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Corporate Due Diligence and Private International Law: A Note on the Hague Court of Appeal's decision in Shell

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The issue of corporate due diligence and its private international law implications is very important, and is a hot topic debated in a recent European Union draft legislation. In relatively recent times, there have been allegations of environmental damage and other forms of human rights violations carried out in developing countries, whose legal systems are relatively weak. In such cases, the actual tortfeasor is usually a subsidiary company domiciled in a developing country, while its parent company is usually domiciled in a developed country. Victims of such human rights abuses have sought to institute their claims in developed countries against both the subsidiary (actual tortfeasor) and parent company in order to obtain a better remedy – a form of forum shopping in private international law. On some occasions the applicable law – the law of the place of damage located in a developing country – might lead to injustice for the claimants by not providing sufficient remedy. Such claims have also been met with objections to the court's jurisdiction to try the claim on the ground, *inter alia,* that the claim does not have a reasonable prospect of success against the anchor defendant – the parent company. The Hague Court of Appeal's and the United Kingdom Supreme Court's decisions this year against Shell – in which both courts asserted jurisdiction against both the parent company and the foreign subsidiary, acknowledging that that the claim against the former had prospect of success – are clear examples of the importance of corporate due diligence and private international law. This comment focuses on the Hague Court of Appeal's decision.

In this case, four Nigerian farmers and Milieudefensie (a Dutch environmental non-governmental organization) claimed compensation from Shell's subsidiary company in Nigeria and its parent company in Netherlands, for damage they say the Nigerian farmers suffered as a result of oil spills from underground pipelines and an oil well in Nigeria. The pipe leaks occurred in the Nigerian villages of Oruma and Goi and a well leak in the village of Ikot Ada Udo in the period 2004-2007. They also demanded that Shell clean up the contamination better and take measures to prevent a recurrence. It was common ground that Nigerian law applied. Shell denied liability. According to Shell, the leaks were caused by sabotage and in that case there is no liability under Nigerian law. Shell also challenged the jurisdiction of the Dutch Court to hear the case against its subsidiary company in Nigeria on

the basis that the event and damage occurred in Nigeria so that the case should simply be resolved in Nigeria and not Netherlands. Shell also argued that the case had no prospect of success against its parent company in Netherlands.

The court of first instance – the Hague District Court – resolved the private international law issue of jurisdiction against Shell. However, it mainly resolved the substantive law issue in favour of Shell by holding that the leaks were caused by sabotage. The Claimants appealed this ruling, while Shell cross-appealed on the issue of jurisdiction. The appeal of the claimants was successful and the cross-appeal of the defendants was dismissed.

On the preliminary private international law issue of jurisdiction, the Hague Court of Appeal held it had international jurisdiction by virtue of Article 7(1) of the Dutch Code of Civil Procedure. Article 7(1) of the Dutch Code of Civil Procedure ("DCCP") allows connected claims – here the claims against the parent company and the one against the subsidiary – to be heard by the same forum when "the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing". In this connection, the Hague Court of Appeal, applying Article 7 of the DCCP held that it was effective to combine this lawsuit against the Shell's parent company with that against the Nigerian subsidiary, as there was sufficient coherence for this. On the substantive issue, it held, *inter alia,* that Shell was liable in compensation to the claimants according to Nigerian law because Shell had to prove beyond reasonable doubt that there was sabotage in order to avoid liability, which Shell was unable to do in this case.

It is evident from this case that there was some delay in completing the case. The case which was commenced in the year 2009 was completed at the Court of Appeal in January 29, 2021 – which took a period of about 11 years to complete. If this matter goes to the Dutch Supreme Court, it means it would take longer to complete. The jurisdictional issue up to the Court of Appeal was decided in 2015 – which took a period of about six years to complete. By way of comparison, the United Kingdom Supreme Court's decision on the jurisdictional issue against Shell took about 5 years to complete from the trial court to the Supreme Court, and it is not clear if the jurisdictional issue has been settled once and for all, or the parties will proceed to trial or settle.

It is important that clear private international law rules should be developed that gives claimants access to justice without delay in whatever forum that has minimum connection to the case, and where these victims can get the best remedy they are looking for in cases of business-human rights litigation. The European Unions' draft legislation on corporate due diligence aims to do this with provisions that propose an amendment of Brussels I Recast and Rome II Regulation. The proposed amendment of Brussels I Recast would allow, *inter alia,* for claims to be brought in an EU Member State against an EU-domiciled parent company for business-human rights violations that occur in non-EU Member States where their subsidiaries or companies they have a business relationship with allegedly caused the damage. On the proposed amendment of Rome II Regulation, it provides for a choice of law rule which would allow the victims of such business-human rights violations to choose between the laws of the place of damage, place giving rise to the damage, place where the parent company is domiciled or if not domiciled in the EU, the place where it operates.

To my mind, these proposals are to be welcomed. If they were applicable, the jurisdictional issue in the *Shell case* in the Dutch courts would probably be otiose as there would be an obvious legal basis to sue Shell's parent company and its subsidiary for alleged human rights' violations carried out in Nigeria. This will also save time and costs for the parties from the perspective of access to justice.

Though the applicable law, which the parties mutually consented to applying, in this case did not lead to injustice for the claimants because the Hague Court of Appeal held that under Nigerian law Shell's parent company owed the claimants a duty of care for the acts of their subsidiary, I question the substantive application of Nigerian law in this case. This rule circumvents the principle in Nigerian law that a parent company is not liable for the

acts of its subsidiary based on the principle of corporate legal personality, and that since both entities are separate, the parent company will only be liable under Nigerian law where the subsidiary acts as an agent of the parent company and vice versa (see the Nigerian Supreme Court cases of *Bulet Int (Nig) Ltd & Anor v. Olaniyi & Anor*) (2017) LPELR – 42475 (SC); *Union Beverages Ltd. v. Pepsicola Int. Ltd* (1994) 3 NWLR). If this case goes to the Dutch Supreme Court, it could reach the same conclusion as The Hague District Court that under Nigerian law Shell parent company did not owe a duty of care to the claimants for the acts of their subsidiary company in Nigeria. Again, this accentuates why the proposal to amend Rome II for business-human rights litigation is to be welcomed – the claimants would in this case have a choice between at least Nigerian and Dutch law. I would only add that the concept of environmental damage which is provided for under Rome II should be extinguished, so that the proposal to amend Rome II for business-human rights litigation applies to all forms of business-human rights violation, including environmental damage.

In the final analysis, there was justice for the claimants in this case, though there was a long delay because there was no legislation that specifically deals with the private international implications of corporate due diligence. The European Union's draft legislation on the private international implications for corporate due diligence is thus to be welcomed.

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