Jurisdiction to Sue a Parent Company in the English Courts for the Actions of its Foreign Subsidiary: *Vedanta v Lungowe* and Post-Brexit Implications

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Introduction

This article will examine the private international law and substantive liability issues in proceedings against UK based parent companies for the actions of foreign subsidiaries. The UK Supreme Court's landmark decision in *Vedanta v Lungowe* will be assessed.[1] Moreover, the post-Brexit implications for the viability of such claims before English courts will be considered. In the context of business-related civil claims for human rights violations, the European Parliament's Committee on Legal Affairs has recently presented a draft proposal with recommendations to the Commission on corporate due diligence and corporate accountability.[2] These proposals include amendments to the European Union's ('EU') Brussels Ia Regulation and the Rome II Regulation.[3] The author will introduce these new developments on jurisdiction and the applicable law in relation to corporate human rights abuse claims against EU based parent companies for the actions of foreign subsidiaries.

The Emerging Accountability of Multinational Companies for Human Rights Violations in the Developing World

It could be argued that access to justice over human rights abuse claims against parent companies for the actions of subsidiaries should not be easily granted because it would interfere with the *laissez-faire* business efficacy promoted by the corporate and jurisdictional veils.[4] The emerging jurisprudence on parent company liability would also diverge from the usual restrictive approach of the English courts to piercing the corporate veil.[5] However, the fundamental human right of access to justice and the need for corporate due diligence and accountability necessitates an international consensus on parent company liability. Such an international agreement on substantive parent company liability could be coordinated through private international law's largely untapped global

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[1] *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)

[2] See <https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf>

[3] See 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'); 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').

[4] *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.

[5] 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.

governance potential.[6] 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. Private international law offers a coordinating framework that distributes regulatory authority and may thereby enable disadvantaged litigants from developing countries to seek an appropriate remedy from the parent company abroad. However, a large number of uncoordinated jurisdictional and choice of law norms increase the likelihood of forum shopping, parallel proceedings, conflicting judgments and decisional discord. Private international law's role as facilitator 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').[7] In redressing the balance of power between multinational companies and the adversely affected litigants, private international law also contributes to the UN Sustainable Development Goals.[8]

The doctrine of limited liability of shareholders often prevent victims harmed by a foreign subsidiary's violation of human rights 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.[9] 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.[10]

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,[11] the due diligence approach[12] and the tort based parental duty of care approach.[13] The latter approach has been utilised by English courts and will be the focus of the discussion on private international law and substantive liability issues.

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[6] 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.

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

[8] In particular, Goal 16 and Target 16.3 of the UN Sustainable Development Goals.

[9] G Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 *Wash. & Lee L. Rev.* 1769; B Pettet, 'Limited Liability – A Principle for the 21st Century?' (1995) 48 *Current Legal Problems* 125, 149-150.

[10] 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 (n 9) 152-155.

[11] 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 9) 1819-1822.

[12] 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.

[13] See P Nygh, 'The Liability of Multi-national Corporations for the Torts of Their Subsidiaries' (2002) 3 *European Business Organization Law Review* 51.

The Road 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 would be answered according to standard principles of the law of negligence.[14] In *Chandler v Cape plc*, it was held that the corporate veil was not relevant in tort cases, thus effectively circumventing *Adams v Cape plc*.[15] *Chandler* opened the door for direct tort liability claims against parent companies domiciled in the UK. 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.[16] 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.[17] In applying the *Caparo* test Arden LJ stated:[18]

> 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 has established that his employer's parent company owed him a duty of care. Arden LJ dismissed any suggestion 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.[19] In *VTB Capital plc v Nutritek International Corp*, Lord Neuberger remarked, 'In addition, there are other cases, notably *Adams v Cape Industries plc* [1990]

[14] *Lubbe v Cape plc* [2000] 1 WLR 1545.

[15] *Chandler v Cape plc* [2012] EWCA Civ 525. 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.

[16] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

[17] ibid at 618.

[18] *Chandler v Cape plc* [2012] EWCA Civ 525, [80].

[19] Each company within a group of companies is a separate legal entity with limited liability: *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 corporations 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'.

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).'[20]

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.[21] It is important to highlight that the Supreme Court was considering the jurisdictional question of whether there was an arguable case against Vedanta. It did not have to consider whether Vedanta in fact 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 generally owe a duty of care to third parties for the actions of their foreign subsidiaries.[22] 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.[23]

The decision is significant for multilateral efforts to subject businesses to accountability and due diligence for 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 human rights 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.[24] 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.[25]

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 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

[20] *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [127].
[21] 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.
[22] The decision of the UK Supreme Court in *Okpabi v Shell* on appeal from [2018] EWCA Civ 191 is pending.
[23] See also, Lord Templeman's judgment in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 465.
[24] *Vedanta v Lungowe* [2019] UKSC 20, [2].
[25] Ibid [3].

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.[26] In considering whether England or Zambia is the proper place to hear claims against Konkola, the Supreme Court vindicated the approach that the respondents can 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. 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.[27] The court of first instance also concluded that Vedanta's group wide policies created a real triable issue against the parent company.[28] 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'.[29] 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 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'.[30]

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.

[26] The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011).
[27] *Vedanta v Lungowe* [2019] UKSC 20, [56].
[28] Ibid [24].
[29] Ibid [49].
[30] *AAA & Others v. Unilever Plc and Unilever Tea Kenya Ltd.* [2018] EWCA Civ 1532, [36].

Provided health, safety and environmental training across its group 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'.[31]

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 can be brought in the courts of the Member State where the company is domiciled.[32] 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.[33] 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 Regulation. Moreover, in the context of Article 4 of the Brussels Ia Regulation it can be further argued that Articles 33 and 34 of the Regulation have codified the instances where prior parallel proceedings outside the EU may result in a stay of proceedings. 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.[34] 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.'[35] This *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'.[36]

[31] *Vedanta v Lungowe* [2019] UKSC 20, [51].
[32] Articles 4(1) and 63 of the Brussels Ia Regulation.
[33] Case C-281/02 *Andrew Owusu v NB Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-01383 (Grand Chamber).
[34] Civil Procedure Rules, Practice Direction 6B.
[35] Civil Procedure Rules, Practice Direction 6.37(3).
[36] *Vedanta v Lungowe* [2019] UKSC 20, [88].

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'.[37] 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.[38]

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.[39] 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.[40] 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.[41] 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.[42]

Many of the connecting factors pointed towards Zambia as the proper place. These connecting factors included the applicable law, the place of harm and damage, many respondents did not speak English, the need for translation, the difficulty of traveling 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'.[43]

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

[37] Ibid [71].
[38] Ibid [89].
[39] Ibid [78].
[40] Ibid [81]-[83].
[41] Ibid [82].
[42] Ibid [84].
[43] Ibid [87].

litigated) could be undertaken at all with the limited funding and legal resources' available to the respondents in Zambia.[44] 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.[45] According to Lord Briggs, the first instance judge's approach and the exercise of jurisdiction was justified.

Vedanta is a decision 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 state the responsibilities in the field of business and human rights.[46] 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.[47] 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 also a lingering disconnect between international aspirations and the practical ability of victims to enforce human rights norms against businesses through municipal courts.

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 can 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 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

[44] Ibid [95].
[45] Ibid [97].
[46] See Ruggie Principles, Principles 1, 11, 13 and 14.
[47] Ibid. Principle 14.

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.

Post-Brexit Proceedings Against Parent Companies for the Actions of their Foreign Subsidiaries

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.[48] During the Brexit transition period, 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, ("EU Withdrawal Agreement") contains provisions on jurisdiction, recognition and enforcement of judgment and the applicable law. Article 67(1)(a) of the EU Withdrawal Agreement stipulates that, jurisdiction will be governed by the Brussels Ia Regulation where proceedings are commenced prior to the end of the transition period.[49] 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.

Post-Brexit, the continued application of the Brussels Ia Regulation is not possible because the Regulation derives its legal basis from an EU Treaty.[50] The English courts will revert to the broader application of the common law doctrine of *forum non conveniens* even in cases where it cannot currently be employed as a result of the constraints of EU civil procedural law.[51] 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.[52] 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 English court deciding not to stay proceedings.[53]

[48] For other recent examples, see, *AAA & Others v. Unilever Plc and Unilever Tea Kenya Ltd.* [2018] EWCA Civ 1532; *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* [2018] EWCA Civ 191. The decision of the UK Supreme Court in *Okpabi v Shell* is pending.

[49] The Brexit transition period ends on 31 December 2020.

[50] Article 288 TFEU.

[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).

[52] *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460.

[53] See *Connelly v RTZ Corpn plc (No 2)* [1998] AC 854, 873 (Lord Goff of Chieveley); *Lubbe v Cape plc* [2000] 1 WLR 1545, 1555 (Lord Bingham of Cornhill). 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: *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].

In relation to the applicable law for non-contractual obligations, the UK has decided to adopt the Rome II Regulation as retained EU law.[54] 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.[55] Where a parent company is sued in relation to the activities of a foreign subsidiary, 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. This could be a law that is ill-suited or disadvantageous 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 and prove the content of foreign law.[56] 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.

On 11 September 2020, the European Parliament's Committee on Legal Affairs presented a draft proposal with recommendations to the Commission on corporate due diligence and corporate accountability.[57] The draft proposal recommends a directive containing substantive rules on corporate due diligence and corporate accountability and amendments to EU private international law instruments. Amendments are proposed for the Brussels Ia Regulation which are designed to provide claimants from third states access to justice in the courts of the EU Member States. An amendment to the Rome II Regulation on the law applicable to non-contractual obligations is also proposed.

In the context of business-related civil claims for human rights violations, the proposed amendments to EU private international law instruments include the creation of a *forum necessitatis* rule.[58] A rule that accords jurisdiction to the Member State where a company operates and the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship has also been proposed.[59] The law applicable to non-contractual obligations will be the law under Article 4(1) or the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.[60]

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

[55] Article 3 of the Rome II Regulation.

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

[57] See <https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf>

[58] See G Van Calster, 'First analysis of the European Parliament's draft proposal to amend Brussels Ia and Rome II with a view to corporate human rights due diligence' <https://gavclaw.com/?s=european+parliament+draft>; C Thomale, 'Chris Thomale on the EP Draft Report on Corporate Due Diligence' <https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/>

[59] Ibid.

[60] For conflicting views on the need for and substance of the new choice of law rule see, J von Hein, 'Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims' <https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/> and G Rühl, 'Human rights in global supply chains: Do we need to amend the

Conclusions

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 simultaneously preserved and circumvented by the imposition of direct tortious liability on the parent company. The Vedanta judgment facilitates victims of corporate human rights abuses by providing clarity on significant issues in English law. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group wide policies. 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's decision is arguably 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. 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 liberally.[61] 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. Retained EU law creates 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.

The European Parliament's proposed amendments to the EU private international law instruments will not affect the course of international civil litigation before English courts. However, these developments 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.

Rome II-Regulation?' <https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>.

[61] On 15 October 2020, the UK Government announced that it is bringing in regulations at the end of the Brexit transition period (31 December 2020) which will 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.