R e p o r t

Expert Meeting 16 June 2014

In memory of Daan Schoemaker

‘Multinationals and Transparency in Foreign Direct Liability Cases’

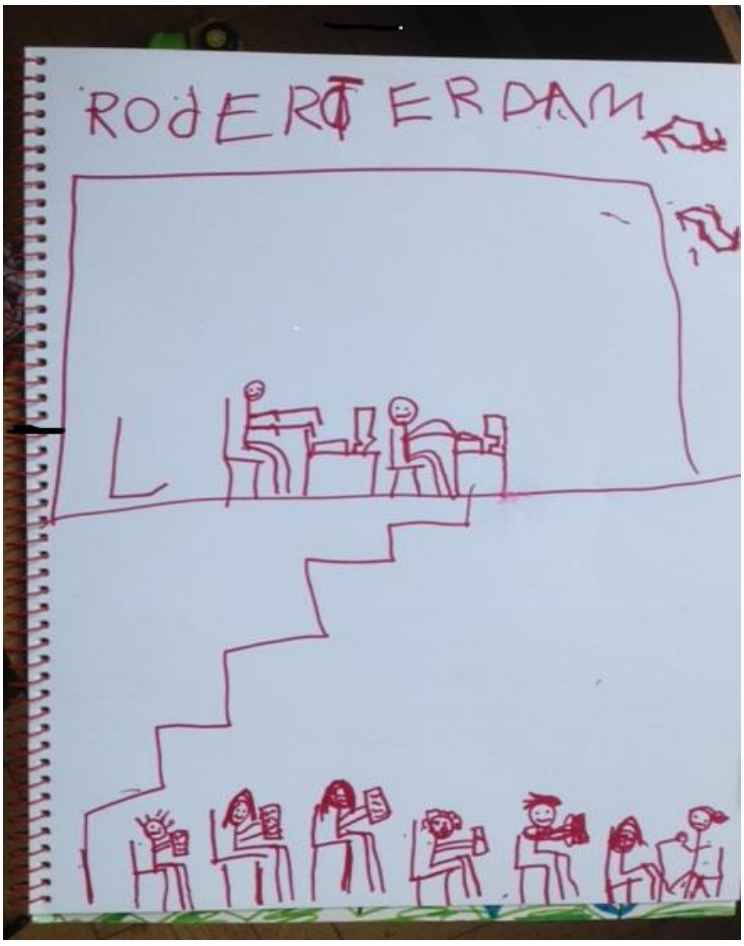
Dutch disclosure rules in the light of the right to Access to Remedy

Amnesty International Netherlands and

the Dutch Section of the International Commission of Jurists (NJCM)

This report is the result of the expert meeting 'Multinationals and Transparency in Foreign Direct Liability Cases, held on 16 June 2014, which was organized by Amnesty International Netherlands and the Dutch Section of the International Commission of Jurists (NJCM), hosted by Amnesty International Netherlands, Keizersgracht 177, Amsterdam. It is composed of the contributions of the key note speakers.

This expert meeting was organised in memory of Daan Schoemaker who passed away unexpectedly 25 February 2012. Daan was a board member of the NJCM; he worked for Sustainalytics and – previously - for Amnesty International Netherlands.[1]



By Karel Schoemaker 16 June 2014

[1] On 14 February 2013 NJCM and Sustainalytics organized the NJCM Seminar 'Human Rights Violations as a Business Risk; from soft law to hard law', in memory of Daan Schoemaker.

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Program Expert meeting 'Multinationals and Transparency in Foreign Direct Liability Cases' 16 June 2014		
1.30 PM	**Reception with coffee/tea**	
2.00 PM	**Opening**	Heleen Tiemersma, *Amnesty International Netherlands*
2.10 PM	**Reflections on Daan Schoemaker**	Marleen van Ruijven, *Amnesty International Netherlands*
2.20 PM	**Access to Remedy**	Audrey Gaughran, *Amnesty International International Secretariat*
2.40 PM	**Multinationals and Transparency in Foreign Direct Liability Cases**	Dr. Liesbeth Enneking, *Utrecht Centre for Accountability and Liability Law (Ucall), Utrecht University*
3.05 PM	**Dutch disclosure rules and practice**	Mr. dr. Remme Verkerk, *Houthoff Buruma*
3.30	**Coffee/tea break**	
3.45	**UK disclosure rules and practice**	David Chivers QC, Erskine Chambers, London
4.10	**European developments regarding evidence and disclosure law**	Prof. Cees van Dam, *Rotterdam School of Management, King's College London*
4.35 PM	**Discussion with audience**	
5.00 PM	**Informal reception**	
6.00 PM	**Close**	

1. Introduction

1.1 Multinationals and transparency

Multinationals operating abroad may negatively impact local communities and/or employees by their own activities or by activities of suppliers or other business relations. When seeking to hold multinationals to account, impacted people may start a court case in the home country of the multinational ('foreign direct liability claim'). To prove their case they will often need information in possession of the multinational about, for example, its group structure and operational structures. They often face multinationals unwilling to provide such information. In court, the success of their claims depends – among other factors - on national procedural law of the forum country.

One of the most important international developments in this context over the past few years has been the development by UN Special Representative John Ruggie of an authoritative policy framework on business and human rights. This 'Protect, Respect and Remedy' framework, laid down in the Guiding Principles, seek to provide clarity on the existence and delineation of state obligations and corporate responsibilities when it comes to preventing, mitigating and remedying the detrimental impacts that corporate activities may have on the human rights of others.

The framework's third pillar emphasizes the significance of allowing and enabling victims of corporate human rights abuse to seek redress for their detriment through both non-judicial and judicial mechanisms. The Guiding Principles urge states to:

'… take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuse, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.' (UNGPs, Principle 26)

One of the main characteristics of foreign direct liability cases is the inequality of arms that typically exists between the host country plaintiffs on the one hand and the corporate defendants on the other when it comes to financial scope, level or organization and access to relevant information.

1.2 Dutch disclosure rules

The Dutch system of evidence gathering in civil procedures is known to be restrictive; much more restrictive for instance than its US and UK counterparts. This became clear in the case before the Hague district court of four Nigerian farmers and the Dutch NGO Milieudefensie against Royal Dutch

Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC) (court decision on 30 January 2013). This case clearly showed the problems with the relatively restricted disclosure rules in the Netherlands.[2]

Access to remedy

From this case, the question was raised whether the relatively restricted disclosure rules can be an obstacle to the principle of 'Access to Remedy', as formulated in the UN Guiding Principles on Business and Human Rights[3] for foreign claimants seeking to hold multinationals to account. If yes, the following question is if there is a need to amend Dutch disclosure rules and how they can be amended in order to contribute to the realisation of 'Access to Remedy'.

1.3 Aim of this meeting

Apparently, there are no easy answers to these questions. The Dutch government chose not to deal with this issue within the context of the National Action Plan on Business and Human Rights (December 2013).[4] Currently, Dutch law of evidence, including disclosure, is under revision. There may be opportunities to influence this process. This expert meeting aims at feeding the debate on how Dutch disclosure rules could be amended in order to contribute to the realisation of 'Access to Remedy' .

'Injustice Incorporated'

As far as Amnesty International Netherlands is concerned this expert meeting should be seen in the light of the book 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy'[5] that Amnesty International has launched March 2014. In this book Amnesty International calls for radical change to ensure corporate accountability and the right to an effective remedy. Injustice Incorporated examines what happens when poor communities confront powerful multinational corporations in an effort to secure justice. It focuses on four emblematic cases of corporate abuse to expose how their political and financial power, intertwined with specific legal obstacles, allows companies to evade accountability and deny the right to remedy. It highlights, in particular, the

[2] Other contributions in this report will go deeper into this case.
[3] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[4] In 2012 the EU called on member states to draft national action plans for implementing the UN Guiding Principles on Business and Human Rights. See for the Dutch NAP [http://www.rijksoverheid.nl/documenten-en-publicaties/publicaties/2014/01/30/national-action-plan-on-business-and-human-rights.html].
[5] The full book can be found on http://www.amnesty.nl/sites/default/files/public/pol300012014en.pdf.

difficulties of seeking remedy in the home State of a multinational for human rights abuses committed by its operations in another State. Through these cases, the book identifies and discusses three key obstacles: legal hurdles to extraterritorial action, lack of information and corporate-State relationships. The book makes specific recommendations to remove each of these obstacles, calling for legal, policy and practical change. Injustice Incorporated is the start of Amnesty International's long-term focus on securing legal and policy change to significantly improve access to justice for corporate human rights abuses.

2. Access to Remedy (Audrey Gaughran)

Audrey Gaughran has been Director of Global Issues at Amnesty International's International Secretariat since April 2010. She runs a programme that covers a range of human rights issues, including business and human rights, and refugee and migrant rights. She is also responsible for Amnesty International's work on economic issues and their impact on rights. Audrey has previously worked for the International Secretariat of Amnesty International as Director of Research, Director of the Africa Programme, Director of Gender, Head of the Business and Human Rights Unit and as a researcher in the Africa Programme.

2.1 General

This contribution is about the human right to remedy and how this relates to the ability of people to access foreign courts to make civil claims against multinational corporations (MNCs). This is something Amnesty International has studied extensively and I will refer to that research. In summary, states must prevent abuse by non-state actors and ensure access to remedy if abuses occur. In the context of MNCs, this means, at minimum enabling access to courts. Given this, it falls within the scope of states' human rights obligations to ensure that access to courts for foreign victims of abuse is truly accessible and that common obstacles faced by victims are addressed. This is by no means a settled argument – many states reject this view, but there is also growing support.

2.2 The right to an effective remedy

When human rights violations and abuses occur, international law requires that the perpetrator is held accountable and the victim receives an effective remedy. These are vital elements of the international human rights system: securing justice and redress is not only a way of addressing the past, but an essential tool to shape the future, both for the individuals directly affected and in order to protect the rights of society as a whole.

The international human rights system has – through various UN treaty bodies and experts – expanded on the scope and content of the right to remedy, making clear both what remedy should look like in substance and what kinds of processes a State should have in place to ensure the right to effective remedy.

The right to remedy in case of business-related hr violations

Under international law states not only have a duty to refrain from violating people's rights, they have a duty to protect people's rights from harm by non-state actors – such as companies - and a corresponding duty to ensure remedy if abuses occur. This includes, but is not limited to, enabling those whose rights are harmed by non-state actors to seek reparations directly from the non-state actor (bringing court case).

The right to an effective remedy encompasses the victim's right to: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms. Reparation includes: restitution (meaning return to original state), compensation (for damage or unlawful detention), satisfaction (for example apology), rehabilitation (for example medical care) and guarantees of non-repetition. While remedy can be provided by a range of means and processes, and non-judicial mechanisms are used, UN human rights treaty bodies have underlined the importance of judicial mechanisms.

The home state's responsibility for their MNCs operating abroad

The provision of effective remedy is, first and foremost, the responsibility of the state where the violation occurs. However, when multi-national corporations (MNCs) are involved questions arise. In particular what is the responsibility of the home state of a MNC? What is the scope of the home state's responsibility for the human rights impacts of companies acting in other countries – often through subsidiaries who are separate legal entities? And what therefore is the home state's responsibility to uphold the right to remedy? Is it triggered by a failure in the host state – or is it stand-alone responsibility? And what does this mean for civil actions in home states, which is the focus of this discussion? Is there an obligation on home states – such as the Netherlands - to allow for civil claims by foreign nationals whose rights have been abused by Dutch companies or their subsidiaries? And therefore an obligation to consider how effective such remedial systems are?

Of course all governments have obligations to ensure civil litigation can be accessed where necessary to protect rights and remedy violations for people within its jurisdiction…..but does a state need to consider the ability of people outside its territorial jurisdiction to access its courts?

There are several human rights arguments that support the requirement for home states to allow foreign plaintiffs access to their courts to bring legal actions against companies. However, from a human rights perspective we cannot argue that there is an obligation to make access to courts for foreign plaintiffs easier unless we can demonstrate a legal basis for this. We can make a moral case, even a human rights policy – case to home states, but can we say they should or they must?

This is one of the issues which Amnesty International decided to study through an in-depth analysis of the right to remedy in cases of corporate abuse involving MNCs. The resulting book – published in March this year – concludes, amongst other things, that evidence leads to a legal requirement that states must make access to courts possible for foreign victims of abuse involving companies incl subsidiaries.

It should be noted that where the parent or controlling company is the proper defendant, there is not necessarily a question of extra-territorial obligations. International law and standards require that States should facilitate direct actions against private actors for reparation; this must extend to the parent companies. Home states are uniquely placed to ensure this. There already exists the possibility of states to exercise jurisdiction over the company.

Amnesty's book 'Injustice Incorporated'

In its recently published book ' Injustice Incorporated', Amnesty International focuses on four emblematic cases studied in considerable depth, as well as numerous cases on which we worked for more than a decade. Our study exposed both legal obstacles and how corporate political and financial power intertwined with these legal obstacles to allow companies to evade accountability and deny, or severely curtail, remedy.

I would like to focus on two issues that are directly relevant to the issue under consideration today: extra-territorial legal obligations of states and what this means for remedy and – specifically – access to home state courts; and the question of access to information.

2.3 Extra-territorial legal obligations of states

States have legal obligations for negative impacts on human rights of their decisions, actions and failures to act which have impacts outside their borders. These are known as extra-territorial legal obligations. (Jurisdiction is principly based on territory, but not exclusively.) The scope of these obligations is contested and controversial. However, UN treaty bodies have expanded on the scope of extra-territorial legal obligations for human rights, and legal scholars have elaborated the Maastricht Principles on these kind of obligations.

Briefly, extraterritorial obligations encompass: (a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

A state's extra-territorial legal obligations extend to the impact of companies based in the state but acting outside the state borders. For example: The UN Committee on Economic, Social and Cultural Rights has clarified that states should prevent third parties from violating the rights protected under the International Covenant on Economic, Social and Cultural Rights in other countries, if they are able to influence these third parties by way of legal or political means. A number of other UN bodies and experts have also affirmed the responsibility of states to regulate companies that have their main base of operation within that state's territorial jurisdiction.

The nature of MNCs – consisting of different legal personalities

There are some challenges here. One key issue is that often we are talking of a subsidiary that is a separate legal entity incorporated in another state. However, the counter argument it that it is now well accepted that the parent or controlling company can and should exercise actual oversight of global operations.

Over the last decade a number of international processes have established standards for how business should consider its human rights impact. These standards – such as the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights – have a number of important features in common: critically, they treat the multinational corporate group as a whole: the UN Guiding Principles on Business and Human Rights apply "to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure." The OECD Guidelines and speak directly to "multinational enterprises". The Voluntary Principles on Security and Human Rights were set up by the home States of multinational extractive companies, along with the companies themselves and international NGOS, specifically to address concerns about the impact of companies' security arrangements in host States.

The emergence of standards that explicitly recognize the corporate group and the role of a parent or controlling company are important; they underline a fundamental reality about the nature of multinational corporate operations – while each entity within the group has separate legal personality, the group as a whole is typically strategically co-ordinated, managed and controlled by the parent or controlling company. This is particularly the case with regard to human rights, social and environmental impacts, on which the parent or controlling company tends to develop a unified policy. There are also some examples of court decisions that support this point. In its *Barcelona Traction* judgment, the International Court of Justice noted the veil of the company may be lifted to prevent the misuse of the privileges of legal personality.

Bringing a claim against the parent company in its home state

There are many reasons why individuals may seek to hold the parent or controlling company of a multinational group liable for human rights abuses in a host State caused by, or involving, its subsidiaries, by bringing a case before the courts of the parent company's home State. For example, the parent may have been actively involved in the abuses (for instance by giving orders or instructions); they may have contributed to the abuses by failing to exercise reasonable oversight, develop preventative measures or act when problems came to light; abuses may have been carried out on their behalf; or they may have benefited from abusive practices. In such cases the parent may be considered the proper defendant to the claim and/or jointly liable with its subsidiary.

There are also practical reasons for bringing a claim against a parent company in its home state rather than against the subsidiary in the host state where the abuse occurred. Plaintiffs' choice to bring a legal action in a company's home State courts may also be based on an assessment that they are more likely to achieve justice and reparation in the home State rather than the host State. This is particularly the case where the host State's justice system suffers from corruption, inefficiency, severe delays, lack of independence or other factors that undermine justice. Plaintiffs may also believe that they are more likely to be awarded a substantial amount of compensation and that the judgment is more likely to be enforced if they pursue action in a company's home State. They therefore see it as in their best interests to pursue action against the parent company in the home State.

Multinationals' abuse of the right to remedy

In addition to these legal and practical reasons to pursue a claim in the home State of the parent or controlling company, there is also the consideration of abuse of the rights to remedy itself by multinational corporations. In all of the cases examined by Amnesty International, parent companies benefited from and substantially controlled the operations of subsidiaries or joint ventures, but were – to greater or lesser extents – able to evade accountability when things went wrong.

Look, for example, at the Bhopal (India) gas tragedy in 1984 at the Union Carbide India Limited (UCIL) pesticide plant and the continuing environmental contamination; the 1984 failure of the waste containment system at the Ok Tedi gold and copper mine in Papua New Guinea and continuing environmental contamination; and the 2006 dumping of toxic waste in Abidjan (Côte d'Ivoire). In these cases the parent companies did deals with the host state government (Papua New Guinea, India and Ivory Coast) and secured immunity from civil and criminal action in those countries. In other cases we examined, such as Shell in the Niger Delta, Amnesty International and other NGOs

have documented how court cases can drag on for years, even decades. In these cases the right to remedy of the victims was abused as a direct consequence of the actions of corporations.

Consequences of the extraterritorial dimension of the state's obligation to protect HRs

A consequence of the extraterritorial dimension of the state's obligation to protect human rights is an obligation to ensure remedy for abuses. Again there is growing recognition. For example, the Human Rights Committee expressed concerns about Germany's failure to effectively protect human rights against the activities of German companies operating abroad. Addressing concerns about the forced eviction of a group of Ugandan families by a German multinational coffee company the Human Rights Committee encouraged Germany to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.

Once it is accepted that a home state has an obligation to prevent abuses extra-territorially - and there is clearly a growing acceptance - it follows it also has an obligation to (a) have in place mechanisms to enable remedy if abuse occur and (b) to prevent abuses of the right to remedy if it is in a position to do so. In addition, the prospect of an adverse legal finding provides an incentive for the parent or controlling company to put systems and measures in place to ensure that no human rights abuses occur in the context of their worldwide operations. This could be one of the most significant factors in bringing about effective global corporate accountability. This alone would arguably be a sufficient basis – under the obligation of international cooperation and assistance – for states to allow access to their courts for people whose rights have allegedly been abused by companies who are headquartered in their country.

Having established that there is an obligation on the home state to enable access to its courts for those whose rights have been infringed by the operations of multinationals based in its territory, it follows that the State must ensure that such mechanisms are effective. This is acknowledged in the UN Guiding Principles on BHR.

This is theoretically fine, but practically leads to a number of questions. What, for example, does the Dutch state owe to the people of Niger Delta affected by Shell's operations? Or to people in Abidjan who experienced the dumping of hazardous waste in 2006? I will not go too deeply into these issues as there is a significant degree to which it depends on the facts of the individual case. But Amnesty International has argued that the government of the Netherlands violated the right to health of the people of Abidjan, and owes a remedy directly. This goes beyond providing the possibility to sue the companies involved.

2.4 Access to information

One of the most significant barriers that individuals and communities confront when attempting to seek remedies for corporate-related human rights abuses is their lack of information - on corporate structure, activities and impacts as well as the options to seek redress. In all of the cases reviewed in Amnesty International's study the affected individuals and communities faced huge challenges in accessing information necessary to mount a successful legal claim – even when there was a clear abuse of human rights.

Plaintiffs generally lacked information on the social and environmental impacts of corporate activity. Frequently this information was not gathered – either by the State or the company – or it was not disclosed. The failure to gather and disclose information can affect many rights and specifically the right to effective remedy.

The lack of sufficient information about the nature of the impact and its consequence on people's lives, livelihoods or health (the "injury" or "loss" in a tort claim) can undermine the robustness of a legal claim. The onus is on the plaintiffs to prove, on a balance of probabilities, both that the defendant's (company's) action or inaction was responsible for a specific harm, and the personal injury or loss caused to themselves. The plaintiffs and their lawyers will need to gain access to the information required to prove both of these elements.

In almost all of the cases Amnesty International has investigated information needed by plaintiffs to prove that the company's operations were responsible for causing damage either did not exist or was in the hands of the corporate defendant. In many cases this was due – at least in part – to weaknesses in the regulatory system in the host country, particularly where monitoring of critical aspects of impact and risk management were left to the company itself.

In many legal systems, this information can be obtained during legal proceedings. Provided a claim is not frivolous or vexatious, a judge will allow it to proceed and order the disclosure of the documents sought by the plaintiffs to help substantiate their case at the discovery stage. However, where discovery rules are restrictive (as here in the Netherlands), plaintiffs have a very difficult task. The civil action taken by four Nigerian farmers against Royal Dutch Shell and its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria Limited (SPDC), provides an example of challenges. Others will speak more on that. However, I will note that much turned on the claims by Shell that oil spills are caused by sabotage and theft. This claim is based on the outcome of oil spill investigations - which are led by Shell itself. Shell investigates itself – a clear conflict of interest. AI has documented how the oil spill investigations are deeply flawed.

The way the law protect HR must adapt to the reality of the world, be evidence based, and consistent with human rights obligations. Addressing the challenges of ensuring effective remedies for human rights violations and abuses by MNCs means certain widely held legal doctrines and presumptions must be challenged. In this regard we make four pertinent recommendations:

(a) An explicit Duty of Care

Placing the parent company under an explicit duty of care. The duty of care would be defined with reference to the concept of human rights due diligence set out in the UN Guiding Principles on Business and Human Rights. An explicit duty of care on the parent or controlling company would significantly clarify the legal standards applicable to that company both before and for the purposes of any claim concerning corporate-related human rights abuses.

(b) Shifting the burden of proof in certain situations

Such a duty of care would not eliminate the hurdles associated with the responsibility of plaintiffs to discharge other burdens of proof (i.e., in a negligence claim, even if the parent company were under an express legal duty of care, the plaintiffs would still need to show, at a minimum, that the parent company breached that duty of care and that this caused the damage suffered). The second element of the framework, therefore, is a rebuttable presumption that a parent company is legally responsible for certain types of human rights abuses arising in the context of its global operations such as those involving large-scale human rights disasters or severe or systematic human rights abuses. As such, if victims can prove that they suffered harm, the parent company would have the burden of proving that it was not legally responsible or should not be held legally responsible for that harm. The standard of proof needed to rebut this presumption would again be defined by reference to international due diligence standards.

However, depending on the cause of action, the burden of proof would also be shifted for other elements required to prove that claim. For example, in a negligence claim, the parent company would not only need to prove that it did not breach its express duty of care towards those individuals and communities (by reference to the due diligence standard as described in more detail above) but also that any breach did not cause the harm suffered by the victims. In contrast to the present situation, which requires the plaintiff to show the reasons why the parent/controlling company should be liable, it would be up to the company to show why it should not. Such a presumption is effectively a form of strict liability, with a due diligence defence. In cases such as those involving large-scale human rights disasters or severe or systematic human rights abuses, it is very apparent when corporate activity resulted in the harm caused (as, for example, in the cases of the gas leak in

Bhopal and the toxic waste dumping in Abidjan). It is therefore entirely reasonable to expect the relevant parent company to prove that it was not legally responsible or should not be held legally responsible for that harm. There are many laws that already allow for reducing or shifting the burden of proof between the parties. For example, Article 6 of the Swiss

Gender Equality Act establishes a lighter burden on plaintiffs alleging discrimination; they only have to prove that discrimination is likely to have occurred.

The value of this approach is that it would shift the burden of proof to the party that was in the best position to obtain and present the relevant information. It also balances the interests of the different parties: companies would not be prevented from defending themselves and victims of abuse would still have to prove that they suffered harm.

(c) Mandatory disclosure of information

Companies should be required by law to generate and disclose information that relates to the impact of their operations on the environment, public health or other matters of public interest, where its availability and accessibility is critical for the effective enjoyment of human rights. Companies that work with toxic or hazardous substances should be placed under more stringent disclosure rules. They should be compelled by law to disclose all information about the contents and toxicity of substances released into the environment that cause or have the potential to cause death or injury, and to ensure that such information is expressed in a way that is comprehensible to those affected.

(d) Reforms to civil procedure laws on disclosure

Procedural rules that make it difficult, if not impossible for plaintiffs to access information they need to substantiate their cases, should be revised. This reform could be achieved through provisions ensuring broad documentary discovery rules and ensuring that materials referenced and/or included in court bundles are automatically deemed publicly accessible (i.e., consent to access these does not depend on the judge agreeing, or parties to the legal action consenting).

The changes proposed above could be seen as striking at the heart of corporate and tort law –making a parent company legally responsible for the acts of its subsidiaries and shifting to the parent company the claimant's usual burden of proving that the parent company is responsible for the harm caused. However, in cases involving human rights there is an overriding public interest in making such changes.

3. Multinationals and Transparency in Foreign Liability Cases (Liesbeth Enneking)[6]

Dr. Liesbeth Enneking is a Postdoctoral Research Fellow at Ucall, the Utrecht Centre for Accountability and Liability Law, Utrecht University, and an Assistant Professor of Private International Law at the Molengraaff Institute for Private Law, Utrecht University. Over the past years she has published two books and a variety of articles on 'foreign direct liability claims'.

3.1 Emerging trend towards foreign direct liability claims

There is an emerging socio-legal trend in Western societies towards 'foreign direct liability claims' against multinational corporations for harm caused to people and planet abroad. The majority of these claims have been brought before US federal courts, on the basis of the Alien Tort Statute. Well-known examples are claims against Ford and General Motors for their alleged involvement in the human rights violations perpetrated by the South African Apartheid regime, and the claims against Shell for its alleged involvement in human rights violations perpetrated by the Nigerian military government against environmental activists in the Ogoniland region of the Niger Delta. Over the past few years, more and more claims similar to those brought before US federal courts have started to become pursued elsewhere. A recent example is the claim pursued before the London High Court against Trafigura for its involvement in the Probo Koala toxic waste dumping incident in the Ivory Coast. Another example is the Dutch Shell Nigeria case, initiated in 2008/2009, which was the first foreign direct liability case to be brought before a Dutch court. The course of the proceedings in this case suggests that the Dutch procedural regime on the collection of evidence may pose a significant hurdle for plaintiffs seeking to pursue foreign direct liability claims before Dutch courts.

Role and feasibility of foreign direct liability cases

Through foreign direct liability cases, Western society systems of tort law are given a role in promoting international corporate social responsibility and accountability in a number of ways. Firstly, these cases provide host country citizens with a way to address and obtain redress for harm caused by corporate activities if local remedies are inadequate. Secondly, they provide multinational

[6] See also 'Multinationals and Transparency in Foreign Direct Liability Cases – The prospects for obtaining evidence under the Dutch Civil Procedural Regime on the Production of Exhibits', L. Enneking, 2013, The Dovenschmidt Quarterly, vol. 2, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349594.

corporations with behavioural incentives to operate in a socially responsible manner, not only at home but also abroad. Thirdly, these cases provide a measure of transparency as regards the potentially detrimental effects that the transnational activities of 'our' multinational corporations may have on people and planet elsewhere.

The role that Western society systems of tort law may play in this context is closely connected to the legal feasibility of these cases, which is determined mainly by 4 main factors: (a) jurisdiction; (b) the applicable system of tort law; (c) the conditions for liability that are connected to the substantive legal basis upon which the claim is brought; and (d) procedural and practical circumstances of the forum country.

Regarding procedural and practical circumstances, it is well known that the US features a litigation culture that is particularly plaintiff-friendly, whereas in continental Europe, procedural and practical circumstances are far less likely to be conducive to the successful pursuit of this type of litigation.

The main barriers in Dutch foreign direct liability cases are the costs of litigation, combined with the limited possibilities to bring collective actions and the fact that the Dutch system of evidence gathering in civil procedures is relatively restrictive.

3.2 Evidence and proof

One of the basic rules of civil procedure is that the party that initiates a civil claim must prove the facts and circumstances substantiating that claim. Accordingly, the burden of proof in foreign direct liability cases will generally be on the host country plaintiffs bringing these claims. There are a few exceptions to this rule, in the Netherlands and in most other legal systems, including the possibility of a reversal of the burden of proof under special circumstances, the possibility of the imposition of an aggravated burden on the defendant to motivate his defence, and the possibility of a more generous appreciation of the available evidence by the court, for instance through presumptions of fact. Such matters tend to fall within the scope of the law applicable to the case, however, and will for that matter usually not be governed by Dutch law in foreign direct liability cases.

By contrast, rules pertaining to the collection of evidence and modes of proof will generally be considered as rules of procedure and not as rules of material tort law, at least in the Netherlands, and will for that reason generally be governed by Dutch law as the law of the forum country.

Although ideally, both parties in a civil procedure should have the same information at their disposal as regards the issue in dispute, in practice this will often not be the case. A minimum threshold in this respect is provided by the right to a fair trial as laid down in article 6 of the European Convention on

Human Rights. One of the main aspects of this right is the principle of 'equality of arms' between the parties to a legal dispute. It should be noted, however, that the ECHR Member States are left with a margin of appreciation as to how to achieve this result, which means that not all limitations to the equality of arms-principle are automatically incompatible with the Convention.

In Dutch civil procedures there is growing emphasis on seeking and establishing the material truth. This tendency is reflected in the growing importance of statutory obligations on the parties to a civil dispute to disclose information on relevant facts and circumstances related to their case. These obligations are the exception to the general rule of party autonomy, on the basis of which parties are in principle free to determine whether and in what way (i.e. to what extent and on the basis of what facts, circumstances and legal grounds) they present their case to a court.

On the one hand, obligations to provide information are primarily meant to assist the court in reaching a well-informed decision and are as such not actionable for the parties to the dispute themselves. On the other, the principle of *audi alteram partem* (hearing both sides of the argument) brings with it that any information provided by one party to the dispute should also be made available to the other party. As such, these obligations may provide the parties to the dispute with a stepping stone that may better enable them to invoke their right to request exhibits under Article 843a DCCP, which will be further discussed below. .

3.3 Documents disclosure under Dutch law

In Dutch civil procedures disclosure of documents is governed by art. 843a Dutch Code of Civil Procedures (DCCP). On the basis of this provision, a party to a civil dispute can file a motion requesting the disclosure by the other party to the dispute (or by a third party) of documentary evidence that the requesting party can use to substantiate his claims. The evidence requested on this basis may include not only text documents but also other types of data files, such as films, photos or cd-roms. It should be noted that plaintiffs may seek disclosure not only of documents related to the proximate cause of the harm caused such as technical reports, but also, for instance, documents that provide insight into internal group policies and command structures and/or due diligence reports mapping out the detrimental impacts that the transnational business activities had or may have.

In order for a request to be granted, three conditions need to be satisfied: (a) legitimate interest; (b) adequate specification; and (c) the requested documents must be somehow connected to a legal relationship involving the requesting party itself or its legal predecessor. This includes for example the legal relationship that comes into existence between the victim(s) and the perpetrator(s) of a wrongful act or omission.

It is important to note that one of the main objectives of these requirements is to prevent so-called 'fishing expeditions', that is requests for all kinds of documents put forward without any clearly defined plan or purpose in the hope of discovering information that may somehow be used to substantiate a claim.

Even if all three conditions are met, the party in possession of the requested documents may still refuse the disclosure of those documents if there are weighty reasons to do so, including for instance legal obligations or privacy-related or business-economical interests requiring that the information concerned is kept confidential. In practice, an appeal for non-disclosure is not easily granted. It is up to the party in possession of the requested documents to prove that the general interest of establishing the truth in civil procedures should in that particular case give way to the interest of confidentiality.

Requests for disclosure of documents can be filed not only as a motion in the course of a civil procedure while it is pending before a Dutch court but also as a separate claim in furtherance of another procedure or of a future procedure. This option exists even if the main procedure is pending abroad or is intended to be brought before a court outside the Netherlands.

3.4 Potential impediments for starting a foreign direct liability case – Shell Niger Delta case

The Dutch civil procedural regime on the production of exhibits is much more restrictive than its US counterpart of pre-trial discovery, with its broad possibilities for plaintiffs to obtain evidence from others in order to substantiate their claims. In combination with the fact that the initial statement of claim may be based upon mere skeleton allegations of the key facts and a reasonable belief in the allegations put forward – which need only be substantiated in a later phase of the proceedings – the liberal rules in the US on pre-trail discovery are one of the factors that contribute to the overall low threshold in the US for initiating civil claims. In the Netherlands, there is a fear of introducing a US-style 'claim culture', with excessive numbers of procedures, high litigation costs, 'fishing expeditions' and 'blackmail settlements'.

The evidence threshold is likely to prove – and remain, despite the current revision of the Dutch Code of Civil Procedure including the provision on the obligation to provide exhibits (art. 843a DCCP) – a serious impediment for plaintiffs in foreign direct liability cases before Dutch civil courts. This seems to be confirmed by the Dutch Shell Nigeria case.

In this case four Nigerian farmers brought a number of claims in relation to oil spill incidents near three Nigerian villages in the Niger Delta against Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC). According to the plaintiffs, the Nigerian subsidiary had not exercised due care in preventing the oil spills from occurring, in mitigating their consequences and in properly cleaning up the contaminated sites afterwards. With respect to the parent company, they claimed that it had failed to use its influence over the group's environmental policies to ensure that the local oil-extraction activities engaged in by its Nigerian subsidiary were undertaken with due care for people and planet locally.

Plaintiffs filed a request for certain key documents about the spills of the pipelines in the Niger Delta, concerning, for instance, the condition of the oil pipelines and the Shell group's internal policies and operational practices. Nevertheless, The Hague district court in an interlocutory ruling in September 2011 dismissed the request for disclosure. One of the main reasons for the court to do so was that according to the court the plaintiffs lacked a legitimate interest in disclosure of the requested documents, since, among other things, they had not sufficiently substantiated their claims that the spills were the result of faulty maintenance and contested Shell's claims that they were the result of sabotage.

In its final ruling in January 2013, the Hague district court, on the basis of the evidence presented to it, came to the conclusion that the oil spills were a result of sabotage, and not of faulty maintenance. This, in combination with the fact that under Nigerian law the operator of an oil pipeline is not liable, in principle, for harm resulting from oil spills caused by sabotage, led the court to dismiss the majority of the claims against the Nigerian Shell subsidiary SPDC.[7] It also dismissed all of the claims against the parent company RDS, finding that under Nigerian tort law a parent company does not in principle have a legal obligation to prevent its subsidiaries from causing harm to third parties except under special circumstances, which the court did not find to exist.[8]

3.5 The way forward

The way forward – to find solutions to the potentially structural transparency barrier in foreign direct liability cases brought before Dutch courts posed by the Dutch civil procedural regime on the production of exhibits – could encompass the following:

[7] The Hague District Court, 30 January 2013, *LJN* BY9845; *LJN* BY9850. In one of the procedures, relating to two oil spills in 2006 and 2007 from an abandoned wellhead near the village of Ikot Ada Udo, the court granted the claims, ordering SPDC to pay compensation for the resulting loss, The Hague District Court, 30 January 2013, *LJN* BY9854.

[8] The Hague District Court, 30 January 2013, *LJN* BY9845, *LJN* BY9850, *LJN* BY9854.

Call for a legally enshrined duty for Netherlands-based multinationals to draw up and disclose due diligence reports on the detrimental impacts that their activities as well as those of their foreign subsidiaries or business partners may have or are having on people and planet abroad.

Seizing upon the current review of the DCCP in an attempt to realize a more liberal statutory regime on the production of exhibits in civil procedures before Dutch courts. This would also correspond with the obligation for states under the UN 'Protect, Respect, and Remedy' policy framework on business and human rights to provide victims of corporate human rights abuse with access to domestic judicial mechanisms and the accompanying call upon states by the Framework's Guiding Principles to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy in this respect. (UN Guiding Principle 26)

Exploring the regime's boundaries in future foreign direct liability cases, and the way it interacts with substantive legal rules on the burden of proof in civil cases. This should also include attempts to file pre-trial requests for document disclosure. If it were to turn out that the Dutch regime on document disclosure may indeed pose structural barriers in this type of litigation, this raises the question whether the inequality of arms that is inherent in these foreign direct liability cases constitutes a violation of Article 6 of the European Convention on Human Rights. This question may be raised in future foreign direct liability cases before Dutch courts or, if necessary, even before the ECHR.

4. Dutch disclosure rules and practice (Remme Verkerk)

Mr. dr. Remme Verkerk practices as a lawyer at Houthoff Buruma; he specialises in litigation, in particular Supreme Court litigation, in civil and commercial matters. He wrote a dissertation entitled 'Fact-Finding in Civil Litigation, A Comparative Perspective'.

Remme Verkerk talks about the rules on obtaining information, on the basis of four particular cases.[9]

Transparency

Transparency is perceived as one of the key factors ensuring that corporations respect human rights (see e.g. the UN Guiding Principles on Business and Human Rights, UNGP 21). Transparency is the degree to which information is readily available. It entails having access to accurate and relevant information within a reasonable time and at a reasonable cost. The Netherlands, like any other judicial system, offers litigants various ways of obtaining information form adversaries or non-parties. In principle, the parties to a lawsuit are entitled to have access to relevant information. [10]

Access to information in civil litigation

The question that arises is whether civil procedural rules provide suitable mechanisms for obtaining information from multinationals about human rights policies and allegations of human rights violations. The rules that grant the parties in civil litigation access to information are designed to ensure the just resolution of a wide range of disputes, not specifically to encourage multinationals to be transparent about human rights policies or allegations of human rights violations.

Although a litigant is in principle entitled to have access to relevant information, the litigant's procedural rights are neither unconditional nor unlimited. Very broad and nonspecific requests for information are generally rejected as 'fishing expeditions'. Requests for information should be proportional, relevant and not be too burdensome for the party required to produce information. Therefore, most legal systems pose significant limits on the right of access to information. In most jurisdictions, before the court will allow discovery and/or taking of evidence, parties are required to plead their case with particularity and to adduce sufficient factual information. Similarly, in many jurisdictions, requests for information are required to be specific and the party requesting the

[9] Amnesty International has summarized the key note speech presented by Remme Verkerk. Thereto, Verkerk's article was used: 'Multinational Corporations and Human Rights'; civil procedure as a means of obtaining transparency', R.R. Verkerk, The Dovenschmidt Quarterly, vol. 2, 2013.

[10] Principle 16.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedures 2006.

information must show good cause. Furthermore, it is widely held that privileged information must remain confidential. Many jurisdictions also protect commercially sensitive information.

The decisions by the District Court in The Hague in actions brought against Shell illustrate that judges may refuse to refuse broad requests for the discovery of documents for a variety of reasons. These decisions do not necessarily set a precedent for future direct liability cases. The procedure in appeal is still pending and there are also many examples of cases in which courts have been more liberal in granting broadly construed discovery requests.

The Shell cases: Article 843a Dutch Civil Code of Procedure (DCCP)

Several cases were brought against Royal Dutch Shell by three Nigerian farmers and a fisherman for damages to their land and water as a result of oil leaks. The case was heard by the district court of The Hague. The plaintiffs made use of the procedural instruments available under Dutch law to try to obtain documents held by Royal Dutch Shell.[11] In each of these cases the claimant's request was fairly broad, asking for access to more than twenty (categories) of documents. The court refused most of the claimant's discovery requests. One of the considerations was that some of the documents were irrelevant to the factual questions at hand. It must be noted that Dutch judges have some degree of discretion and some are more willing than others to grant (broad) discovery requests. In general, a litigant increases the odds for success if the request is limited for specific documents.

It is important to know that each legal system provides a wide range of instruments to obtain information. A request for the discovery of documents is only one of these instruments. Other instruments that are available under Dutch civil procedural law include the preliminary hearing of witnesses and the preliminary appointment of an expert.

***Vliegbasis Volkel*[12]: alternative instruments under the DCCP.**

In this public interest case, claimants apparently objected against US' nuclear weapons that are (allegedly) stored at a Dutch Airbase. Litigants *inter alia* seemed to argue that such weapons were a threat to the (wide) surroundings of the Airbase. The Dutch state neither admits nor denies the presence of nuclear weapons on Dutch territory. Claimants tried to 'fish' for information by requesting the court to order a preliminary hearing of witnesses and a preliminary expert investigation. It should come as no surprise that the claimants lost this 'uphill battle'. The strategy that the claimants adopted was nevertheless clever: Dutch procedural law offers the judge few possibilities to refuse requests for the preliminary hearing of witnesses of the preliminary expert investigation.

[11] The Hague Court, 14 September 2011, *LJN* BU3538, BU3535 and BU3529.
[12] Dutch Supreme Court, 24 December 2004, *LJN* AR4980.

Public law instruments to obtain information

Some jurisdictions provide a much broader set of instruments to obtain information than other jurisdictions. The US Federal Rules of Procedure, for example, provide a far wider set of discovery rules than most European jurisdictions. In the United States, litigants have an almost unlimited access to documents (electronic and otherwise) and witness testimony during the early stages of litigation.

Civil procedure is certainly not the only tool available to encourage corporations to be more transparent about human rights. In some jurisdictions public law mechanisms are well equipped and developed to obtain information. Private law and public law methods of obtaining information should not be considered competing systems. In many instances, a combination of private and public law methods may be worthwhile. For example, in the Netherlands, a common strategy is to rely on the Public Access to Government Information Act and the Personal Data Protection Act to obtain information. Litigants may combine these methods with civil procedural devices in order to obtain as much information as possible.

A good illustration on how public law mechanisms may be of use in civil cases is the Trafigura case. In this case, information gather by the Dutch public prosecutor was made available to claimants that had initiated civil litigation in England against Trafigura.

Trafigura case: public law mechanism to obtain information

Trafigura, a multinational corporation that was alleged to be involved in a toxic waste dump in the Ivory Coast, came under criminal investigation by the Dutch police in 2006. The Dutch public prosecutor obtained information during the course of the criminal investigation. One important piece of evidence was an expert report drafted by the Dutch Forensic Institute. The public prosecutor provided the expert report to claimants that had started litigation against Trafigura in the Netherlands. Claimants could use this evidence in civil litigation.[13]

Advantages of transnational litigation

One distinctive feature of litigating against a multinational corporation is that it is, by definition, located in a number of different jurisdictions. Each of these jurisdictions may have its own set of procedural rules regarding access to information. Some legal systems, including the Dutch system,

[13] The Hague Court of Appeal, 23 November 2010, LJN BO4912. The decision was later upheld by the Dutch Supreme Court (2012, LJN BV3436).

include a procedure providing for the gathering of information or the taking of evidence needed for litigation abroad. Information processed by multinational corporations is often spread throughout a number of countries and could be simultaneously available in each of them.

Abu Dhabi Islamic Bank/ABN Amro case (2012, RvdW 2012, 824): Article 843a DCCP

In this case the Supreme Court of the Netherlands confirmed that the statutory provision that enables document discovery (Article 843a DCCP) does not require that the requested documents be used for litigation in the Netherlands.[14] If the conditions of the statutory provision are met, victims of human rights violations are entitled to request the production of documents needed for litigation outside the Netherlands.

The costs of the fact-finding process in civil litigation

Litigation against a multinational corporation is generally expensive and time-consuming. It requires a fair amount of resources to initiate the litigation, to request the court to order the production of evidence and to resolve possible discovery disputes. Perhaps the real challenge that victims of human rights violations face is not a lack of access to information but rather a lack of financial means to make use of the system. Civil litigation may help to enhance corporate transparency, but only for those who can afford it.

Conclusion

Litigants seeking to file an action against a multinational corporation may have multiple tools (civil, criminal and administrative legal procedure) in various jurisdictions for retrieving the required information.

[14] Supreme Court of the Netherlands, 8 June 2012, LJN BV8510.

5. Disclosure and inspection in England (David Chivers)

David Chivers QC practices as a barrister specialising in company law at Erskine Chambers in London. On behalf of Traidcraft and CORE, he was involved in lobbying ministers and the Department of Trade on the codification of directors duties in the UK Companies Act 2006. Since then he has worked with ECCJ in formulating and presenting to EU institutions proposals to extend corporate responsibility for environmental and human rights abuses to the actions of subsidiary and associated companies. He has written various publications.

I PRE-ACTION DISCLOSURE

a) Disclosure under the Pre-Action Protocols

These protocols are designed to allow a meaningful exchange of information in order to see whether the dispute can be resolved without proceedings. The protocols are non-binding but failure to comply may result in costs penalties. The Practice Direction on Pre-Action Conduct requires the parties to:

(1) List the essential documents relied on in support of the claim.
(2) Identify and request copies of relevant documents.
(3) Produce copies of documents requested by the other side, or explain why copies will not be produced.

Twelve specific Protocols are in place, covering diverse types of claim such as personal injury, low-value Road Traffic Accidents, Clinical Negligence, Construction and Engineering, Professional Negligence, and Defamation.

b) Pre-action disclosure from the defendant under the CPR

This is obligatory but much depends on the court's discretion.

Criteria are:

(1) Both Applicant and Respondent are likely to be a party to subsequent proceedings.
(2) If proceedings had started, the Respondent's standard duty of disclosure would extend to documents which Applicant seeks to have disclosed.
(3) Pre-action disclosure is desirable to dispose fairly of anticipated proceedings, assist the resolution of the dispute without proceedings, or save costs.
(4) If the foregoing criteria are satisfied, the court has jurisdiction to order pre-action disclosure. However, it still remains to see whether the court will exercise its discretion in favour of

ordering disclosure. You have to be very specific. The English court will ask the plaintiff to pay, if you manage disclosure of difficult documents, disclosure is one of the most expensive aspects of proceedings, as hundreds of thousands of documents may have to be shifted.

c) Pre-Action disclosure from a non-party

Criteria are:

(1) A wrong has, at least arguably, been carried out by a wrongdoer.
(2) The claimant intends to assert his legal rights against the wrongdoer.
(3) There is need for an order to enable the action to be brought against the wrongdoer. Usually, the order will be to require the respondent to the application to identify the wrongdoer.
(4) The respondent to the application is a person who was "mixed up" in, or facilitated (even innocently) the wrongdoing.

II DISCLOSURE AT THE TIME OF COMMENCEMENT:

a) Disclosure orders ancillary to injunctions

These are granted where necessary to make injunctions effective - for example, the court may order disclosure of property and assets which may be the subject of a freezing injunction, say there is a reason to fear that the documents will be destroyed.

b) Search orders

Such an order usually requires the defendant to deliver up specific or categorised documents; and/or to permit the applicant to search named premises and copy or take away all such specific or categorised documents or other property as may be found there. The rationale: in some cases the court's intervention may be needed to prevent the destruction or suppression of evidence.

III DISCLOSURE AFTER PROCEEDINGS COMMENCED

a) Disclosure by a party to proceedings

Under English law, the court will ordinarily order disclosure after the particulars of claim and defence have been filed. Standard disclosure will be appropriate in many cases.

The documents that must be disclosed under standard disclosure are:

(1) Documents on which the party relies.

(2) Documents which adversely affect his own case, adversely affect another party's case, or support another party's case.
(3) Documents which he is required to disclose by a relevant Practice Direction.

The general rule is that a party to whom the existence of certain documents has been disclosed has a right to inspect them. The disclosing party is then under a duty to facilitate the inspection of the document. The relevance test is critical. Parties are often arguing that the information is too sensitive, but confidentiality can be circumvented.

b) Non-party disclosure

Two methods:

(1) A witness summons requiring a person to produce documents in court. The summons must specifically identify the documents sought.
(2) An order for disclosure. The documents of which disclosure is sought must be likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings. Disclosure must also be necessary in order to dispose fairly of the claim or to save costs. Even if these two criteria are satisfied, the Court nevertheless retains a discretion, and does not regard the jurisdiction to order disclosure against a non-party as a matter of routine

IV DISCLOSURE IN SUPPORT OF FOREIGN PROCEEDINGS

(a) The Evidence (Proceedings in Other Jurisdictions) Act 1975

Criteria are:

(1) The application must be made on behalf of a foreign court or tribunal; the evidence must be sought for the purposes of civil proceedings which have either been instituted or where institution is contemplated.
(2) The English court can only order evidence to be disclosed in relation to English proceedings and that a person could be compelled to give in the foreign court.

(b) Letters of Request Under the Council Regulation

(1) Unless the requested Court is entitled to refuse, Article 10(1) states that "*the requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.*"
(2) Importantly, the Court receiving the request appears to have only a limited power to refuse to give effect to the request.

6. EU developments regarding evidence and disclosure (Cees van Dam)

Prof. dr. Cees van Dam is Amnesty International Professor of International Business and Human Rights at the Rotterdam School of Management (RSM), Erasmus University. In addition to RSM, he works for King's College London and Utrecht University (Molengraaff Institute). He wrote more than 150 publications, including 10 books on national and international law. In 2008, he published a book on Business and Human Rights (in Dutch). In 2013, Oxford University Press published the second edition of his book European Tort Law, which covers liability law in France, Germany, the UK and the European Union, as well as case law from the European Court of Human Rights.

General

The aim of this speech is to identify developments at European Union level that may be relevant for improving the position of claimants in getting access to remedies, particularly with respect to disclosure and evidence rules and evidence rules.

6.1 EU core business: internal market and judicial cooperation

Internal market

The internal market is an area without internal frontiers in which the free movements of goods, persons, services and capital is ensured (Article 26 Treaty on the Functioning of the European Union, ('TFEU'). However, differences in national law lead to distortions and impediment of free movement. Therefore, measures must be taken at the EU-level that can effectively solve or limit these problems. Such measures must be in line with two basic principles: the principle of subsidiarity (a measure at the EU level can only be taken if the problem cannot be properly solved by member states); and the principle of proportionality (measures at the EU-level must not go further than necessary).

Judicial cooperation

Judicial cooperation in civil matters is governed by Article 81 TFEU. Article 81 TFEU deals with:

- the compatibility of private international law rules of the Member States;
- securing access to justice and effective remedies for breach of EU law;
- fairness of national civil procedure rules;

- overcoming national divergences impeding the functioning of the internal market in the area of civil justice;
- harmonisation of national laws and regulations;
- cooperation in the taking of evidence;
- mutual recognition and enforcement between member states of judgments and of decisions in extrajudicial cases; and
- the elimination of obstacles to the proper functioning of civil proceedings.

The European Commission plans to publish a 'Green paper on minimum standards for civil procedures', which aims at harmonizing civil procedures within the EU.

Available legislative instruments

When it comes to harmonizing the national laws of the Member States there are a number of options available:

- Treaty: uniform law adopted by all Member States' legislators
- Regulation: uniform law, usually adopted by Council and Parliament
- Directive: harmonised law, usually adopted by Council and Parliament
- Recommendation: non-binding recommendations by the Commission
- Communication

In civil procedure, the most likely instruments for harmonization are the Regulation and the Directive.

6.2 Business and human rights at EU-level

EU strategy on CSR

The European Commission strategy on CSR has been laid down in Communiciation (2011) 681. The Commission encourages that enterprises should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders. The Commission's *CSR agenda for action* is: (a) improving self- and co-regulation processes; (b) improving company disclosure of social and environmental information (c) emphasising importance of national CSR policies; and (d) aligning European and global approaches.

Different perspectives

In the context of European Union law, the topic of business and human rights can be looked at from different perspectives:

Business and human right from the defendant's (business) perspective:

- Do differences in procedural rules impede free movement or distort market?
- Are harmonising measures adequate to effectively solve/limit problems?

Claimant's (human rights) perspective:

- Do differences in procedural rules imply that access to justice is not always ensured?

Disclosure within EU-context

Disclosure (also called discovery) is a feature in Anglo-American procedural law that obliges the parties at some point in the procedure, usually prior to the trial,[15] to provide the relevant information to the court and the opponent. The European continental systems do not know a system of disclosure or discovery. It is for the parties to request the court to oblige the other party to submit certain documents, which is much less claimant friendly than the Anglo-American system.

Article 6 of the European Convention on Human Rights, which protects the right to a fair trial, governs both the Anglo-American as the European continental system. The European Court of Human Rights has ruled that, regardless of the legal system, a claimant must have a reasonable opportunity to present his case, including providing evidence; conditions must not substantially disadvantage him vis-à-vis his opponent.[16]

According the UN Guiding Principles on Business and Human Rights states should ensure effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. (Principle 26)

When it comes to harmonizing the procedural laws of the EU Member States, it should be noticed that civil procedure law and disclosure issues are culturally and politically sensitive.

[15] The trial is the oral hearing on the merits, often preceded by exchanges of opinions between the parties about formal and procedural issues.

[16] Dombo Beheer/Netherlands (1993): claimant must have a reasonable opportunity to present his case, including providing evidence; conditions must not substantially disadvantage him vis-à-vis his opponent.

In the EU legislation so far, EU disclosure rules stay close to continental principles. This is evident in the disclosure regime of Directive 2004/48/EC on enforcement of intellectual property rights. Disclosure of evidence can only be ordered by a judge, subject to tests of necessity, scope and proportionality, protecting secrets or otherwise confidential information. The principles of subsidiarity and proportionality play an important role. A claimant requesting disclosure must show that evidence in control of the other party is relevant for substantiating his claim. He also must specify this evidence or categories of this evidence as precisely and narrowly as he can.

Hence, even if one can make the EU case – claiming differences in procedural rules impede free movement or distort the market - continental disclosure rules that primarily protect the defendant may not change fundamentally.

This can be illustrated by the European Commission proposal for damages for infringement of competition law (*Commission Proposal 11 June 2013 COM(2013) 404 final*). Despite the fact that the Commission accepts that there is information asymmetry between the claimant and the defendant (the company that allegedly infringed competition law rules), it is for the claimant to request disclosure and this request is subject to a proportionality test: the judge shall consider the likelihood that a competition law infringement occurred, the scope and cost of disclosure for any third parties, and whether the evidence to be disclosed contains confidential information.

Collective redress mechanisms

Another example of the reluctance of the EU to change the disclosure rules and bring them more in line with the Anglo-American tradition is the Commission Recommendation of 11 June 2013, COM(2013)3539 final on collective redress mechanisms. In this Recommendation, the European Commission set out a series of common, non-binding principles for collective redress mechanisms in the Member States so that citizens and companies can enforce the rights granted to them under EU law where these have been infringed. National redress mechanisms should be available in different areas where EU law grants rights to citizens and companies, notably in consumer protection, competition, environment protection and financial services. By recommending to Member States to put in place national collective redress mechanisms the Commission wants to improve access to justice. At the same time, national collective redress mechanisms should preserve fundamental procedural safeguards to avoid development of abusive litigation culture. It is stated that elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States should be avoided as a general rule. Once again, this shows that the European continental traditions of civil procedure law prevail over the Anglo-American traditions of disclosure and discovery.

6.3 EU Non-financial reporting

EU Directive on non-financial reporting (2014)

When it comes to collect information on litigation against business, the EU Non-financial Reporting Directive on non-financial reporting (2014) is of a more indirect importance. The Directive deals with the obligation to disclose information on policies, risks and outcomes as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, diversity in board of directors. It applies to 6,000 large companies with more than 500 employees. The companies may use existing guidelines they consider appropriate (UN Global Compact, ISO 26000, etc).

Although this non-financial reporting is only at the beginning stage, it is to be expected that these reporting obligation will be further developed over the next decade. It should be noted that non-financial reporting will provide information on outcome rather than source.

6.4 Concluding remarks

- Civil procedure law and disclosure issues are culturally and politically sensitive.
- EU disclosure rules stay close to European continental principles; even if one can make the EU case (market distortion, effective remedy for non-EU citizens) disclosure rules may not change fundamentally.
- Non-financial reporting is only at the beginning but will provide information on outcome rather than source.
- The UNGPs/Ruggie's framework angle might be more likely to be successful in achieving results regarding access to justice.