Suing TNCs in the English courts: the challenge of jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

PIL and IP: Special Issue 2016.4 of the Dutch Journal on Private International Law (NIPR)

The fourth issue of 2016 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, is dedicated to Private International Law and Intellectual Property. It includes papers on the law applicable to copyright infringements on the Internet, how to handle multiple defendants in intellectual property litigation, the incorporation of the Unified Patent Court into the Brussels I bis regulation, principles of private international law and aspects of intellectual property law and the territoriality principle in intellectual property.

Sierd J. Schaafsma, 'Editorial: Private International law and intellectual property', p. 685-686 (guest editor)

Paul L.C. Torremans, 'The Law applicable to copyright infringement on the Internet', p. 687-695

> *This article looks at the law applicable to copyright infringement on the Internet. In order to do so we need to look first of all at the rules concerning*

the applicable law for copyright infringement in general. Here the starting point is the Berne Convention. Its provisions give an indication of the direction in which this debate is going, but we will see that they merely provide starting points. We then move on to the approach in Europe under the Rome II Regulation and here more details become clear. Essentially, the existing rule boils down to a lex loci protectionis approach, which is in conformity with the starting point that is found in the Berne Convention. It is however doubtful whether such a country by country approach can work well in an Internet context and suggestions are made to improve the legal framework by adding a rule for ubiquitous infringement and a de minimis rule. Finally, we also briefly look at the issues surrounding the cross-border portability of online content services and the impact that the current focus on these may have in terms of the choice of law.

Sierd J. Schaafsma, 'Multiple defendants in intellectual property litigation', p. 696-705

One of the key provisions in international intellectual property litigation is the forum connexitatis in Article 8(1) of the Brussel I bis Regulation. This jurisdiction provision makes it possible to concentrate infringement claims against various defendants, domiciled in different EU Member States, before one court: the court of the domicile of any one of them. The criteria of Article 8(1) are, however, complicated and the case law of the Court of Justice is not always very clear. This contribution seeks to explore, evaluate and comment on the current state of affairs in respect of Article 8(1) in the context of intellectual property litigation.

Michael C.A. Kant, 'The Unified Patent Court and the Brussels I *bis* Regulation', p. 706-715

According to the Agreement on a Unified Patent Court (UPCA), the establishment of a Unified Patent Court (UPC) for the settlement of disputes relating to European patents and European patents with unitary effect also depends upon amendments to the Brussels I bis Regulation (BR) concerning its relationship with the UPCA. In light of this, the European legislator established new Articles 71a to 71d BR. Unfortunately, these provisions have effected uncertainties and schematic inconsistencies within the Brussels system.

Besides, inconsistencies have been established between jurisdiction rules of the BR and competence rules of the UPCA. The most notable flaws in this respect are discussed in this contribution.

Michelle van Eechoud, 'Bridging the gap: Private international law principles for intellectual property law', p. 716-723

This past decade has seen a veritable surge of development of 'soft law' private international instruments for intellectual property. A global network has been formed made up of academics and practitioners who work on the intersection of these domains. This article examines the synthesizing work of the International Law Association's Committee on intellectual property and private international law. Now that its draft Guidelines on jurisdiction, applicable law and enforcement are at an advanced stage, what can be said about consensus and controversy about dealing with transborder intellectual property disputes in the information age? What role can principles play in a world where multilateral rulemaking on intellectual property becomes ever deeply politicized and framed as an issue of trade? Arguably, private international law retains it facilitating role and will continue to attract the attention of intellectual property law specialists as a necessary integral part of regulating transborder information flows.

Dario Moura Vicente, 'The territoriality principle in intellectual property revisited', p. 724-729

This essay revisits territoriality as the founding principle of international IP law. Both copyright and rights in patents and trademarks were essentially conceived by the drafters of the Berne and Paris Conventions as territorial rights which should be governed by the law of the country for which their protection is claimed. This is still the starting point of the relevant provisions in several recent soft law instruments adopted, inter alia, by the American Law Institute and the European Max Planck Group on Conflict of Laws in IP. An important deviation therefrom has, however, been enshrined in conflict of jurisdictions rules that allow for the extraterritorial enforcement of IP rights. Other relevant developments in this respect concern Internet uses of protected works, with regard to which certain restrictions to territoriality have been adopted in order to promote the applicability of a single law to online infringements. The liability

of Internet service providers should, in turn, be governed by the law of the country where the centre of gravity of their activities is located, not necessarily the lex protectionis. Other alternatives to the lex protectionis, such as the lex originis or the lex contractus, have gained prominence concerning the initial ownership of unregistered IP rights. And a choice of the applicable law by the parties has been allowed in respect of remedies for infringement acts, as well as of contracts providing for the creation or the transfer of securities in IP rights. A mitigated form of territoriality has thus emerged in recent IP law instruments, which allows for greater diversity and flexibility in conflict of laws solutions in this field.

Reminder: Registration deadline for young scholars‘ PIL conference in Bonn

The following reminder has been kindly provided by Dr. Susanne L. Gössl. LL.M. (Tulane), University of Bonn.

This is a short reminder that the registration deadline for the first German young scholars‘ PIL conference on April 6th and 7th 2017 at the University of Bonn (see our previous post here) is approaching.

The conference will be held in German. Its general topic is “Politics and Private International Law”.

Professor Dagmar Coester-Waltjen has kindly agreed to deliver our conference’s opening address. Consolidated in four panels with the topics “Arbitration”, “Procedural Law and Conflict of Laws/Substantial Law”, “Protection of Individual Rights and Conflict of Laws” and “Public Law and Conflict of Laws”, a total of eight presentations and one responsio will address current aspects of the relationship between politics and PIL and invite further discussion.

Participation is free, but a registration is required.

The registration deadline is **February 28th 2017**.

In order to register for the conference, please use this link. Please be aware that the number of participants is limited.

Further information may be found here.

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

Positions Helsinki University

Helsinki University has four open positions for assistant/associate professors and professors, in the area of Law and Digitalization; Law and Globalisation; Transnational European Law and Russian law and administration.

More information is available here.

Comparative Contract Law (a European and Transnational Perspective), 3rd edition

Seven years after the first edition, the third and complete edition of this book edited by Prof. Sixto Sánchez Lorenzo (University of Granada) and published by Thomson-Reuters/Aranzadi has finally been released- the actual date

is December 2016.

In two volumes (around 2500 pages, in Spanish) this huge academic work, gathering 24 authors of 51 chapters, provides for a complete analysis of legal families, sources, formation, content, interpretation, performance and breach of contract from a comparative perspective. General and singular aspects of contracts, emphasizing convergences and divergences between national legal systems and their impact in international trade, are dealt with therein. International texts, such as CISG, DCFR, PECL, UNIDROIT and OHADAC Principles are also analyzed in each chapter.

ISBN: 9788491359258

Click here to access the summary.

Reminder: Brexit means Brexit, Seminar in London 26 January

This is a reminder of the Seminar on Brexit and Private International Law at King's College London on 26 January 2017.

The seminar will discuss the risks which Brexit poses for the UK as a centre for dispute resolution of civil and commercial disputes, with particular reference to Jurisdiction/Enforcement; Applicable law; Procedure; and Cross-border Insolvency law.

The Chair is Professor Jonathan Harris QC.

Speakers are:

Sir Richard Aikens: Brick Court Chambers and King's College London

Alexander Layton QC: 20 Essex Street Chambers and King's College London

Dr Manuel Penades Fons: King's College London

It will take place at King's College London – Strand Campus at 6.30 p.m.

For registration and more information, see here.

Rome I Regulation – Magnus/Mankowski Commentary

The advance of the English language article-of-article commentary gathers ever more momentum. The series of European Commentaries on Private International Law (ECPIL), edited by Ulrich Magnus and Peter Mankowski, welcomes the publication of its second volume addressing the Rome I Regulation. It assembles a team of prominent authors from all over Europe. The result is the by far most voluminous English language commentary on the Rome I Regulation, the prime pillar of European private international law and the fundament of cross-border trade with Europe. Its attitude is to aspire at leaving virtually no question unanswered. Parties' choice of law, the tangles of objective connections under Art. 4, consumer contracts, employment contracts, insurance contracts, form and all the other topics of the Rome I Regulation attract the in-depth analysis they truly deserve.

Private International Law:

Embracing Diversity (updated)

There is just a month to go for the *Private International Law: Embracing Diversity* event taking place in Edinburgh, organized by the University in cooperation with several other institutions from the UK and abroad. The updated program of this one-day meeting of PIL experts can be downloaded here. Please remember the venue (St. Trinnean's Room, St. Leonard's Hall – University of Edinburgh, EH16 5AY), and also that registration is required at www.law.ed.ac.uk/events (attendance fee: £40.00 per attendee).

Kind Reminder on the EAPO

My colleague Adriani Dori (MPI Luxembourg) kindly reminded me today: the EU Regulation 655/2014 is applicable from Wednesday 18. I thought it worth recalling here as well.

Monograph on Intellectual Property Rights and Applicable Law, by Javier Maseda Rodríguez

It is my pleasure to give notice of a recently published monograph of my colleague Dr. Javier Maseda Rodríguez (Associate Professor of private international law at the University of Santiago de Compostela, Spain), entitled

La ley aplicable a la titularidad original de los derechos de propiedad intelectual sobre las obras creadas en el marco de una relación laboral (The law applicable to the initial ownership of intellectual property rights of

works created in the context of an employment relationship).

This monograph aims to identify the applicable law to the initial ownership of intellectual property rights to works created in the context of an employment relationship. The topic is indeed a classic one for private international law scholars with an interest in intellectual property. Still, it remains a hot issue, as shown in a book that compiles with a comparative intent normative, practical and doctrinal positions on the subject, explaining at the same time the reception in Spanish law of regulations alien to the Spanish tradition – such as Art. 11 (2) English *Copyright, Designs and Patent Act* 1988, Art. 7 Dutch IPL or the *works made for hire* from sect. 201.b, par. 17, American *Copyright Act 1976.*

The research undertaken by Dr. Maseda Rodríguez evinces the controversy raised by the ascription of the initial ownership of intellectual property rights to a specific work, in light of the different responses given by legal systems –and this, in spite of the rapprochement among systems thanks to rules like the *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*-, both in general and with respect to works created in the context of an employment relationship. Hence the comparative law analysis, providing support for the different viewpoints as to the applicable law: on the one hand, the continental systems of *droit d'auteur*, which identify the employee as the author and therefore as original holder of economic and moral rights (art. 1, 5.1, 51 y 97.4 Spanish LPI). On the other, the *copyright* systems, which consider the entrepreneur/employer, who facilitates the creation by investing in the product, as *author*, and therefore as original holder of all rights, economic and moral (art. 11 (2) English *Copyright, Designs and Patent Act* 1988, the art. 7 Dutch IPL or *works made for hire* of the sect. 201.b, par. 17, American *Copyright Act 1976*).

The absence of any material notion of *author* facilitates to address the question of the original ownership of intellectual property rights from a pure conflict-of-law rules perspective. Dr. Maseda approaches the issue from two points of view -employment and intellectual property-, regulated by different applicable rules –the *lex laboris* and the law regulating intellectual property rights. The *pros* and *cons* of both solutions are discussed; so is their respective implementation, which is explained decoupling moral and economic intellectual property rights, as their different nature result in different problems.

Regarding the implementation of the *lex laboris* to the original ownership of

economic intellectual property rights the following three issues are tackled with in the monograph: first, the reception of *copyright* rules into Spanish law; secondly, the problems generated by the availability of economic intellectual property rights by its original owner; thirdly, the restrictions to the *lex laboris* (protection of the salaried creator: limits to party autonomy, and the recourse to the *lois de police* or the international public policy regarding the original ownership of economic intellectual property rights).

Concerning the implementation of the *lex loci protectionis* to the original ownership of moral rights, the author examines the case of claims *for* the Spanish territory and *for* a foreign country. From this point of departure he addresses the reception of foreign norms regulating authorship and/or the initial ownership of moral intellectual property rights in favor of the employer; and the compatibility with the Spanish public policy of the waiver of moral rights in favor of the employer (for instance through by way of a clause in the employment contract).

Finally, the coexistence of both regulations –the *lex laboris* and the *lex loci protectionis*– is also addressed, with a special emphasis on the conciliation of the conflicting interests between employer and employee.

Dr. Javier Maseda Rodríguez's monograph is the sixteenth volume within the series *De conflictu legum,* a compilation of monographs especially devoted to private international law with a specific focus on civil procedural international law, conflict of law rules and international commercial law.