

ESTABLISHING EXTRATERRITORIAL JURISDICTION OF HOME STATE FOR INVESTOR ACCOUNTABILITY: ENGLISH AND DUTCH ANCHORING MECHANISM AND AN IIA COMPLEMENT OR ALTERNATIVE

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ABSTRACT

There is an international trend of holding investors liable through the judicial process of home states for their infringements committed in host states. In such civil proceedings, English and Dutch courts adopted an anchoring mechanism for jurisdictional issues, from which lessons can be learned by other investors' home state courts. However, there are problems with its legal basis. Firstly, it relies upon the "Brussels Regulation" which should not be applicable to cases concerning the jurisdiction of non-EU states. Even assuming that it is applicable, the English anchoring mechanism now faces a renewed "forum non conveniens" challenge with Brexit. Compared to the English "necessary or proper party" gateway, the Dutch anchoring mechanism under Article 7(1) of the Dutch Code of Civil Procedure confuses the necessity of joint consideration and the ground of extraterritorial jurisdiction, without any requirement of links between the forum state and the claims. This article advocates international investment agreements (hereinafter "IIAs") provision on investor liability in the home state to complement or replace the anchoring mechanism, which can be

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justified as an analogy to an exceptional arrangement to territorial principle. The existing provision shall be improved, such as by taking the IIA with such a provision as part of the applicable laws and considering the application of home state laws, designating a specific home state court or adopting further junctions where domicile of defendant and place of tort are inapplicable, and clarifying plaintiff qualification based on victims of investor infringements.

KEYWORDS: *investor liability, home state, investor accountability, extraterritorial jurisdiction, anchor defendant, infringement, Brussels Regulation, necessary or proper party, joint consideration, international investment agreements, applicable law, domicile*