CJEU on the place of the damage under Article 7(2) of Brussels Ia as regards violation of personality rights of a legal person

First personal impressions presented by Edina Márton, LLM, PhD (Saarbruecken)

For jurisdictional purposes, the localisation of cross-border violations of personality rights under European instruments, such as Regulation (EU) No 1215/2012 (Brussels Ia), has attracted the attention of a considerable number of scholars and often led to different legal solutions in the national judicial practice. At EU level, besides Shevill (C-68/93; ECLI:EU:C:1995:61) as well as eDate and Martinez (C-509/09 and C-161/20; ECLI:EU:C:2011:685), since 17 October 2017, a third judgment in case Bolagsupplysningen (C-194/16; ECLI:EU:C:2017:766) has given further clarification in this area. In the recently delivered judgment, the ECJ specified one of the two limbs of the connecting factor "where the harmful event occurred or may occur" under Article 7(2) of Brussels Ia, namely the place of the alleged damage.

Two key factual elements of Bolagsupplysningen differentiate this case from Shevill, as well as eDate and Martinez. First, one of the alleged victims is a legal person established under Estonian law and has business activities in Sweden (paras 9 and 10). Secondly, the case concerned *"the rectification of allegedly incorrect information published on … [the] website [of the Swedish defendant], the deletion of related comments on a discussion forum on that website and compensation for [the entire] harm allegedly suffered"* (para 2; emphases omitted; words in square brackets added).

Regarding the determination of the jurisdictionally relevant place of damage, the ECJ basically ruled that a legal person asserting that its personality rights have been violated through the Internet may bring an action for rectification and removal of the allegedly infringing information, and compensation for all the damage occurred before the courts of the Member State in which its centre of interests is situated. In addition, it also stated that the courts of each Member

State in which the contested online information is or was accessible are not competent to hear actions brought for rectification and removal of that information.

In the present author's view, one of the most significant aspects of the judgment is that the ECJ treated the pecuniary and non-pecuniary damage equally for determining the jurisdictionally relevant place of damage (para 36). In addition, the ECJ applied the "centre of interests" connecting factor introduced in eDate and Martinez to this case and identified it vis-à-vis a legal person pursuing business activities in a Member State other than in the Member State in which its registered office is located (paras 40 ff.). The decisive element for this identification seems to be the pursuit of business activities. As a side note, it is worth questioning how to define this approach for entities that do not carry out such activities (cf. the centre of interests of a natural person generally coincides with his/her habitual residence in eDate and Martinez, para 49). Finally, and, in the opinion of the present author, most importantly, regarding claims for rectification and removal of allegedly infringing online information, the ECJ disregarded the so-called mosaic principle (paras 45 ff.).

Is "la réserve héréditaire" part of French international public policy ?

Through two decisions (Civ. 1ère, 27 sept. 2017, n° 16-17198 et 16-13151) both issued on September 27th, The French *Cour de cassation* finally gave an answer to one of the most discussed question of French Succession law: Is *la réserve héréditaire* part of French international public policy?

The circumstances of both cases are very similar. Two French composers living in California, where they had most of their assets, got married respectively in 1984 and 1990. They put their assets in a trust and designated their wives as

beneficiaries. In both cases, the settlers did not designate the children they had from previous relationships as beneficiaries of the trust. After the death of their fathers, the latter turned to French courts in order to obtain part of the inheritance. They argued that the Californian law applicable to the succession should be declared contrary to French international public policy for not including a *réserve héréditaire* for certain heirs.

According to Article 912 §1 of the French Civil Code, *la réserve hérédiataire* or the reserved portion « *is that part of the assets and rights of the succession whose devolution, free of charge, the law assures to certain heirs, called forced heirs, if they are called to the succession and if they accept it* ». In other words, under French succession law, a person cannot freely dispose of all of his or her assets. French law set boundaries by putting aside a reserved portion of the deceased's property. However, he or she can freely dispose of the disposable portion (*quotité disponible*) which is defined as « *that part of the assets and rights of the succession that is not reserved by law and of which the deceased can freely dispose by liberalities* » (Article 912 § 2).

Whereas the Court of Cassation ruled that the reserved portion is mandatory in internal matters, the question of its imperative nature in international cases was yet unclear. Authors disagree. While some consider that the *réserve héréditaire* cannot be considered as such as part of French *ordre public international*, others consider that due to the fact that it is an expression of solidarity among family members as well as a guarantee of equality between heirs, it has to be part of French international public policy.

The controversy was aggravated in 2011 when the Conseil Constitutionnel condemned le *droit de prélèvement* for amounting to a discrimination based on nationality. The *droit de prélèvement* is another specific French mechanism. It allows French heirs that have been deprived of the reserved portion from the assets located abroad to deduct the equivalent of such reserved portion from the part of the deceased's assets that are located in France. As a consequence of this decision, the reserved portion remained the only protection for heirs from the risk of disinheritance.

However, in both decisions, the Court found that the mere fact that the foreign law does not provide for a mechanism such as the reserved portion does not amount to a violation of French international public policy. The foreign law could

nevertheless be disregarded, but only if its concrete application in a specific case leads to a situation that would be incompatible with French essential principles.

Giving the particulars circumstances of the cases, the Court found that in both cases the application of Californian law was not contrary to French public policy. First, the Court outlined that the deceased had lived in California for over thirty years and that most of their assets were located there. As a consequence, both situations were not strongly connected to the French *forum*. Then, the Court pointed out that the children living in France were adults and that their economic situation will not suffer from their being deprived of the succession.

These observations lead the Court to consider that, in these situations, the Californian law is not contrary to French international public policy even though it does not provide for a reserved portion. The Court emphasis on the particular circumstances of the case, namely that the situation was mainly located in California and that none of the claimants was in need or economically instable, indicates that these circumstances weighed strongly on the outcome. It does not exclude that, in different circumstances, a foreign law that would not provide for a reserved portion could be dismissed as contrary to public policy.

Prior to the coming into force of the Succession Regulation, the solution appears in accordance with its public policy provision. Stating that courts could only refuse to apply provisions that are *manifestly* incompatible with the forum's international public policy, Article 35 allows that foreign laws be disregarded when their application could lead to serious consequences. It does not appear to be the case in the present situations.

The new discussed question is now: In which case the application of a foreign law not including a reserved portion could lead to a situation incompatible with French essential principles ?

Freedom of establishment after Polbud: Free transfer of the registered office

Bastian Brunk, research assistant and doctoral student at the Institute for Comparative and Private International Law at the University of Freiburg (Germany), has provided us with the following first thoughts on the CJEU's groundbreaking *Polbud* judgment.

The Judgment

In its judgment in *Polbud* (C-106/16), the CJEU again took the work out of the EU legislature's hands while further developing the freedom of establishment provided for in Articles 49 and 54 TFEU. The case was heard following a request for a preliminary ruling under Article 267 TFEU by the Sad Najwyzszy (Supreme Court of Poland). In short, the CJEU had to decide on the following questions:

(1) Are Articles 49 and 54 TFEU applicable to a transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State with the purpose of converting its legal form, when the company has no intention to change the location of its real head office or to conduct real economic activity in the latter Member State?

(2) Is a national legislation that makes the removal of a company from the commercial register and, accordingly, the out-migration of that company conditional upon its liquidation compatible with the freedom of establishment?

Answering these questions, the CJEU made *Polbud*, the company at stake, a liberal gift and strengthened the mobility of companies within the European Single Market. First, the CJEU stated that the freedom of establishment applies to the transfer of the registered office of a company from one Member State to another even if no real business is intended to be conducted in the latter Member State. Secondly, the CJEU ruled out national legislation providing for the mandatory liquidation of a company if the company requests the removal from the initial commercial register in cases of outward migration.

The facts

In September 2011, the shareholders of *Polbud*, a limited liablity company established under Polish law, decided to transfer the company's registered office from Poland to Luxembourg. The resolution made no reference to a simultaneous transfer of either the real head office or the place of real economic activity. Based on that resolution, the registry court in Poland recorded the opening of the liquidation procedure. In May 2013, following a resolution adopted by a shareholder meeting in Luxembourg, the registered office of *Polbud* was transferred to Luxembourg. *Polbud* was renamed to *Consoil Geotechnik* and its legal form was changed to the *Société à responsabilité limitée (S. à r. l.)*, the Luxembourgish private limited liability company. Subsequently, *Polbud* lodged an application with the Polish registry court for its removal from the commercial register. This application was refused to be registered because, as the registry court stated, *Polbud* failed to provide evidence of the successful execution of a liquidation procedure. *Polbud* appealed against this decision, arguing that no liquidation was needed because the company continued to exist as a legal person incorporated under Luxembourgish law.

The precedents

Articles 49 and 54 TFEU provide for the freedom of establishment. According to the CJEU case-law, the concept of "establishment" within the meaning of these Articles is a very broad one, allowing a Union national to participate, on a stable and continuous basis, in the economic life of another Member State and to profit therefrom (CJEU in *Gebhard*, C-55/94, para. 25 and *Almelo*, C-470/04, para. 26). It involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period (CJEU in *Factortame and Others*, C-221/89, para. 20 and *Commission v. United Kingdom*, C-246/89, para. 21). In order to claim freedom of establishment, it is generally necessary to have secured a permanent presence in the host Member State (CJEU in *Centro di Musicologia Walter Stauffer*, C-386/04, para. 19 and *Schmelz*, C-97/09, para. 38). This case law can, generally speaking, be translated as "no freedom of establishment without establishment".

On the other hand, the CJEU generously extended the application of Articles 49 and 54 TFEU to letterbox companies without "fixed establishment" and/or "permanent presence" in their home Member State. In *Centros* (C-212/97) the

Court ruled that EU law is applied to the set-up of subsidiaries, branches and agencies in other Member States and, in that regard, it is immaterial that the company was formed in one Member State only for the purpose of establishing itself in another Member State, where its main, or indeed entire, business is to be conducted (*Centros*, para 17).

The CJEU then used its 2009 *Cartesio* judgment (C-210/06) as an opportunity to, *obiter dictu*, set guidelines for cross-border transfers of seat. It stated that, on the one hand, a Member state has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status (thus treating companies as legal creatures of their country of origin). On the other hand, freedom of establishment comprises the right of a company to move from one Member State to another. If domestic legislation of the Member State of origin requires the liquidation of the company, thereby preventing it from converting itself into a legal person governed by the law of the target Member State, such a measure cannot be justified under the rules on freedom of establishment (*Cartesio*, paras. 110 ff.).

This jurisdiction was complemented by the CJEU in *Vale* (C-378/10) where the Court clarified the legal position of the Member State of destination. If a Member State allows for the conversion of companies governed by national law, it must also grant the same possibility to foreign EU companies (*Vale*, para. 46). In the absence of relevant EU-law, the target Member State may set up procedural rules to cover the cross-border conversion but must ensure that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (*Vale*, para. 48).

The Opinion of AG Kokott

In her *Opinion* of 4 May 2017 (see here), AG *Kokott* took up a distinct position emphasizing the need for actual establishment for the application of Articles 49 and 54. This criterion is sufficiently met, as AG *Kokott* states, if, at least, the company *intends* to set up an actual establishment in the sense of conducting at least a nominal economic activity in the target Member State (*Opinion*, para 36).

The AG underlines her position citing the above mentioned CJEU case-law in *Factortame and Others* (C-221/89), *Commission v. United Kingdom* (C-246/89), *Centro di Musicologia Walter Stauffer* (C-386/04) and *Schmelz* (C-97/09). She concludes that the freedom of establishment "*gives economic operators in the European Union the right to choose the location of their economic activity, it does not give them the right to choose the law applicable to them*" (*Opinion*, para. 38).

Implications of the *Polbud* judgment for the internal market

The CJEU now takes a different point of view: Once formed in accordance with the legislation of a Member State, companies enjoy the full range of that freedom. Nothing new, so far, as *Geert van Calster* suggests in his comment (see here). But what makes Polbud (r)evolutionary?

First, the CJEU creates legal certainty in an area that is particularly important for the functioning of the European Single Market. In its *Cartesio* judgment, the Court allowed for the cross-border conversion of EU companies in general but did little to shape the relationship between the involved Member States. Therefore, it was widely thought, that, just like AG *Kokott* propounds, the conversion of a company from one Member State to another required a genuine economic link with the State of destination. In *Polbud*, the CJEU clarifies that the regulatory power of a Member State ends when a company converts itself into a company governed by the law of another Member state. It is for the latter State to determine the legal and/or economic conditions that have to be satisfied by the company in order to bring the conversion into effect (paras 33 ff.). Under Articles 49 and 54 TFEU, the State of origin is only allowed to provide legislation for the protection of public interests (such as the protection of creditors, minority shareholders and employees) but cannot impose mandatory liquidation.

Secondly, the CJEU obliges the State of origin to observe the *principle of equivalence*. This principle, already known from the *Vale* decision (see above), was generally considered as obliging only the target Member State in cross-border conversion cases to legally treat domestic and foreign companies equally. By contrast, the State of origin was only thought to be bound by the general prohibition of restrictions (i.e. the prohibition of rules hampering or rendering less attractive the exercise of fundamental freedoms, see CJEU in *Kraus*, C-19/92, para. 32). In *Polbud*, the CJEU, without being explicit on this point, extends the scope of application of the principle of equivalence to the Member State of origin

by stating that "*the imposition, with respect to such a cross-border conversion, of conditions that are more restrictive than those that apply to the conversion of a company within that Member State itself*" is not acceptable (para. 43).

Finally, recapitulating its jurisdiction in *Daily Mail* and *National Grid Indus* (C-371/10), the CJEU points out that exercising the freedom of establishment for the purpose of enjoying the benefit of the most favourable legislation, does not, in itself, amount to an abuse of rights (para. 62). The Court further explains its position saying that "*the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty*" (para. 63).

Assessment

As already observed, *Polbud* encouragingly facilitates the cross-border mobility of companies but, on the other hand, leaves the reader with open questions.

It was high time to free cross-border conversions from the requirement of a genuine economic link with the Member State of destination. The legal situation before *Polbud*, that allowed letterbox companies to conduct their business in other Member States (which can be compared to initial choice of law) but prevented the formation of letterbox companies through the transfer of an existing company's registered office to another Member State (which can be compared to subsequent choice of law), was somewhat arbitrary from a legal and economic point of view.

On the other hand, the extension of the scope of application of the principle of equivalence to the Member State of origin can only be seen as inconsistent with the legal doctrine of the freedom of establishment provided for in Articles 49 and 54 TFEU. Heretofore, only EU-foreigners could enjoy the right to non-discrimination, whereas, in regard to EU law, Member States were free to impose (relatively) stricter rules to its own citizens. This principle finds its expression, for example, in the above-mentioned treatment of companies as creatures of their state of origin that the CJEU established in its *Cartesio* judgment. As the principle of equivalence corresponds to the prohibition of discrimination, it is even more astonishing that the CJEU permits exemptions for overriding reasons in the public interest. These unwritten exemptions generally apply only in cases of restrictions

of the freedom of movement (see Kraus, para. 32 and *Gebhard*, para. 37). On the contrary, discriminations require the strict observance of the catalogue of justifications set out in Article 52 TFEU. In future decisions, the CJEU should recall this clear distinction and cease to further the linguistic ambiguity.

Conference Report: Annual meeting of the Alumni of the Hague Academy of International Law/Hamburg 2017 – Thorn and Lasthaus on Brexit and Private International Law

By Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany, and attendee of the 2017 Summer Courses on Private International Law at the Hague Academy of International Law

On 13 October 2017, the Alumni of the Hague Academy of International Law/Hamburg, the German section of Attenders and Alumni of the Hague Academy of International Law, A.A.A., hosted their annual meeting. At the invitation of Professor Karsten Thorn (Bucerius Law School, Hamburg), who lectured a Special Course on "The Protection of Small and Medium Enterprises in Private International Law" at the Academy during the 2016 Summer Courses, the meeting was held at Bucerius Law School, Hamburg. The academic programme consisted of four presentations, two of them dealt with issues of Private International Law after Brexit.

Professor Karsten Thorn's presentation on "European Private International Law after Brexit" was divided into two parts. In the first part he discussed direct legal

consequences of Brexit on Private International Law in relations between the United Kingdom (in particular England) and Germany. He highlighted the importance of Union Law and especially the duties to recognise derived from the fundamental freedoms for the rise of England as a legal hub. Therefore, Brexit would have grave consequences for the attractiveness of England in a number of legal areas. This would apply, for example, to company law. Whereas under Union Law the recognition of a company established in accordance with the law of one Member State must not be refused by another Member State, each Member State would apply its own rules on this issue post-Brexit. This could also impact companies established before Brexit, although it was disputed whether this would infringe their legitimate expectations and if so, whether this protection was subject to a certain time limit. In any event, the companies should act rather sooner than later to avoid any legal uncertainty. Comparable issues would arise in insolvency law. First and foremost, there would be – in contrast to the current legal situation – no duty for a Member State's court to recognise a decision of an English court on the existence of the centre of the debtor's main interests (COMI) in England anymore. Again, each Member State would apply its national rules on the recognition of foreign insolvency proceedings. Secondly, an English scheme of arrangement, a court-approved private debt restructuring solution, would likely not be recognised by the Member States after Brexit. By contrast, fewer negative consequences would arise with regard to the right to a name because even now Article 21 TFEU only guaranteed the recognition of a name rightfully obtained in the EU citizen's State of nationality or residence and this freedom is further limited by the Constitution of the recognising Member State. Finally, he highlighted the negative impact of Brexit on procedural law. Post-Brexit, English decisions will no longer benefit from mutual trust in the EU Member States. A revival of bilateral treaties with Member States or instruments of the Hague Conference could only serve as sectoral solutions. Under these conditions, he presumed an increased usage of arbitration in the UK post-Brexit, not least because the United Kingdom is a Contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, he pointed out that English courts would return to traditional instruments of the English procedural law such as anti-suit injunctions. The second part of his presentation dealt with indirect consequences of Brexit on the European Private International Law. Firstly, he submitted that a number of provisions in EU legislation can be regarded as legal transplants from English law. This applies, e.g., to Article 9 paragraph 3 Rome I Regulation and Article 6 lit. a EU Succession

Regulation. In his opinion, post-Brexit at least the former provision will be discarded after a revision of the respective EU legislation. Secondly, he turned to the question of the usage of English as working language of the EU bodies. He stated that most EU legislation was drafted in English. Because legal English was very different to the legal language used in all other Member States this was still noticeable in the official translations. Therefore, English shaped the spirit of the EU legislation. Although he believed that English would still be the dominant language in the EU bodies after Brexit, he argued that the continental legal thinking could gain more significance.

In her presentation on "Pluralism of Legal Sources with regard to International Choice of Court Agreements", Caroline Lasthaus (Bucerius Law School, Hamburg) examined – after a brief overview of the interplay between the German autonomous national rules on jurisdiction, the Brussels I Regulation Recast, the 2007 Lugano Convention and the 2005 Hague Choice of Court Convention –options of the United Kingdom to foster the enforcement of choice of court agreements in favour of UK courts post-Brexit. An accession to the 2007 Lugano Convention would require either the membership of the United Kingdom in the European Free Trade Association or a unanimous agreement of the Contracting Parties. However, both options were, in her opinion, unlikely. Furthermore, the rules of the 2007 Lugano Convention would be outdated and the United Kingdom would have to accept the CJEU's jurisdiction over questions of interpretation of the Convention. Therefore, she scrutinised whether an accession to the 2005 Hague Choice of Court Convention could be a suitable solution. The accession itself would not raise any difficulties, since the United Kingdom could accede to the Convention unilaterally. Hence, the decisive question was whether the Convention would serve the needs of the United Kingdom. Lasthaus argued that neither the applicability of the Convention only to international exclusive choice of court agreements nor the exclusion of agreements with a consumer would make the Convention less attractive for the United Kingdom. Moreover, both the Brussels I Regulation Recast and the 2005 Hague Choice of Court Convention would allow the choice of a neutral forum. However, she stressed that the Convention was rather strict with regard to the formal requirements of an agreement, whereas the Brussels I Regulation Recast followed a much more flexible approach. Even though a violation of formal requirements would not lead to the agreement to be null and void by virtue of the Convention, the Convention's rules on recognition and enforcement would not apply to judgements rendered

based on such an agreement. Finally, one crucial downside of the Convention would be the necessity of an exequatur procedure with regard to the judgements rendered based on a choice of court agreement. This would lead to higher costs for the litigants and to a longer procedure. As a result, she conceded that an accession to the 2005 Hague Choice of Court Convention could not mend all the consequences of the non-applicability of the Brussels I Regulation Recast post-Brexit. Nonetheless, an accession would still make sense for the United Kingdom and could also boost the conclusion of a worldwide Convention on the recognition and enforcement of foreign judgements.

Both presentations were followed by lively discussions among the speakers and participants. It was agreed that the implementation of existing EU legislation into domestic law could not cushion the consequences of Brexit, especially because the fundamental freedoms would no longer apply to the United Kingdom. Additionally, it became clear once more that the final outcome of Brexit is still uncertain. In this vein, it is noteworthy from a Private International Law point of view that there was some disagreement on whether the United Kingdom would need to accede to the Convention at all or if it would still be a Contracting State of the Convention after Brexit by way of a succession of State.

Conference on International Sales, London, 16-17 April 2018

King's College School of Law is organising a conference on **Unity and Diversity in the Law of the International Sale of Goods.** This conference will bring together prominent academics and practitioners from all over the world to discuss pressing issues pertaining to international sales transactions.The focus will be on the UN Convention on Contracts for the International Sale of Goods. The speakers will explore the current state of the law of sale of goods by examining how sales contracts, particularly those used in international trade, are governed in the modern world. The central theme concerns two competing forces within the sale of goods law:

- Those leading to disintegration,
- Those pushing towards uniformity, consolidation and standardisation.

The conference will take place on 16-17th of April 2018 at King's College London. For more information and the programme, please click here.

For the registration page, please click here.

Conferenza annuale: Corti europee e giudici nazionali

On 30 October 2017 the Jean Monnet Module on European Civil Procedure will host its annual conference on 'Corti europee e giudici nazionali' in Milan. The conference language is Italian. For further information see here.

Cross-Border Business Crisis: a Conference in Rome

On 3-4 November 2017 the LUISS «Guido Carli» University School of Law, with the support of the International Law Association (Italian Branch) and the auspices of the International Insolvency Institute, will host in Rome a conference on «Cross-Border Business Crisis: International and European Horizons».

Three bilingual (English/Italian) sessions are scheduled: I) International and European Policies on Business Crisis (Chairperson: Luciano Panzani); II) Regulation 2015/848 within the European System of Private International Law (Chairperson: Stefania Bariatti); III) Cross-Border Insolvency and Italian Legal Order: Old and New Challenges (Chairperson: Sergio M. Carbone).

Speakers include academics and practitioners (Massimo V. Benedettelli, Giorgio Corno, Domenico Damascelli, Luigi Fumagalli, Anna Gardella, Lucio Ghia, Francisco J. Garcimartín Alférez, Antonio Leandro, Maria Chiara Malaguti, Fabrizio Marongiu Buonaiuti, Alberto Mazzoni, Paul Omar, Antonio Tullio, Robert van Galen, Francesca Villata, Ivo-Meinert Willrodt).

Most of them are members of the ILA-Italy Study Group on «Cross-Border Insolvency and National Legal Orders» and will discuss the findings of their research during the conference.

Program and details on registration are available here

Out now: Encyclopedia of Private International Law!

Hard to believe, but true: The Encyclopedia of Private International Law, published by Edward Elgar and edited by Jürgen Basedow (Max Planck Institute Hamburg), Franco Ferrari (NYU Law School), Pedro de Miguel Asensio (Universidad Complutense de Madrid) and me, has finally been released end of September. Bringing together more than 180 authors from 57 countries the Encyclopedia sheds light on the current state of Private International Law around the globe and provides insights into how the discipline has been affected by globalization and increased regional integration over the last decades.

The Encyclopedia is available both in print and via Elgaronline and consists of four volumes. The first two volumes describe topical aspects of Private International Law in form of 247 alphabetically sorted entries. The third volume describes the Private International Law regimes of 80 countries in form of national reports. The fourth volume contains a collection of national codifications and provisions of Private International Law in English translation. More information is available here and here.

I take the opportunity to thank everybody who has helped to make the

Encyclopedia come true, notably the authors and translators (many of them editors or readers of this blog), my fellow editors, my team at the University of Jena and last but not least the team over at Edward Elgar!

Should you be interested in receiving a review copy please send an email to reviews@e-elgar.co.uk.

Court of Appeal allows in England claims against English-based multinational for overseas human rights violations

Written by Ekaterina Aristova, PhD in Law Candidate, University of Cambridge

On 14 October 2017, the London's Court of Appeal passed its long awaited decision in *Lungowe v Vedanta* confirming that foreign citizens can pursue in England legal claims against English-based multinationals for their overseas activities.

In 2015, Zambian villagers commenced proceedings against Vedanta, an English-based mining corporation, and its indirect Zambian subsidiary, KCM, alleging responsibility of both companies for the environmental pollution arising out of the operation in Zambia of the Nchanga Copper Mine by KCM. In 2016, the High Court allowed claims against both companies to be heard in England. The overall analysis of the judgement (see the author's earlier post on this blog) suggested that (1) claims against the parent company on the breach of duty of care in relation to the overseas operations of the foreign subsidiary can be heard in the English courts and (2) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state. The Court of Appeal has entirely upheld a High Court ruling.

Vedanta has focused their argument on the fact that Article 4 of the Brussels I Regulation Recast does not automatically allow an English-domiciled parent company to be sued in England and, despite the CJEU's ruling in *Owusu v Jackson*, there is always discretion as to whether the English court should allow the claims to be tried in England. In response, the three appeal judges were very clear in confirming the univocal effect of *Owusu* decision which precludes English courts from declining a mandatory jurisdiction to try claims against the English-domiciled defendant. Logically, analysis further moved to KCM's applications. KCM as a foreign defendant was brought into proceedings on the basis of a 'necessary or proper party' gateway under the English traditional rules of jurisdictions. It allows service out of the jurisdiction subject to two additional conditions: (1) there is between the claimant and English-domiciled defendant a real issue which it is reasonable for the court to try; and (2) England is the proper forum for trying the claims. Unsurprisingly, an initial question of whether uncustomary claims alleging liability of the local parent company for overseas damages are viable in England was a major stumbling block for the corporate defendants.

First of all, Lord Justice Simon, who delivered a leading judgement, confirmed that absence of the reported cases on the breach of duty of care by the parent company owed to the persons affected by its subsidiary's operations does not automatically render such a claim unarguable. He then relied on several well-known English cases to derive basic principles for the imposition of such duty of care on the parent company: (1) The three-part test of foreseeability, proximity and reasonableness set out in *Caparo Industries Plc v Dickman* constitutes a starting point of the analysis; 2) A duty of care may be owed, in appropriate circumstances, to the employees of the parent company and those directly affected by the subsidiary's operations; 3) Such a duty of care arises when the parent company has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or controls the operations which give rise to the claim; 4) Some of the circumstances in which the existence of the duty of care may, or may not, be established can be traced in *Chandler v Cape* and *Thompson v The Renwick Group*; 5) It is necessary to determine whether the parent company was well placed, because of its knowledge and expertise to protect the claimants; proving that parent company and the subsidiary run the same business is not sufficient; (6) The evidence sufficient to establish the duty may not be available at the early stages of the case. Following

these principles, it was concluded that, irrespective of the strength or the weakness of the claim against the parent company (as opposed to the claim against the subsidiary as an operator of the mine) and in light of the supporting evidence already presented by the claimants, the claim against Vedanta cannot be dismissed as not properly arguable.

The Court of Appeal's decision is particularly interesting for two reasons. The first issue relates to how its conclusions should be approached in the context of similar environmental litigation against English-based multinational in *Okpabi v Shell*. Earlier this year, Fraser J, sitting as a judge in the Technology and Construction Court, ruled that a claim against English-based parent company and the Nigerian subsidiary of the Shell group for oil pollution in Nigeria will not proceed in the English courts. The judge himself did not make any conclusions which would question the ultimate decision reached by the two instances in *Lungowe v Vedanta*. More importantly, his analysis fairly suggests that determination of the parent company liability should be approached on a case-by-case basis weighing the particular characteristics of the corporate organisation of the group and the nexus between the parent company and its subsidiaries (see the author's earlier post on this blog). Nevertheless, the reasoning of Fraser J could be criticised for the scrupulousness of identifying whether sufficient evidence on each factor of the duty of care test was presented by the claimants at such an early stage of the proceedings. The jurisdictional inquiry into existence of an arguable claim against the parent company should not substitute the determination of the substantive argument and the trial itself. This approach was rightly emphasised by the Court of Appeal in *Vedanta*. By contrast, thorough analysis of the liability argument carried by Fraser J in *Okpabi v Shell* is arguably very close to the resolution of the case on the merits. The decision was appealed by the claimants, the Nigerian citizens, on these very grounds.

The second set of issues arises from the Court of Appeal's reluctance to engage in the discussion of the regulatory significance of the litigation against major transnational corporations for their overseas operations in the English courts. In the course of appeal's hearing Vedanta argued that allowing cases against English multinationals in their home state was not in the public interest. The judgement itself refrained to consider whether public interest factors have any impact on the jurisdictional inquiry in the disputes concerned with the private interests of the litigants. Therefore, foreign direct liability claims against powerful

corporate groups were placed in the context of conventional theoretical public/private divide of the rules of private international law. The Parliament and the Government have at least twice engaged into discussion of the UK role in promoting responsibility and ensuring accountability of its companies in the course of 2009 and 2017 human rights and business inquiries. Further increase in the number of legal claims against English-based transnational corporations brought by the foreign citizens in the English courts may revive interest in the role of the discipline of private international law to take part in the global governance debate.

Conference: The well-being of children in international child abduction cases, Antwerp, 23-24 November

Child Focus, the University of Antwerp, Center IKO, CFPE-Enfants Disparus, Missing Children Europe and the French Central Authority invite you to the final conference of their research project, EWELL, co-funded by the European Commission.

The project partners conducted a large scale research study on the psychological effects of international child abduction on the well-being of abducted children. Their results will be presented at the final conference. This will be conbined with workshops on topics of psychology and law (including Brussels IIa).

The full programme is available here.

This conference is free of charge, but registration is required.

Travel and accommodation expenses will not be reimbursed.