# Tort Litigation against TNCs in the English Courts

Ekaterina Aristova, a PhD in Law Candidate at the University of Cambridge, has made available on SSRN her article "Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction". Published earlier this month in the Utrecht Law Review the article discusses a recent trend of private claims alleging direct liability of parent companies for overseas human rights abuses ('Tort Liability Claims') focusing on the rules of civil jurisdiction applied by the English courts. It demonstrates how jurisdictional issues arising in Tort Liability Claims challenge the traditional value-neutralism paradigm of private international law as an abstract and technical disciplineby necessitating increasing involvement of domestic courts in the regulation of transnational corporations ('TNCs').

The author has kindly provided us with a brief summary of her key findings:

> *1) Tort Liability Claims are typically initiated in England by private partiesaffected by the activities of TNCs in the host (foreign) state.These arecivil liability cases in which the cause of actionagainst English-domiciled parent companiesis framed through the tort law concept of duty of carerather than the corporate law doctrine of piercing the corporate veil or customary international law on human rights. The allegations are based on the common law principles which provide that in certain circumstances the parent company may be found to have assumed a duty of care, owed to the claimants, to ensure their safety.The article explainsthat duty of care is invoked by the claimants in order to: (1) attribute liability for the overseas abuse to the parent company; (2) establish the necessaryterritorialconnection between the alleged tort and England; and (3) weaken the extraterritoriality concerns raised by the judgment of the English courtswith respect to the events occurred on the territory of the host(foreign)state.*
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> *2) To date, the application of Brussels I and English common law by English courts to Tort Liability Claims has resulted in the development of a jurisdictional solution for claims brought against English-domiciled parent companies and their foreign subsidiaries as co-defendants. The concept of duty of care allows claimants to bring claims against English-domiciled parent*

*companies as anchor defendants so as to allow the joinder of the foreign subsidiary as a necessary or proper party under common law. Following the CJEU's decision in Owusu, the general rule of domicile under Article 4 of Brussels I has a mandatory effect in the proceedings against English-domiciled parent company and claimants cannot rely onthe doctrine of forum non conveniens under English traditional rules. As a result, claims brought against foreign subsidiaries are also likely to survive the forum conveniencescontrol. The overall analysis of the rules of jurisdiction in this article suggests that: (1) claims against the English-domiciled parent company in relation to the overseas operations of its foreign subsidiary can be heard in the English courts; and (2) the existence of an arguable claim against an English-domiciled parent company also establishes jurisdiction of the English courts over the connected claims against the subsidiary even if the factual basis of the case occur almost exclusively in the foreign state.*

*3) 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') in relation to the environmental pollution in Zambia resulting from the KCM's operations. Both the High Court (discussed by the author earlier on this blog) and the Court of Appeal (also refer to author's earlier post) confirmed that Zambian citizens can pursue in England claims against Vedanta and KCM. Decisions of the English courts inVedanta allow making few important observations. Firstly, 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. 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. 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.*

*4) Unlike in Vedanta, the foreign claimants in Okpabi v Shellfailed 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') for the ongoing pollution and environmental damage caused by the oil spills in Nigeria. In 2018, the Court of Appeal in a split decision concluded that the claimants had not established an arguable duty of care assumed by RDS in relation to SPDC's operations and that, hence, there was no real issue to be tried by RDS and the claimants. As a result, claims against RDS and SPDC were dismissed. The article criticises the Court of Appeal decision for two major shortcomings. 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 second serious shortcoming of the Court of Appeal's majority decision in Okpabiis an unreasonably high burden on the claimants to establish an arguable case on the duty of care at the jurisdictional stage of proceedings. Arguably, such approach blurs the boundary between jurisdictional inquiry and resolution of the case on the merits.*

*5) Finally, the article also discusses the Anglo American Group litigation, where 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. The claimants argued that the central administration of AASA was in London, since this was the location of Anglo American plc, its English-based parent company, and that it followed that AASA was domiciled in England under the meaning of Brussels I. 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', declined to find that decisions of the English-domiciled parent company with respect to the operations of the group had any relevance in determining the domicile of the foreign subsidiary. As a result, it is challenging for the claimants in the Tort Liability Claims, if not impossible, to assert jurisdiction over a foreign subsidiary directly without also commencing proceedings against an English-domiciled parent company. The article further criticised Court of Appeal decision for the lack of jurisdictional analysis of the integrated nature of TNCs and their managerial organisation.*

*6) The overall conclusion of the article is that Tort Liability Claims offer the discipline an opportunity to reconsider its role of the neutral mediator in international litigation and contribute to the debate on international corporate accountability. Itis notargued that private international law should 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,the disciplinemay 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.*