

Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction

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1. Introduction

Recent decades have seen an explosion of interest in the social, economic and environmental risks caused by the cross-border operations of transnational corporations ('TNCs'). These powerful corporate groups have often been involved in various forms of corporate wrongdoing in many parts of the world.¹ Severe abuses, reported by various non-governmental organisations ('NGOs'), range from murder to the violation of socio-economic rights.² As a response to inadequate legal remedies for the victims of corporate abuses in host states³ and an absence of international binding instruments on corporate accountability,⁴ few jurisdictions have shown a growing trend of civil liability cases against TNCs ('Tort Liability Claims').⁵ These cases are examples of private negligence claims brought by the victims of overseas corporate wrongs against parent companies before the courts of the home states.

This paper will address the potential of Tort Liability Claims to close a regulatory gap in international corporate accountability. It is divided into three parts. Part 1 will provide a general analysis of Tort Liability Claims through a description of the facts of the most significant UK cases and an identification of their common features. The second part will then examine recent developments in the establishment of the personal jurisdiction of the English courts over the corporations involved in the overseas abuses. Finally, the concluding part will critically assess the overall impact of the increasing trend of litigating against TNCs in their home states. This paper argues that rules of jurisdiction play a critical role in the framework of Tort Liability Claims, but their potential to close a regulatory gap in group liability for overseas torts is limited by the absence of international coordination and uniform legal approaches to the activities of TNCs.

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1 In the context of this paper, TNCs are considered as a particular form of the corporate group. Terms such as 'transnational corporation', 'transnational corporate group', 'multinational enterprise', 'multinational corporation', 'multinational corporate group' are used synonymously.

2 See, for instance: Global Exchange, '2017 10 Top Corporate Criminals List' (2017), <<https://globalexchange.org/campaigns/corporatecriminals2017/>> (last visited 8 May 2018).

3 See in more detail: B. Wray, 'Transnational Corporations and the Disjoint of Traditional Structures of Liability to Victims' (2010), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1733582> (last visited 8 May 2018); Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (2014), <<https://www.amnesty.org/en/documents/POL30/001/2014/en/>> (last visited 8 May 2018).

4 The general framework of public international law governing human rights, social and environmental performance of TNCs is discussed in J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006), pp. 76-103.

5 See, for instance: *Dagi v BHP* [1997] 1 VR 428 (Australia); *Garcia v Tahoe Resources* 2017 BCCA 39 (Canada); *Ododo Francis v ENI and Nigerian Agip Oil Company (NAOC)* (Italy); *Akpan v Shell*, Court of Appeal, The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3587 (the Netherlands).

2. Tort Liability Claims: A new solution for regulating TNCs

Tort Liability Claims emerged at the end of the 20th century and, up to date, have been tested in both the common-law and the civil-law system.⁶ For various reasons, UK remains a principal forum for litigating personal injury cases against TNCs.⁷ The fast-developing legal doctrine of duty of care in the context of corporate groups, the presence of numerous NGOs focused on a business and human rights agenda, and wide media coverage of prominent cases have contributed to an expansion of negligence claims against TNCs. Despite the different facts and the circumstances of each case, they share several common features.⁸ The litigation consists of civil liability cases in which the cause of action is framed through the tort law concept of negligence rather than the corporate law doctrine of piercing the corporate veil or customary international law on human rights. Proceedings are typically initiated by private parties affected by the corporate defendants, typically the subsidiary's employees or members of the local community. Furthermore, the claims are brought before the courts of the home state, which is not the state in which the claimants sustained their injuries.

The most significant aspect of these foreign direct liability cases, however, is their focus on the acts and omissions of the parent company, rather than the subsidiary. Indeed, some cases do not even name the subsidiary as a defendant.⁹ Tort Liability Claims attempt to establish direct liability of the parent company as a primary tortfeasor through the breach of the duty of care it is said to have owed to the claimant.¹⁰ The allegations are based on the common law tortious principles which provide that in certain circumstances the parent company may be found to have assumed a duty of care, owed to the subsidiary's employees, to ensure their safety. For instance, in *Connelly v RTZ*, the claimants alleged that the duty of care existed because the parent company had devised and/or advised the subsidiary on the contents of its policy on health, safety and the environment.¹¹ In *Guerrero v Monterrico Metals*, claimants, who were subjected to torture, inhuman and degrading treatment and false imprisonment by a Peruvian service company, brought proceedings against the English-domiciled parent company alleging that it had negligently failed to ensure that there was adequate risk management at the subsidiary's facilities.¹² The factual circumstances of the Tort Liability Claims vary significantly, but commonly claimants allege that the parent companies should be directly responsible for the overseas torts by breaching the duty of care.

The existence of duty of care under English law is determined in accordance with the three-stage test established in *Caparo Industries plc v Dickman*: (a) foreseeability of harm; (b) a sufficient degree of proximity in the relationship between the parties; and (c) it must be fair, just and reasonable to impose liability.¹³ The establishment of the first two elements is often argued by the claimants in Tort Liability Claims through the interpretation of the control relationship between members of the corporate group. In *Guerrero v Monterrico*, the claimants contended that the parent company was able to prevent personal injuries allegedly inflicted on the claimants by police officers due to the 'effective control' it exercised over the management of the subsidiary.¹⁴ The House of Lords in *Lubbe v Cape* noted that resolution of the issue of parent company liability 'will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group'.¹⁵

6 Ibid.

7 See for details on the advantages of the legal proceedings in the English courts T.C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (2009), p. 310.

8 For a thorough analysis of the emerging trend towards Tort Liability Claims see: L. Enneking, *Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (2012).

9 See, for example, *Connelly v RTZ* [1998] A.C. 854 (HL).

10 Other theories of parent company liability considered by the academics or alternatively invoked by the claimants are: (i) vicarious liability for the negligence of the foreign subsidiary as an agent; (ii) secondary liability for aiding and abetting the commission of the tort; (iii) enterprise liability; and (iv) piercing the corporate veil. These attribution tests for allocating responsibility are mostly unpractised in the Tort Liability Claims.

11 *Connelly v RTZ*, supra note 9.

12 *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB).

13 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 (HL).

14 *Guerrero v Monterrico Metals Plc*, supra note 12, [8].

15 *Lubbe v Cape plc* [2000] 1 W.L.R. 1545 (HL) 1555.

To date, there has been no comprehensive judicial consideration of the substantive rules of the parent company liability at the merits stage, because the vast majority of Tort Liability Claims has either failed on procedural grounds or been settled after the jurisdiction of the home state court was upheld. Nevertheless, the courts have in principle recognised that an English-domiciled parent company may, on appropriate facts and under certain circumstances, be recognised to assume a duty of care owed to the employees of the subsidiary or local communities. Thus, in *Connelly v RTZ*, the court observed that, although the claimant's arguments were unusual, if they were supported by facts they would likely to give rise to a duty of care.¹⁶ The general weakness of the case against Monterrico Metals was acknowledged by the court, but did not preclude it from finding that the claimants had demonstrated a good arguable case for supporting a freezing injunction.¹⁷ The most recent authority in the application of the duty of care doctrine within a corporate group is the Court of Appeal's decision in *Chandler v Cape*, which identified that a parent company, may, even in the absence of complete control over the operations of its subsidiary, be responsible for the injuries of the subsidiary's employees.¹⁸ Despite the fact that the case did not have any foreign element, some commentators have rightly concluded that the ruling will have an influence in the context of TNCs.¹⁹ Indeed, in the three most recent and much-debated Tort Liability Claims, the courts have heavily relied on *Chandler* principles to determine the scope of duty of care of the English-domiciled parent company in relation to the personal injuries arising overseas.²⁰

For claimants, pursuing a case against a TNC on the basis of tort is advantageous for various reasons. It is submitted that duty of care is invoked in order to: (1) attribute liability for the overseas abuse to the parent company; (2) establish the necessary connection between the alleged tort and the territory of the home state; and (3) weaken the extraterritoriality concerns raised by the judgment of the home court with respect to the events occurred on the territory of the host state. These implications of the doctrine of duty of care are worth further clarification.

The main purpose of the duty of care doctrine is the establishment of the liability of the parent company for the injuries of the claimant. The doctrine of separate legal personality and the limited liability principle are reluctant to make a parent company automatically liable for the acts of its subsidiary. By contrast, the duty of care doctrine establishes the circumstances when the control exercised by a parent company may give rise to liability.²¹ The benefit of asserting direct liability of the parent company is that it enables claimants to avoid having to pierce the corporate veil. The claimants do not have to provide any evidence that the subsidiary was a mere facade²² or was established to evade existing legal obligations of the parent company.²³ The threshold for piercing the corporate veil is high. Instead, claimants focus on the conduct of the parent company itself and target it as the controller of the operations of the whole group. The duty of care doctrine does not challenge traditional theories of corporate law by suggesting that all legal entities in the corporate group should be treated as a single unit. It accepts and appreciates that the parent company and the subsidiary enjoy separate personality and have distinct rights and obligations. Furthermore, by establishing the case against the parent company, the claimants automatically target a pool of assets that would not otherwise be available were litigation to be commenced against the subsidiary in the host state.

16 *Connelly v RTZ* [1999] C.L.C. 533 (QB) 533.

17 *Guerrero v Monterrico Metals Plc*, supra note 12, [26].

18 *Chandler v Cape* [2012] EWCA Civ 525.

19 R. Meeran, 'Tort Litigation against Multinational Corporations for Human Rights Abuses: An Overview of the Position Outside the United States', (2011) 3 *City University of Hong Kong Law Review*, p. 10; 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*, no. 3, p. 481; D. Palombo, 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell', (2015) 4 *British Journal of American Legal Studies*, pp. 467-468.

20 *Lungowe v Vedanta* [2017] EWCA Civ 1528; *His Royal Highness Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191; *AAA v Unilever Plc* [2017] EWHC 371 (QB).

21 It was noted that the duty of care doctrine only applies efficiently to the vertically integrated corporate structures. In the polycentric corporations, where control functions are spread among different legal entities, establishment of the negligence of the parent company is more challenging. See H. Ward, 'Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options', (2001) 24 *Hastings International and Comparative Law Review*, no. 3, p. 470.

22 *Gilford Motor Co Ltd v Horne* [1933] Ch. 935 (CA); *Woolfson v Strathclyde RC* 1978 S.C. (H.L.) 90.

23 *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 A.C. 415.

The compensational nature of Tort Liability Claims is what makes them most valuable for the claimants.²⁴ Therefore, framing the argument against the parent company increases the claimants' chances of receiving an effective remedy.

Secondly, the duty of care doctrine provides the required connecting factor of the claim with the territory of the home state. The rules of private international law in the UK have strong territorial focus.²⁵ This means that jurisdiction of the court to hear the case is justified by the connection of the particular dispute with the territory of the forum state. Tort Liability Claims seek to establish such connection not only through the English domicile of the parent company as a defendant but also identification of the tortious conduct in England. The claimants argue that the home state is the place where the tort has occurred when duty of care was breached by the parent company.

Furthermore, framing the case through the duty of care doctrine provides a means by which the extraterritoriality concerns may be addressed.²⁶ Since operations of corporate groups are spread across various jurisdictions, two or more states may be interested in regulating the activities of legal units within the corporate group. At the same time, the territorial nature of state jurisdiction implies that none of these states will be able to exercise public control over the TNC as one unit without triggering various jurisdictional conflicts. It is highly possible that a decision of the home state court on the liability of the parent company for the overseas operations in the host state may be viewed as an intervention in the affairs of another sovereign.²⁷ In response, it may be argued that Tort Liability Claims focus on the acts and omissions of the parent company (as opposed to the acts and omissions of the subsidiary). They challenge decisions taken in the territory of the home states. Thus, it is debatable whether Tort Liability Claims constitute a true example of the extraterritorial adjudicatory jurisdiction. Instead, they may be characterised as 'domestic measures with extraterritorial implications'.²⁸ As noted by the Special Representative of the Secretary General for Business and Human Rights, 'a critical distinction between two very different phenomena is usually obscured'.²⁹

The claimants' choice to rely on the duty of care is unlikely to be dictated by conflict rules to choose English law as the law applicable to some issues in the case, such as the appropriate standard of care and whether or not that standard has been breached. In earlier Tort Liability Claims, the English courts accepted that claimants' arguments that English law should apply could have been successful.³⁰ Following the enactment of the Rome II Regulation, however, the English court in at least one Tort Liability Claim found that the law of the host state where damage occurred was applicable.³¹ This piece of legislation is a harmonised set of EU rules, governing the conflict of laws regime on the law applicable to non-contractual obligations.³² In two other more recent cases, the parties and the courts agreed that laws of the home and host states (England and Nigeria/Kenya) in relation to the parent company's liability were similar, thus excluding any possibility of disagreements over applicable law at the jurisdictional stage of the proceedings.³³

The rapid emergence of Tort Liability Claims in the past decade demonstrates that they form part of an international effort aimed at establishing public control over the private operations of TNCs. Their success in addressing the challenges of cross-border operations of corporate groups, however, depends on the

24 H. Ward, 'Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemicals and Cape PLC Cases', (2003) 12 *Yearbook of International Environmental Law*, p. 136.

25 P. Muchlinski, *Multinational Enterprises and the Law* (2007), p. 144.

26 J. Wouters & C. Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction', (2009) 40 *George Washington International Law Review*, no. 4, p. 952.

27 The duty of non-intervention is understood to be a corollary of the principle of state sovereignty. See further J. Crawford, *Brownlie's Principles of Public International Law* (2012), p. 447. States refrain from exercising direct extraterritorial jurisdiction over foreign persons and conduct abroad with the exception of the criminal offences with strong international consensus on the necessity of their prosecution such as terrorism, money laundering, corruption and grave human rights abuses. See further J. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010). Although the exact scope of the principle of non-intervention is often debated, it is generally regarded as a restriction to the extraterritorial exercise of state powers.

28 Zerk, *supra* note 27, p. 13.

29 J. Ruggie, 'Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework' (2010), para. 48, <http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf>, (last visited 8 May 2018).

30 *Lubbe v Cape plc* [1998] C.L.C. 1559, 1568.

31 *Lungowe v Vedanta*, *supra* note 20, [19].

32 Regulation No. 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, pp. 40-49.

33 *His Royal Highness Okpabi v Royal Dutch Shell*, *supra* note 20, [55]; *AAA v Unilever Plc* [2017], *supra* note 20, [79].

rules governing domestic courts' power to adjudicate disputes. The territorial focus of the adjudicative jurisdiction is often contrary to the transnational nature of the TNCs' activities. Powerful corporate groups have the flexibility to spread operations over multiple jurisdictions and create a legal separation between the subsidiary's activities and the home state of the parent company. Considerable controversy surrounding the exercise of the extraterritorial regulation over TNCs' operations often leads to the 'jurisdictional veil' of the parent company and a significant degree of autonomy from any national jurisdiction. The next part will demonstrate how English courts currently resolve issues of jurisdiction in Tort Liability Claims.

3. Tort Liability Claims: The challenge of jurisdiction

While Tort Liability Claims constitute a promising means of access to a judicial remedy for victims of corporate human rights abuses, the claimants face serious hurdles in the courts of the home states.³⁴ The question of jurisdiction resolved by the rules of private international law is the first obstacle for the parties and the court to face. The English courts do not *per se* exercise subject matter jurisdiction over corporate wrongs occurred in the foreign state. The claimants in Tort Liability Claims are required to establish personal jurisdiction over corporate defendants. There is a series of potentially applicable regimes governing the jurisdiction of the English courts depending on the defendant's domicile.³⁵ Jurisdiction over English-domiciled parent companies is currently determined under the rules of the Brussels I Regulation (recast) ('Brussels I'), which is the key instrument for the rules of jurisdiction in cross-border disputes in the EU.³⁶ Where Brussels I does not apply (i.e. when the overseas subsidiary of TNC is domiciled in a non-Member State), the English courts will rely on common law rules to determine whether to exercise jurisdiction over the foreign defendant.

The general rule on jurisdiction under Brussels I is found in Article 4, which provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. On the one hand, jurisdiction on the basis of domicile promotes the overriding objective of Brussels I: legal certainty.³⁷ Moreover, domicile reflects procedural fairness of the rules of jurisdiction by justifying a 'home court advantage' for the defendant.³⁸ The definition of 'domicile' for the purposes of Brussels I is contained in Article 63 and provides that a company is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business. Article 64 extends this definition for Ireland, Cyprus and the UK, by specifying that 'statutory seat' means the registered office or, where no such office exists, the place of incorporation or, where there is no place of incorporation, the law of the place in which the formation took place. To date, finding personal jurisdiction over English-domiciled parent companies under Article 4 of Brussels I has not presented a significant barrier for the claimants.³⁹

Article 4 of Brussels I has a mandatory effect in proceedings against English-domiciled parent companies. It permits English courts to assert jurisdiction over a local defendant, no matter where the cause of action arose.⁴⁰ There are only rare and limited circumstances in which a parent company's application challenging jurisdiction of the English court may succeed.⁴¹ The claimants are no longer forced to confront the *forum*

34 For an extensive analysis of various obstacles faced by the foreign claimants in the home states' courts see G. Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013). Access to justice for victims of human rights abuses in the UK is specifically addressed in R. McCorquodale, 'Survey of the Provision in the United Kingdom of Access to Remedies For Victims of Human Rights Harms Involving Business Enterprises' (2015).

35 See generally P. Rogerson, *Collier's Conflict of Laws* (2013), pp. 54-55.

36 Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, pp. 1-32. It is not the purpose of this article to discuss post-Brexit application of the EU jurisdictional rules in the context of Tort Liability Claims.

37 The CJEU on numerous occasions referred to legal certainty as one of the key principles of the EU jurisdictional regime. See, for instance, C-38/81, *Effer SpA v Hans-Joachim Kantner*, [1982] ECR 825, para. 6; C-26/91, *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA*, [1992] ECR I-3967, para. 12; C-129/92, *Owens Bank Ltd v Bracco*, [1994] ECR I-117, para. 32; C-440/97, *GIE Groupe Concorde and Others*, [1999] ECR I-6307, para. 23.

38 C-440/97, *GIE Groupe Concorde and Others*, [1999] ECR I-6307, para. 24; C-412/98, *Universal General Insurance Co v Groupe Josi Reinsurance Co SA*, [2000] ECR I-5925, para. 35.

39 *Guerrero v Monterrico Metals Plc* [2010] EWHC 3228 (QB), [2]; See also *Ngcobo v Thor Chemicals* (CA, 9 October 1995), 1.

40 J. Hill & M.N. Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (2016), p. 78.

41 Recently, Arts. 33 and 34 were introduced in Brussels I in the course of the recasting process. New provisions provide courts of Member States with the discretion to stay proceedings where parallel proceedings are already pending before the courts of a third state. However, the new rules remain to be tested in practice in the context of Tort Liability Claims.

non conveniens challenge under the English common law rules. In the past, it was possible for English courts to exercise their discretion to stay proceedings against English-domiciled defendants, where another clearly more ‘appropriate’ forum was available to the parties.⁴² Following the CJEU’s decision in *Owusu v Jackson*, however, English courts are now prevented from staying proceedings on this basis.⁴³ They have consistently refused applications for a stay of proceedings against English-domiciled companies, even when the abuses are alleged to have taken place almost exclusively overseas.⁴⁴

The Brussels I regime only applies to claims brought against EU-domiciled defendants. Jurisdiction over non-EU domiciled defendants, by contrast, is determined in accordance with the private international law rules of Member States. An English court may exercise jurisdiction over a foreign defendant as long as effective service of the claim form can be made. Under rules 6.36 and 6.37 of the Civil Procedure Rules the court may grant permission to serve in proceedings outside of England and Wales if: (i) any of the gateways set out in paragraph 3.1 of Practice Direction 6B apply; (ii) the claim has a reasonable prospect of success; and (iii) the English court is the proper place to bring the claim. The list of available grounds of jurisdiction under Practice Direction 6B is broad. The most plausible procedural principle, typically invoked in Tort Liability Claims, which enables the joinder of the foreign subsidiary in the English proceedings is to establish that the subsidiary is a necessary or proper party to a claim against the English-domiciled parent.

The ‘necessary or proper party’ gateway for the claims against the foreign defendant only applies in circumstances where a claim is made against another (anchor) defendant and a claim form has been or will be served on that defendant.⁴⁵ Establishment of jurisdiction under this basis of jurisdiction could be exceptionally wide as it does not require the existence of any territorial connection between England and the joined defendant.⁴⁶ The English courts, therefore, have approached claims brought under the ‘necessary or proper party’ gateway carefully to ensure that a specious claim against an anchor defendant is not used as a device to bring a foreign defendant within the jurisdiction.⁴⁷ The first element of the ‘necessary or proper party’ gateway is the establishment of whether there is an anchor defendant at all. The court has to consider the merits and reasonableness of the claims against the English-domiciled parent company to determine if there is a real issue which it is reasonable for the court to try. So long as the claimants can prove that there is a real issue to be tried against an English-based parent company, the English court will find that it has jurisdiction to try the claims submitted.⁴⁸ This then triggers consideration of the second element of the gateway (i.e. whether the foreign subsidiary is a necessary or proper party to an arguable claim against an English-domiciled anchor defendant). Where, however, the court concludes that the claimants failed to present an arguable claim against the English-domiciled parent company, there would be no anchor defendant and the claims against the foreign subsidiary will not proceed in England either.⁴⁹ Application of these jurisdictional principles in recent case law will be considered further in the next sub-sections.

3.1 *Lungowe v Vedanta* and significance of an arguable claim against the English-domiciled parent company for jurisdictional purposes

One of the most recent successful attempts of foreign citizens to establish English jurisdiction over legal entities of TNC is litigation against English-based mining corporation Vedanta Resources Plc (‘Vedanta’) and its Zambian subsidiary Konkola Copper Mines (‘KCM’).⁵⁰ 1,826 Zambian citizens alleged personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land arising out of the operation

42 *Connolly v RTZ*, supra note 9, *Lubbe v Cape plc*, supra note 15.

43 Case C-281/02, *Owusu v Jackson*, [2005] ECR I-1383.

44 *Lungowe v Vedanta*, supra note 20; *Garcia v BIH (UK) Ltd* [2017] EWHC 739 (Admlty); *AAA v Unilever Plc* [2017], supra note 20.

45 *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

46 *The Brabo* [1949] A.C. 326, 338.

47 *Witted v Galbraith* [1893] 1 QB 577, 579; *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch. 258, 274; *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1990] 2 Lloyd’s Rep 215, 222; *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*, supra note 45, [76]-[87].

48 *Lungowe v Vedanta*, supra note 20.

49 *His Royal Highness Okpabi v Royal Dutch Shell*, supra note 20; *AAA v Unilever Plc*, supra note 20.

50 *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC); *Lungowe v Vedanta*, supra note 20. For the detailed analysis of the High Court’s judgment see E. Aristova, ‘Jurisdiction of the English Courts over Overseas Human Rights Violations’, (2016) 75 *Cambridge Law Journal*, no. 3.

by KCM of the Nchanga Copper Mine in Zambia. The claimants focused on the breach of the duty of care owed by Vedanta to ensure that KCM's mining operations did not cause harm to the environment or local communities. The central argument of the claim related to the evidence that the English-domiciled parent company exercised a high level of operational control directly over KCM's operations in Zambia, including implementation of health, safety and environmental policies. In response, Vedanta claimed that the court should apply the *forum non conveniens* argument under English traditional principles and stay proceedings in favour of the Zambian courts. Furthermore, the parent company submitted that proceedings should be stayed due to abuse of Brussels I since the weak claim against Vedanta was a device brought to ensure that the real claim against KCM was also litigated in England.

Coulson J, sitting as a judge of the High Court, took the claimants' side and clearly confirmed the mandatory application of Article 4 of Brussels I. First of all, the judge relied on *Owusu*,⁵¹ holding that the different facts of the present case and any criticism of the CJEU's reasoning did not make the *Owusu* judgment less binding.⁵² Moreover, the judge concluded that the sole purpose of the claim against Vedanta was not to act as a hook for the claim against KCM since there was a real issue to be tried between Vedanta and the claimants.⁵³ In particular, it was noted that (i) the claimants were entitled to bring claims against Vedanta on the breach of duty of care within the previous case law on the liability of English-based parent companies; (ii) concerns existed about jurisdiction of Zambian courts over Vedanta; (iii) KCM was experiencing significant financial difficulties and claimants' resort to a wealthier parent was understandable.⁵⁴ Overall, the claimants did not meet the high hurdle of demonstrating that the sole object of the proceedings was to oust the jurisdiction of another court, or alternatively that the basis of the joinder was fraudulent.⁵⁵

Overall, Coulson J concluded that the claim against parent company Vedanta that it was liable for the environmental pollution in Zambia was arguable under both English and Zambian law.⁵⁶ The judge identified the following principles based on the preceding authorities on the parent company's duty of care resolved by the English courts: (i) the claimants must satisfy the tripartite test for the existence of a duty of care;⁵⁷ (ii) depending on the facts, it is arguable that a claim of negligence against a parent company arising out of the operations of its subsidiary might give rise to liability;⁵⁸ and (iii) such a claim is more likely to succeed if advanced by former employees;⁵⁹ however, depending on the facts, claims made by residents rather than former employees are still arguable.⁶⁰ Following the application of these principles to the facts of the case and in light of the presented evidence, the judge identified that the claimants had presented a 'thoughtful and detailed attempt' to establish that Vedanta had a duty of care regarding the claimants.⁶¹ In particular, Coulson J took into account that: (i) Vedanta's board of directors had oversight over all of Vedanta's subsidiaries; (ii) under the management agreement between Vedanta and KCM, the defendant foreign subsidiary, a number of services including project development and management, were provided by Vedanta; (iii) the Irish court had published a decision which considered the important role of the parent company's employees in the Vedanta corporate group; and (iv) a former KCM employee had provided a witness statement which provided direct evidence of Vedanta's control over KCM.⁶²

Once the judge was satisfied that there was a real issue to be tried between Vedanta and the claimants and that there was indeed an anchor defendant in the jurisdiction, he addressed the question of whether KCM was a necessary or proper party to the claim against Vedanta. First, Coulson J stated that the claim against KCM had a real prospect of success, inter alia because it was primarily responsible for the operation

51 See notes 42-44 and accompanying text, *supra*.

52 *Lungowe v Vedanta Resources Plc*, *supra* note 50, [71].

53 *Ibid.*, [82].

54 *Ibid.*, [77]-[81].

55 *Ibid.*, [74].

56 *Ibid.*, [124].

57 *Caparo Industries Plc v Dickman*, *supra* note 13.

58 *Chandler v Cape plc*, *supra* note 18.

59 *Ngcobo v Thor Chemicals*, *supra* note 39; *Connelly v RTZ*, *supra* note 9.

60 *Lubbe v Cape plc*, *supra* note 15.

61 *Lungowe v Vedanta Resources Plc*, *supra* note 50, [121].

62 *Ibid.*, [119].

of the mine and did not challenge the underlying basis of the claim.⁶³ Second, the judge found that claims against both co-defendants were based on common facts and legal principles and on the same causation and loss arguments, and that it would require one investigation.⁶⁴ It was sufficient to conclude that the joinder of KCM in English proceedings was reasonable in order to avoid parallel proceedings on similar facts and events in different parts of the world. Finally, the judge held that the existence of an arguable claim against Vedanta made England the most appropriate place for trying the claims against KCM.⁶⁵ The court's reasoning was grounded on the same factors that had earlier justified a conclusion to join KCM as a necessary or proper party in the English proceedings against Vedanta, namely to avoid parallel proceedings in two jurisdictions.⁶⁶ Such approach is in line with the existing authorities that adjust the concept of natural forum in the complex proceedings with multiple parties flexibly to resolve the dispute in its entirety in one jurisdiction.⁶⁷

In 2017, the Court of Appeal entirely upheld a High Court ruling.⁶⁸ Unsurprisingly, its decision focused on the determination of the scope of duty of care and circumstances sufficient to resolve a 'real issue to be tried' test for exercising jurisdiction over Vedanta as an anchor defendant under English common law. Lord Justice Simon, who delivered a leading judgment, generally agreed with Coulson J's conclusions but slightly extended the principles applicable to the imposition of a duty of care on the parent company in relation to the subsidiary's operations.⁶⁹ In particular, it was noted that the circumstances giving rise to the duty of care may be present where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim; or (b) controls the operations which give rise to the claim.⁷⁰ It was also specifically distinguished that the evidence sufficient to establish the duty of care may not be available at the early stages of the case.⁷¹ Overall, the Court of Appeal concluded that the claim against Vedanta could not be dismissed as unarguable, even if the claimants may face difficulties in proving it at the merits stage of the proceedings.⁷²

Decisions of the English courts in *Vedanta* are some of the most significant achievements of the foreign victims and their lawyers struggling with the jurisdictional hurdle in Tort Liability Claims. The overall analysis of the judgments suggests that (i) the claims against an English-domiciled parent company in relation to the overseas operations of its foreign subsidiary can be heard in the English courts; and (ii) the existence of an arguable claim against an English-domiciled parent company also establishes jurisdiction of the English courts over the foreign subsidiary even if the factual basis of the case occurred almost exclusively in the foreign state. Some further important observations can be made.

First, if the parent company merely held shares in the capital of a foreign subsidiary this would not lead to the establishment of a duty of care and additional circumstances are required to conclude whether the parent company could be held responsible. Second, the parent's direct and substantial oversight of the subsidiary's operations in question, including specific environmental and technical deficiencies of the infrastructure in the host state, is likely to give rise to the duty of care. Thus, the Court of Appeal was persuaded by the evidence on Vedanta's direct training, administrative, financial, strategic and environmental support in the implementation of KCM's mining infrastructure and by statements regarding the commitment to address environmental problems resulting from KCM's operations.⁷³ Third, engagement in a mini-trial on the substantive liability issues is not appropriate at the early jurisdictional stage of proceedings, before full disclosure of the relevant documents.⁷⁴ Such approach is in line with the existing authorities stating

63 Ibid., [99].

64 Ibid., [141].

65 Ibid., [168].

66 Ibid.

67 See further A. Bell, *Forum Shopping and Venue in Transnational Litigation* (2003), pp. 104-107.

68 *Lungowe v Vedanta*, supra note 20.

69 Ibid., [83].

70 Ibid.

71 Ibid.

72 Ibid., [90].

73 Ibid., [84].

74 Ibid., [86], [90].

that a ‘real issue to be tried’ test is not a high one.⁷⁵ The claimant is not required to establish the facts on the merits, but rather to show that the cause of action is plausible (or, in other words, that the claim is not bound to fail).⁷⁶ Fourth, in the context of applying the ‘necessary or proper party’ gateway, the practical objectives of avoiding two trials on similar facts and events in different parts of the world outweigh the need for the existence of a territorial connection between England and the claim against a foreign subsidiary of the English-domiciled parent company. Finally, assertion of jurisdiction over foreign subsidiary in Tort Liability Claims is also heavily impacted by the absence of *forum non conveniens* control under English common law over claims against English-domiciled parent companies.

TNCs have unprecedented abilities to search for the most efficient law for establishing corporate headquarters and running their operations.⁷⁷ The current legal framework confers distinct regulatory and economic advantages to TNCs allowing parent companies to establish business presence in multiple jurisdictions without bearing the burden of having to defend there. The resolution of the jurisdictional inquiry in *Vedanta* has clearly confirmed that domicile as a cornerstone of the Brussels I regime makes it possible for the English court to assert jurisdiction over English-domiciled parent companies in Tort Liability Claims, no matter where the cause of action arose and without the possibility of subjecting the claim to *forum non conveniens* control under English traditional rules. Such approach is justifiable.⁷⁸ It has an advantage of predictability for both claimants and defendants. It also ensures that a jurisdictional inquiry is dealt with efficiently in terms of duration and costs. Moreover, the English-domiciled parent company is sued in England for the acts and omissions allegedly occurred within the forum and, therefore, a genuine link exists between England and the dispute.

There is little room for the argument that the parent company could not have foreseen the litigation regarding overseas corporate abuses in its home state. The facts that parent companies are incorporated in England, run their global operations from there, and manage and direct subsidiaries’ activities from England indicate that English courts are a suitable forum to decide a dispute involving parent company as a defendant. Where English-domiciled companies choose to undertake activities abroad, the political and economic link between itself and the home state does not cease to exist. They remain subject to the regulatory requirements imposed by their home states. The choice of England, as well as other home states, as the jurisdiction for establishing the head office of the corporate group is generally explained by multiple advantages gained by the parent company by virtue of this decision.⁷⁹ TNCs enjoy the benefits of a stable political climate, access to capital markets, economic expansion, advanced corporate law, etc. It is not, therefore, unreasonable or unfair to expect that the English-domiciled parent company of TNC would also be subject to the jurisdiction of the English courts.

Following the analysis of the *Vedanta* case, it may appear that the current rules of jurisdiction are no longer a major issue for the victims of corporate wrongs seeking for a judicial remedy in the English courts. At the same time, recent case law has demonstrated that the claimants may still struggle with asserting personal jurisdiction of the English courts over local and foreign legal entities of the TNC. This may happen when (i) the claimants fail to establish an arguable claim regarding the breach of the duty of care by the English-domiciled parent company;⁸⁰ or (ii) the claims against the foreign subsidiary are brought before the English courts in the absence of a legal claim against the English-domiciled parent company.⁸¹ These legal problems will be addressed in the next two sub-sections.

75 *Aeroflot – Russian Airlines v Berezovsky* [2013] EWCA Civ 784 [115].

76 *AAA v Unilever Plc*, supra note 20, [76].

77 H. Eidenmuller, ‘Transnational Law Market, Regulatory Competition, and Transnational Corporations’, (2011) 18 *Indiana Journal of Global Legal Studies*, no. 2, p. 729.

78 See also discussion in P. Muchlinski, ‘Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases’, (2001) 50 *International & Comparative Law Quarterly*, pp. 11-14; P. Rogerson, ‘The Common Law Rules of Jurisdiction of the English Courts over Companies’ Foreign Activities’, in P.J. Slot & M. Bulterman (eds.), *Globalisation and Jurisdiction* (2004), pp. 100-101.

79 Rogerson, supra note 78, p. 101.

80 *His Royal Highness Okpabi v Royal Dutch Shell*, supra note 20.

81 *Young v Anglo American South Africa Ltd* [2014] EWCA Civ 1130.

3.2 *Okpabi v Shell* and the challenge of a 'real issue to be tried' test

Unlike in *Vedanta*, the foreign claimants in *Okpabi v Shell* failed to establish jurisdiction of the English courts over claims against Royal Dutch Shell, an English-domiciled parent company ('RDS'), and its Nigerian operating subsidiary Shell Petroleum Development Company of Nigeria Ltd ('SPDC').⁸² Two sets of proceedings were commenced against RDS and SPDC by Nigerian citizens. The first claim was brought on behalf of the Ogale community, while the second was initiated by the inhabitants of the Bille Kingdom in Nigeria. Both claims alleged serious and ongoing pollution and environmental damage caused by oil spills arising out of Shell's operations in and around the claimants' communities. The claimants argued that RDS had breached its duty to ensure that SPDC's operations in the Niger Delta did not cause harm to the environment and their communities. The claims against SPDC were brought on the basis that it was a necessary or proper party to the proceedings against RDS. The defendants argued that both claims had nothing to do with England and should proceed in Nigeria.

On 26 January 2017, Fraser J, sitting as a judge of the High Court, ruled that claims against RDS and SPDC could not proceed in the English courts. In accordance with the English common-law rule, discussed above, it was necessary for the judge to establish that there was a real issue to be tried between RDS and the foreign claimants. This jurisdictional test was resolved by answering the question of whether there was an arguable claim on the existence of a duty of care on RDS in relation to the environmental damage caused by SPDC. Fraser J followed the list of principles developed by Coulson J in *Vedanta* to determine the scope of the parent company's duty of care.⁸³ In the judge's view, the claimants had difficulty with the second and third factors of the *Caparo* test, namely proximity and that it would be fair, just and reasonable to impose a duty of care on RDS.⁸⁴ Fraser J reached such conclusion by virtue of analysing the Shell Group corporate structure. In particular, to demonstrate the lack of proximity he relied on the facts that (i) RDS was not a direct parent of SPDC; (ii) only two officers of RDS were members of the Executive Committee of the Shell Group; (iii) RDS was merely a holding company and did not itself conduct any oil exploration in Nigeria; (iv) the duty of care imposed on RDS might be too broad taking into account the number of Shell's subsidiaries in more than 100 jurisdictions.⁸⁵ In sum, Fraser J held a very conservative position to the concept of separate legal personality between RDS and SPDC.

Fraser's overall conclusion that the claimants had not established an arguable duty of care assumed by RDS to SPDC's employees and that, hence, there was no real issue to be tried by RDS and the claimants, was upheld, albeit with a different argumentation, by the Court of Appeal in a split decision.⁸⁶ Lord Justice Simon, writing the leading judgment, again focused on the factor of proximity from the *Caparo* test and evidence of RDS's operational control over subsidiaries' activities.⁸⁷ While Simon LJ recognised that RDS had established a centralised system of mandatory design and engineering across all Shell subsidiaries, it was insufficient to find that RDS exercised material control over SPDC's material operations.⁸⁸ He specifically distinguished between parent companies that control the material operations of the subsidiaries and parent companies that issue mandatory policies and standards for application throughout the group companies in order to ensure conformity with particular standards.⁸⁹ Sir Geoffrey Vos, the Chancellor of the High Court, supported Simon LJ's reasoning by arguing that the claimants had failed to present evidence on RDS' high level of involvement in the direction and oversight of SPDC's day-to-day operations.⁹⁰ He concluded that RDS did not exercise control going beyond the level generally carried out by parent companies over their subsidiaries, such as parental approval of subsidiary's financial decisions and issue of high-level mandatory policies, standards and manuals.⁹¹ The overall reasoning of the judgment suggests that the majority of the

82 *His Royal Highness Okpabi v Royal Dutch Shell* [2017] EWHC 89 (TCC); *His Royal Highness Okpabi v Royal Dutch Shell*, supra note 20.

83 See notes 57-60 and accompanying text, supra.

84 *His Royal Highness Okpabi v Royal Dutch Shell*, supra note 82, [114]-[115].

85 *Ibid.*, [114].

86 *His Royal Highness Okpabi v Royal Dutch Shell*, supra note 20.

87 *Ibid.*, [86]-[129].

88 *Ibid.*, [121]-[122].

89 *Ibid.*, [89].

90 *Ibid.*, [205].

91 *Ibid.*

Court of Appeal's judges required evidence of significant involvement of RDS in the day-to-day operations of SPDC and of operations control, including imposition (as opposed to promulgation) and enforcement of mandatory design and engineering practices.⁹²

By contrast, Lord Justice Sales disagreed with his colleagues and concluded that the claimants had shown at the jurisdictional stage that they had a good arguable case that RDS owed and had breached a duty of care resulting in harm to the claimants.⁹³ In his view, the presented evidence indicated that RDS had the control over and the management of the operation and security of the pipeline and, hence, the risk of spills from the pipeline, to a material degree.⁹⁴ In particular, Sales LJ was persuaded by the evidence in relation to the Shell group's organisation of affairs through RDS's central control over Nigerian operations; powers of the RDS Executive Committee to control the subsidiary's operations and Shell's public statements on the protection of the environment and health.⁹⁵ He agreed with his colleagues that setting global group standards for guiding subsidiaries' operations in itself was not sufficient for RDS to have a duty of care.⁹⁶ Nevertheless, Sales LJ concluded that the existence of such standards 'was capable of providing a mechanism for the projection of real practical executive control by RDS's [top management], if they wished to'.⁹⁷ Moreover, he took into account the fact that part of the remuneration of members of RDS's Executive Committee was linked to their success in controlling environmental damage, thus making them personally interested in ensuring that they could exercise effective control in managing that risk.⁹⁸ Overall, Sales LJ concluded that the claimants had shown 'on the evidence available that they have a case which is more than merely speculative' on the alleged duty of care owed to them by RDS.⁹⁹

The important Court of Appeal decision in *Okpabi v Shell* raises several points for discussion. First of all, it is submitted that the court took a highly restrictive approach for the imposition of the duty of care on English-domiciled parent companies in relation to the overseas activities of their subsidiaries. The majority's interpretation of the 'proximity' factor of the three-part *Caparo* test departs from the *Chandler* approach, where the Court of Appeal specifically noted that the proof of parent company's specific actions on devising or implementing subsidiaries' operational policies is not required and responsibility may be imposed for omissions to take precautionary steps or give advice.¹⁰⁰ In *Chandler*, Cape's state of knowledge about the factory operated by the subsidiary and its superior knowledge about the nature and management of asbestos risk was one of the key factors for holding that Cape had a duty of care owed to the subsidiary's employees and could have given the subsidiary adequate instructions to ensure the employees' safety.¹⁰¹ However, in *Okpabi*, the Court of Appeal failed to address the requirement of 'proximity' in a similar manner and consider whether there was an omission on behalf of RDS to advise SPDC on specific steps to protect the claimants from the environmental damage caused by the oil leaks.

The second serious shortcoming of the Court of Appeal's majority decision in *Okpabi* is an unreasonably high burden on the claimants to establish an arguable case on the duty of care at the jurisdictional stage of proceedings. Just as Fraser J, Simon LJ and Chancellor Vos engaged in a thorough analysis of the liability argument at the interlocutory stage before full disclosure of the evidence and full legal submissions on these points. The scrupulousness of identifying whether sufficiency and completeness of evidence on each of the factors of *Chandler* was presented by the claimants at such an early stage of the proceedings is somewhat surprising and raises at least two concerns. Firstly, both Fraser and the majority of the Court of Appeal went beyond the generally accepted statement that demonstration of the 'real issue to be tried' requirement is not a high test.¹⁰² Instead, the claimants were required to establish a 'winnable' case on the

92 Ibid.

93 Ibid., [134].

94 Ibid., [144].

95 Ibid., [153].

96 Ibid., [161].

97 Ibid.

98 Ibid., [162].

99 Ibid., [136].

100 *Chandler v Cape plc*, supra note 18.

101 Ibid., [78].

102 See notes 75-76 and accompanying text, supra.

existence and breach of duty of care by RDS in respect of SPDC's operations.¹⁰³ Arguably, such approach blurs the boundary between jurisdictional inquiry and resolution of the case on the merits. In *Vedanta*, as seen above, the High Court and the Court of Appeal specifically acknowledged that resolution of the issue of jurisdiction should not be transformed into a mini-trial of the substantive legal points.¹⁰⁴ In this respect, Salles LJ offered a far more sensible approach to the resolution of the jurisdictional question in *Okpabi* suggesting that the claimants should only be required to demonstrate that they have a 'more than merely speculative' case on the alleged duty of care owed to them by RDS.¹⁰⁵

Second, imposing at such an early stage of the proceedings a high evidential burden on the claimants, who rarely have access to the internal corporate documentation of TNCs, calls into question the future of Tort Liability Claims in the English courts. The ability of victims of corporate abuses to access evidence in support of their claims against parent companies has already been identified as one of the principal practical hurdles in commencing Tort Liability Claims.¹⁰⁶ In the majority of cases, the affected individuals do not possess all of the relevant information on the peculiarities of the control relationship in the corporate structure and actual involvement of the parent companies in the subsidiary's day-to-day activities. In *Vedanta*, the Court of Appeal considered the fact that the evidence sufficient to establish a duty of care may not be available at the early stages of the case as one of the few propositions material to the resolution of the 'real issue to be tried' inquiry.¹⁰⁷ Some commentators have already argued in favour of legal reform to reverse the burden of proof in Tort Liability Claims.¹⁰⁸ In the absence of legislative developments in this field and in light of the Court of Appeal's decision in *Okpabi*, however, foreign claimants may experience difficulties in providing evidence to support their claims against the English-domiciled parent companies.

3.3 Silicosis litigation against Anglo American Group and the concept of 'central administration' in the context of Tort Liability Claims

Both *Vedanta* and *Okpabi v Shell* were commenced against English-domiciled parent company and a foreign subsidiary as co-defendant. As seen in the previous sub-sections, the existence of a claim against English-domiciled parent company allowed foreign claimants to trigger the application of the 'necessary or proper party' gateway under English common law in relation to the claims against a foreign subsidiary. The Anglo American Group litigation is the only example of claims brought before the English court directly against the foreign subsidiary (i.e. without alleging the parent company's liability).¹⁰⁹ The South African claimants contended that they had suffered from silicosis and silico-tuberculosis in the course of their employment by AASA, the South African company.¹¹⁰ The claimants argued that the central administration and/or the principal business of AASA was in London, since this was the location of Anglo American plc, its English-based parent company,¹¹¹ and that it followed that AASA was domiciled in England under the meaning of Brussels I. Anglo American plc only became the parent company of AASA in 1999 (after the disputed events took place) and, thus, did not face any liability claims. It is for this reason that the claimants could not follow the scenario commonly used in other Tort Liability Claims, and had to employ a creative argument on the location of the 'central administration' to expose the foreign subsidiary to the jurisdiction of the English courts directly under Brussels I.

103 L. Roorda, 'Okpabi v. Shell on Appeal: Foreign Direct Liability in Troubled Waters' (2018), <<http://rightsasusual.com/?p=1194>> (last visited 8 May 2018).

104 *Lungowe v Vedanta Resources Plc*, supra note 50, [62]; *Lungowe v Vedanta*, supra note 20, [90].

105 *His Royal Highness Okpabi v Royal Dutch Shell*, supra note 20, [136].

106 Skinner et al., supra note 34, p. 52; McCorquodale, supra note 34, pp. 17-19; J. Zerk, 'Corporate Liability for Gross Human Rights Abuses – Towards a Fairer and More Effective System of Domestic Law Remedies' (2014).

107 *Lungowe v Vedanta*, supra note 20, [83].

108 F. Gregor, 'The EU's Business: Recommended Actions for the EU and its Member States to Ensure Access to Judicial Remedy for Business-Related Human Rights Impacts' (2014); Leigh Day, 'Submission to the Joint Committee on Human Rights Inquiry on Business and Human Rights', news release, 31 August 2016; C. van Dam et al., 'Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care', in J.J. Álvarez Rubio & K. Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (2017).

109 *Vava v Anglo American South Africa Ltd* [2013] EWHC 2131 (QB); *Young v Anglo American South Africa Ltd*, supra note 81.

110 The second action against the defendants was brought by Ms. Young, who alleged that the AASA was vicariously liable for the negligence of the doctors.

111 The claimants had abandoned their submission that AASA had its principal place of business in England at the later stages of the proceedings.

At a procedural hearing before Silber J, the claimants submitted that the ‘central administration’ of the company was the place where ‘the important decisions are made; the entrepreneurial management takes place’.¹¹² The defendants agreed, but contended that the decisions of the company itself, and not the ultimate parent company, were essential.¹¹³ Silber J decided that the claimants had established a good arguable case that the management decisions of AASA were taken in England.¹¹⁴ In expressing this view, the judge placed considerable weight on the influential management functions exercised by the ultimate parent company over the Anglo American Group and refused to accept that the ‘central administration’ was simply the place where the subsidiary’s board and shareholder meetings were held.¹¹⁵

When the time came for the jurisdictional question to be decided, however, the English court concluded that it had no jurisdiction, a decision that was later upheld on appeal. In 2013, Smith J held that irregular meetings of AASA’s board of directors held in South Africa were sufficient for taking decisions in the nature of the business of the company¹¹⁶ and, subsequently, that AASA did not carry on any functions in England.¹¹⁷ In his analysis of the role of the parent company in the management of its subsidiary, Smith J did not accept the preliminary views of Silber J and stressed that a distinction should be drawn between ‘AA plc *influencing* decisions and *determining* decisions’ (emphasis added).¹¹⁸ The claimants argued that the definition of ‘central administration’ in Brussels I was unclear and required interpretation by the CJEU.¹¹⁹ Smith J, however, determined that there was no uncertainty and no further action was required.¹²⁰ His Honour’s decision was unanimously supported by the Court of Appeal who defined ‘central administration’ as the place ‘where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company’s operations’.¹²¹ The Court of Appeal considered the integrated nature of the Anglo American Group, but declined to find that decisions of the parent company with respect to the operations of the group had any relevance in determining the domicile of the subsidiary.¹²²

The significant decision in *Young v AASA* is an influential one, confirming that it is challenging, if not impossible, to assert jurisdiction over a foreign subsidiary under Article 4 of Brussels I. While the concept of ‘central administration’ for the purposes of Brussels I was clarified, the uncertainty of exercising jurisdiction over subsidiaries that share an element of common management and control with a parent company has not been fully resolved, however. The Court of Appeal’s decision raises at least two concerns about jurisdictional significance of the integrated nature of a TNC and its managerial organisation. The first one is related to the court’s great reliance on Everling’s definition of ‘central administration’ provided in the context of freedom of establishment in the common market under what is now Article 48 of the Treaty on the Functioning of the EU:

The central administration is located where the company’s organs take the decisions that are essential for the company’s operations. In this connection, only the organs of the company itself count; it is irrelevant whether the company depends upon the decisions of a parent company which has its domicile outside of the Community.¹²³

This definition was given in 1964 without any intention for it to be applied as a ‘one size fits all’ answer for all EU legislation that uses the phrase ‘central administration’ (including Brussels I). Since then the corporate and organisational structure of TNCs as the main vehicles of globalisation has changed significantly. Multinationals operating in the 21st century represent much more complex commercial arrangements functioning through

112 *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), [17].

113 *Ibid.*

114 *Ibid.*, [59].

115 *Ibid.*, [43]-[57].

116 *Vava v Anglo American South Africa Ltd*, *supra* note 109, [37].

117 *Ibid.*, [72].

118 *Ibid.*, [38].

119 *Ibid.*, [1].

120 *Ibid.*, [75].

121 *Young v Anglo American South Africa Ltd*, *supra* note 81, [45].

122 *Ibid.*, [48].

123 U. Everling, *The Right of Establishment in the Common Market* (1964), p. 75.

a globally integrated network of affiliates. To what extent should this legal and business transformation of TNC impact the jurisdictional analysis? Is Everling's interpretation of 'central administration', provided in a different economic reality, still accurate today? These considerations, however, were not addressed by the Court of Appeal.

A related concern arises with respect to the Court of Appeal's decision to link the central administration of the company to the place where essential decisions for that company's operation are adopted. The judgment was criticised for failure to identify the nature of 'essential decisions' for the company's operations.¹²⁴ In the view of the Court of Appeal, day-to-day operations of the company constitute its 'essential decisions'. It must be kept in mind, however, that the parent company of a TNC may be involved in adopting decisions related to the budget, financing, and approval of key projects of the subsidiary. The importance of such decisions cannot be underestimated because they may have a decisive influence for the subsidiary's existence and operations. Does financial control over the subsidiary's operations, such as budgeting, business planning and investment decisions, constitute essential decisions? How should the parent company's powers to appoint and retain control over directors and key personnel be classified? If the subsidiary adopts and follows parents' policies and procedures, does it have impact on the subsidiary's decision-making process and impact the location of the 'essential decisions'? The Court of Appeal's definition of 'central administration' fails to answer these questions unambiguously.

Establishing jurisdiction in the home state of a parent company in respect of harm caused by the direct conduct of its subsidiary in a host state is one of the greatest hurdles faced by foreign citizens. The *Anglo American Group* case law demonstrated that foreign subsidiaries are currently not at risk of being sued before the English courts under the rule of domicile of Brussels I. It has been suggested that home states should introduce a rebuttable presumption of control in determining the subsidiary's 'central administration' in the parent company's state of incorporation.¹²⁵ Other commentators called for the home states to assert jurisdiction over claims against the overseas subsidiary of TNC on the basis of the *forum necessitatis* doctrine when no other effective forum guaranteeing a fair trial is available.¹²⁶ Following *Naït-Litman v Switzerland*, however, this doctrine has an uncertain future.¹²⁷ In this case, the European Court of Human Rights considered that international law did not impose on Swiss authorities the obligation to exercise jurisdiction on the basis of *forum necessitatis* over a civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted on Mr. Naït-Liman in Tunisia. In the absence of legislative developments in this field, however, foreign claimants would experience difficulties in pursuing in the English courts claims against overseas subsidiaries in the absence of an arguable claim against the English-domiciled parent company.

4. Tort Liability Claims: The way forward

Tort Liability Claims are considered to be an important regulator of TNCs' environmental management,¹²⁸ the pursuit of corporate responsibility¹²⁹ and the protection of human rights.¹³⁰ This legal instrument has received a positive evaluation among academics, human rights lawyers and NGOs.¹³¹ The statements on the forward-looking consequences of Tort Liability Claims are justified to a certain extent, but it is also important to look at the overall impact of the increasing trend of litigating against TNCs in their home states.

124 A. Dickinson & E. Lein (eds.), *The Brussels I Regulation Recast* (2015), pp. 548-549.

125 J.J. Álvarez Rubio & K. Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (2017), p. 13.

126 Committee on Civil Litigation and the Interests of Public, 'International Civil Litigation for Human Rights Violations' (2012).

127 *Naït-Litman v Switzerland*, Decision of 15 March 2018, application no. 51357/07.

128 M. Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer', (2001) 41 *Washburn Law Journal*, p. 424.

129 H. Ward, 'Governing Multinationals: The Role of Foreign Direct Liability', *Briefing Paper New Series No. 18* (2001), <http://www.iatp.org/files/Governing_Multinationals_The_Role_of_Foreign_D.pdf> (last visited 24 September 2017); A. Magaisa, 'Corporate Groups and Victims of Corporate Torts – Towards a New Architecture of Corporate Law in a Dynamic Marketplace', (2002) *Law, Social Justice & Global Development*, no. 1, <https://www2.warwick.ac.uk/fac/soc/law/elj/igd/2002_1/magaisa/> (last visited 24 September 2017).

130 J. Kirshner, 'A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses', (2015) 13 *Northwestern Journal of International Human Rights*, no. 1.

131 L.C. Pineiro & X. Kramer, 'The Role of Private International Law in Contemporary Society: Global Governance as a Challenge', (2014) 7 *Erasmus Law Review*, no. 3, p. 110.

It may be argued that the entire debate on international corporate accountability is undesirable, as it presents a serious threat to the undoubted benefits of transnational business activity. The prospect of facing private claims beyond the traditional understandings of territorial jurisdiction may affect the way in which decisions are made on the structuring of corporate operations. In 1998, the Lord Chancellor's department, in a restricted consultation letter, argued that increasing litigation against TNCs in the English courts could influence their decision to move headquarters to a different jurisdiction.¹³² Special legislation to reverse the House of Lords' ruling in *Connelly v RTZ* was even considered.¹³³ The flipside of Tort Liability Claims is relocation of Western corporations from the host states, whose welfare inter alia depends on the presence of large corporate groups. When Mr. Connelly's claim was being litigated in the English courts, the lawyers of the corporate defendant suggested that their client was considering shifting its investments from South Africa.¹³⁴

The lack of a single precedent on parent company liability considerably limits the possible advantages of Tort Liability Claims. To date, all cases have either fallen on procedural grounds or been settled after the jurisdiction of the home state court was upheld. The latter outcome may be indicative on its own because it demonstrates that corporations are only willing to negotiate a settlement once the first test (i.e. decision on the acceptance of jurisdiction) is resolved in the claimants' favour. It is not in the interests of TNCs to continue to defend cases if this may have the far-reaching consequences of an ultimate judgment.¹³⁵ The claimants' lawyers, who often pursue litigation on the basis of contingency fees, are equally not interested in lengthy expensive litigation.¹³⁶

Some commentators have argued that the compensatory nature of Tort Liability Claims also raises questions as to their efficiency as a tool for regulating corporate responsibility.¹³⁷ Most of the time, monetary redress is the primary reason for claimants bringing an action against a parent company. The subsequent consequences of Tort Liability Claims include media pressure on the companies to give greater consideration to the social impact of their operations, the implementation of policies on corporate social responsibility, and greater public attention to patterns of corporate behaviour in host states.¹³⁸ At the same time, it is not yet obvious whether the indirect effects of litigation in home states truly result in the establishment of global standards of responsible corporate behaviour, or simply contribute to maintaining the positive public image of large multinationals. Claims differ on facts and are decided on a case-by-case basis. Tort Liability Claims do not attempt to create a universal standard of corporate accountability applicable irrespectively of the location of the claimants, or the management centre and operations base of the corporate group. It may be argued that Tort Liability Claims in which the argument is framed on the basis of a duty of care in England give insufficient regard to the lack of remedy in the host states. Indeed, tort litigation in the home state does not directly consider the subsidiary's misconduct and what actions the host state may take to address this misconduct.

The role of Tort Liability Claims in managing corporate behaviour also depends on one's view of the scope of domestic courts' power to adjudicate disputes. The rules of jurisdiction play a significant, if not a decisive, role in the framework of Tort Liability Claims. Not only is the question of jurisdiction the first for the parties and the court to face, but the regulatory consequences of the court's decision could be tremendous. Indeed, the national courts of the home states may be viewed as a means for granting foreign citizens access to justice. The decision of the court of the developed state to accept jurisdiction over a Tort Liability Claim could open the door for claimants to conduct proceedings with experienced jurists and the potential for significant damage awards. It may, at the same time, constitute an intervention in the internal affairs of another sovereign since the dispute still has a strong connection with the territory of the host

132 Ward, *supra* note 21, p. 466.

133 *Connelly v RTZ*, *supra* note 9.

134 Ward, *supra* note 21, p. 122.

135 Zerk, *supra* note 4, p. 207.

136 Meeran, *supra* note 19, p. 10.

137 Ward, *supra* note 24, p. 136.

138 See generally Zerk, *supra* note 4, p. 236.

state. The potential of national rules on jurisdiction to accept a regulatory function, however, is subject to solving various theoretical puzzles.

The rules of jurisdiction are one of the three issues resolved by private international law. Historically, the role of the discipline has primarily been to determine the jurisdiction and applicable law in civil cases with a foreign element without deciding the dispute itself. The conventional understanding of private international law is based on Savigny's paradigm of value-neutrality.¹³⁹ However, the impacts of globalisation require the law to respond to the new demands of economic growth. Reluctance of private international law to become involved in the regulation of cross-border economic activities has been challenged.¹⁴⁰ Commentators have questioned the identity of the discipline and even such fundamentals as the private/public divide in international law.¹⁴¹ Attention has been also drawn to the inefficiency of private international law to address the issues of corporate accountability¹⁴² and 'transnational liftoff of the private actors'.¹⁴³

The shift from the value-neutrality paradigm to the regulatory role of the rules of private international law is limited by the absence of international consensus on the legal implications of the concept of TNC and of universally recognised standards of corporate behaviour. So far, the international effort on establishing public control over private operations of TNCs has been largely unsuccessful. The focus was on public international law but the dialogue between the sovereigns has only resulted in numerous soft-law initiatives criticised for their lack of enforcement.¹⁴⁴ Analysis of Tort Liability Claims and patterns of corporate behaviour in the host states demonstrate that far-reaching jurisdictional conflicts are inevitable.

The problem of extraterritoriality and the complexity of issues arising out of Tort Liability Claims require a coordinated international response to the challenges of cross-border corporate activities. In the absence of a comprehensive international treaty on the issues of business and human rights, one of the possible solutions would be framing uniform jurisdictional rules for the Tort Liability Claims at the international level as a response to the existing regulatory vacuum, where the courts of the home state have limited or no authority to adjudicate the dispute arising from the activities of the overseas subsidiaries and the host state is unwilling or unable to address corporate abuses, driven by the socio-economic benefits of the foreign direct investment. It may be argued that private international law should not close the gap in group liability through unilateral transformation of judges into agents of justice by substituting the norms of public international law and substantive domestic law governing overseas operations of business actors. Rather, it may engage where appropriate and the uniform rules of jurisdiction are capable of balancing the regulatory impact of these jurisdictional rules with its potential to cause inter-state jurisdictional conflicts. Tort Liability Claims offer the discipline an opportunity to reconsider its role and contribute to the debate on international corporate responsibility. ■

139 F.K. Von Savigny, 'Private International Law. A Treatise on the Conflict of Laws' (translated by William Guthrie) (1869).

140 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* (2014), pp. 1-6; F. Juenger, 'Private International Law or International Private Law?', (1994) 5 *King's College Law Journal*, pp. 49-51.

141 A. Mills, 'The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law' (2009).

142 H. Muir Watt, 'European Integration, Legal Diversity and the Conflict of Laws', (2004) 9 *Edinburgh Law Review*, no. 1, p. 16.

143 In the terms of Robert Wai in his significant article R. Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', (2001) 40 *Columbia Journal of Transnational Law*.

144 M. Kamminga & S. Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction', in M. Kamminga & S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (2000), p. 9.