

Some observations on private international issues in the Shell case

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In the Shell case, there were actually four Nigerian farmers and a non-governmental organisation from the Netherlands that sued Shell's subsidiary and the parent company in the Netherlands. Shell's subsidiary is located in Nigeria, while the parent company was actually domiciled in the Netherlands. There were jurisdictional challenges brought by Shell to the claimants' case. The facts of the case was that of an oil spillage that occurred in Nigeria, allegedly caused by Shell – and the claimants were asking Shell to remedy the oil spillage and to pay compensation for it.

Now, several issues arose such as the issue of access to justice, the jurisdictional issue and I also want to talk about the applicable law issue. At first instance, the court decided in one of the cases that there was no reasonable prospect of success on the claim against the parent company, because it was actually the subsidiary that was alleged to have carried out the environmental damage in Nigeria. There was no dispute as to the fact that the applicable law was Nigerian law. On the issue of jurisdiction, the Dutch courts applied article 7(1) of the Dutch Civil Procedure Code, which holds that when there is a sufficient connection between two defendants, the Dutch court can join both cases to hear them together. In this case the court considered that there was a sufficient connection. But the important point is that it took about six years for this issue to be resolved in the Dutch courts. From 2009 to 2015, just on this preliminary issue of jurisdiction- it took about six years. In total, the case took about eleven years to become completed on the substantive issue.

If there had been special private international law provisions in this respect, this case would

not have taken this long to be completed; it would have been obvious to hold that the parent company and its subsidiary in Nigeria could be sued in the Netherlands. And that's what the proposal from the JURI Committee of the European Parliament on Corporate Due Diligence and Corporate Accountability is trying to achieve.

Then, on the issue of applicable law that I've briefly talked about, although there was no contest on the applicable law being Nigerian law, the court actually held that there was a duty of care owed by the parent company to the claimants in ensuring that the subsidiary carried out its activities without harming the claimants. But I question the way the Hague Court of Appeal applied Nigerian law, because if you look at the Nigerian Supreme Court cases, it has not advanced in the way English law has advanced to hold the parent company liable for the acts of the subsidiary, on the basis that the parent company owes the claimants a duty of care. Nigerian case-law considers that a parent company and its subsidiary are separate entities, and the parent company can only be held liable where the subsidiary is an agent of the parent company – that is the only possibility for a parent company to be held liable.

This is actually an important issue because in such situations as in the Shell case, the claimants should be able to have choices as to what law should apply. Fortunately, in the report of the JURI committee with recommendations to the Commission on corporate due diligence and corporate accountability, the proposal to include a new Article 6(a) in the Rome II Regulation provides as alternatives: the law of the place of damage, the law of the place giving rise to the damage, the law of the place where the parent company is domiciled, and the law of the place where the parent company operates. This proposed approach should provide sufficient remedy to victims of alleged business-related human rights violations as in the Shell case.

It is also a good thing that the proposed Article 6(a) of Rome II does not provide for an escape clause like Article 4(3) of Rome II. This is because the escape clause *could* lead to an unfavourable law; the closest law does not necessarily mean the better law for the claimant under Rome II.

My only critique is that the new provision for business-related human rights claims does not sufficiently state how its provisions are different from environmental damage under Article 7 of Rome II. This raises some question in cases of environmental damage with human rights implications as in the Shell case: will the claimant rely on the new Article 6(a) or the already existing Article 7 of Rome II? My suggestion is that this problem can be resolved if the concept of environmental damage under Article 7 of Rome II is partially or completely extinguished, and the new Article 6(a) of Rome II applies to all such cases of business-related human rights and environmental claims.

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