

Tort Litigation against Transnational Companies in England

This post is an abridged adaptation of my recent article, *Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications* in the *Journal of Private International Law*. The article can be accessed at no cost by anyone, anywhere on the journal's website. The wider post-Brexit implications for private international law in England are considered at length in my recent OUP monograph, *Brexit and the Future of Private International Law in English Courts*.

According to a foundational precept of company law, companies have separate legal personality and limited liability. Lord Templeman referred to the principle in *Salomon v Salomon & co Ltd* [1896] UKHL 1, as the 'unyielding rock' on which company law is constructed. (See Lord Templeman, 'Forty Years On' (1990) 11 *Company Lawyer* 10) The distinct legal personality and limited liability of each entity within a corporate group is also recognized. In *Adams v Cape Industries plc* [1990] Ch 433 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 minimize their losses and liabilities through manipulation of the corporate form, particularly in relation to groups of companies. A parent company is normally not liable for the legal infractions and unpaid debts of its subsidiaries. However, the direct imposition of duty of care on parent companies for torts committed by foreign subsidiaries has emerged as an exception to the bedrock company law principles of separate legal personality and limited liability. In *Chandler v Cape plc* [2012] EWCA Civ 525, [69], Arden LJ '.....emphatically reject[ed] any suggestion that this court [was] in any way concerned with what is usually referred to as piercing the corporate veil.'

Arguments drawn from private international law's largely untapped global governance function inform the analysis in the article and the methodological pluralism manifested in the jurisdictional and choice of law solutions proposed. It is through the postulation of territoriality as a governing principle that private international law has been complicit in thwarting the ascendance of transnational corporate social responsibility. (See H Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347, 386) Private international law has kept corporate liability within the limits of local law through *forum non conveniens* and the *lex loci delicti commissi*. It is only recently that a challenge of territoriality has emerged in connection with corporate social responsibility.

Extraterritoriality is employed in this context as a method of framing a private international law problem rather than as an expression of outer limits. Therefore, there is nothing pejorative about regulating companies at the place of their seat, and there is no reason why the state where a corporate group is based should not (and indeed should not be obliged to) sanction that group's international industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by third parties or stakeholders. (Muir-Watt (ibid) 386)

The idea of methodological pluralism, driven by the demands of global governance, can result in jurisdictional and choice of law rules that adapt to the needs of disadvantaged litigants from developing countries, and hold multinational companies to account. The tort-based parental duty of care approach has been utilized by English courts for holding a parent company accountable for the actions of its subsidiary. The limited liability and separate legal entity principles, as applied to corporate groups, are circumvented by the imposition of direct tortious liability on the parent company.

The UK Supreme Court's landmark decisions in *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3 have granted jurisdiction and allowed such claims to proceed on the merits in English courts. The decisions facilitate victims of corporate human rights and environmental abuse by providing clarity on significant issues. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group-wide policies. Formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. When evaluating whether a

claimant can access substantial justice in another forum, English courts may consider the claimants lack of financial and litigation strength. The UK Supreme Court decisions are in alignment with the ethos of the UN Guiding Principles on Business and Human Rights (“Ruggie Principles”), particularly the pillar focusing on greater access by victims to an effective remedy. (The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011))

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 motivate an English court not to stay proceedings. (*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460) It has been argued that if the Australian “clearly inappropriate forum” test for *forum non conveniens* is adopted, (*Voth v Manildra Flour Mills Pty Ltd* (1991) 65 A.L.J.R. 83 (HC); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (HC)) it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds. As a result, it is more likely that a disadvantaged foreign litigant will succeed in overcoming the jurisdictional hurdle when suing the parent company. From a comparative law standpoint, the adoption of the Australian common law variant of *forum non conveniens* will effectively synthesize *The Spiliada’s* wide-ranging evaluative enquiry with the certainty and efficiency inherent in the mandatory rules of direct jurisdiction of the Brussels-Lugano regime.

In relation to choice of law for cross-border torts, the UK has wisely decided to adopt the Rome II Regulation as retained EU law. (See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019) Article 4(1) of the Rome II Regulation will continue to lead to the application of the law of the country where the damage occurred. Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more flexibly. The territorial limitations of the *lex loci damni* might be overcome by applying the principle of closest connection to select a more favorable law. The result-selectivism inherent in the idea of a favorable law is reminiscent of the regulatory approach of governmental interest analysis. (See SC

Symeonides, *Codifying Choice of Law Around the World* (OUP 2014) 287) Article 7 of the Rome II Regulation provides the claimant in an environmental damage claim a choice of applicable law either pursuant to Article 4(1) or the law of the country in which the event giving rise to the damage occurred. Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of the Rome II Regulation. The Rome II Regulation, under the guise of retained EU law, constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to depart from retained EU law and develop their own jurisprudence.

Any future amendments to EU private international law will not affect the course of international civil litigation before English courts. (Cf A Dickinson, 'Walking Solo - A New Path for the Conflict of Laws in England' Conflictoflaws.net, suggests engagement with the EU's reviews of the Rome I and II Regulations will provide a useful trigger for the UK to re-assess its own choice of law rules with a view to making appropriate changes) However, recent developments in the UK and Europe are a testament to the realization 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.