TRANSNATIONAL LITIGATION AND CORPORATE ACCOUNTABILITY

Professor Simon Archer
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Dickson Poon School of Law | Transnational Law Institute
King’s College London

Professor contact: Email: sarcher@goldblattpartners.com
Tel: +1.416.476.5078

COURSE DESCRIPTION

Bringing claims against corporate actors domiciled or headquartered in one jurisdiction for alleged wrongful conduct in another jurisdiction face well-recognized, long-standing barriers of access to justice.

In this module, you will join a pop-up, plaintiff-side litigation boutique for one week and participate in a modified case development method, through which you will identify the primary legal and administrative barriers of access to justice in transnational litigation, and identify and critique the legal strategies or innovations of the past 25 years, with special attention paid to extra-territorial or universal jurisdiction, innovation in (primarily tort) law, and 'soft law' methods of seeking transnational corporate accountability for wrongful conduct.

We will examine several aspects of five case studies in some detail, including environmental claims, extraction industry claims, and supply chain claims, as well as emerging areas, such as transnational insolvency and a transnational securities litigation class proceeding.

We will discuss the importance of procedural frameworks, strategic questions in framing transnational litigation, including relationship to wider social and political movements and goals, and the corresponding critique of juridification of political conflict. We will identify relevant legal barriers and litigation strategies within wider context and the key actors and resources used in different forms of transnational litigation, including the emergency of litigation financing and insurance and plaintiff-side litigation brokers.
GOALS AND LEARNING OBJECTIVES

Framed in traditional terms, the learning objectives in this module are to be able to identify barriers to transnational litigation of claims against corporate actors in several substantive domains of law including environmental torts, human rights violations, labour/employment law and insolvency law, to identify innovations and methods of seeking legal and quasi-legal forms of accountability, and situate these methods within a wider debate about the role of litigation in addressing environmental and social harms or problems.

Framed in less traditional terms, the approach taken is that, by the nature of the claims themselves, and the transnational context in which they stretch, there is no single or best way to conceptualize them, develop them or to think about the legal issues and non-legal aspects. For this reason, one of the ways in which we will approach the subject will be to develop a claim and a case in each session by starting with a primary report, news article or other evidence of a potential claim, and discuss as a legal team the possible ways in which to build a transnational litigation strategy based on that claim. This is in fact how most claim of the kind we will examine are "discovered" and developed, and at least one session will cover an actual case in development in January, 2018.

Participants will therefore be strongly encouraged to expect to actively participate in seminar with the following activities and objectives in mind:

- reviewing news reports to identify potential claims and cases (1x per session, max ~30 mins reading/prep time);
- identifying possible parties, evidence and for a (in session discussion);
- developing theories of the case (in session discussion); and
- identifying barriers and administrative issues and elements of the case (in session discussion),

each as described in some more detail below.

We have provided more reading materials than is necessary to participate in this module. These materials are primarily for reference, and to assist those who wish to explore certain themes, process or materials further. The primary materials required for successful participation are two: (a) a quick review of the background document for the case each day (approx. 30 mins reading time maximum) and (b) the willingness to apply your previous legal education and professional experience to problem solving and building a claim in each case.

Most materials we will use are available online. A link to a Dropbox folder containing most materials not otherwise easily available will be sent to all who enrol.
**COURSE SYLLABUS**

NOTE: Content is tentative and subject to minor modification and review. All modifications will be provided to participants with sufficient advanced notice to respond accordingly.

**Monday, 8 January 2018 – Class I – Transnational Claims and Barriers to Them**

This class will introduce the themes and issues to be considered in the module as a whole, introducing the key barriers to litigating transnational claims against corporate actors, briefly review key concepts. We will consider in some greater depth one of those barriers, the doctrine in separate legal personality, and its practical and theoretical implications.

We will briefly review the findings of the expert opinion on damages caused by Chevron's subsidiaries and their antecedents in Ecuador, and participants will develop a theory of the case and a litigation strategy with a view to identifying the parties, fora, legal theories, barriers, necessary financing and administrative requirements, among other issues.

We will consider the procedural history in the U.S., Ecuador, and then Canada, where the judgment of the Ecuadorean court is being enforced, which is in many respects exemplary of the barriers to effective transnational tort litigation. We will review the facta of the parties to that motion to enforce judgments with a view to their positions on separate legal personality.

Reading:

- **Read**: Executive Summary, Damages Report and Summary, September 17, 2010 [Dropbox].


- **Referred to but not required**: Gower & Davies, *Principles of Modern Company Law*, (10th ed.), *skim chapters* 7/8/9, and review bases for disregarding separate legal personality ("lifting the veil").

- **Referred to but not required**: facta of the parties enforcing judgment in Canadian courts [Dropbox].

- **Referred to but not required**: Paddy Ireland, "Capitalism without the capitalist: the joint stock company share and the emergence of the modern doctrine of separate corporate personality", 17 *J. Legal Hist.* 41 1996 [Dropbox].

**Tuesday, 9 January 2018 - Class II – The Evolution of Extra-Territorial Jurisdiction**

This class will explore the first of the methods used to seek to enforce accountability for corporate wrongful conduct transnationally: the evolution of extra-territorial jurisdiction.
The participants will review the Nevsun Report (Human Rights Watch) and will develop a theory of the case and a litigation strategy with a view to identifying the parties, evidence, fora, legal theories, barriers, necessary financing and administrative requirements, among other issues.

We will briefly review the promise and recent history of the Alien Tort Claims Act (U.S.), and the Kiobel decision that is widely considered to have limited the scope of the ATCA. We will briefly consider parallel but distinct developments in "universal jurisdiction" and its limits, and the conception of wrongful conduct and human rights as "public law" and "private law".

Reading:


- **Be aware of**: Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659.

- **Be aware of**: Private Member's Bill C-323 (2011) An Act to amend the Federal Courts Act (international promotion and protection of human rights) [Dropbox].
  
  o For comparison: http://cnca-rcrce.ca/campaigns-justice/ombudsperson/

- **Referred to but not required**: Craig Scott, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart: 2001), Chapter 2 [Dropbox].
  

- **Referred to but not required**: Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 (CanLII).


**Wednesday, 10 January 2018 - Class III – The Evolution of Soft Law Methods and Norms**

This class will explore the second of the three primary methods used to seek to enforce accountability for corporate wrongful conduct transnationally: the evolution of "soft law" approaches.

Participants will review the NYT article by Jim Yardley reporting on the Rana Plaza building collapse, and will develop a theory of the case and a litigation strategy with a view to identifying the parties, fora, evidence, legal theories, barriers, necessary financing and administrative requirements, among other issues.
We will then discuss "soft law" approaches that range from voluntary adoption of corporate codes of conduct to multi-stakeholder agreements and in at least one case, a form of voluntary binding arbitration. These forms of "soft law" have typically developed in response to global supply chains with garment production a common example. We will consider issues of lead buyer liability, proximity in tort along supply chains, related concepts in labour and employment law (definitions of "employer" and "employee"), the different modalities and fora of enforcement (including consumer actions and arbitration) and their limits.

Reading:


- **Skim or be aware of**: Rahaman v J.C. Penny et al, (2016) Court File NO N15C 07 174 MMJ and Das v. George Weston Limited, 2017 ONSC 5583 (CanLII) [Dropbox].

- For background: http://bangladeshaccord.org/

- For background: http://www.maquilasolidarity.org/en


- **Referred to but not required**: Jimmy Donaghey and Juliane Reinecke, "When Industrial Democracy meets Corporate Social Responsibility – A Comparison of the Bangladesh Accord and Alliance as responses to the Rana Plaza disaster" [Presentation at Warwick Law School and Social Sciences, November 17, 2016, appear on file with author] [Dropbox].

**Thursday, 11 January 2018 – Class IV – The Evolution of Transnational Tort Litigation**

This class will explore the third of the three primary methods used to seek to enforce accountability for corporate wrongful conduct transnationally: the evolution of doctrine
in tort law, in this case, successfully overcoming the two primary legal barriers of separate legal personality and *forum non conveniens*.

Participants will view (prior to class) the W5 video/report on violence and displacement in mining communities in Guatemala. Participants will develop a theory of the case and a litigation strategy with a view to identifying the parties, fora, evidence, legal theories, barriers, necessary financing and administrative requirements, among other issues.

We will consider the impact of this case law and application in other common law jurisdictions, as well as the limits of the theory of liability and its application in different common contexts (garment industry, extraction industry).

**Reading:**

- **View in advance:** "Paradise Lost: searching for gold at the end of the Guatemalan rainbow" (online: http://www.ctvnews.ca/w5-searching-for-gold-at-the-end-of-the-guatemalan-rainbow-1.502718), *Part 1 of 3 only (~13 minutes).*


- **Referred to but not required:** Henri Saint Dahl, "*Forum Non Conveniens, Latin America and Blocking Statutes*" 2003-2004 35 U. Miami Inter-Am. L. Rev. 21 [Dropbox].

- **Referred to but not required:** Ronald Brand "Challenges to *Forum Non Conveniens*" 45 *International Law and Politics* (2013) [Dropbox].

- **Referred to but not required:** Lubbe and Others and Cape Plc. and Related Appeals [2000] UKHL 41 (online: http://www.bailii.org/uk/cases/UKHL/2000/41.html).

- **Referred to but not required:** *Choc v Hudbay* [2013] [pleading and summary judgment motion attached]

- For background: http://www.chocversushudbay.com/.

**Friday, 12 January 2018 – Class V – Issues Arising With Other Rights Enforced In Transnational Context**

In this class we will consider a series of recent issues in transnational litigation engaging other rights and claims.
We will begin this class by briefly reviewing the core findings of the Muddy Waters Research report on the Sino-Forest group of companies issued in June, 2011. Participants will develop a theory of the case and a litigation strategy with a view to identifying the parties, fora, evidence, legal theories, barriers, necessary financing and administrative requirements, among other issues.

We will discuss issues in enforcing shareholder rights in transnational litigation and issues in enforcing creditor rights in transnational insolvencies, both of which arise out of the development of transnational shareholder class action disputes, primarily in the U.S. and Canada, and insolvencies of transnational corporations.

Reading:


- **Read**: Jeff Gray, "Sino-forest defence lawyers' bill a 'staggering' $41 million", *Globe and Mail*, April 20, 2015 [Dropbox].


- **Referred to but not required**: *In Re Nortel Networks Corporation 2015 ONSC 2987* and *In Re Nortel Networks Inc. Case 09 10138 KG Doc 15544* [Dropbox].

- **Referred to but not required**: *Labourers Pension Fund et al v Sino Forest et al*, Court File NO CV-11-431153-00CP [Dropbox].

SELF-REFLECTION AND SOCIOLOGY (NOT REQUIRED, [DROPBOX])

