

# Access to justice for victims of human rights abuses by multinational corporations in the Netherlands

Channa Samkalden

*Prakken d'Oliveira Human Rights Lawyers*

*Milieudefensie & others vs Royal Dutch Shell PLC (RDS) & Shell  
Petroleum Development Company Ltd (SPDC)*

- District Court of The Hague, 30 January 2013
  - ECLI:NL:RBDHA:2013:BY9845
  - ECLI:NL:RBDHA:2013:BY9850
  - ECLI:NL:RBDHA:2013:BY9854
- Appeal: (interim) judgment expected 14 July 2015

## Practical challenges

- Funding
  - Legal Aid
  - Pro Bono
  - NGO's
  - Crowd-funding
- Fact-finding
  - Clients
  - Witnesses
  - Experts

## Legal challenges

- Jurisdiction
- Applicable (foreign) law
- Applying different systems of law
- Fact-finding/disclosure

## Legal challenges: jurisdiction

- *Lex fori*: Dutch Code of Civil Procedure (DCCP) / EEX-Regulation (Brussels I)
- Starting point: parent company jurisdiction
- S. 6 EEX (comp. 7 DCCP):
  - "A person may also be sued... where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings "*
- Abuse of procedural law?
  - “sole aim to establish jurisdiction
  - “claim manifestly ill-founded”

## Legal challenges: applicable law?

- *Lex causae: WCOD/ Dutch Civil Code (DCC) / Rome II regulation*
- “Where the damage occurs” → Nigerian law applies
- Conservatie interpretation by foreign courts required?
- Unfamiliarity of Courts with foreign systems of law, e.g. Dutch courts vs common law system

## Legal challenges: applicable law (Shell-cases)

- DCCP / DCC
- Nigerian Statutes (e.g. Oil Pipelines Act)
- Nigerian & UK case law
- International law
  - Banjul Charter
  - OESO & UN Guiding principles: not binding
  - Universal human rights (public order exception)
- Shell guiding principles/ written policy: not binding

## **Legal Challenges: applying different systems of law concurrently**

- a. Lex fori:
  - Civil procedure
  - Admissibility (e.g. representative action Milieudefensie)
  - Disclosure / access to evidence
  
- b. Lex causae:
  - liability
  - Right of action
  - Burden of proof



## **Legal Challenges: applying different systems of law concurrently - *disclosure***

- Starting point: who makes a claim must provide the evidence
- Complication: facts occurred in Nigeria, technical data and evidence on cause of spill /role parent company lie with Shell
- S. 843a DCCP: request disclosure

*“Anyone who has records at his disposal or in his custody must allow a person with a legitimate interest in doing so to inspect, to have a copy of, or to have an extract from, those records that pertain to a legal relationship to which he or his legal predecessors are party. “Records” includes information recorded on a data medium.”*

## **Legal Challenges: applying different systems of law concurrently – *disclosure (843a DCCP)***

- Request procedure
- Requirements:
  - a. Legitimate interest
  - b. “certain” documents
  - c. Relating to an existing legal relationship
- High burden of proof, fear of “fishing expeditions”
- System rewards non-transparency of multinationals
- No general obligation to disclose relevant information, as in many Anglo-Saxon countries

## **Legal Challenges: applying different systems of law concurrently – *disclosure (Shell-cases)***

- Request filed in preliminary stage of litigation
- Evidence sought with regard to
  - a. Cause of spills
  - b. Role and involvement parent company
- District Court on preliminary disclosure request (2011): liability not sufficiently substantiated with reference to Nigerian law - request for disclosure dismissed
- District Court in main case (2013): claims not sufficiently substantiated with evidence; insufficient proof of breach of Nigerian law

## Legal Challenges: applying different systems of law concurrently – *disclosure (Shell-cases)*

- Lex Causae: *Chandler v Cape* [2012] EWCA Civ 525 (parent company liability), Arden LJ:  
*“In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case ...”*
- Circumstances mentioned by Arden LJ established after disclosure / full overview of facts
- Dutch Court required evidence of applicability of (all of the) Arden-criteria, while not allowing disclosure
- Interaction of Dutch and Nigerian/UK law results in higher evidential threshold

## Conclusions

- Main challenges are legal challenges
- Problems related to application of different (foreign) legal systems could be remedied in national law or by a binding international instrument
- Such instrument could include provisions on parent company liability, but should at least include procedural guarantees e.g. regarding access to evidence