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Private international law and substantive liability issues in tort litigation against multinational companies in the English courts: recent UK Supreme Court decisions and post-Brexit implications

Mukarrum Ahmed *

This article examines the private international law and substantive liability issues in tort claims against UK based parent companies for the actions of their foreign subsidiaries. Arguments drawn from private international law's largely untapped global governance function inform the analysis and the methodological pluralism manifested in the jurisdictional and choice of law solutions proposed. The direct imposition of duty of care on parent companies for torts committed by foreign subsidiaries is examined as an exception to the bedrock company law principles of separate legal personality and limited liability. In this regard, the UK Supreme Court's recent landmark decisions in *Vedanta v Lungowe* and *Okpabi v Shell* have granted jurisdiction and allowed such claims to proceed on the merits in the English courts. This article assesses these decisions and their significance for transnational corporate accountability. The post-Brexit private international law regime and its implications for the viability of tort claims against parent companies are examined.

Keywords: Private international law; jurisdiction; choice of law; tort; liability; multinational company; parent company; *Vedanta v Lungowe*; *Okpabi v Shell*; Brexit

A. Introduction

This article will examine the private international law and substantive liability issues in tort litigation against UK based parent companies for the actions of their foreign subsidiaries. According to a foundational precept of company law,[1] companies have separate legal personality and limited

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[1] Lord Templeman referred to the principle in *Salomon v Salomon & co Ltd* [1896] UKHL 1, as the "unyielding rock" on which company law is constructed: See Lord Templeman, "Forty Years On" (1990) 11 *Company Lawyer* 10.

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liability.[2] The distinct legal personality and limited liability of each entity within a corporate group is also recognised.[3] A parent company is normally not liable for the legal infractions and unpaid debts of its subsidiaries. However, the direct imposition of a duty of care on parent companies for torts committed by foreign subsidiaries has emerged as an exception to the bedrock company law principles of separate legal personality and limited liability.[4] In this regard, the UK Supreme Court's recent landmark decisions in *Vedanta v Lungowe* and *Okpabi v Shell* have granted jurisdiction and allowed such claims to proceed on the merits in the English courts.[5] This article will assess these decisions and their significance for transnational corporate accountability. The post-Brexit private international law regime and its implications for the viability of tort claims against parent companies will be examined.[6]

The article will commence by analysing the theoretical insights that may be gained from a global governance perspective of private international law. This understanding of the nature and function of private international law will orient the discussion of the central issues. The road to the direct imposition of duty of care on parent companies for torts committed by foreign subsidiaries will be considered next. This will be followed by an assessment of the UK Supreme Court decisions and the post-Brexit future of tort claims against parent companies in the English courts. The consideration of the theoretical and practical issues raised in proceedings against parent companies will pave the way for

[2]See, for instance, s3 of the Companies Act 2006. M Petrin and B Choudhury, "Group Company Liability" (2018) 19 *European Business Organization Law Review* 771, 779, observe that limited liability has been considered to be efficient and welfare maximising for society as a whole.

[3]See n 31 and n 35 below.

[4]In *Chandler v Cape plc* [2012] EWCA Civ 525, [69], Arden LJ " … … emphatically reject[ed] any suggestion that this court [was] in any way concerned with what is usually referred to as piercing the corporate veil". Most commentators agree with Arden LJ that direct parent company liability in tort is not an instance of piercing the corporate veil even though it has an equivalent effect: D Kershaw, *Company Law in Context* (OUP, 2nd edn, 2012) 147; M Petrin, "Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc*" (2013) 76 *Modern Law Review* 603, 616; A Sanger, "Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary" (2012) 71 *Cambridge Law Journal* 478, 480. Cf P Yeoh, "A Parent Company's Liability for a Subsidiary's Action" (2012) 33 *Business Law Review* 206.

[5]*Vedanta Resources Plc and Another v Lungowe and Others* [2019] UKSC 20 (Lord Briggs with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agreed); *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (Lord Hamblen with whom Lord Hodge, Lady Black and Lord Briggs agreed).

[6]The relevant pre-Brexit jurisdictional and choice of law regime was the European Union's Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 ("Brussels Ia Regulation") and Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 ("Rome II Regulation").

jurisdictional and choice of law solutions inspired by the spirit of methodological pluralism.[7]

B. The emerging accountability of multinational companies for abuse in the developing world: the regulatory role of private international law and the corporate veil

It could be argued that access to justice in abuse claims against parent companies for the actions of foreign subsidiaries should not be easily granted because it would interfere with the *laissez-faire* business efficacy promoted by the corporate and jurisdictional veils.[8] The emerging jurisprudence on parent company liability would also diverge from the usual restrictive approach of the English courts to piercing the corporate veil.[9] However, the fundamental human right of access to justice and the need for corporate due diligence and accountability necessitates an international consensus on substantive parent company liability. In the absence of a comprehensive international treaty on business and human rights, substantive parent company liability could be coordinated through private international law's global governance potential.[10]

In spite of the significant role of multinational companies in shaping the global market, these entities escape any credible form of accountability.[11] Public international law has traditionally been conceptualised as ignoring private companies, to which it denies the status of subjects and prevents them

[7]For a discussion of methodological pluralism in private international law, see text accompanying notes 20–21 below.

[8]*Grand Aerie Fraternal Order of Eagles v Haygood*, 402 S.W.3d 766, 779 (Tex. 2013): "We note that 'jurisdictional veil-piercing' is distinct from 'substantive veil-piercing', so imputing a related entity's contacts for jurisdictional purposes requires a showing that the parent controls the subsidiary's internal operations and affairs". See P Muchlinski, "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 *Cambridge Journal of Economics* 915, 920.

[9]In *Prest v Petrodel Resources Ltd & Others* [2013] UKSC 34, [35], Lord Sumption adopts a conservative approach to piercing the corporate veil by describing it as a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The reference to existing legal obligations would apparently exclude most tortious conduct. Moreover, it appears that post-*Prest*, there is one definite ground for veil-piercing. The other grounds have not been expressly excluded, but courts will need to re-consider them in future cases. It should be noted that Lord Sumption observed that veil piercing should be a remedy of last resort.

[10]See H Muir-Watt, "The Relevance of Private International Law to the Global Governance Debate" in H Muir-Watt & D Fernandez Arroyo (eds), *Private International Law and Global Governance* (OUP, 2014) 1, 6.

[11]H Muir-Watt, "Private International Law Beyond the Schism" (2011) 2 *Transnational Legal Theory* 347, 364–368.

being called to account.[12] Muir-Watt highlights that private international law has not filled the void by regulating the transnational conduct and corporate social responsibility of multinational companies.[13] Indeed, victims of abuse may be disenfranchised through *forum non conveniens* or territorial choice of law principles.[14] On the other hand, the lack of an adequate legal status for the corporate group does not prevent multinational companies from taking advantage of the economic freedoms guaranteed to capital and services in cross border markets.[15] Thus, these companies seek to select the jurisdiction with the least shareholder regulation or the least costly stakeholder protection. This has encouraged the migration of production sites to legal systems where international competition for investment tends to keep down both standards of care and levels of compensation. The economic power of the foreign investor coupled with the political power of the local government may result in abuses of power which are condoned by the applicable local law. Such abuse may, for instance, include environmental damage, expropriation or land-grabbing, forced migration, repression of freedom of expression, mistreatment of workers, and child labour.

The existing asymmetry between the power wielded by large multinational companies and those individuals from developing countries adversely affected by their activities needs to be redressed.[16] Private international law offers a structural coordinating framework that distributes regulatory authority[17] and may thereby enable disadvantaged litigants from developing countries to seek an appropriate remedy from the parent company abroad. A multilateral private international law regime with uniform jurisdictional and choice of law rules for parent company liability would be ideal but carefully designed and implemented national jurisdictional and choice of law rules may nonetheless be able to

[12]From the perspective of public international law, Martti Koskenniemi observes that the current international legal order tends to serve powerful corporate actors and marginalises regulation: M Koskenniemi, *The Politics of International Law* (Hart Publishing 2011) 246.
[13]Muir-Watt (n 11) 367.
[14]The characteristic example of private international law's complicity in corporate impunity is the Bhopal litigation: *In re Union Carbide*, 809 F 2d 195 (2d Cir 1987), *cert denied* 108 S Ct 199 (1987). It should be noted that the American *forum non conveniens* doctrine considers the public interest and weighs it against the parties' private interests. For example, a judge is required to consider the long queue of cases when deciding to stay proceedings, essentially respecting an American claimant's wish to sue in American courts above a foreign claimant's desire to invoke American jurisdiction. See *Piper Aircraft v Reyno* (1981) 454 US 235, 256. Cf This idea was expressly rejected in England where only the parties' private interests are relevant in the *forum non conveniens* test: *Lubbe v Cape Plc* [2000] 1 WLR 1545, [33].
[15]Muir-Watt (n 11) 367.
[16]The use of the term "power" rather than "authority" refers to a lack of legitimacy and accountability.
[17]M Ahmed, *The Nature and Enforcement of Choice of Court Agreements* (Hart Publishing, 2017), Chapter 2; A Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009), Chapter 1.

facilitate disadvantaged litigants in seeking redress from the parent company abroad. It should be noted that a large number of uncoordinated jurisdictional and choice of law norms will increase the likelihood of forum shopping, parallel proceedings, conflicting judgments and decisional discord. Jurisdictional rules play a significant role in claims against parent companies.[18] The question of jurisdiction is the first hurdle to overcome by a claimant and the regulatory consequences of the court's decision may be far reaching. Indeed, companies may be willing to negotiate a settlement once jurisdiction is resolved in favour of the claimant.

Private international law rules are based on Savigny's paradigm of value-neutralism.[19] However, the onset of globalisation requires the law to respond to the new demands of economic growth. Private international law's reluctance in regulating cross-border economic activities has been challenged.[20] The concept of methodological pluralism in private international law can be harnessed to select and implement jurisdictional and choice of law rules that effectively regulate the transnational conduct and corporate social responsibility of multinational companies. The rich experience of choice of law theory, where the once mutually antagonistic unilateral and multilateral choice of law rules now co-exist with the rise of "*pluralisme des méthodes*",[21] may also be invoked in support of a similar eclecticism of techniques in the law of jurisdiction. Private international law's role as enabler of a remedy for disadvantaged litigants from developing countries against a parent company abroad upholds the letter and spirit of the UN Guiding Principles on Business and Human Rights ("Ruggie Principles").[22] In redressing

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[18] E Aristova, "Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction" (2018) 14 *Utrecht Law Review* 6.

[19] FK Von Savigny, *Private International Law, A Treatise on the Conflict of Laws: And the Limits of Their Operation* (first published 1869, William Guthrie trans, Forgotten Books, 2012).

[20] Muir-Watt (n 10). R Michaels, "Post-critical Private International Law: From Politics to Technique" in H Muir Watt and DP Fernandez Arroyo (eds), *Private International Law and Global Governance* (OUP, 2014), 54, favours the traditional continental private international rules and concludes that the next step for the existing European rules would be to show the extent to which they are already capable of integrating and formulating the political concerns that underlie the US conflict of laws revolution. See also, M Lehmann, "Regulation, Global Governance and Private International Law: Squaring the Triangle" (2020) 16 *Journal of Private International Law* 1, 7–10.

[21] H Batiffol, *Le pluralisme des méthodes en droit international privé* (1973) 139 *Recueil des Cours* 75, 106; B Audit, "Rapport Français" in SC Symeonides (ed), *Private International Law at the End of the 20th Century: Progress or Regress?* (Kluwer Law International 1999), 191, 210; A Bucher, *La dimension sociale du droit international privé* (2009) *Recueil des Cours* 341; C Roodt, "Reflections on Theory, Doctrine and Method in Choice of Law" (2007) 40 *Comparative and International Law Journal of Southern Africa* 76.

[22] The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011).

the balance of power between multinational companies and the adversely affected litigants, private international law also contributes to the UN Sustainable Development Goals.[23]

The doctrine of limited liability of shareholders often prevents victims harmed by a foreign subsidiary's abuse from obtaining a remedy when that subsidiary operates in a developing country that has a weak or ineffective legal system. The separate legal personality of the subsidiary ensures that the shareholders are not liable for the actions of the subsidiary. This could be an impediment for victims where the direct damage has been caused by an out of pocket subsidiary. Significantly, the separate legal personality and limited liability of each company within a group of companies may also prevent victims from seeking a remedy from the parent company.[24] It should be noted that some commentators have argued for unlimited liability for all torts based on the fact that limited liability was never intended to apply to torts.[25]

Where victims are not able to pierce the corporate veil or otherwise establish that the subsidiary was an agent of the parent, the approaches to holding a parent company liable for the acts and omissions of its foreign subsidiary are the enterprise liability approach,[26] the due diligence approach[27] and the tort based parental duty of care approach.[28] The last of these approaches has been utilised by English courts and will be the focus of the discussion on private international law and substantive liability issues. The next section provides an overview of how the direct parent company liability for torts in English law evolved.

C. The path to direct parent company liability for torts in English Law

In *Lubbe v Cape plc,* Lord Bingham held that the question of proving a duty of care being owed between a parent company and the tort victims of a subsidiary

[23]In particular, Goal 16 and Target 16.3 of the UN Sustainable Development Goals.
[24]G Skinner, "Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law" (2015) 72 *Washington & Lee Law Review* 1769; B Pettet, "Limited Liability – A Principle for the 21st Century?" (1995) 48 *Current Legal Problems* 125, 149–150.
[25]H Hansmann & R Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100 *Yale Law Journal* 1879, 1883, 1892–94, 1916–19; See also, Pettet *ibid* 152-155.
[26]Under enterprise liability the entire corporate enterprise is liable for harm that any of its subsidiaries or sibling companies caused. In this paradigm, there is no limited liability at all for the enterprise and its various companies. See Skinner (n 24) 1819–1822.
[27]France has enacted legislation requiring certain companies to undertake human rights due diligence. Parent companies can be held accountable for the human rights violations and environmental damage caused by their foreign subsidiaries. See LOI n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'order.
[28]See P Nygh, "The Liability of Multi-national Corporations for the Torts of Their Subsidiaries" (2002) 3 *European Business Organization Law Review* 51.

would be answered according to the standard principles of the law of negligence.[29] In *Chandler v Cape plc*,[30] it was held that the corporate veil was not relevant in tort cases, thus effectively circumventing *Adams v Cape plc*.[31] *Chandler* opened the door for direct tort liability claims against parent companies domiciled in the UK. In *Chandler*, an employee of a subsidiary of Cape plc suffered injuries due to exposure to asbestos and brought claims against the parent company as the subsidiary had ceased to exist. The Court of Appeal accepted a broad view of the concept of "assumption of responsibility" and validated its use as a tool for tort victims that were injured by activities of a subsidiary and sought to hold the parent company liable.

The Court of Appeal in *Chandler* unanimously held that the parent company owed a duty of care on the basis of the *Caparo v Dickman* test.[32] The threefold test stipulated by Lord Bridge in *Caparo* provides that, the damage should be foreseeable, there should be a relationship of proximity or neighbourhood and it should be fair, just and reasonable to impose a duty of care.[33] In applying the *Caparo* test Arden LJ stated:[34]

> Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

The Court of Appeal's decision in *Chandler* represents the first time that an injured employee of a subsidiary company established that his employer's parent company owed him a duty of care. Arden LJ dismissed any suggestion

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[29] *Lubbe v Cape plc* [2000] 1 WLR 1545.
[30] *Chandler v Cape plc* [2012] EWCA Civ 525. Cf In *Thompson v The Renwick Group plc* 6 [2015] 2 BCC 855, it was held that no duty of care was assumed by a parent company towards the employees of its subsidiary where the parent company appointed a director responsible for health and safety in the subsidiary company.
[31] The leading case in the UK on the issue of corporate personality and limited liability relating to corporate groups is *Adams v Cape Industries plc* [1990] Ch 433 (Slade LJ) in which the court rejected the single economic unit argument made in the *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 decision, and also the approach that the court will pierce the corporate veil if it is necessary to achieve justice. In taking the same approach as the one taken in *Salomon v Salomon & co Ltd* [1896] UKHL 1, the court powerfully reasserted the application of limited liability and the separate legal entity doctrine in regard to corporate groups, leaving hundreds of current and future victims uncompensated, whilst assisting those who seek to minimise their losses and liabilities through manipulation of the corporate form, particularly in relation to groups of companies.
[32] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).
[33] *Ibid* at 618.
[34] *Chandler v Cape plc* [2012] EWCA Civ 525, [80].

that the case involved piercing the corporate veil, but the outcome has an equivalent effect in that (through the application of tortious principles) it imposes direct liability upon a parent company despite the fact that the parent company is a legal entity separate from that of its subsidiary.[35] In *VTB Capital plc v Nutritek International Corp*, Lord Neuberger remarked, "In addition, there are other cases, notably *Adams v Cape Industries plc* [1990] Ch 433, where the principle [of piercing the corporate veil] was held to exist (albeit that they include obiter observations and are anyway not binding in this court)".[36] The door opened by *Chandler* has encouraged claimants allegedly harmed by the conduct of a foreign subsidiary to initiate proceedings in the English courts against the parent company. The following sections will examine two recent UK Supreme Court decisions and their significance from a jurisdictional and substantive law perspective.

D. The United Kingdom Supreme Court in *Vedanta v Lungowe*

In *Vedanta v Lungowe*, the UK Supreme Court adjudicated that claims for negligence brought by Zambian respondents against an English parent company ("Vedanta") and its Zambian subsidiary (Konkola Copper Mines plc ("Konkola")) for damage suffered in Zambia can proceed to a trial of the substantive issues in the English courts.[37] It is important to highlight that the Supreme Court was considering the jurisdictional question of whether there was an "arguable" case against Vedanta.[38] It did not have to consider whether Vedanta in fact

[35]Each company within a group of companies is a separate legal entity with limited liability: See *Adams v Cape Industries plc* [1990] Ch 433 (Slade LJ); *Bank of Tokyo Ltd v Karoon* [1986] 3 All ER 468, 486 (Robert Goff LJ); *Re Southard Ltd* [1979] 3 All ER 556, 565 (Templeman LJ). Cf In *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852, 860, Lord Denning had concentrated on the fact that the subsidiaries were "bound hand and foot" to the parent company. He therefore took the approach that the three companies should be treated as one, single economic unit. However, this approach was later criticised in *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, 96, making the point that the Court of Appeal in *DHN Ltd v Tower Hamlets LBC* had made no mention of the principle that the veil would only be pierced "where special circumstances exist indicating that [the company] is a mere façade concealing the true facts".

[36]*VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [127].

[37]See T Van Ho, "Vedanta Resources Plc and Another v. Lungowe and Others" (2020) 114 *American Journal of International Law* 110; S Hopkins, "Vedanta Resources Plc and Another v. Lungowe and Others" (2019) 70 *Northern Ireland Legal Quarterly* 371.

[38]This is not the civil standard of proof of the balance of probabilities: *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, 880 (HL) (Lord Simmonds). In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, Lord Goff endorsed Lord Simmonds' formulation as applied to the jurisdictional gateways. At the same time, he held that the existence of a reasonable prospect of success fell to be determined according to a lesser standard, namely that there should be a "serious issue to be tried". This has been held to correspond to the test for resisting an application for summary judgment. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, [7], Lord Sumption reformulated the effect of "the better of the argument" test in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR

owed a duty of care to the respondents, which will be determined on the merits before the High Court. It would be premature to conclude that UK-domiciled parent companies will always owe a duty of care to third parties for the actions of their foreign subsidiaries.[39] The Supreme Court also reiterated that appeals on matters of jurisdiction should be kept to a minimum and that parties should not lose sight of the requirement for proportionality when presenting their cases.[40]

The decision is significant for multilateral efforts to subject businesses to accountability and due diligence for environmental and human rights abuse in developing countries. The Supreme Court's unanimous decision lends support to the victim's right of access to justice. Lord Briggs also observed that parent companies that supervise and publicly disclose the human rights, environmental, social, or labour standards used by their subsidiaries assume a duty of care to those harmed by the subsidiary. This observation has potentially far reaching ramifications for corporate approaches to due diligence and accountability.

The respondents were primarily subsistence farmers relying on land and local waterways to sustain basic agrarian livelihoods. They alleged that they suffered personal injury, damage to property and loss of income, amenity and enjoyment of land as a result of pollution and environmental damage caused by discharges of harmful effluent from the Nchanga copper mine since 2005. Konkola is joint-owner of the mine with the Zambian government and operates it. The Court noted that materials published by Vedanta state that its ultimate control of Konkola is not to be regarded as any less than it would be if wholly owned.[41] The respondents argued that Vedanta devised the health, safety, and environmental standards followed by Konkola. Vedanta exercised a very high level of control and direction over the subsidiary.[42]

The Supreme Court provided guidance for assessing a parent company's duty of care for harm caused by its subsidiaries in common law negligence. Whilst this

547, 555–7 (Waller LJ) as follows: " … (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it".; *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [9] (Lord Sumption). See also, *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [71] (Lord Collins); *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28].

[39] The decision of the UK Supreme Court in *Okpabi v Shell* [2021] UKSC 3 has also granted jurisdiction and is discussed below.

[40] See also, Lord Templeman's judgment in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 465; *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337.

[41] *Vedanta v Lungowe* [2019] UKSC 20, [2].

[42] *Ibid* [3].

case was limited to the issue of jurisdiction, Lord Briggs made a number of interesting comments on the substantive issue of parent company liability which will no doubt assist the High Court in assessing the question of duty of care in the trial. The issue of parent company liability is significant for the emerging sub-discipline of business and human rights and the implementation of the Ruggie Principles.[43] In considering whether England or Zambia is the proper place to hear claims against Konkola, the Supreme Court vindicated the approach that the respondents may only be guaranteed substantial justice in jurisdictions where they have access to appropriate legal counsel.

The appellants' appeal focussed on the claim that the commencement of proceedings against Vedanta in order to force Konkola to defend itself in English courts was an abuse of EU law. The Supreme Court recognised it would be an abuse of this rule to allow the respondents to sue an English domiciled "anchor" defendant solely to pursue a foreign co-defendant in the English courts but that this exception should be applied strictly.[44] Both the lower courts found on the facts that the respondents had a bona fide claim and a genuine intention to seek a remedy in damages against Vedanta even though establishing jurisdiction over Konkola was also a key factor in their decision to litigate in England. The Supreme Court concluded that there was no abuse of EU law.

The respondents' case against Vedanta rested mainly on several group wide policies and guidelines adopted by the parent company regarding operations and management of Konkola. Applying Zambian law, the first instance court found that Zambian courts would arguably interpret principles of the law of negligence in line with the English common law.[45] The court of first instance also concluded that Vedanta's group wide policies created a real triable issue against the parent company.[46] The respondents' interest in pursuing Vedanta therefore went beyond securing the court's jurisdiction over Konkola.

On appeal, the appellants argued that using group wide policies to find that Vedanta owed a duty of care for the actions of its subsidiary would require creating "a new category of common law negligence".[47] Lord Briggs rejected this assertion. In this respect, Lord Briggs commended the summary by Sales LJ in *AAA v Unilever plc* (another challenge to jurisdiction on similar issues): "A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort

[43]The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011).
[44]TC Hartley, *International Commercial Litigation* (Cambridge University Press, 3rd edn, 2020) 162.
[45]*Vedanta v Lungowe* [2019] UKSC 20, [56].
[46]*Ibid* [24].
[47]*Ibid* [49].

regarding the imposition of a duty of care on the part of the parent in favour of a claim are satisfied in the particular case".[48]

The claims against Vedanta rested not on the fact that it owned Konkola. That relationship merely creates an opportunity for the parent to control the subsidiary's operations. The lower courts held (on a summary assessment) that it was arguable Vedanta did owe a duty of care to the respondents given that it had:

> Published a sustainability report which emphasised how the Board of the parent company had oversight over its subsidiaries.
>
> Entered into a management and shareholders agreement under which it was obligated to provide various services to Konkola, including employee training.
>
> Provided health, safety and environmental training across its group of companies.
>
> Provided financial support to Konkola.
>
> Released various public statements emphasising its commitment to address environmental risks and technical shortcomings in Konkola's mining infrastructure.
>
> Exercised control over Konkola, as evidenced by a former employee.

In relation to Sales LJ's finding in *AAA v Unilever plc* that cases where the parent company might incur a duty of care to third parties harmed by the activities of a subsidiary would usually fall into two basic types: (i) where the parent has effectively taken over management of the subsidiary's actions and (ii) where the parent has given relevant advice to the subsidiary about how it should manage a risk, Lord Briggs said that, in his view, "there is no limit to the models of management and control which may be put in place within a multinational group of companies".[49]

The Supreme Court examined the issue of the appropriate forum for the claim against Konkola. Under the Brussels Ia Regulation, causes of action against EU based companies may be brought in the courts of the Member State where the company is domiciled.[50] The Court of Justice of the European Union ("CJEU") has adjudicated that the general rule on jurisdiction confers a right on the claimant to bring proceedings against a company where it is domiciled.[51] Indeed, claims against an EU based parent company have become more viable after the CJEU's decision in *Owusu v Jackson*. The decision has confirmed the mandatory nature of jurisdiction and that the discretionary doctrine of *forum non conveniens* has no place under the Brussels Convention (and its successors). Moreover, in the context of Article 4 of the Brussels Ia Regulation it may be further argued that Articles 33 and 34 of the Regulation have codified the instances where prior

[48] *AAA & Others v Unilever Plc and Unilever Tea Kenya Ltd.* [2018] EWCA Civ 1532, [36].
[49] *Vedanta v Lungowe* [2019] UKSC 20, [51].
[50] Arts 4(1) and 63 of the Brussels Ia Regulation.
[51] Case C-281/02 *Andrew Owusu v NB Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-01383 (Grand Chamber).

parallel proceedings outside the EU may result in a stay of proceedings.[52] Any attempt to circumvent the operation of the Brussels Ia Regulation by staying proceedings on any other grounds may now be harder to justify in principle.

The English Civil Procedure Rules provide that a claim against an English defendant can "anchor" the case by allowing the courts to exercise jurisdiction over another "necessary or proper party" to the claim, so long as there is a real issue which is reasonable for the court to try between the claimant and the anchor defendant.[53] This jurisdictional gateway is said to be "extraordinarily wide" as it does not require any connection between the parties, in particular the foreign defendant and England.[54] A single set of proceedings leading to one judgment on all the issues has obvious advantages of efficiency and convenience. The court has a responsibility to ensure that the "necessary or proper party" gateway is not abused[55] because it allows a claimant to serve a defendant outside jurisdiction on the basis of an associated jurisdictional liability.[56] Therefore, the court should be satisfied that the claim against the "anchor" defendant is about a real triable issue.[57] If there is no serious issue to be tried in the proceedings against the anchor defendant (or it is bound to fail)[58] then the "necessary or proper party" ground of jurisdiction is not available against the defendant to be joined. However, so long as there is a good arguable case against the anchor defendant, the claimant's motive is merely a factor in the exercise of the discretion to serve out.

The rules prohibit a court from exercising this authority unless it is "satisfied that England and Wales is the proper place in which to bring the claim".[59] This

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[52]According to Arts 33 and 34 of the Brussels Ia Regulation, a second seised EU court may in the interests of the proper administration of justice (in a discretionary way somewhat analogous to *forum non conveniens*) decline jurisdiction in favour of the first seised non-EU court. See P Beaumont, "Forum non conveniens and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution" [2018] *Revue critique de droit international privé* 447.

[53]Civil Procedure Rules, Rule 6.36 and Practice Direction 6B para. 3.1(3). Cf Third parties, such as those who might be called upon to contribute or indemnify the defendant, can be joined to a dispute in England using Civil Procedure Rules Part 20 which also covers counterclaims by the defendant. It is possible to obtain jurisdiction over third parties who are out of the territorial jurisdiction so long as the third party is a necessary and proper party: Civil Procedure Rules Practice Direction 6B para. 3.1(4).

[54]P Rogerson, *Collier's Conflict of Laws* (Cambridge University Press, 4th edn, 2013), 150.

[55]*The Brabo* [1949] AC 326, 338.

[56]A Arzandeh, "'Gateways' within the Civil Procedure Rules and the future of service-out jurisdiction in England" (2019) 15 *Journal of Private International Law* 516, 539, argues that the concept of related actions under Article 30 of the Brussels Ia Regulation can provide the impetus for reining in the current "necessary or proper party" jurisdictional gateway.

[57]*Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379.

[58]The case against the anchor defendant was bound to fail in *Multinational Gas v Multinational Gas Services* [1983] Ch. 258 (CA).

[59]Civil Procedure Rules, Rule 6.37(3).

forum conveniens rule requires courts to consider various connecting factors that relate to the interests of the courts and the burden placed on the parties by litigating in any of the potential jurisdictions in which the case could be heard. One factor that is often considered is the risk of parallel proceedings and conflicting or inconsistent judgments. Significantly, the court may allow a case to proceed where it would otherwise find another forum proper if there is a "real risk that substantial justice will not be obtainable in that foreign jurisdiction".[60]

The judge at first instance found that Zambia would be the proper place for the case against Konkola but for the "closely related claim against Vedanta".[61] The risk of irreconcilable judgments led the court to conclude that the case against Konkola should be heard in England. Additionally, the court of first instance concluded that the respondents would be denied "access to justice" if the case were heard in Zambia because they would be unable to obtain appropriate legal representation.[62]

On appeal, the appellants advanced two arguments. First, they asserted that the first instance court's approach would mean that "the risk of irreconcilable judgments is likely to be decisive in every case" where EU law provides a claimant with the right to sue other defendants in England.[63] Second, they claimed that the first instance judge did not pay sufficient attention to considerations of comity and inappropriately examined the problems the respondents would face in funding litigation.

Lord Briggs found the first instance court erred in concluding that England is the proper place for the case. The risk of irreconcilable judgments does not transform the right to sue one defendant in English courts into a right to sue all defendants in England. While this risk is a factor, the weight it is given depends on the actual availability of an alternative forum.[64] Vedanta was willing to submit to Zambia's jurisdiction. The respondents were under no obligation to accept that offer, but Lord Briggs determined that Vedanta's willingness to defend itself in Zambia presented the respondents with a choice. They could either pursue separate cases in England and Zambia, risking irreconcilable judgments, or they could choose to pursue a single consolidated case against both defendants in Zambia and avoid the risk.[65] The risk of irreconcilable judgments may still be considered by the lower court, but given the circumstances in this case, it is only one factor that should not be given priority over others.[66]

Many of the connecting factors pointed towards Zambia as the proper place. These connecting factors included the applicable law, the place of harm and

[60] *Vedanta v Lungowe* [2019] UKSC 20, [88].
[61] *Ibid* [71].
[62] *Ibid* [89].
[63] *Ibid* [78].
[64] *Ibid* [81]–[83].
[65] *Ibid* [82].
[66] *Ibid* [84].

damage, many respondents did not speak English, the need for translation, the difficulty of travelling from Zambia to England, the location of many witnesses, the need to translate documentary evidence and that a Zambian judgment is enforceable in English courts. Documents and relevant Vedanta employees are likely to be located in England but technology makes it easy to address these factors by ensuring that the case proceeded appropriately. As a result, Lord Briggs concluded, "[i]f substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England".[67]

Lord Briggs found the lower court had appropriately examined the issue of substantial justice. The court of first instance concluded that litigation funding was not available in Zambia. This proved crucial to both the court of first instance and Lord Briggs. The trial is expected to be complex and demands significant expense for expert evidence. Lord Briggs found that the court of first instance had correctly considered whether the "unavoidable scale and complexity of this case (wherever litigated) could be undertaken at all with the limited funding and legal resources' available to the respondents in Zambia.[68] Without explicitly pronouncing judgment on the Zambian legal system, the first instance judge concluded that the respondents in this particular case could not obtain the legal counsel necessary with the available funding.[69] According to Lord Briggs, the first instance judge's approach and the exercise of jurisdiction was justified.

English court decisions have generally focused on a parent company assuming a duty of care by relying on a parent company's claims that they control or supervise the conduct of subsidiaries. It is common for parent companies to assert group wide policies on these issues. The UK Supreme Court's decision indicates that what parent companies might have viewed as insignificant is actually an assumption of responsibility that gives rise to a duty of care. Businesses are not yet required by English law to engage in human rights due diligence but they may be held to the standards they claim to observe.

The Court's recognition that concerns over substantial justice arise when respondents are unable to obtain appropriate legal counsel for complex claims may prove to be crucial for future business and human rights disputes. These claims are protracted and scientific expertise is required. Victims are often unable to pay for the costs of litigation. Unless a legal system provides legal aid, contingency fees arrangements or another viable method of funding litigation, a victim may have no choice but to seek legal counsel in another jurisdiction. The Supreme Court's judgment indicates that this is a relevant factor when determining the appropriate forum and it may even outweigh considerations of comity. This aspect of the Court's ruling may facilitate victims

[67]*Ibid* [87].
[68]*Ibid* [95].
[69]*Ibid* [97].

that lack financial and litigation strength to proceed against multinational companies in English courts.

In the aftermath of the Supreme Court's decision, there is a risk that parent companies might recuse themselves of any responsibility for the operations of their subsidiaries. However, this is unlikely to become a standard practice amongst businesses. Parent companies claim responsibility over the practices of their subsidiaries because it is advantageous. For instance, many institutional investors demand their investees adopt and disclose their policies and practices. Businesses that fail to do so risk losing the support of these investors. At a multilateral level, the need for and substance of a binding international treaty on business and human rights is being discussed. In the future, it may become increasingly difficult for multinational companies to not abide by human rights due diligence norms.

E. The United Kingdom Supreme Court in *Okpabi v Shell*

The Supreme Court in *Okpabi v Shell* concluded that it was at least arguable,[70] based on the degree of control and de facto management, that the parent company owed a duty of care to the appellants in respect of alleged environmental damage and human rights abuses by Shell's Nigerian subsidiary. A similar issue was addressed by the Supreme Court in *Vedanta v Lungowe*, which is very relevant to both the procedural and the substantive issues raised in *Okpabi v Shell*. *Okpabi v Shell* provides guidance on the circumstances in which a parent company may owe a duty of care to those affected by acts or omissions of its foreign subsidiary. The decision also rejects a strict approach to corporate separation, making clear that companies may not rely on corporate form alone to limit risks associated with the operations of corporate affiliates. The court reiterates that there is no special test applicable to the responsibility in tort of a parent company.

The Supreme Court determined the question of jurisdiction and did not decide on the merits of the dispute. Nevertheless, the court's analysis highlights the growing significance of pro-active corporate governance, due diligence and internal controls for effectively managing corporate human rights and environmental risks.

Joint claims were brought by more than 40,000 citizens of two affected areas in the Niger Delta[71] in the English courts against Royal Dutch Shell ("RDS") and one of its Nigerian subsidiaries, Shell Petroleum Development Company of

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[70]See n 38 above.

[71]The Commission of Jurists and The Corporate Responsibility (CORE) Coalition Limited, acting as "interveners" in *Okpabi v Shell* [2021] UKSC 3 (Lord Hamblen), also submitted evidence alongside the Claimants of international and domestic standards and comparative law jurisprudence in relation to human rights and environmental protection.

Nigeria Ltd ("SPDC"). The appellants alleged that oil spills and pollution from pipelines operated by SPDC caused substantial environmental damage, with the result that natural water sources cannot safely be used for drinking, fishing, agriculture, washing or recreational purposes.

Following the Court of Appeal's decision in *Okpabi v Shell* in 2018, the Supreme Court took a different approach in *Vedanta v Lungowe* on the question of jurisdiction for environmental damage allegedly caused by a subsidiary. The Supreme Court in *Vedanta* cast some doubt on the Court of Appeal's approach in *Okpabi v Shell*, ruling that there was no "reliable limiting principle" that a parent could never incur a duty of care in respect of the activities of a subsidiary merely by laying down group-wide policies.[72] Such policies could arguably indicate that a duty of care existed if the parent took active steps to implement them or the parent held itself out as exercising the relevant level of control or supervision of the subsidiaries pursuant to such policies. To the extent that such policies applied to inherently dangerous activities, the Court confirmed that a parent might be held liable in respect of harm arising from systemic failures in those policies.

The Supreme Court unanimously granted the appeal, having found that the Court of Appeal had made material errors in law.

The parties had overburdened the court of first instance with evidence, leading the Court of Appeal to be drawn into a mini-trial of substantive factual issues, which was not appropriate at the interlocutory stage.[73] In particular, the Supreme Court found that the majority of the Court of Appeal incorrectly assumed that because the high level documentation provided by the appellants did not provide evidence of control, it followed that further documentation provided on disclosure would be unlikely to do so.[74] As a result, the Court of Appeal had failed to focus on the "arguability" of the factual assertions set out in the Particulars of Claim.[75] The correct approach would have been to accept assertions supporting the claim as arguable, unless they were "demonstrably untrue or unsupportable".[76]

The Court of Appeal had focussed inappropriately on the issue of control. The Supreme Court stated that control was just the "starting point" whereas the relevant enquiry was "the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation)".[77] The

[72] *Vedanta v Lungowe* [2019] UKSC 20, [52] (Lord Briggs).
[73] See *Okpabi v Shell* [2021] UKSC 3, [101]-[119]; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1.
[74] "Operational control is most likely to be revealed by documentation relating to operational matters".: *Okpabi v Shell* [2021] UKSC 3, [134].
[75] See n 38 above.
[76] *Okpabi v Shell* [2021] UKSC 3, [107].
[77] *Ibid* [147].

Court observed that "control of a company and de facto management of a part of its activities are two different things".[78]

The Court of Appeal had been wrong to assert that the promulgation of group-wide policies could never in itself give rise to a duty of care. There is no such "reliable limiting principle".[79]

The Court of Appeal had erred in approaching the issue of parent liability in negligence with a generalised presumption that a parent company will not be liable for the acts of its subsidiaries. Following *Vedanta v Lungowe*, the Supreme Court confirmed no such presumption existed.

The Court of Appeal had been wrong to approach the issue of parent company liability in negligence as a special category of liability. Citing *Vedanta v Lungowe*, the Supreme Court stated that normal principles of the law of negligence applied in determining questions of parent liability for acts of a subsidiary. The Supreme Court treated the following factors as relevant but not exhaustive:[80]

Taking over the management or joint management of the relevant activity.

Providing defective advice and/or promulgating defective group-wide policies.

Taking steps to adopt and implement group-wide policies.

Holding out that it exercises a particular degree of supervision and control of a subsidiary.

Addressing the proper question of arguability and applying general principles of the law of negligence, the Supreme Court concluded that RDS had not shown that the appellants' case was "demonstrably untrue or unsupportable".[81] On the contrary, the Supreme Court found that there was a "real issue to be tried".[82] It found particularly compelling the evidence that the Shell group is organised along functional lines, rather than according to strict corporate form where each entity within a corporate group is distinct.

The Supreme Court's decision only addresses the threshold question of jurisdiction: whether the claim is arguable enough to proceed. In explaining how the lower courts had erred, the Supreme Court emphasised the nature of the threshold that has to be overcome by the appellant.

Notwithstanding its limitation to the question of jurisdiction, the decision is significant. English courts have traditionally adopted a strict approach to recognising the principle of separate legal personality. However, the Supreme Court's unequivocal rejection of any "special" category of law in *Okpabi v Shell* seems to propose a more dynamic and claimant-friendly approach to the question of liability within a corporate structure.

[78] *Ibid*.
[79] *Ibid* [143]–[145].
[80] *Ibid* [26]–[27].
[81] *Ibid* [153].
[82] *Ibid*.

This is consistent with other recent decisions of the English Courts in *Vedanta v Lungowe*, *AAA & Others v Unilever PLC & Another*[83] and *Kadie Kalma & Others v African Minerals Ltd & Others*.[84] The decision also aligns with developments in other common law jurisdictions such as New Zealand.[85] In Canada, the courts have recently gone further and are willing to hold parent companies liable for breaches of "customary international law" in respect of damage caused by their subsidiaries.[86] In similar vein, in Europe, the corporate veil may no longer protect parent companies from liability for the acts of their affiliates. In the Netherlands, in a case brought by four Nigerian farmers and Friends of the Earth, the Court of Appeal of The Hague held Shell liable for certain damages suffered through oil spills in Nigeria.[87] The Hague District Court has recently ordered Royal Dutch Shell to reduce the CO2 emissions of the Shell group through the Shell group's corporate policy.[88] This is an area of English law that will doubtless develop further in the years to come.

The more dynamic approach in the *Okpabi v Shell* decision signals that English courts may consider claims to be "arguable" against a wider set of UK-based entities, than if, as the Court of Appeal had seemed to advocate, a "special" duty in this situation applied, tied to the presence of the shareholding relationship.

However, this decision is unlikely to mean that claims against parent companies may be brought in the UK without limitations. In another recent English court decision, the *Fundão* dam case,[89] a group of more than 200,000 Brazilian citizens had brought a £5bn claim against mining group parent, BHP, in respect of damage they argued they had suffered following the collapse of an iron ore dam in Brazil, owned by a subsidiary. The English High Court rejected the claim because it viewed the claim as a "clear abuse of process".[90] In particular, the English court observed that, as a result of concurrent Brazilian proceedings and the

[83][2018] EWCA Civ 1532.
[84][2020] EWCA Civ 144. On 6 August 2020, permission to appeal to the UK Supreme Court was refused in *Kadie Kalma and others (Appellants) v African Minerals Ltd and others (Respondents)* UKSC 2020/0073.
[85]*James Hardie Industries PLC v White* [2018] NZCA 580 and *James Hardie Industries Plc v White* [2019] NZSC 39.
[86]*Nevsun Resources Ltd. v Araya & Others* 2020 SCC 5.
[87]*Milieudefensie & Others v Shell Petroleum NV & Others*, [C /09/365498/HA ZA 10-1677] and [C /09/330891/HA ZA 09-0579]; [C / 09/337058 / HA ZA 09-1581] and [C / 09/365482 / HA ZA 10-1665], see https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx accessed on 9 June 2021.
[88]*Milieudefensie et al. v Royal Dutch Shell Plc*, [C/09/571932 / HA ZA 19-379], see ECLI: NL:RBDHA:2021:5339, Rechtbank Den Haag, C/09/571932 / HA ZA 19–379 (engelse versie) (rechtspraak.nl) accessed on 9 June 2021.
[89]*Municipio de Mariana v BHP Group Plc & Others* [2020] EWHC 2930 (TCC).
[90]*Ibid* [141].

large number of claimants, the English case would be "irredeemably unmanageable".[91]

The evolving landscape of corporate liability should inform the manner in which companies design, implement and report on their policies and procedures, and the due diligence they perform in their operations and on acquisitions. According to the Supreme Court's analysis, formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. In theory, claims might extrapolate, for instance, to entities involved in supply chain supervision, minority investors and joint venture partners, and not just the local subsidiary and its parent. Whilst promulgating group wide policies may be used to suggest involvement of a parent in the acts of a local subsidiary, simultaneously, a parent company should not ignore governance or fail to provide effective policies down the corporate chain.

As a practical conclusion, the decision suggests that installing more pro-active corporate governance and internal due diligence, and more effective controls and reporting will be more important than relying on corporate structure in managing certain types of serious corporate risk. Multinational corporate groups must have a clear hold on how, and to whom, responsibility for management functions is delegated throughout the group. That ongoing challenge will be brought into sharp focus for companies operating not only in the UK but also in the EU, with a rise in cases in which claimants are seeking to hold companies liable for human rights and environmental harms.

Vedanta v Lungowe and *Okpabi v Shell* are decisions on the jurisdiction of the English court. Notwithstanding, the Supreme Court's findings may give rise to an enduring legacy for business and human rights. The Ruggie Principles authoritatively state the responsibilities in the field of business and human rights.[92] The Principles are based on three complementary and interdependent pillars: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedy, judicial and non-judicial. Inter alia, parent companies should address the harm caused by their subsidiaries.[93] The Ruggie Principles highlight the importance of remedies but the international practice of business and human rights has yet to catch up with these ideals. There is a lingering disconnect between the international aspirations and the practical ability of victims to enforce human rights norms against businesses through municipal courts. Attention will now turn to the future of tort litigation against multinational companies in English courts in the wake of Brexit.

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[91] *Ibid* [104].
[92] See Ruggie Principles, Principles 1, 11, 13 and 14.
[93] *Ibid*. Principle 14.

F. Post-Brexit tort litigation against multinational companies in the English courts

The recent spate in parent companies being sued in the English courts for the actions of their foreign subsidiaries will continue to be subject to close scrutiny after Brexit.[94] Articles 66–69 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019,[95] contain provisions on jurisdiction, recognition and enforcement of judgments and the applicable law. Article 67(1)(a) of the EU Withdrawal Agreement stipulates that, jurisdiction is governed by the Brussels Ia Regulation where proceedings are commenced prior to the end of the transition period.[96] Article 66(b) of the EU Withdrawal Agreement provides that, the Rome II Regulation shall apply in the UK in respect of events giving rise to damage, where such events occurred before the end of the transition period. Therefore, English courts will continue to render judgments where jurisdiction is governed by the Brussels Ia Regulation in relation to proceedings commenced before 1 January 2021.

Post-Brexit, the continued application of the Brussels Ia Regulation is not possible because the Regulation derives its legal basis from an EU Treaty[97] and the UK has decided not to retain it in the UK because it is founded on reciprocity within the EU which is no longer offered to UK judgments. The English courts use the common law doctrine of *forum non conveniens* in all cases commencing since 1 January 2021 as the constraints of EU civil procedural law[98] no longer apply. Post-Brexit, an English court may decide to not exercise jurisdiction over a parent company by staying proceedings where the preponderance of connecting factors point towards the availability of another forum that is more appropriate for the trial of the dispute. The two pronged *Spiliada* approach to *forum non conveniens* has provided a fine tuned response to jurisdictional battles by balancing the demands of a natural forum abroad with the interests of justice requiring the matter to be nevertheless heard in England.[99] Therefore, the availability of *forum non conveniens* may help the English courts to ward off jurisdictional challenges against parent companies for damage caused by their subsidiaries at the outset. However, in exceptional cases, the claimant's lack of financial and litigation strength in the natural forum may be considered under the interests of justice limb of *The Spiliada* test which may lead to an

[94]For other recent examples, see, *Kadie Kalma & Others v African Minerals Ltd & Others* [2020] EWCA Civ 144; *Municipio de Mariana v BHP Group Plc & Others* [2020] EWHC 2930 (TCC); *AAA & Others v Unilever Plc and Unilever Tea Kenya Ltd.* [2018] EWCA Civ 1532.
[95]EU Withdrawal Agreement.
[96]The Brexit transition period ended on 31 December 2020.
[97]Art 288 TFEU.
[98]See *Owusu* n 51 above.
[99]*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460.

English court deciding not to stay proceedings.[100] English law does not expressly endorse a "forum of necessity" doctrine but in the latter instance English courts might demonstrate a willingness to function as such.[101]

If the Australian "clearly inappropriate forum"[102] test is adopted, it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds.[103] A diminished, but acceptable, global role for *forum non conveniens* is also based on a "clearly inappropriate" forum test.[104] The International Law Association's *Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation*[105] and the International Law Institute's *Principles for Determining when the Use of the Doctrine of Forum Non Conveniens and Anti-suit Injunctions is Appropriate*[106] support a "manifestly more appropriate" and "clearly more appropriate" *forum non conveniens* test respectively. The "clearly inappropriate forum" test applies the relatively strict standard that a stay should only be granted if proceedings would cause a serious injustice by being oppressive and vexatious to the defendant. The Australian *forum non conveniens* approach in effect acts as a barrier against Australian multinationals seeking to escape the jurisdiction of

[100]See *Connelly v RTZ Corpn plc (No 2)* [1998] AC 854, 873 (Lord Goff); *Lubbe v Cape plc* [2000] 1 WLR 1545, 1555 (Lord Bingham). Cf Lord Hoffman in his dissenting judgment reasoned that the refusal of a stay due to the lack of financial and litigation strength of the claimant in the natural forum cannot be based upon any defensible principle. "It means that the action of a rich plaintiff will be stayed while the action of a poor plaintiff in respect of precisely the same transaction will not": *Connelly v RTZ Corpn plc (No 2)* [1998] AC 854, [39]. At [41], Lord Hoffman also referred to the floodgates argument with respect to the liability of a parent company in England: "… any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world". See also, *Vedanta v Lungowe* [2019] UKSC 20, [93].

[101]For an example of a *forum necessitatis* provision, see, Art 3 of the Swiss Federal Act on Private International Law (1987). The European Commission considered including a *forum necessitatis* provision in the Brussels Ia Regulation (2012) but no consensus was reached and the proposal was not part of the final version.

[102]*Voth v Manildra Flour Mills Pty Ltd* (1991) 65 A.L.J.R. 83 (HC); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (HC).

[103]P Prince, "Bhopal, Bougainville and Ok Tedi: Why Australia's Forum non Conveniens Approach is Better" (1998) 47 *International and Comparative Law Quarterly* 573, 597.

[104]See Art 22 in the Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001 Interim Text Prepared by the Permanent Bureau and the Co-reporters jdgm2001draft_e.PDF (hcch.net) accessed on 9 June 2021. Beaumont (n 52) advances a global solution to the conflicts of jurisdiction by balancing the EU *lis pendens* rule with a clearly circumscribed and exceptionally applicable *forum non conveniens*.

[105]Principle 4.3 of Resolution 1/2000, (2000) 69 ILA Rep Conf 13; Report (2000), 69 ILA Rep Conf 137.

[106]Principles 1, 2 and 4 of the International Law Institute, Bruges Session 2003, Second Commission, 2 September 2003 (Rapporteur: Sir Lawrence Collins, Co-rapporteur: M Georges Droz) in "Texts, Materials and Recent Developments" (2003) 5 *Yearbook of Private International Law* 337, 338.

Australian courts in relation to their overseas conduct.[107] Indeed, jurisdictional certainty and efficiency will be fostered as a result of a test whose methodologically pluralist parameters are less discretionary than the wide ranging evaluative enquiry undertaken in the quest for the natural forum.[108] It should be observed that the High Court of Australia has chosen to amend or replace the *Voth* test in contexts where it was felt to be unworkable, notably in cases involving parallel proceedings and exclusive choice of court agreements.[109] This solution may be criticised for increasing litigation risk for UK domiciled companies. However, it has become imperative that alternatives to the *forum non conveniens* status quo are explored because otherwise access to justice for disadvantaged litigants may be delayed and denied.

In relation to choice of law for cross border torts, the UK has wisely decided to adopt the Rome II Regulation as retained EU law.[110] Unlike the Brussels Ia Regulation, the Rome II Regulation does not require reciprocity and has an *erga omnes* effect. This means that Member State courts would apply the Rome II Regulation after Brexit to cases with a connection to the UK according to the principle of universal application.[111] Where a parent company is sued in relation to the activities of a foreign subsidiary and the parties have not entered into a choice of law agreement,[112] the applicable law under Article 4(1) of the Rome II Regulation is the law of the country where the damage occurred i.e. usually the law of the foreign country.[113] This could be a law that is either undeveloped or otherwise ill-suited for the claimant's proceedings in the English courts. However, the parties may instead rely on English tort law as the default applicable law by choosing not to plead or prove the content of foreign law.[114]

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[107] Prince (n 103) 597.

[108] See *Vedanta v Lungowe* [2019] UKSC 20, [6]-[14] and *Okpabi v Shell* [2021] UKSC 3, [107]. The need to overhaul the costly and time consuming Goffian *forum conveniens* model in the post-Brexit legal environment has been suggested in A Dickinson, "Walking Solo – A New Path for the Conflict of Laws in England" *Conflictoflaws.net* <Walking Solo – A New Path for the Conflict of Laws in England – Conflict of Laws> accessed on 9 June 2021. Dickinson suggests that the wide ranging evaluative enquiry can be reined in by shifting the burden of proof in its entirety to the defendant and requiring a clearly more appropriate forum than England for a stay of proceedings.

[109] R Garnett, "Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?" (1999) 23 *Melbourne University Law Review* 30.

[110] See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

[111] Art 3 of the Rome II Regulation.

[112] Art 14 of the Rome II Regulation. See generally, M Ahmed, "The Nature and Enforcement of Choice of Law Agreements" (2018) 14 *Journal of Private International Law* 500.

[113] If the claim is framed in terms of the alleged violation of human rights, the general choice of law rule under Art 4 would apply and point towards the application of the law of the country of "direct damage". Case C-350/14 *Florin Lazar v Allianz SpA* EU: C:2015:802, [30], confirms that it is only the place where the direct victim suffers direct damage that is relevant for the purposes of Art 4(1) of the Rome II Regulation.

[114] See generally, R Fentiman, *Foreign Law in English Courts* (OUP 1998).

Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more liberally.[115] Article 4(3) could ensure that the law manifestly more closely connected to the tort such as the law of the country in which the event giving rise to the damage occurred or the law of the country in which the parent company is domiciled applies. However, it should be noted that this methodologically pluralist and liberal application of the exception in Article 4(3) will depart from Article 4's preference for objective choice of law rules by rendering the provision susceptible to being used as a surrogate for the discretionary closest connection principle.

Article 7 of the Rome II Regulation applies to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage.[116] According to Article 7, the law applicable to environmental damage is the *lex loci damni* as per Article 4(1), but the victim can choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred.[117] It should be noted that Article 7 only refers to Article 4(1) and does not refer to the other sub provisions in Article 4. Thus, in the absence of agreement by the parties as to choice of law,[118] Article 7 prevents the designation of the law of the parties' common habitual residence or another, manifestly more appropriate, law.[119]

Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of

[115] A Briggs, *The Conflict of Laws* (OUP, 4th Edn, 2019), 264, argues that the abstract debate about Art 4(3)'s strict or restrictive interpretation is not illuminating, and every case will turn on its own set of facts. In the context of cross border personal injury disputes, there is English precedent for Art 4(3) of the Rome II Regulation displacing the common habitual residence rule in Art 4(2) to return to the place of direct damage in *Gary Owen v Galgey & Ors* [2020] EWHC 3546 (QB) (Linden J) and *Marshall v Motor Insurers' Bureau & Ors* [2015] EWHC 3421 (QB) (Dingemans J). Cf *Winrow v Hemphill* [2014] EWHC 3164 (QB) [63] (Slade J).

[116] If the claim is framed in terms of environmental damage, Art 7 of the Rome II Regulation provides a special choice of law rule for environmental damage. Recital 24 of the Rome II Regulation adopts a definition of "environmental damage".

[117] Recital 25 of the Rome II Regulation. The Hague District Court in *Milieudefensie et al. v Royal Dutch Shell Plc* (n 88) considered that Dutch law applies on the basis of Art 7 of the Rome II Regulation and that, in so far as the action seeks to protect the interests of Dutch residents, this also leads to the application of Dutch law on the basis of Art 4 of the Rome II Regulation. For a discussion of whether the decisions concerning the subsidiary company's operations taken by the parent company that start the chain of events resulting in the environmental damage are to be considered as the event giving rise to the damage under Art 7, see, U Grusic, "International Environmental Litigation in EU Courts: A Regulatory Perspective" (2016) 35 *Yearbook of European Law* 180, 221-225.

[118] Art 14 of the Rome II Regulation.

[119] R Plender and M Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell, 5th Edn, 2020), 694.

the Rome II Regulation.[120] Such provisions of English law will then apply regardless of the applicable law in an English court.[121] Overriding mandatory rules may be identified expressly in statute law or the courts may determine whether it was the legislator's intention that they should be given that effect.[122]

Notwithstanding the technicalities in the application of Articles 4, 7 and overriding mandatory provisions, the Rome II Regulation under the guise of retained EU law constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to diverge from retained EU law and develop their own jurisprudence.[123] Courts at the level of the Court of Appeal in England and Wales and the UK Supreme Court may overturn binding pre-Brexit EU case law if they consider it "right to do so".[124] In practice, all UK courts are likely to be influenced by non-binding post-Brexit EU case law where they are interpreting the same piece of legislation. A flexible interpretation of the retained Article 4(3) and the concept of overriding mandatory provisions might enable English law to achieve parity with any future amendments to EU private international law through the backdoor.[125]

[120]See G Rühl, "Human Rights in Global Supply Chains: Do We Need to Amend the Rome II-Regulation?" *Conflictoflaws.net*, https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/ accessed on 9 June 2021. Cf J von Hein, "Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims", *Conflictoflaws.net* https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/ accessed on 9 June 2021.

[121]"The European notion of mandatory rules is an intellectual cousin of Currie's interest analysis": PJ Borchers, "Categorical Exceptions to Party Autonomy in Private International Law" (2008) 82 *Tulane Law Review* 1645, 1655. For the regulatory function of overriding mandatory rules and public policy, see, Lehmann (n 20) 15–17.

[122]Plender and Wilderspin (n 119) 806.

[123]From the perspective of a theory of adjudication, the tension between the category of "fit" exemplified by retained EU law and the category of "justification" based on principle or policy in hard cases will result in the indigenous development of the corpus of retained EU law. See generally, R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) Chapter 4.

[124]The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations (SI 2020/1525) allow the Court of Appeal of England and Wales (and equivalent courts across the UK) to depart from retained EU case law. Under the European Union (Withdrawal) Act 2018, it is only the UK Supreme Court (or High Court of Justiciary in Scotland) that has this power.

[125]European Parliament Committee on Legal Affairs, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability 11 September 2020 https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf accessed on 9 June 2021. However, the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability does not include the proposed amendments to the EU private international law instruments. Art 20 of

G. Conclusions

It is through the postulation of territoriality as a governing principle that private international law has been complicit in thwarting the ascendance of transnational corporate social responsibility.[126] Private international law has kept corporate liability within the limits of local law through *forum non conveniens* and the *lex loci delicti commissi*.[127] It is only recently that a challenge of territoriality has emerged in connection with corporate social responsibility. Extraterritoriality is employed in this context as a method of framing a private international law problem rather than as an expression of limits.[128] Therefore, there is nothing pejorative about regulating companies at the place of their seat, and there is no reason why the state where a corporate group is based should not (and indeed should not be obliged to) sanction that group's international industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by third parties or stakeholders.[129] The idea of methodological pluralism driven by the demands of global governance can result in jurisdictional and choice of law rules that adapt to the needs of disadvantaged litigants from developing countries and hold multinational companies to account.

The tort based parental duty of care approach has been utilised by English courts for holding a parent company accountable for the actions of its subsidiary. The limited liability and separate legal entity principles as applied to corporate groups are circumvented by the imposition of direct tortious liability on the parent company. The *Vedanta v Lungowe* and *Okpabi v Shell* decisions facilitate victims of corporate human rights and environmental abuse by providing clarity on significant issues. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group wide policies. Formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. When evaluating whether a claimant can access substantial justice in another forum, English courts may consider the claimants lack of financial and litigation strength. The UK Supreme Court

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the proposed Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability provides that Member States shall ensure that relevant provisions of the Directive are considered overriding mandatory provisions in line with Art 16 of the Rome II Regulation: See https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title1 accessed on 9 June 2021.

[126] Muir-Watt (n 11) 386.

[127] *Ibid*.

[128] The term "extraterritorial" in this context usually signifies that harmful conduct occurs in the course of activities abroad, outside the jurisdiction of a parent companies "home" state courts. The term is often used in a negative sense, particularly when applied to the reach of domestic legislation and controversial English court orders such as anti-suit injunctions.

[129] Muir-Watt (n 11) 386.

decisions are in alignment with the ethos of the Ruggie Principles, particularly the pillar focussing on greater access by victims to an effective remedy.

Post-Brexit, the broader availability of the doctrine of *forum non conveniens* may help the English courts to ward off jurisdictional challenges against parent companies for damage caused by their subsidiaries at the outset. However, in exceptional cases, the claimant's lack of financial and litigation strength in the natural forum may be considered under the interests of justice limb of *The Spiliada* test which may lead to an English court deciding not to stay proceedings. It has been argued that if the Australian "clearly inappropriate forum" test is adopted, it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds. As a result, it is more likely that a disadvantaged foreign litigant will succeed in overcoming the jurisdictional hurdle when suing the parent company. From a comparative law standpoint, the adoption of the Australian common law variant of *forum non conveniens* will effectively synthesise *The Spiliada's* wide ranging evaluative enquiry with the certainty and efficiency inherent in the mandatory rules of direct jurisdiction of the Brussels-Lugano regime.

In matters of choice of law, Article 4(1) of the Rome II Regulation will continue to lead to the application of the law of the country where the damage occurred. Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more flexibly. The territorial limitations of the *lex loci damni* might be overcome by applying the principle of closest connection to select a more favourable law.[130] Article 7 of the Rome II Regulation provides the claimant in an environmental damage claim a choice of applicable law either pursuant to Article 4(1) or the law of the country in which the event giving rise to the damage occurred. Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of the Rome II Regulation. The Rome II Regulation under the guise of retained EU law constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to depart from retained EU law and develop their own jurisprudence.

Any future amendments to EU private international law will not affect the course of international civil litigation before English courts.[131] However,

[130]The result-selectivism inherent in the idea of a favourable law is reminiscent of the regulatory approach of governmental interest analysis. See SC Symeonides, *Codifying Choice of Law Around the World* (OUP, 2014), 287; Lehmann (n 20), 10-13.
[131]Cf Dickinson (n 108) suggests engagement with the EU's reviews of the Rome I and II Regulations will provide a useful trigger for the UK to re-assess its own choice of law rules with a view to making appropriate changes.

recent developments in the UK and Europe are a testament to the realisation that the avenue for access to justice for aggrieved litigants may lead to parent companies that are now subject to greater accountability and due diligence.

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