using any of the facilities available. Generally, it could be done by way of an email exchange between the court and the parties, by way of telephone using conference calling facilities, or by way of the court's video-link system, if available. In the specific child related proceedings however, it should be noted that the UN General comment No. 12 (2009) on the right of the child to be heard sets one recommendation in par. 43 – the experience indicates that the situation should have the format of a talk rather than a one?sided examination. Therefore, the use of tools allowing conversational approach, like Skype for Business, BT MeetMe, Zoom, FaceTime or any other appropriate means of remote communication can be considered. If other effective facilities for the conduct of remote hearings are identified, the situation obviously allows for any means of holding a hearing as directed by the court, so there is considerable flexibility.

The timing of the hearing of the child

Naturally, if there are rules in place regarding the timely hearing of the child, in the current situation some adjustments could be accepted. In the domestic systems, when such provisions exist, respective temporary amendments could be

a solution to facilitate the activity in these very challenging circumstances.

If we look again at the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, it provides for situations where it will not be practicable for there to be a hearing within three working days (as prescribed by the law), due to the likely shortage of social workers, reporters, decision-makers, children and families to attend an urgent hearing in the new area. As a result, the Act amends the time limit for some particular proceedings involving children up-to seven days. It is duly noted that in order to avoid unnecessary delays, the respective professionals involved should note these extended timescales, and prepare accordingly.

Is the objection by the parties to the hearing being held remotely decisive?

The pandemic situation is very potentially convenient for the parties who seek delays for one reason or another. As an example, the passage of time could undoubtedly affect the court's decision to assign custody in parental disputes, or as pointed by the ECtHR in Balbino v. Portugal, the length of proceedings relating to children (and especially in child abduction proceedings) acquire particular significance, since they are in an area where a delay might in fact settle the problem in dispute.

The objections that deserve attention would be most likely based on two grounds: health reasons, related or not to COVID-19, and the technical issue of internet access. When we speak about health reasons, the first logical suggestion would be to request medical evidence. Sadly, in the coronavirus situation this is not the case – simply because one can have contracted it without any knowledge or symptoms, which puts the courts in difficult position having in mind the considerable danger if they take the wrong decision. Therefore, it is justified that the judges continue with the proceedings and do not accede to these kinds of applications, but to indicate that the party's health and the resulting ability to engage in the court process would be kept under review.

Regarding internet access, this might arise as a difficult issue. On one side, it is easy to say that the arrangements for the party to engage in the process, as they are currently understood, involve the party being in her/his home and joining the proceedings over the internet, and all that's needed is some basic internet access. It can be also said that the party can go to some neutral venue, maybe an office in

local authority premises, a room in a court building, and be with an attorney that they are instructing, keeping a safe socially isolated distance. However, for objective reasons the internet access available might be not sufficient, and this should not lead to a violation of the principle of a fair trial, and the judge should also take these considerations seriously.

How is security and transparency addressed?

This section will briefly touch upon only two of a multitude of issues related to the security and transparency when dealing with remote hearings – the open hearings principle and the recording of the hearing.

Obviously, all remote hearings must be recorded for the purposes of making records of the respective hearing, and it goes without saying that the parties may not record without the permission of the court. Some of the solutions might be recording the audio relayed in an open court room by the use of the court's normal recording system, recording the hearing on the remote communication program being used (e.g. BT MeetMe, Skype for Business, or Zoom), or by the court using a mobile telephone to record the hearing.

As to the second issue, remote hearings should, so far as possible, still be public hearings. Some of the proceedings concerning children are indeed not public, but this is not the rule. The UK Protocol Regarding Remote Hearings addresses how this can be achieved in times of pandemic: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorized in legislation. This way, the principles of open justice remain paramount.

It could be suggested that, in established applications moving to a remote hearing, any transparency order will need to be discharged and specific directions made. In the UK Court of protection remote hearings the authorities are satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having particular regard to the public health situation which has arisen, and also the detailed steps set out are designed to ensure that the consequences on the rights of people generally and the press in particular

under Article 10 are minimized.

III. How to assess if a particular child-related hearing is suitable to take place online?

As noted by Sir McFarlane, whether or not to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for its life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a "thorough, forensically sound, fair, just and proportionate manner". The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

Therefore, it should be assessed on a case per case basis if a hearing that concerns a child can be properly undertaken over the remote system. Sometimes the proceedings prior to this moment are supporting the judge in allowing the hearing to go remotely – the allegations have been well articulated in documents, they are well known to the parties, the witnesses – members of the medical profession, school staff, social workers – gave or can give their evidence remotely over the video link and for the process of examination and cross-examination to take place. What normally goes wrong is the technology rather than the professional interaction of the lawyers and the professional witnesses. In this sense the case might be ready for hearing and the parties are sufficiently aware of all of the issues to be able to have already instructed their legal teams with the points they to make.

IV. The right of the child to be heard in the context of remote proceedings

It is natural that remote hearings and all means of online communication

unavoidably affect the proceedings itself. The current situation, unprecedented as it is and with all the challenges described above, raises the question of specifically how the child should be heard, if at all, and is this an absolute right, considering that providing a genuine and effective opportunity for the child to express their views requires the court to take all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case?

To explore this right in the light of the COVID-19 pandemic, some background should be provided. As it is pointed in the UN General comment No. 12 (2009) on the right of the child to be heard, the right itself imposes a clear legal obligation on States' parties to recognize it and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States' parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. Something more – in par. 19 it says that *"Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children."*

The right of the child to be heard is regulated in the same sense in Article 24(1) of the Charter of the Fundamental Rights of the EU and Article 42(2)(a) of Regulation No. 2201/2003 (Brussels II bis). The Hague convention of 25 October 1980 on the Civil Aspects of International Child Abduction also provides in Article 13 that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

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. It states that the court may use "all means available to it under national law as well as the speci?c instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No 1206/2001" but "in so far as possible and always taking into consideration the best interests of the

child" thus retaining some degree of discretion also in this regard.

In Joseba Andoni Aguirre Zarraga v. Simone Pelz (case C-491/10 PPU) however CJEU held that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

It is worth noting that in some cases the hearing of the child can be conducted indirectly or via representative, or where it is considered as harmful for the child it can be dispensed with altogether. In the case of Sahin v. Germany, on the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. The expert stated that after several meetings with the child, her mother and the applicant, he considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to requiring the direct questioning of the child on her relationship with her father.

So far, the question how the right of the child to be heard is regarded in the remote hearings, that had to take place recently, is not widely discussed. Therefore, at this moment we should draw some conclusions from the available case-law and emergency rules. Naturally, this right itself cannot be waived and the views of children and young people should be taken into account when emergency placements are first made; the decision at any given time must take into account the best interests of the child. The most appropriate approach would be adjusting the available domestic proceedings, and at all times the local authorities should provide pertinent information to inform this decision and the child must be at the center of all decision making, which includes the social work team listening to the child's views.

How this might look in practice? First of all, the children as a rule should be offered the opportunity to join their hearing virtually and securely. Testing and

monitoring are crucial in order to get as many children as possible able to attend. Good suggestion would be a letter giving them more information about how they can participate via their tablet laptop/PC or mobile phone, information sheet which will explain how they can join a virtual hearing, instructions to help them with the set up. This should be followed by a test to make sure everyone is prepared for the day of the hearing. In accordance with the domestic procedural rules, information about rights and reminder for the children and young people that they have the right to have a trusted adult, an advocate or lawyer attend the virtual hearing to provide support might be also useful.

However, it for sure would not be possible for every child to join its hearing remotely. In this case, they should still provide their views – e.g. by emailing the information to the local team mailbox and the judge will then ensure this information is given to the respective professionals involved in the procedure.

V. Conclusion

The rapid onset of the Covid-19 pandemic has been a shock to most existing justice systems These are times unlike any other, and extraordinary measures are being taken across the world. Many of us are already asking ourselves – why not earlier? And with those changes in place, can things go back to the way they were? Should a regular framework for the development of virtual courtrooms and remote hearings that enables all concerned, including the judges, to operate remotely and efficiently be created, and was it due even before the pandemic? There are no easy answers – but it is well-worth analyzing the options of applying and making full use of the existing online tools and resources in child-related proceedings in the future. Well summarized by Justice A. Pazaratz in *Ribeiro v Wright*: “None of us have ever experienced anything like this. We are all going to have to try a bit harder – for the sake of our children.”

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Foreign Limitation Periods in England & Wales: Roberts v SSAFA

Written by Elijah Granet

When a British woman gives birth in a German hospital staffed with British midwives on a contract from the British ministry of defence, what law applies and to what extent? This seemingly simple question took Mrs Justice Foster, in the English and Welsh High Court of Justice, 299 paragraphs to answer in a mammoth judgment released on 24 April: *Roberts (a minor) v Soldiers, Sailors, Airmen and Families Association & Ors* [2020] EWHC 994 (QB). In the course of resolving a variety of PIL issues, Mrs Justice Foster held that the German law of limitations should be disapplied as, on the specific facts of the case, contrary to public policy.

Facts

The British military has maintained a continuous presence in Germany since the end of the Second World War. In June 2000, Mrs Lauren Roberts, the wife of a British soldier serving in Germany and herself a former soldier, gave birth to her son, Harry, in the Allegemeines Krankenhaus in Viersen ('**AKV**'), a hospital in North-Rhine Westphalia.

AKV had been contracted to provide healthcare for British military personnel and their dependents by Guy's & St Thomas's Hospital NHS Trust in London, which, in turn, had been contracted by the British Ministry of Defence ('**MoD**') to procure healthcare services in Germany. Midwifery care for British personnel and dependents, however, was supplied instead by the Soldiers, Sailors, Airmen and Families Association ('**SSAFA**'), a charity. These British midwives worked under the direction of AKV, taking advantage of the mutual recognition of qualifications under EU law.

Tragically, during the birth, Harry suffered a brain injury which has left him severely disabled. Mrs Roberts, who brought the action in her son's name, alleges that negligence on the part of an SSAFA midwife during Harry's birth caused these injuries. She further alleges that the MoD is vicariously liable for

this negligence. The MoD, in turn, while denying negligence on the midwife's part, asserts that, regardless, German law allocated any vicarious liability to AKV. These allegations have yet to be tried before the court.

The applicable law

Due to unfortunate procedural delays, the case, although begun in 2004, took until 2019 to reach the High Court. This meant that the 2007 Rome II Regulation was inapplicable, and the case instead was governed by English conflicts rules. The relevant statutory provision was the Private International Law (Miscellaneous Provisions Act). Section 11 of that Act lays out a general rule of *lex loci delicti commissi*, but s 12 allows this principle to be displaced where significant factors connecting a tort or delict to another country mean 'that it is substantially more appropriate' to use a law other than that of the location of the tort or delict. Counsel for Mrs Roberts argued that the s 12 exception should apply, given that *inter alia* Mrs Roberts was only in Germany at the behest of the Crown, had no familial or personal connections to Germany, moved back to England in 2003, and were being treated by English-trained midwives who were regulated by British professional bodies.

The authoritative text on English conflicts rules, *Dicey, Morris & Collins on the Conflict of Laws* (15th ed), provides that at para 35-148 that the threshold for invoking s 12 is very high, and that the section is only rarely invoked successfully. This is reinforced by *inter alia* the decision of the English and Welsh Court of Appeal, *per* Lord Justice Longmore, in *Fiona Trust and Holding Corp & Ors v Skarga & Ors* [2012] EWCA Civ 275. Mrs Justice Foster (at para 132) ruled (at paras 132–144) that this threshold was not met. Her Ladyship placed great significance on the fact that the midwives were required to learn basic German, follow the directions of German obstetricians, operate according to the rules of the German healthcare system, and provide care to military personnel who were living in Germany. Thus, German law was applicable.

The limitation period question

English jurisprudence addresses questions of foreign law as matters of objective fact to be determined through expert evidence. This can prove, as it did in this case, to an extremely complex task. For the purposes of this article, it is

sufficient to note that Mrs Justice Foster ultimately found (after extensive discusssion at paras 192–280) that, in light of various decisions of the German Bundesgerichtshof (Federal Court of Justice) on the application of both the old and new versions of §852 of the Bürgerliches Gesetzbuch (German Civil Code), the relevant limitation period of three years commenced in 2003, meaning that the claim issued in 2004 was within time.

More relevantly for PIL scholars, Her Ladyship also ruled that, in the alternative, any applicable German limitation period was to be disapplied. In English law, the disapplication of foreign limitation periods is governed by the appropriately-named Foreign Limitation Periods Act 1984. While the general rule is that foreign limitation periods displace English limitations, Section 2(2) allows for the disapplication of foreign limitation periods where their application would 'conflict with public policy to the extent that its application would cause undue hardship' to a party. This is, once again, a deliberately high threshold which is rarely applied; the authoritative English text on limitation, *McGee on Limitation Periods* (8th ed), provides (at para 25-027) that '[j]udges should be very slow indeed to substitute their views for the views of a foreign legislature'. Similarly, Mr Justice Wilkie, in *KXL v Murphy* [2016] EWHC 3102 (QB), para 45, warned that the entire system of private international law could collapse if public policy was too readily invoked, and the public policy test should only succeed where the foreign provision caused undue hardship which would be 'contrary to a fundamental principle of justice'.

After surveying the case law, Mrs Justice Foster concluded, at paras 181–184, that undue hardship must be a 'detriment of real significance', whose existence (or lack thereof) must be determined through a careful and holistic evaluation of the particular facts of any given situation. Thus, the question was not if the German limitation period *per se* caused undue hardship (and indeed, Mrs Justice Foster held at para 182 that it did not), but rather if the application of an otherwise unobjectionable provision to the unique factual matrix of the case would create undue hardship. Thus, Mrs Justice Foster ruled (at paras 185–6) that, if (contrary to her findings) the German limitation period commenced in 2001, this would be a disproportionate hardship given the disadvantages Mrs Roberts had as a primigravida unfamiliar with obstetrics who had given birth in a foreign country where she did not speak the language. Furthermore, the highly complex organisational structure of medical care, between the SSAFA, the MoD,

and AKV would mean that it would be unjust and disproportionate for the relevant 'knowledge' for the purposes of the §852 limitation period to have been said to commence in 2001.

Comment

This case demonstrates the complexities which arise when applying abstract rules of private international law to the realities of human affairs. Although the (by comparative standards) wide discretion accorded to judges in English law has its critics, in this case, the ability to disapply foreign law where it might lead to an unjust result was able to ensure that the Roberts family, for whom one must have the greatest sympathy, were able to proceed with their claim. It is hard to disagree with Mrs Justice Foster's conclusion that, on the facts, it would be a disproportionate hardship on the family. Both the case-law and texts are clear that this discretion should be applied only rarely, given that its overuse would be to the detriment of the principles of legal certainty and English conflicts rules, *Roberts* demonstrates that the common law preference for flexibility can, if used wisely, avert serious injustice in those rare circumstances where the general rules are insufficient.

The curious case of personal jurisdiction for cyber-based transnational transactions in India: Does one size fit all?

By Radhika Parthasarathy

The advent of the internet has led to mass-communication like no other. Everything one wants is at the tip of our fingers now, thanks to mobile phones, laptops, iPads and the likes. Mass consumerism has seen an exponential increase in the last ten years. If one needs to buy quirky stationery, we have the likes of

Amazon and Chumbak online; if one wants to watch the latest episode of Brooklyn Nine-Nine, Netflix does the needful; if we wish to read multiple newspapers, while also saving papers, multiple Apps such as InShorts exist. Platforms such as these stream large quantities of data across the globe, thus bringing the world closer, but also leading to certain jurisdictional issues in case of litigations. Such activity requires a cross-cutting need and definition of personal jurisdiction.

Personal jurisdiction relates to the jurisdiction of a Court to adjudge a dispute between parties. The general rule is that to exercise such jurisdiction, physical presence is mandatory. As such, jurisdiction *in personam* is not to be exercised over a person who is not subject to the jurisdiction of courts. This has become a commonly accepted principle domestically and globally. However, the advent of technology and the pervasiveness of the world wide web has led to massive debates in this regard. How is personal jurisdiction then to be adjudicated for matters of cyber torts, or that of defamation that takes place online? In the context of the internet, personal jurisdiction oft refers to and deals with websites or services on the internet that deal with advertisements or promotions of business or brands online in their home State but debate their liability to be litigated within another foreign State. However, courts in the United States, Europe and, India are now determining how to assess and enforce such jurisdiction.[1]

Understanding Personal Jurisdiction: the United States and Europe

A. The United States

In the United States [“the US”], the criteria of “certain minimum contact” with the jurisdiction where the cyber transaction has occurred must be met to assess personal jurisdiction. This aligns with the Long Arm Statute of the United States of America. Traditionally, in *International Shoe* v. *Washington,* the Supreme Court held that a defendant may be held liable for such cross-border issues if they have at least a *minimum level of contact* with the State that seeks to hold them liable

and there must be a reasonable expectation of being sued in that State.[2] In this regard, courts in the US have held that mere advertisements on a website are not enough to hold a defendant liable for a cross-border tort and to exercise personal jurisdiction there.[3]

Before this, however, was the iconic case, *Calder* v. *Jones*,[4] where the Court, in 1984, held that where an action is targeted at a particular forum, even if there is minimum contact, the *"effects" test* may be applied. In this case, an article was written and edited in Florida, the article concerned a resident in California and relied on sources in California, and thus, the Court held that the intentional tortious act was "expressly aimed at California". This test essentially, thus, lays down that where an act is done intentionally, has an effect within the forum state and is directed or targeted at the forum state, then jurisdiction will be satisfied.[5] Thus, the effects test is useful when the exact nature of the defendant's internet activities need to be assessed *vis-à-vis,* injury caused to a resident elsewhere, in a different State.[6]

The legal position in the US has been seemingly settled, off late, in this regard in *Zippo Manufacturing Co. v. Zippo Dot Com Inc*,[7] which rendered the famous *Zippo Test*. Per the Zippo Test, a finding of jurisdiction would be contingent upon the nature of the website and sought to employ a sliding scale test. It further laid down two important points:

1. The interactive nature of the site, which would aid in quantifying the extent of the damage so caused;
2. The harmful effect within the jurisdiction of the concerned state.

Per *Zippo*, websites are of three kinds- websites that conduct business over the internet; websites where users exchange information with the host computers; and websites that do little more than present information.[8] However, this has been criticized for not providing enough information on the assessment of the extent of interactivity of the website to justify purposeful availment.[9]

Multiple cases, however, well into the 2000s, yet apply the *Calder* case. For instance, in *Blakey v. Continental Airlines*,[10] the minimum contacts test was applied along with the effects test to assess "proper jurisdiction". This was further cemented by *Young v. New Havem Advocate*,[11] where two Connecticut newspapers defamed the warden of Virginian prison. Here, the court assessed the

issues based on the *Calder* test once again and opined that proof must be derived that the defendant's internet activity is expressly targeted at or directed to the forum State. Similarly, in *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme*,[12] the *Calder* test was applied once again to establish personal jurisdiction between two French organizations and Yahoo (an American company). Thus, it seems more appropriate to say that Courts in the US, first apply the Zippo Test, but then apply the effects test as laid down in Calder to have a wholly encompassing test.

B. European Standing

In the European Union ["EU"], the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ["Brussels Convention"][13] regulates acts concerning torts, delict and quasi-delict under Art. 5(3) and thereby, a defendant may be sued in the court of the place where the harm has occurred.[14] The leading law on the matter of defamation can be found in *Shevill & Ors.* v. *Presse Alliance S.A.*,***[15]*** where a libellous article was published in one place but distributed across multiple jurisdictions. Here, the ECJ devised what came to be known as the mosaic approach and held that the place where the harm has occurred includes:

1. the place where publisher resides, or where the defamatory statement came into existence, or the place of publication;
2. the place of distribution or where the material was read and received.

This approach was also applied in *Handelskwekerij G J Bier B. V.* v. *Mines de Potasse d'Alsace SA*, where the Court held that the "place where the harmful event occurred" must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.[16] However, this approach has led to criticism that it enables forum shopping for the plaintiff.[17] This approach suggests that the plaintiff may choose the more convenient forum under Art. 5(3) as one forum may have a more liberal approach to prove defamation than another.

Article 5(3) was subject to further interpretation in 2011 when the ECJ held that a person may bring an action for liability when their rights have been infringed on the internet before:

1. the courts of the Member State in which the publisher of that content is established; or
2. before the courts of the Member State *in which the centre of his interests is based;* or
3. the courts of each Member State in the territory of which content placed online is or has been accessible.[18]

This position has since been challenged in the *Svensk Handel* case, wherein Article 7 of the Brussels Recast Regulation (similar to Article 5(3)) was assessed.[19] Here, while the Court didn't expressly reject the Mosaic Approach, it did, however, lay down that "the centre of interest" must be located and interpreted broadly to include residence, where the most harm occurs. However, the Court laid down an important safeguard by stating that any order for the takedown of insulting content cannot be initiated in every Member State where the website is accessible. Since the earlier days till now, there seems to be a newfound cogency in the application of personal jurisdiction for defamatory matters in the EU.

Banyan Tree Holdings and the Indian Position

In the case of *Banyan Tree Holdings* v. *A. Murali Krishna Reddy*,[20] the plaintiff is part of the hospitality business and has since 1994, used the word mark, "Banyan Tree" which has now acquired a secondary meaning. It also maintains websites that use the mark and are accessible in India. However, in 2007, the defendants began work on Banyan Tree Retreat and hosted a website which directed to a "Banyan Tree" project. The Plaintiffs contended that the use of this mark is dishonest and aimed at encashing on the reputation and goodwill of the Plaintiff. They also claim that it would lead to confusion and deception if such usage was so allowed.

In this case, the Court found that the website of the defendant is accessible in Delhi and is thus, not a passive website, as derived from American laws. Further, the defendant also sent a brochure to Delhi regarding their property's sale. In this case, parties relied on the holdings and observations of *International Shoe Co.,* the *Zippo Test* of "sliding scale", *Cybersell Inc.* and the effects test in *Calder*,

among multiple other American cases on the same issue. It then discussed cases from Australia and Canada before assessing the Indian Position on the same.

In India, there seems to have been some form of debate on such issues. In a similar factual matrix as *Banyan Tree*, the Delhi High Court in *Casio India Ltd.* v. *Ashita Tele Systems Pvt Ltd.****[21]*** held that even a mere likelihood of deception on the internet would entertain an actual action for passing off and no actual deception needed to be proven. Thus, the mere accessibility of the website from Delhi could invoke the Court's jurisdiction. However, in another case,[22] the Court held that the mere accessibility of a website from one jurisdiction may not be enough or sufficient for a court to exercise its jurisdiction.

In *Banyan Tree*, on an analysis of these positions, Justice Muralidhar found that essential principles developed in other jurisdictions may be seamlessly adopted into our own.[23] The Court chose to disagree with *Casio* and held that a passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction.[24] Further, it observed that the degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined while adjudging the "effects" test.[25] Additionally, there is a need to assess whether the Plaintiff can show a prima case that the specific targeting in the forum State by the Defendant resulted in an injury or harm to the Plaintiff within the forum state.[26] The Court thus chose to apply the "effects" test with the "sliding scale" taste, this reconciling the application of the *Calder* test with the *Zippo* Test in India.

On the matter of jurisdiction, the Court held that to establish a prima facie case under Section 20(c) of the Code of Civil Procedure, 1908 ["the CPC"], the Plaintiff will have to establish that irrespective of the passive or interactive nature of the website, it was targeted specifically at viewers in the forum State, which in this case would have been Delhi.[27] They will then have to establish that there has been specific harm or injury caused to it by the Defendant's actions.

Conclusion: Certainty in India's

Position?

In India's case, it has become abundantly clear that cross-border defamation will be adjudged as per Section 19 of the CPC, as per the residence of the defendant or where the wrong has been done. Additionally, India also follows the double actionability rule to adjudge applicable law in such matters. However, if the tort is committed outside India, then Section 19 yields to Section 20 of the CPC, and the territorial jurisdiction is adjudged as such.[28] The factors relating to the cause of action and its assessment have been discussed in multiple cases. For instance, online sale of property in a different jurisdiction did not constitute sufficient cause of action for courts in Kerala.[29] However, while the test in *Banyan Tree* may be quite descriptive, Muralidhar J. opines that it does not lay down a "one size fits all" test,[30] in the sense that while it is foolproof for an online commercial transaction and intellectual property issues, it does not cover the area of torts such as defamation.

In a differing opinion, in *World Wrestling Entertainment, Inc. v. M/s Reshma Collection & Ors*,[31] the Appellant was a Delaware based company providing the online sale of digital merchandise to customers world over and also in Delhi and held the trademark for the same. Here, the Court held that due to the spontaneous nature of the transactions (offer and acceptance and payment of consideration) over the internet, the cause of action is deemed to have occurred at the place the customer carried out his part of the transaction.[32]

The jurisprudence in such torts is still developing in India and largely follows the double actionability rule. The double actionability rule is the foundation or cross-border torts, particularly, defamation.[33] This rule lays down two points:

1. The act must be "actionable" as a tort in England; and
2. The act must be "non-justifiable" by the law of the place where it was committed. (this was eventually overruled by *Boys v. Chaplin*)[34]

This rule was further discussed and upheld in *Govindan Nair* v. *Achuta* Menon,[35] when the then Raja of Cochin (which was at the time an independent Indian State), sent a communication to the plaintiff excommunicating him from his caste in British India. The High Court applied the rule but dismissed the case as there was no trace of malice. In more recent times, the order in *Baba Ramdev*

and Anr. v. *Facebook Inc.*,[36] is highly interesting. The allegation here was that a book based on the plaintiff was being circulated on a global basis by social media platforms, such as Facebook. The basic issue here was whether a global takedown order could even be passed by the Court. The Court essentially held that:

1. If the content was uploaded in India, or from IP addresses in India, the content had to be taken down, blocked/ restricted on a global basis;[37]
2. However, if uploaded from outside India, the Court cannot exercise its jurisdiction.[38]

Such exercise of jurisdiction has also been discussed in *YouTube v. Geeta Shroff*, wherein the Court held that any exercise of jurisdiction must be done assuming that the internet transaction is one akin to a real-life transaction, thereby ensuring that the Court cannot assume extra-territorial jurisdiction on the matter.[39]

Julia Hornle points out that the laws in the US are quite liquid on the point of personal jurisdiction and can be used to adapt to multiple scenarios.[40] However, tests in India have seemingly been fact-specific and not one test that can cover the entirety of actions that take place on the internet. Thus, courts may exercise jurisdiction either very broadly or very narrowly. However, this does not mean that India does not follow any minimum standard. The laws laid down in the US and other common law jurisdictions have gone a long way in establishing India's position on personal jurisdiction in matters of cyber-transactions. Thus, it is easy to conclude by saying India has given the concept of personal jurisdiction a wide berth and a multi-dimensional interpretation and one can hope to have a "one size fits all" criteria in the foreseeable future, as Courts get better acclaimed with the use of and the advancement of technology in all fields – legal, commercial

[1] TiTi Nguyen, *A Survey of Personal Jurisdiction based on Internet Activity: A Return to Tradition*, 19 Berkeley Tech. L.J. 519 (2004).

[2] International Shoe v Washington, 326 U.S. 310 (1945)

[3] Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997)

[4] Calder v. Jones, 465 U.S. 783 (1984)

[5] *Id.*

[6] Dudnikov v. Chalk & Vermilion, 514 F.3d 1063 (10th Cir. 2008).

[7] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119

[8] *Id;* Christopher Wolf, *Standards for Internet Jurisdiction*, FindLaw (May 03, 2016), https://corporate.findlaw.com/litigation-disputes/standards-for-internet-jurisdiction.html

[9] *No Bad Puns: A different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1833 (2003).

[10] Blakey v. Continental Airlines, 751 A.2d 538 (NJ 2000)

[11] Young v. New Havem Advocate, 315 F 3d 256 (4th Cir, 2003)

[12]Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme, 433 F.3d 1199 (9th Cir. 2006)

[13]Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Regulation 44/2001 (Dec. 22, 2000)

[14] Article 5(3) allows for two jurisdictions – the place of domicile of the defendant OR the place where the harm has occurred; Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A. (preliminary ruling requested by the Gerechtshof of The Hague) (Case 21/76) [1976] ECR 1735, [1978] QB 708, [1977] 1 CMLR 284.

[15] Shevill & Ors. v. Presse Alliance S.A., Case C-68/93 [1995] 2 W.L.R. 499

[16] Handelskwekerij G J Bier B. V. v. Mines de Potasse d'Alsace SA, Case 21/76 [1976] E.C.R. 1735

[17] Christopher Forsyth, *Defamation under the Brussels Convention: A Forum Shopper's Charter?*, 54(3) Cam. L.J. 515 (1995)

[18] eDate Advertising GmbH and Others v X and Société MGN Limited, Cases C-509/09 and C-161/10

[19] Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16, ECJ

[20]Banyan Tree Holdings v. A. Murali Krishna Reddy, CS (OS) No.894/2008 (Nov. 23, 2009) [hereinafter Banyan Tree]

[21] Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited 2003 (27) PTC 265 (Del)

[22] (India TV) Independent News Service Pvt. Limited v. India Broadcast Live Llc And Ors., 2007 (35) PTC 177 (Del.).

[23]Banyan Tree, *supra* note 20 at ¶38

[24] *Id* at ¶38

[25] *Id* at ¶42

[26]*Id*

[27] *Id* at ¶45

[28] Sarine Technologies v. Diyora and Bhanderi Corpn., 2020 SCCOnline Guj 140.

[29] Presteege Property Developers v. Prestige Estates Projects Pvt. Ltd., 2008 (37) PTC 413 (SC)

[30] Justice Muralidhar, *Jurisdictional Issues in Cyberspace,* 6 Ind. J. L & Tech. 1 (2010).

[31] World Wrestling Entertainment, Inc. v. M/s Reshma Collection & Ors, AO (OS) 506/2013 and CM Nos. 17627/2013 & 18606/2013, decided on October 15, 2014.

[32] *Id.*

[33] Philips v Eyre, 6 L.R. Q.B. 1, 28 (1870, Queen's Bench).

[34] Boys v. Chaplin, 2 Q.B. 1 (1968, Queen's Bench).

[35] Govindan Nair v. Achuta Menon, (1915) I.L.R. 39 Mad 433.

[36] Baba Ramdev and Anr. v. Facebook Inc, CS (OS) 27/2019

[37]*Id* at ¶96(i)

[38] *Id* at ¶96(ii)

[39] YouTube v. Geeta Shroff, FAO 93/2018

[40] Julia Hörnle, *The Conundrum of Internet Jurisdiction and How US Law has Influences the Jurisdiction Analysis in India*, 14 Ind. J. L. Tech. 183 (2018).

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.