UK Supreme Court decision in Vedanta: Finding a proper balance between Brussels I and the English common law rules of jurisdiction

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On 10 April 2019, the UK Supreme Court passed its long awaited decision in *Vedanta v Lungowe* confirming that Zambian citizens, who have suffered from the environmental pollution caused by mining operations in Zambia, can pursue in England claims against Vedanta Resources Plc, an English-domiciled parent company, and Konokola Copper Mines plc, its foreign subsidiary and the owner of the mine ("**Vedanta**" and "**KCM**"). The decision, which has been an object of intense interest in the last weeks, sets important guidelines on the appropriate jurisdictional limits of pursuing claims against English-based transnational corporations ("**TNCs**") in the English courts and the substantive standards of parent company liability. In 2015, Zambian villagers commenced proceedings in the English courts against Vedantaand KCM alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of landcaused by the toxic emissions from a mine operated by KCM in Zambia. The jurisdiction of the English courts was obtained by virtue of Article 4 of the Brussels I Regulation recast ("**Brussels I**"). KCM – the owner and operator of the mine **–** was brought in the English courts under the 'necessary or proper' party gateway. In 2016, the High Court allowed claims against both companies to be heard in England (see author's previous blog for further details). The Court of Appeal later has entirely upheld a High Court ruling (also analysed by the author). The Supreme Court has also confirmed jurisdiction of the English courts to try the case on the merits arguing that claimants will not obtain substantial justice in Zambia. The

judgement addressed four principal issues which are summarised below.

Abuse of EU law

Corporate defendants argued that claimants' attempt to litigate the case in Englandamountsto an abuse of EU law since they have brought ill-founded claims before the English courts against English-domiciled parent company as a local defendant solely for the purposes of joining a foreign-domiciled subsidiary as a co-defendant. So far, an abuse of EU law argument in the context of Brussels I has been only made in relation to Article 8(1) of Brussels I (former Article 6(1)), which permits the joining of connected claims against persons domiciled in different Member States in one jurisdiction to avoid the risk of irreconcilable judgments resulting from separate proceedings. Uncertainty remained, however, over whether the exercise of mandatory jurisdiction under Article 4 of Brussels I could ever be challenged on the grounds that it amounts to an abuse of EU law. The Supreme Court acknowledged the possibility of using the abuse of EU law principle in cases, where Article 4 is used as a means of circumventing or misusing another EU principle or (as was the case in *Vedanta*) the English common law rules of jurisdiction over foreign defendants. The narrow scope of an abuse of EU law test was also confirmed. In particular, the Supreme Court relied on the factual findings made by the lower courts that (i) the claimants established that there was a real issue to be tried against Vedanta; and (ii) the claimants had a genuine desire to obtain a judgment for damages against Vedanta and not merely KCM. Consequently, the abuse of EU law issue was resolved in favour of the claimants.

Parent company's duty of care

The Supreme Court has also made several important findings on the scope of the duty of care of the English-domiciled parent companies in relation to the operation of its foreign subsidiaries. First, it was unequivocally held that intervention of the English-domiciled parent companies in the management of the subsidiaries' operations and their human rights and environmental performance may give rise to a duty of care to third parties, such as local communities. Second, tort litigation against legal entities of TNCs does not involve assertion of a new category of common law negligence liability or amount to novel disputes (as was argued by the corporate defendants). Third, the Supreme Court refused to stick all the cases of parent company liability into specific categories based on the fact

that organisational and management structures of corporate groups vary significantly. Fourth, issuance by the parent company of the group-wide policies may give rise to a duty of care, if the parent company takes active steps to their implementation in the subsidiaries' operations by training, supervision and enforcement. Finally, the Supreme Court claimed that omissions to supervise subsidiaries' operations contrary to the public statements made by the parent company may also lead to the breach of duty of care.

England as a proper forum

The Supreme Court was also faced with the necessity to identify whether England was a proper forum for litigating the case. This question forms part of the *forum conveniens*inquiry for exercising discretion to permit service on a foreign subsidiary as a necessary or proper party. Both the High Court and the Court of Appealconcluded that the existence of an arguable claim against Vedanta made England the most appropriate place for trying the claims against KCM. The courts' reasoning was grounded on the desire to avoid parallel proceedings on similar facts in two jurisdictions. The Supreme Court has, however, took a different view and argued that the purpose of avoiding irreconcilable judgements should be balanced against other connecting factors which link the case with the foreign forum. The Supreme Court further held that – in light of Vedanta's consent to submit to the jurisdiction of the Zambian courts – the claimants have a choice of whether or not to sue Vedanta in England at the risk of irreconcilable judgments. In other words, the risk of irreconcilable judgments ceases to be a "*trump card*" and decisive factor in determining the appropriateness of the forum. Overall, Zambia was identified as the proper forum for pursuing claims against both co-defendants on the basis of several factors (the alleged acts and omissions primarily occurred in Zambia; the claimants are Zambian citizens; the mine is located and operated in Zambia; the damages were sustained by the claimants in Zambia; the majority of the witnesses and the evidence are likely to be based in Zambia, etc).

Access to justice considerations

Even though the Supreme courtconcludedthat the natural forum for the dispute was not England, that wasnot the end of the matter. Under the second limb of *forum conveniens* test, the English courts consider if they should nevertheless exercise jurisdiction in cases when the claimants would be denied justice in the

foreign forum. There is no exhaustive list of factors that can be taken into account in this analysis. In Vedanta, the Supreme Court acknowledged that there is a real risk that substantial justice will be unobtainable in Zambia based on two principal grounds. First, securing funding for pursuing proceedings in Zambia was a serious problem for the rural villagers. Second, the "unavoidable" complexity of the case means that it would be litigated in Zambia on a simpler and more economical scale than in England. As a result, the Supreme Court allowed claims against both defendants to be tried in England on the substantial justice issue.

Practical implications of the Supreme Court decision

The ruling of the Supreme Court in *Vedanta* has been already called the*"the most important judicial decision in the field of business and human rights since the jurisdictional ruling of the United States Supreme Court in Kiobel v Royal Dutch Petroleum in 2013"*. Indeed, it will undoubtedly have several important implications in litigating cases on the human rights performance of TNCs. First, the Supreme Court's unequivocal acknowledgement of the existence of duty of care by the parent companies is an important step towards enhancing corporate accountability for human rights violations. Although there are concerns as to whether the ruling will be a disincentive for parent companies to get actively involved in the supervision of the subsidiaries' operations, the risk of liability for the English-based multinationals is topical more than ever and will (hopefully) result in the concrete steps by businesses and their lawyers in identifying the risks of human rights violations in their foreign operations. Second, allowing claims against Vedanta and KCM to be heard in England is a promising move towards increasing access to justice for the underprivileged claimants coming from the jurisdictions with weak governance. In light of the most recent study on access to legal remedies for victims of business-related human rights abuses conducted for the European Parliament, it is pivotal to ensure that home state courts continue to remain an available forum for commencing proceedings in relation to the worldwide operations of the TNCs.

The Supreme Court's approach to the identification of the proper forum, however, raises reasonable concerns about the future of litigating negligence claims against English-domiciled parent companies in the English courts. Until recently,claimants from the host states have relied heavily on the mandatory nature of Article 4 of Brussels I to bring claims against English-based parent companies as anchor defendants so as to allow the joinder of a foreign subsidiary

under common law. The policy of avoiding parallel proceedings in both states resulting in duplication of cost and the risk of inconsistent judgments hadmore force in the jurisdictional analysis than the existence of any territorial connections between England and claims against the foreign subsidiary. It washighly unlikely that a claim against the foreign subsidiary will be stayed on *forum conveniens*grounds if the courts have already decided that there is an arguable claim against an English-domiciled parent company and the foreign subsidiary is a necessary or proper party to the English proceedings. In effect, thejurisdiction over an arguable claim against the parent company also resolved the issue of jurisdiction over the foreign subsidiary. Following, the Supreme Court decision this practice will change and the English courts will look at the balance of connecting factors to decide where the proper forum for litigating claims against the foreign subsidiary is. Overall, the rules of jurisdictional will remain a hurdle for the claimants seeking recourse in the English courts and the outcome of the jurisdictional inquiry will now depend on whether or not the access to justice is available in the host states.