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.

Postdoctoral fellowships in commercial private international law / international commercial law, Johannesburg

Postdoctoral fellowships in commercial private international law / international commercial law are available at the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg.

See the application form here.

The submission link is here.

The closing date is **31 October 2017**.

For administrative enquires: Ms Dudu Mbatha rdmbatha@uj.ac.za

For academic enquiries: Prof Jan Neels jlneels@uj.ac.za

Prix du Livre Juridique awarded to Éléments d'histoire du droit international privé

On Saturday, October 7, Professor Bertrand Ancel's *Éléments d'histoire du droit international privé* , already presented here, was awarded the Prix du livre juridique at the Salon du livre juridique du Conseil Constitutionnel.

As Professor Ancel said in his thank you speech, *Éléments d'histoire du droit international privé* is the fruit of more than fifteen years of teaching in the history

of private international law. Bertrand Ancel was an associate in private law and criminal sciences, specializing in civil law, comparative private law and private international law, but was not prepared to teach legal history. He has devoted himself to the writing of these *Éléments* out of passion for an area whose knowledge embraces both Greco-Roman Antiquity and the Middle Ages and the contemporary world. Written on the eve of the twenty-first century, the book is an extension of the great works in French by Armand Lainé, Eduard Maurits Meijers and Max Gutzwiller prior to the Second World War, to which *Elements of History of Private International Law* pays tribute. Thus aggregated, *Éléments* give an innovative view of the history of private international law.

Provided with appendices and an extensive bibliography, this work of more than six hundred pages allows to read "l'inlassable réflexion doctrinale et les leçons d'une expérience sans cesse renouvelée des cas concrets". It is dedicated especially to master's students to whom this reflection offers a look at the positive data – essentially case law- and doctrinal constructions. Without history, it remains difficult to understand all the subtleties of private law: "la démarche historique restitue l'expérience" and "l'histoire est ici encore plus qu'ailleurs l'antidote du dogmatisme et l'indispensable auxiliaire de qui entreprend de connaître le droit international privé d'aujourd'hui". The reader will also find the most important judicial decisions and the most significant doctrinal comments.

Source: Université Paris II (Panthéon-Assas)

Conference in Macerata (25 October 2017): Freedom of Movement of Persons in the EU and the Continuity of Family

Status – Problems concerning Registered Partnerships and Cohabitation

(I am grateful to Prof. Fabrizio Marongiu Buonaiuti for providing this presentation of the Macerata conference)

The European Documentation Centre (EDC) established at the **Department of Law of the University of Macerata** is hosting a Conference (in Italian) on **Wednesday, 25th October 2017**, as part of a programme of initiatives launched by the European Commission's Permanent Representation to Italy for celebrating the 60th Anniversary of the Treaties of Rome: **"60 anni di libertà di circolazione delle persone nell'Unione europea e continuità degli status familiari: la problematica delle unioni civili e delle convivenze"** (60 Years of Freedom of Movement of Persons in the European Union and the Continuity of Family Status: Problems concerning Registered Partnerships and Cohabitation).

The Conference deals with the implications for the freedom of movement of persons within the EU of the problems related to the continuity of family *status* acquired abroad, with particular regard to registered partnerships and cohabitation. A discussion on this topic appears particularly timely, in consideration of the recent adoption by the Italian legislature of both the substantive regulation of registered parterships (unioni civili) and cohabitation (convivenze) under law No. 76 of 20 May 2016, and the relevant conflict of laws rules, as set out in Legislative Decree No. 7 of 19 January 2017. The parallel developments taking place at the European Union level will also be taken into consideration, with particular regard to the recent adoption, by the implementation of an enhanced cooperation, of Regulation (EU) No. 1104/2016, concerning jurisdiction, applicable law and the recognition and enforcement of judgments in matters of the property consequences of registered partnerships.

Here is the programme (available as .pdf; all presentations will be delivered in Italian):

Introductory remarks

- *Prof. Francesco Adornato* – Dean of the University of Macerata
- *Prof. Ermanno Calzolaio* – Director of the Department of Law

Ist Session: Freedom of Movement of Persons and Continuity of Personal and Family Status

Chair: *Prof. Angelo Davì*, University of Rome "La Sapienza"

- Registered Partnerships and Freedom of Movement of Persons in the European Space of Freedom, Security and Justice – *Prof. Claudia Morviducci*, University of Rome III
- European Guarantees and Rules concerning Continuity of *Status* as concerns Same-Sex Marriages and Registered Partnerships – *Prof. Francesco Salerno*, University of Ferrara
- Italian Conflict of Laws Rules concerning Registered Partnerships under Legislative Decree No. 7 of 19 January 2017 – *Prof. Cristina Campiglio*, University of Pavia
- Private International Law Rules concerning the Property Consequences of Registered Partnerships under Regulation (EU) No. 1104/2016 – *Prof. Gian Paolo Romano* – University of Geneva

Discussion

2nd Session: The Substantive Regulation of Registered Partnerships and Cohabitation in the Italian Legal System and Unsolved Problems

Chair: *Prof. Enrico del Prato*, University of Rome "La Sapienza"

- The Substantive Regulation of Same-Sex Registered Partnerships under Law No. 76 of 20 May 2016 – *Prof. Michele Sesta*, University of Bologna
- The Substantive Regulation of Cohabitation under Law No. 76 of 20 May 2016 – *Prof. Ubaldo Perfetti*, University of Macerata
- Adoption by Partners of Registered Partnerships – *Prof. Enrico Antonio Emiliozzi*, University of Macerata
- Problems Concerning the Registration of Partnerships Created Abroad in the Italian Civil *Status* Records – *Dr. Renzo Calvigioni* – National Association of Civil Status Officials

Discussion

Litigación Internacional en la Unión Europea II – Calvo/Carrascosa/Caamiña

Litigación international en la Unión Europea II- Ley aplicable a los contratos internacionales. Comentario al reglamento Roma I (International litigation in the European Union II. The law applicable to international contracts. Commentary to the Rome I Regulation) represents the second issue of a collection of treatises on European private international law.

The first part discusses the role and impact of the New Lex Mercatoria in international trade, with a comprehensive study of the Rome I Regulation on the law applicable to contractual obligations.

In the second part an analysis of more than one hundred international trade contracts is undertaken, with special attention to the structure of each contract and the applicable law. International sale of goods, countertrade, donations, international loan, agency contracts, factoring, confirming, crowdfunding, consulting, due diligence, leasing, supply, construction, deposit, management, outsourcing, catering, cash-pooling, engineering, guarantee contracts, timesharing, fiduciary contracts, franchising, distribution contracts, bank contracts, stock contracts, company contracts, joint venture and many others contracts are examined from a private international law perspective. The book also incorporates specific chapters on international consumer contracts and international labor contracts. Besides, special attention is paid to international insurance contracts.

The third part of the book addresses the international contracts drafting techniques with a focus on clauses which are usually included therein.

Several annexes with the best case-law in the field of international contracts and the most commonly used clauses complement the book.

Publishers: Thomson Reuters Aranzadi, 2017, 897 pages.

Issue 2017.3 of Dutch Journal on Private International Law (NIPR)

The third issue of 2017 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, contains contributions on the consequences of Brexit for the future of private international law in the UK and the EU27, the ex post evaluations of legislative actions in the European Union, the Recast of the Brussels IIa Regulation, and cross-border evidence preservation measures under Brussels I-bis.

Xandra Kramer, 'Editorial: NIPR: over Nederlands, Europees en wereldwijd IPR/NIPR: on Dutch, European, and global PIL', p. 407-410.

Jonathan Fitchen, 'The PIL consequences of Brexit', p. 411-432.

> *The UK's triggering of Article 50 TEU poses problems for the future of private international law in the UK and in the EU27. The UK's departure from the EU will end the mutual application of European private international law within the UK's legal systems and will affect the application of that EU law by the EU27 in matters concerning the UK as a new third State. After setting the problem in context, this article provides a political background to the events that led to the Brexit referendum of 2016 and to the UK's June 2017 general election; thereafter it illustrates certain problems posed by the threat of 'cliff-edges' arising as a consequence of a 'disorderly' UK exit from the European Union, finally it offers various possibilities concerning the future of private international law in the UK and in the EU. It is argued that if the beneficial aspects of the progress achieved for all European citizens by European private*

international law are to be salvaged from the Brexit process, both the UK and the EU must each consider most urgently the need for a realistic and undogmatic policy on the future of each other's private international law that reflects the political reality that, though the UK will soon be a third State relative to the EU27, many natural and legal persons will remain connected with the EU27 despite Brexit. It is argued that each side might usefully consider the unifying goals underlying private international law.

Giesela Rühl, '(Ex post) Evaluation of legislative actions in the European Union: the example of private international law', p. 433-461.

Over the last decades systematic ex post evaluations of legislative actions have become an integral part of the European law making process. The present article analyses the European Commission's evaluation practice in the field of private international law and offers recommendations for its improvement.

Thalia Kruger, 'Brussels IIa Recast moving forward', p. 462-476.

The Brussels IIa Regulation (EC 2201/2003) is currently subject to revision. This is a long and cumbersome process. The European Commission published its report on the Regulation's operation in April 2014 and its Proposal for a Recast in June 2016. The European Parliament and the Council are currently discussing the proposed amendments. In order for the Recast to be enacted, unanimity in the Council is required. This article discusses some of the issues currently on the table. These include children's rights, matters of jurisdiction and parallel proceedings in parental responsibility disputes, international child abduction, the abolition of exequatur, the coordination with the 1996 Hague Child Protection Convention, mediation, and information on foreign law.

Tess Bens, 'Grensoverschrijdend bewijsbeslag', p. 477-494.

This article analyses whether the revised Brussels I Regulation ('Recast') allows the Dutch courts to order provisional measures intended to obtain or preserve evidence located in another Member State. Recital 25 of the Recast explicitly states that the notion of provisional measures includes these type of orders. The author discusses whether Dutch measures to preserve evidence qualify as provisional measures under the Recast. Possible substantive barriers to

granting these measures, such as the Evidence Regulation and territorial limitations, are taken into account in making this assessment. The author further argues that there are – in principle – no obstacles for the Dutch courts to order provisional measures aimed at obtaining or preserving evidence located in another Member State. The problems seem to begin at the enforcement stage. To illustrate this point, the author discusses the possibility of coordinating the moment of serving the order and the moment of enforcing the measure in order to retain the element of surprise and the adaptation of the measure for enforcement in France and Germany. As yet there is not a clear answer as to how the enforcement of these kind of measures in a different Member State will function in practice. Moreover, the problems described equally apply to the enforcement of other provisional measures under the Recast and can be expected to give rise to more questions in the future.

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24 November: unalex-Conference at the University of Innsbruck

Readers of our blog will recall that Prof. Dr. Andreas Schwartze from the University of Innsbruck will host the final conference of the EU-project "unalex – multilingual information for the uniform interpretation of the instruments of judicial cooperation in civil matters" in Innsbruck on 24 November (see our earlier post).

The full and final programme (including information as regards registration and accommodation) is now available here, here, and here.

Cuadernos de Derecho Transnacional vol. 9 (2)

Cuadernos de Derecho Transnacional, vol. 9, nr. 2, has just been released. *Cuaderno*s is a bi-annual electronic law journal specialized in International Private Law, Uniform Law and Private Comparative Law, open to contributions in different languages. It is edited by the Private International Law Department of the University Carlos III, Madrid.

All contents can be freely downloaded. Here is the index of the section "Estudios":

Miguel Gómez Jene, *El convenio arbitral: statu quo* (The arbitration agreement: statu quo)

Hilda Aguilar Grieder, *Problemas de Derecho Internacional Privado en la contratación de seguros: especial referencia a la reciente directiva (UE) 2016/97 sobre la distribución de seguros* (Private International Law problems of the international insurance contracts: the new directive (UE) 2016/1997 about distribution of insurance)

Isabel Antón Juárez, *La oposición del régimen económico matrimonial y la protección del tercero en Derecho Internacional Privado* (The opposition of the matrimonial property regime and the protection of the third party in Private International Law)

Ilaria Aquironi, *L'addebito della separazione nel diritto internazionale privato dell'Unione Europe*a (Judicial decisions as to the causes of separation under EU private international law)

Naiara Arriola Echaniz, *La Unión Europea y la Organización Mundial del Comercio: comenzando un diálogo proto- constitucional* (The European Union and the World Trade Organization: a budding proto-constitutional dialogue)

Irene Blázquez Rodríguez, *Libre circulación de personas y Derecho Internacional Privado: un análisis a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea* (Free movement of persons and International Private Law: an analysis in the light of the case law of the European Court of

Justice)

María Asunción Cebrián Salvat, *La competencia judicial internacional residual en materia contractual en España* (The Spanish rules of residual jurisdiction in matters related to contract)

Silvia Pilar Badiola Coca, *Algunas consideraciones sobre el régimen de la responsabilidad civil del porteador en la legislación marítima de Emiratos Árabes Unidos* (Some considerations regarding the maritime carrier liability under the United Arab Emirates maritime law)

Clara Isabel Cordero Álvarez, *Incidencia de las normas imperativas en los contratos internacionales: especial referencia a las normas de terceros estados desde una aproximación europea* (Overriding mandatory provisions in international contracts: a special reference to foreign overriding mandatory provisions from a European approach)

Eva de Götzen, *Recognition of same-sex marriages, overcoming gender barriers in Italy and the Italian law no. 76/2016 on civil unions. First remarks* (Riconoscimento dei matrimoni omosessuali, superamento delle barriere di genere in Italia e legge n. 76/2016 sulle unioni civili. Prime riflessioni)

Carlos Manuel Díez Soto, *Algunas cuestiones a propósito del derecho de participación del autor de una obra de arte original sobre el precio de reventa (droit de suite)* (Some questions concerning the artist's resale right (droit de suite)

Dorothy Estrada Tanck, *Protección de las personas migrantes indocumentadas en España con arreglo al Derecho Internacional y Europeo de los derechos humanos* (Protection of undocumented migrant persons in Spain under international and European human rights law)

Ádám Fuglinszky, *Hungarian law and practice of civil partnerships with special regard to same-sex couples* (Das Ungarische Recht und praxis von lebenspartnerschaften mit besonderer rücksicht auf gleichgeschlechtliche pare)

Natividad Goñi Urriza, *El sometimiento de las adquisiciones minoritarias que no otorgan el control a las normas sobre el control de las concentraciones*

(The control under merger rules of acquisitions of non-controlling minority shareholdings)

Luis Ignacio Gordillo Pérez, *El TJUE y el Derecho Internacional: la defensa de su propia autonomía como principio constitucional básico* (The CJEU and International Law: the defence of its own autonomy as a basic constitutional principle)

Thais Guerrero Padrón, *Sobre los funcionarios de la Unión Europea y su régimen de seguridad social: los tributos como cotizaciones sociales a efectos del TJUE* (Issues about officials of the European Union and its social security regime: taxes as social contributions to the effects of the CJEU)

Carlos María López Espadafor, *Lagunas en el Derecho Tributario de la Unión Europea* (Gaps in the tax law of the European Union)

Isabel Lorente Martínez, *Brexit y cláusulas de sumisión en los contratos internacionales* (Brexit and prorrogation clauses in international contracts)

Diana Marín Consarnau, L*as uniones registradas en España como beneficiarias del derecho de la UE a propósito de la Directiva 2004/38/CE y del Reglamento (UE) 2016/1104* (Spanish "registered partnerships" as beneficiaries of EU law according to the Directive 2004/38 (EC) and the Regulation (EU) 2016/1104)

Fabrizio Marongiu Buonaiuti, *La disciplina della giurisdizione nel Regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"* (Jurisdiction under Regulation (EU) no. 2016/679 concerning the processing of personal data and its coordination with the "Brussels I-bis" regulation)

Alfonso Ortega Giménez, *El fenómeno de la inmigración y el problema de los denominados "matrimonios de conveniencia" en España* (The phenomenon of immigration and the problem of the denominated "convenience marriages" in Spain)

Marta Requejo Isidro, *La protección del menor no acompañado solicitante de asilo: entre Estado competente y Estado responsable* (The protection of

unaccompanied minors asylum-seekers: between competent state and responsible state)

Mercedes Sánchez Ruiz, *La regulación europea actual sobre emplazamiento de producto y la propuesta de reforma de la directiva de servicios de comunicación audiovisual* (The current European rules governing product placement and the new legislative proposal amending the audiovisual media services directive)

Stella Solernou Sanz, *Los límites a la autonomía privada en el marco del contrato de transporte de mercancías por carretera* (Limits on private autonomy in the framework of the contract for carriage of goods by road)

Lenka Válková, *The interplay between jurisdictional rules established in the EU legal instruments in the field of family law: testing functionality through simultaneous application with domestic law* (L'interazione tra le regole di giurisdizione all'interno degli strumenti giuridici dell'UE nell'ambito del diritto di famiglia: la prova del funzionamento attraverso l'applicazione simultanea del diritto nazionale)

Out Now: The Nature and Enforcement of Choice of Court Agreements – A Comparative Study – By Mukarrum Ahmed

This intriguing book examines the fundamental juridical nature, classification and enforcement of choice of court agreements in international commercial litigation. It integrates the comparative and doctrinal analysis of choice of court agreements under the Brussels I Recast Regulation, the Hague Convention on Choice of Court

Agreements (‘Hague Convention’) and the English common law jurisdictional regime into a theoretical framework. In this regard, the book analyses the impact of a multilateral and regulatory conception of private international law on the private law enforcement of choice of court agreements before the English courts – highly recommendable for all who are interested in choice of court agreements!

For more information see here.