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Abstract
This article examines private international law issues raised by civil liability cases commenced in the courts of home states against transnational corporations concerning their alleged involvement in the overseas human rights violations. These claims have been particularly successful in the United Kingdom, where in the last several years the framework of Brussels I Regulation (recast) and English common law rules made it appropriate for the English courts to assert jurisdiction over corporate defendants without the possibility of subjecting claims against the parent companies to forum non conveniens control. In 2019, however, the Supreme Court in a high-profile case Lungowe v Vedanta Resources plc expressed doubts as to whether England should always constitute a proper forum for litigating overseas wrongs arising from the operations of British multinationals. The article aims to assess how the search of the most appropriate forum to litigate the dispute might impact victims of business-related human rights abuses in the post-Brexit environment and propose avenues for legal change.

Keywords: Brexit, duty of care, forum non conveniens, human rights, jurisdiction

I. INTRODUCTION
Access to remedy for victims of business-related human rights violations is the third pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) and one which is recognized to be the most difficult to implement.1 The UNGPs acknowledge that ‘effective judicial mechanisms are at the core of ensuring access to remedy’.2 In recent
years, some jurisdictions have witnessed an increasing number of private negligence claims alleging direct liability of parent companies of transnational corporations (TNCs) for the human rights violations arising from the operations of their overseas subsidiaries (Tort Liability Claims).\textsuperscript{3} These cases fall within a category of ‘transnational tort litigation’ compelling claimants to frame abuses committed by legal entities of TNCs in the language of domestic tort law. The expansion of Tort Liability Claims has renewed interest in the potential of private litigation to strengthen corporate accountability for human rights violations. The claimants’ success, however, often depends on the rules of private international law governing domestic courts’ power to hear the case for the harm that is alleged to have occurred in the foreign jurisdiction.

The problem of jurisdiction and the choice of the appropriate forum to resolve the dispute have played a decisive role in Tort Liability Claims. This type of complex litigation concerns the territory of at least two states. The hazardous operations were conducted by the subsidiary and claimants sustained injuries in the so-called ‘host state’ (often located in Global South), but proceedings are commenced in the state of parent company’s domicile which is typically referred to as the ‘home state’ (often located in Global North). Although pursuing litigation in host states – where the principal events leading to the tort occurred – seems to be an obvious recourse for the claimants, local remedies may not always be the most efficient means to enforce and protect victims’ rights. Developing economies, often lacking in adequate judicial infrastructure and desperate for foreign investment, have proved unwilling or unable to hold TNCs’ subsidiaries accountable for their actions.\textsuperscript{4} In response, victims have searched for alternative means for redress, with an increasingly popular option being the commencement of proceedings against parent companies and/or their subsidiaries in their home states alleging parent company’s direct liability for the harm suffered by the individuals and local communities in the host states.

Tort Liability Claims have been particularly successful in the United Kingdom (UK). Before Brexit,\textsuperscript{5} the framework of Brussels I Regulation (recast) (Brussels I)\textsuperscript{6} and English common law rules made it appropriate for the English courts under certain circumstances to assert jurisdiction over English-based parent companies and their foreign subsidiaries, no matter where the cause of action arose and without the possibility of subjecting the claim against the parent company to the \textit{forum non conveniens} (FNC) control.\textsuperscript{7} FNC is a

\textsuperscript{3} For a thorough analysis of the emerging trend towards Tort Liability Claims, see Liesbeth Enneking, \textit{Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability} (The Hague: Eleven International Publishing, 2012).


\textsuperscript{5} Brexit refers to the UK’s withdrawal from the European Union which took place on 31 December 2020.


legal doctrine applied in common law jurisdictions allowing the courts to decline jurisdiction where there is a more appropriate forum available to the parties, but its application in the European Union (EU) is restricted.

The removal of the FNC obstacle in the English courts for several years has assisted claimants in establishing jurisdiction over an English-domiciled parent company under the Brussels I regime and, therefore, making it easier for claimants to also sue foreign subsidiaries in England as part of the same proceedings under the ‘necessary or proper party’ gateway. However, the UK’s participation in Brussels I following the enforcement of Brexit is now closed. The rules governing jurisdiction in all cross-border disputes, including Tort Liability Claims, are derived from the English common law. It means that FNC argument becomes available for TNCs again, and position of the foreign claimants may be weakened. Over and above, the UK Supreme Court in a high-profile judgment in Lungowe v Vedanta Resources plc (Vedanta) expressed doubts as to whether England should always constitute a proper forum for litigating Tort Liability Claims by revising rules related to the exercise of discretion to permit service on a foreign subsidiary (historically referred to as forum conveniens).

This article suggests that revival of the forum [non] conveniens doctrine will not have an adverse effect on transnational tort litigation in the English courts if appropriate weight is given by the judges to the economic reality of TNCs, their managerial structure and nature of their business operations. Following this introduction, section II analyses the rules of jurisdiction applied by the English courts in Tort Liability Claims over the last years and the effect of Brexit. Section III then turns to explore the challenges presented for the victims of human rights abuses by the application of the FNC doctrine. Section IV suggests the refined analysis of identifying the proper forum for litigating Tort Liability Claims in the English courts, while Section V makes some concluding observations.

II. TORT LIABILITY CLAIMS IN THE ENGLISH COURTS: LEGAL FRAMEWORK

Tort Liability Claims emerged in the UK at the end of the twentieth century. These claims are typically initiated against the English-domiciled parent companies and their

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8 The conceptual basis of the FNC doctrine and applicable principles are further discussed in sections II and III.
9 Civil Procedure Rules (CPR), Practice Direction 6B.
10 The law in this article is stated as best known to the author as of 1 March 2021.
12 Vedanta Resources plc v Lungowe [2019] UKSC 20. The question of whether England is the proper place to bring the claim has evolved in response to two concerns. At the outset of the proceedings, forum conveniens operates as a safeguard against the potentially wide grounds for the proceedings on a foreign defendant (i.e., foreign subsidiary). At a later stage, FNC applies to stay an action on a defendant who has already been served (i.e., English-based parent company). In this article, the term forum [non] conveniens is used where the analysis relates to both processes. See further discussion in Richard Fentiman, International Commercial Litigation, 2nd edn (Oxford: Oxford University Press, 2015) 424–26.
foreign subsidiaries in relation to the alleged damage arising from the subsidiaries’ operations in the host state. The claims in the English courts are not explicitly labelled in human rights terms. They are essentially personal injury cases or claims for compensation for property and/or damages, and the cause of action is usually framed through the tort of negligence. Nevertheless, Tort Liability Claims have been used to vindicate a wide range of human rights. Thus, proceedings are frequently concerned with inadequate workplace health and safety conditions maintained by an overseas subsidiary of an English-domiciled parent company. Besides, English-based TNCs are regularly alleged to have polluted or threatened existing water resources in host states and/or to engage in other environmentally destructive activities which have adverse consequences for the traditional lifestyles of local communities. Moreover, several cases seek to establish direct involvement of corporate defendants with (or complicity in) killings, kidnapping or torture of the local population by state or private security forces.

Tort Liability Claims draw the attention of the English courts to the limits of parent company liability in TNCs. Under the well-established entity-based approach of corporate law embedded in the doctrine of separate legal personality and the limited liability principle, parent companies and their foreign subsidiaries are distinct legal entities. The application of this approach in the context of corporate groups remains controversial and has been subjected to the extensive debate. The rigid legal separation of parent companies from their subsidiaries often leads to the unjust allocation of the risks of conducting hazardous activities from TNCs to victims. The latter are often referred to as the involuntary creditors who rarely predict the possibility of the harm occurring to them and, compared with the contractual creditors, have far fewer bargaining powers to negotiate preventive and compensatory measures with the powerful TNCs. The acts and omissions of the subsidiaries are prima facie not attributable to the parent companies.

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14 In this context, the English jurisprudence can be contrasted with the landmark ruling of the Supreme Court of Canada in Nevsun Resources Ltd v Araya 2020 SCC 5 that customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity can ground a claim for damages against corporations under Canadian law. For an analysis, see Upendra Baxi, ‘Nevsun: A Ray of Hope in a Darkening Landscape?’ (2020) 5:2 Business and Human Rights Journal 241.


Tort Liability Claims allow overcoming the strict legal separation of the entities within TNCs by demonstrating that if the parent company is playing a significant role in controlling or managing activities of the subsidiary in a certain way, it should be directly liable in the tort of negligence for any harm and damages to the individuals and local communities in the host state.

Focusing on the acts and omissions of the parent company also assists claimants with resolving the issue of jurisdiction under the rules of private international law, which operates on the basis of a nexus between the parties, the subject matter of the dispute and the forum in which the case is brought.\(^{22}\) The claimants in Tort Liability Claims are usually foreign citizens who have suffered damage in the host state, and the main events resulting in harm have also occurred in the host state. On the other hand, the English domicile of the parent company as one of the defendants and the alleged breach of the duty of care link the dispute with England and, as seen below, trigger the jurisdiction over the foreign subsidiary. The next two sections critically assess the recent developments on the scope of the parent company’s duty of care and the limits of the jurisdiction of the English courts.

**A. Stretching the Boundaries of the Duty of Care in Tort Liability Claims**

The application of the duty of care doctrine in Tort Liability Claims has evolved quickly over recent decades. The creative argument was made in *Lubbe v Cape plc* (*Lubbe*), one of the first Tort Liability Claims in the UK, by the South African citizens who had suffered personal injuries due to exposure to asbestos and its related products.\(^ {23}\) The case was brought in the English courts against an English-domiciled parent company of the group for a failure ‘to take appropriate steps to ensure the adoption of proper working practices and safety precautions throughout its subsidiary companies’.\(^ {24}\) The House of Lords was not required to resolve the issue on the merits but mentioned that it will likely involve an inquiry into the extent of the parent company’s involvement in controlling subsidiaries’ operations. After the claimants had won the drawn-out battle on the jurisdiction, the parties reached an out-of-court settlement.

To establish the existence of a duty of care under English law, a claimant is required to satisfy the three-stage test established in *Caparo Industries plc v Dickman* (*Caparo*): (a) reasonable foreseeability of harm; (b) a close and direct relationship of proximity between the parties; and (c) it would be fair, just and reasonable to impose liability.\(^ {25}\) Until recently, the most influential authority in the application of duty of care to the parent–subsidiary relationship was the Court of Appeal’s decision in *Chandler v Cape plc* (*Chandler*), which found that in appropriate circumstances the law may impose on a

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\(^ {23}\) *Lubbe*, note 16.

\(^ {24}\) Ibid.

\(^ {25}\) [1990] 2 AC 605. Since the emergence of Tort Liability Claims, the English courts have relied on *Caparo* principles to determine whether a duty of care will arise in a particular case. In 2019, the Supreme Court in *Vedanta* held that the *Caparo* test is only engaged to deal with a ‘novel category of common law negligence liability’, while the parent company’s duty of care is neither special nor controversial. *Vedanta*, note 12, paras 54–56.
parent company responsibility for the health and safety of the subsidiary’s employees. These circumstances include situations where: (1) the business of the parent and subsidiary are in all relevant respects the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe and the parent company knew, or ought to have known this; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on that the parent’s superior knowledge for the employees’ protection, even if the parent was not in the practice of intervening in the health and safety policies of its subsidiaries.

The Court of Appeal’s decision in Chandler raises several critical points. First, the imposition of a duty of care on the parent company with respect to the subsidiary’s operations was distinguished from piercing the corporate veil. Although the analysis of the control relationship between Cape and its subsidiary constituted an important part of the judgment, it was not in itself sufficient for the imposition or assumption of responsibility. Rather, the Court of Appeal was persuaded by evidence of Cape’s close involvement with the subsidiary’s asbestos operations and the health and safety of group employees. Secondly, the explicit recognition that Cape owed a duty of care for an omission to take steps or to advise on the precautionary measures indicates that it is not necessary for claimants to demonstrate evidence of actual control and intervention in the health and safety policies of the subsidiary. Finally, the Chandler test of the duty of care owed by a parent company to its subsidiary’s employees appears to be rather flexible, because the list of factors that may give rise to an assumption of responsibility is not exhaustive.

The Chandler test on parent company liability was further clarified by the Court of Appeal in Thompson v Renwick Group plc (Thompson). The claimant developed pleural thickening because of exposure to asbestos dust in the course of his employment. The claims were brought against the parent company because the subsidiaries, who were the claimants’ employers, did not have any liability insurance and did not have the means to satisfy an order for damages. The Court of Appeal ruled that defendant was merely a holding company without any superior knowledge or expertise to protect the claimant against the risk of injury. In addition, it was held that the parent company did not assume a duty of care to its subsidiaries’ employees merely by virtue of having appointed an individual as a director of the subsidiary as that director was not acting on the parent’s behalf in running the day-to-day operation of the subsidiary.

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26 [2012] EWCA Civ 525.
27 Ibid, para 80.
28 Ibid, para 69.
29 Ibid, paras 72 and 79.
30 Ibid, para 78.
31 [2014] EWCA Civ 635.
32 Ibid, para 37.
33 Ibid, para 26.
Moreover, the court concluded that the intermingling of the businesses of the parent company and its subsidiaries and the shared use of resources did not mean that the separate legal personality of the subsidiary was not ‘retained and respected’. Overall, Thompson confirmed that the legal separation of the subsidiary from its parent could be disregarded only in the exceptional circumstances.

The English courts have considered Caparo, Chandler and Thompson in the Vedanta case. The claim was not tried on the merits, but the inquiry into the existence of an arguable duty of care of the parent company was required as part of the jurisdictional analysis. Proceedings were commenced in the English courts by 1,826 Zambians against Vedanta Resources plc (Vedanta), an English-based mining company, and Konkola Copper Mines (KCM), its Zambian subsidiary, alleging responsibility of both companies for the environmental pollution arising out of the operation in Zambia of the Nchanga Copper Mine by KCM. The Supreme Court unequivocally established that a sufficient level of intervention by the parent company in the conduct of the relevant operations of its subsidiary may give rise to a duty of care to third parties, such as local communities. The judgment contains several ground-breaking findings of particular importance for future cases. First, it was confirmed that Tort Liability Claims do not involve the assertion of a ‘novel and controversial new’ category of cases. Whilst parent company liability is not a special doctrine of English negligence law, the equity relationship between the two companies may enable a parent company to take managerial control of its subsidiary’s operations without any requirement being imposed on the parent to do so.

Second, the Supreme Court refused to squeeze all cases of parent company liability into specific categories based on the fact that the organizational and management structures of corporate groups vary significantly, give rise to different models of corporate governance and, consequently, the extent of the parent company’s intervention in the subsidiary’s operations will also vary. More importantly, the Supreme Court described the four factors set out in Chandler as imposing an ‘unnecessary straightjacket’ on claimants and the courts, thus opening the way for consideration of additional circumstances in which a parent company can be said to incur a duty of care. It further held that the issuance by the parent company of the group-wide policies and guidelines on various issues (for instance, minimizing health and safety or environmental risks) may give rise to a duty of care if the parent company also takes active steps to implement these at the subsidiary level through training, supervision and enforcement. Finally, the Supreme Court confirmed that an omission to supervise the subsidiary’s operations, where they are contrary to proclamations published by the parent company, may also give rise to a breach of duty

34 Ibid, para 38.
35 Vedanta, note 12.
36 Ibid, para 60.
37 Ibid, para 49.
38 Ibid, para 51.
39 Ibid, para 56.
40 Ibid, para 53.
of care. The Supreme Court’s refusal to follow Chandler factors is likely to enlarge the circumstances in which a parent company may be held to be liable for the conduct of its subsidiaries and, in turn, may not only lead to greater numbers of Tort Liability Claims before the English courts but also give rise to the new types of litigation stretching, for instance, the supply-chain responsibility. Indeed, the importance of the group-wide policies developed and enforced by the English-domiciled parent companies was recently considered by the Supreme Court in Okpabi v Royal Dutch Shell (Okpabi). The case concerned severe environmental damage in Nigeria allegedly caused by the oil spills from the pipelines affecting livelihoods and health of the local communities. The Supreme Court reaffirmed that the English courts should not engage in a mini-trial assessing the evidence on the parent company’s liability at the jurisdictional stage, and explained the importance of the internal corporate documents and future disclosure for determining the existence of a duty of care owed towards the claimants.

The law on the direct liability of parent companies is still in its infancy. Following the Supreme Court’s ruling in Vedanta and Okpabi, an English-domiciled parent company with the ability to control the wrongful conduct of the subsidiary, rather than actual control, may owe a duty of care to the subsidiary’s employees and local communities. At the same time, establishing a parent company’s duty of care is highly fact-sensitive and largely depends on the precise circumstances of the Tort Liability Claim in question. With so few cases having so far tried at the merits stage, the exact scope of the parent company’s liability for the overseas wrongs of its subsidiary is still unclear. The claimants would still need to establish that the parent company had breached its duty of care and that this caused damage in the host state. These subsequent stages are where the victims and their lawyers may experience the greatest difficulty.

That said, unless and until the English courts deliver clear and authoritative defendant-friendly judgments, it may be expected that foreign claimants will continue to seek redress before the English courts. Over and above, the English courts are internationally respected for the independent judiciary, high quality of legal counsel and the efficacy and speed of the judicial proceedings. The next sections examine the ability and willingness of the English courts to hear civil liability cases against the local and foreign legal entities of TNCs.

41 Ibid.
43 Okpabi, note 17.
45 The problem of parent company liability is explored in detail in Christian Witting, Liability of Corporate Groups and Networks (Cambridge: Cambridge University Press, 2018).
47 Lubbe, note 16, para 71.
48 It is not uncommon for the parties to Tort Liability Claims to agree to settle the case after the drawn-out jurisdictional battles. Early in 2021, it was announced that Vedanta agreed to settle the claims of the Zambian villagers without admitting liability.
B. The Rules of Jurisdiction in Tort Liability Claims: Pre-Brexit Framework

Until 31 December 2020, the UK was a member state of the EU and was bound by the EU rules on international jurisdiction. Two regimes governed the question whether English courts may exercise jurisdiction over local and foreign corporate defendants in Tort Liability Claims. As a first step, English courts had jurisdiction over English-domiciled parent companies under the Article 4 of Brussels I, which provides that persons domiciled in a member state shall be sued in the courts of that member state. This set the foundation for the second step and triggered application of the English common law to the exercise of jurisdiction over the foreign subsidiary. The ‘necessary or proper party’ gateway of the Civil Procedure Rules (CPR) allows English courts to assert personal jurisdiction over non-EU domiciled defendants (i.e., foreign subsidiary of the English-based TNC) where another claim is made against a locally domiciled (anchor) defendant (i.e., English-domiciled parent company). In essence, the claimants have to succeed in establishing that they have an arguable claim against an English-domiciled parent company and that claims against both co-defendants (the parent and the subsidiary) raise common questions of law and fact justifying consolidation of proceedings in one jurisdiction. However, if the claimants fail to demonstrate the existence of an arguable claim against the English-domiciled parent company, the claim against the foreign subsidiary will not proceed either.

Article 4 of Brussels I had a mandatory effect in proceedings against English-domiciled parent companies commenced before Brexit and permitted English courts to assert jurisdiction over a local defendant, no matter where the cause of action arose. Unsurprisingly, the main difficulty with applying the general rule of domicile in Tort Liability Claims arose when the factual basis of the case occurred almost exclusively in the host state. The English-based parent companies continually questioned the legitimacy and reasonableness of applying Article 4 (or its predecessors) in cases involving a parent company’s liability for the acts of its overseas subsidiaries. Despite these protests, there were only rare and limited circumstances in which a parent company’s application challenging jurisdiction of the English court under Brussels I may have succeeded.

Historically, the English courts could exercise their discretion to stay proceedings against English-domiciled defendants based on the FNC doctrine, where another clearly more ‘appropriate’ forum was available to the parties. The principles

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52 Okpabi, note 17; AAA v Unilever plc, note 18.
54 Okpabi, note 17.
55 In recent years, the corporate defendants have attempted to establish that Tort Liability Claims amount to an abuse of EU law. However, the Supreme Court in Vedanta confirmed that the scope of this challenge is narrow and will not be met if the claimants succeed in presenting an arguable claim against the English-domiciled parent company. Vedanta, note 12, 25. In addition, Articles 33 and 34 of Brussels I allow stay of parallel proceedings in favour of the foreign forum, but they have not been extensively tested in the case law yet.
56 Connelly, note 16; Lubbe, note 16.
governing the exercise of that discretion are set out by Lord Goff in Spiliada Maritime Corp v Cansulex Ltd (Spiliada). The FNC control proceeds as a two-stage inquiry. The first requires consideration of the natural forum for resolving the dispute. It involves looking at where the litigation has its most real and substantial connection or, in other words, ‘where the fundamental focus of the litigation was to be found’. Relevant connecting factors include, inter alia, the place of the commission of the tort, the nationality of the claimants, the place at which injuries were sustained, the location of witnesses and evidence, the applicable law, the language of the documents and witnesses, and financial and logistical considerations. Even if the court concludes that the natural forum for the dispute is not England, that is not the end of the matter. Under the second limb of the Spiliada principle, the English courts consider if they should nevertheless exercise jurisdiction in cases when the claimants would be denied substantial justice in the foreign forum.

The pioneering Tort Liability Claims in England were intensely litigated for several years on the FNC issue. In Connelly v RTZ Corp plc (Connelly), an action was brought by a former employee who had been diagnosed with cancer after working in a Namibian uranium mine operated by a local subsidiary of the defendants. In 1997, the House of Lords decided that the English courts had jurisdiction over the case because the claimant would be denied substantial justice if he proceeded with his claim in Namibia where no financial assistance would have been available to him. Similarly, in Lubbe, access to justice considerations have been decisive in resolving the FNC inquiry. In July 2000, the House of Lords ruled that, even though South Africa was the more appropriate forum for pursuing the litigation, the English courts had jurisdiction because the claimants’ inability to continue proceedings in South Africa due to a lack of resources amounted to a denial of justice.

Following the decision of the Court of Justice of the European Union (CJEU) in Owusu v Jackson (Owusu), however, English courts were prevented from staying proceedings on this basis. The CJEU held that jurisdiction conferred by what is now Article 4 of Brussels I could not be derogated from through the exercise of domestic discretionary powers. It relied significantly on the objectives of the Brussels I regime which were to promote predictability and legal certainty within the internal market and ruled that these would be undermined by the application of the FNC doctrine. Although the CJEU’s decision in Owusu has been the subject of some criticism, fundamentally it had

59 For further analysis of these and other factors, see Erste Group Bank AG (London) v JSC (VMZ Red October), note 58, para 137; VTB Capital plc v Nutritek International Corp [2013] UKSC 5 para 62; Vedanta, note 12, para 85.
60 Connelly, note 16.
61 Lubbe, note 16.
63 Ibid, para 37.
64 Ibid, para 38.
significant implications for Tort Liability Claims. The English courts have considered themselves bound by the CJEU’s judgment and consistently refused applications for a stay of proceedings against English-domiciled companies, even when the abuses were alleged to have taken place almost exclusively overseas.66

The Owusu judgment, which in essence dealt with the exercise of discretionary powers by the English courts over English-domiciled defendants, also had an indirect effect on the assertion of jurisdiction over foreign co-defendants. Thus, in exercising their discretion to permit service on a foreign subsidiary, the English courts have to be satisfied that England is the proper place for bringing the claim (historically referred to as forum conveniens). The court must consider whether England is clearly or distinctly a more appropriate forum where the case may most suitably be tried in the interests of the parties and the ends of justice. The rationale and the principles applied are the same as those underlying the discretion to stay actions on the basis of FNC under the Spiliada test.

For several years, the approach of the English courts was to consider the appropriateness of the forum for the claims against the foreign subsidiary in light of the claims against English-domiciled parent companies. Thus, the High Court and the Court of Appeal in Vedanta concluded that the existence of an arguable claim against Vedanta (which had no FNC control) made England an appropriate place to try claims against KCM under the first limb of Spiliada. The courts’ reasoning was grounded on the necessity to avoid parallel proceedings on similar facts in two jurisdictions. Whilst several connecting factors pointed ‘overwhelmingly to the conclusion that the fundamental focus of the litigation is Zambia’,67 priority was given to the risk of irreconcilable judgments. In effect, the existence of an arguable claim against Vedanta also resolved the forum conveniens inquiry for the claims against KCM.

In a significant step, the Supreme Court in Vedanta clarified the operation of forum conveniens control in Tort Liability Claims. As a starting point, the Supreme Court acknowledged that the assertion of jurisdiction over a foreign subsidiary was heavily impacted by the absence of FNC control against English-domiciled parent companies. In the words of Lord Briggs, ‘not only is one of the court’s hands tied behind its back, but the other is, in many cases, effectively paralysed’.68 The Supreme Court found ‘a remedy for this undoubted problem’ in adjusting the English forum conveniens jurisprudence. It then held that if the English-domiciled defendant offers to submit to the jurisdiction of the foreign courts (as Vedanta did), the risk of parallel proceedings and irreconcilable judgments ceases to be a decisive factor in the determination of the appropriate forum for litigation.

The Supreme Court further balanced the relevant connecting factors under the first limb of Spiliada to find that Zambia was the proper place for trying the case as a whole (against both Vedanta and KCM). The service of English proceedings on KCM was nonetheless permitted because there was a real risk that substantial justice would not be obtainable by the claimants in Zambia due to the unavailability of funding and the necessary legal

67 Vedanta, note 51, para 153.
68 Vedanta, note 12, para 39.
resources. The Supreme Court, therefore, allowed claims against both Vedanta and KCM to proceed to trial in England, but solely on the basis of access to justice considerations. The Supreme Court’s findings in Vedanta had significant implications on the framework of the rules of jurisdiction. In the last decade, the success of Tort Liability Claims in the English courts was largely dependent on the absence of FNC control for the claims against the English-domiciled parent companies and consequent limited scope of the *forum conveniens* rule for the claims against the foreign subsidiary. The Supreme Court’s approach indicated that the search for an appropriate forum to litigate Tort Liability Claims is still very much a live issue before the English courts. It restored – to some extent – the question of jurisdiction in Tort Liability Claims in line with the earlier jurisprudence of the English courts, such as *Connelly* and *Lubbe*. The identification of the appropriate forum for litigating claims against the English-domiciled parent companies and their foreign subsidiaries was revived ‘through the back door – as applicable to foreign defendants’.69 Following Brexit, however, the FNC principles (at least for the nearest future) will govern the jurisdiction of the English courts over both the parent company and the foreign subsidiary.

**C. Post-Brexit Rules of Private International Law**

Until the end of 2020, the UK continued to be subject to most EU law including Brussels I. The UK–EU Trade and Cooperation Agreement signed on 30 December 2020 has not provided any explicit details on the future of the jurisdictional regime in cross-border civil proceedings. The UK Government has announced its intention to accede the 2007 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention),70 but no agreement has been reached in this respect as of 1 March 2021. The current framework is, therefore, governed by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.71 So far as jurisdiction is concerned, the UK has reverted to domestic rules after Brexit.72

The English approach to jurisdiction is founded on service of the claim form on the defendant and is based on the defendant’s presence in the jurisdiction.73 In general terms, service of jurisdiction may be effected within the jurisdiction as of right without the need for permission of the court on a defendant who is present in England (i.e., such as the parent company with the registered office) or outside the jurisdiction with the court’s permission on a foreign defendant (i.e., such as the overseas subsidiary which is not present in England but can be still brought in the proceedings as a necessary or proper party). Following Brexit, the English courts are likely to have the jurisdiction over both

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71 2019 No. 479.
72 The UK is made up of three separate jurisdictions (England and Wales, Scotland, Northern Ireland) and does not have a single unified legal system. This article is primarily concerned with the English law.
73 The framework of English national law and the rules for service of process are explained in Fentiman, note 12, 299–305.
the parent company with the registered office in England and the foreign subsidiary operating in the host state according to the residual rules.\footnote{The assertion of jurisdiction over a foreign subsidiary under the ‘necessary or proper party’ gateway will remain relatively unchanged.} The principal modification of the framework applicable to Tort Liability Claims is that defendants will be able to seek a stay of proceedings on the FNC grounds under the \textit{Spiliada} principles against the local parent company (and not merely against the foreign subsidiary as was the case in the pre-Brexit framework) in favour of the host state.\footnote{As one scholar has reasonably predicted, the doctrine of FNC ‘may well be about to witness an upturn in fortunes’. See Ardavan Arzandeh, Locating the Place of Forum (\textit{Non}) Conveniens in the English National Jurisdiction Rules (Oxford: Hart Publishing, 2019) 104.} It has been already argued that re-introduction of the FNC in Tort Liability Claims may have an unfavourable impact on the claimants seeking to bring the claims in England.\footnote{Van Ho, note 42, 115.}

The rules of jurisdiction may change again if the UK accedes the Lugano Convention which sets out a regime between the EU member states and the European Free Trade Association States (namely Iceland, Switzerland and Norway) and is materially the same as the Brussels I.\footnote{The UK’s accession to the Lugano Convention is subject to EU consent. If the EU grants its approval, the Lugano Convention will enter in force following a three-month objection period.} If the UK is invited to join the Lugano Convention, the English courts will again rely on the rule of domicile as a general ground to assert jurisdiction over the English-domiciled parent companies. The discretion of the English courts to stay proceedings against parent companies will be limited by the mandatory provisions. The jurisdiction over foreign subsidiaries will be exercised in accordance with the \textit{Vedanta} approach to the ‘necessary and proper party’ gateway and the \textit{forum conveniens} control.\footnote{It is possible that claimants would then consider suing the parent company alone in specific cases without seeking to join the foreign subsidiary to avoid the burdensome requirement to obtain permission to serve a claim form outside the jurisdiction and satisfy the court that England is the ‘proper forum’ for the trial.} At least for now, the English courts have re-gained their discretionary powers under the FNC doctrine. The next section further explores the unfortunate effects of searching for the most appropriate forum in Tort Liability Claims.

\section*{III. The Doctrine of Forum [Non] Conveniens and Tort Liability Claims}

The history of trying Tort Liability Claims in England suggests that defendants fiercely challenge claimants’ choice of England as the forum for resolving the dispute and seek to force the litigation into the relevant host state. When both claimants and defendants are persistent in defending their interests to litigate in the forum of their preference, the fairness of the jurisdictional rules is called into question.\footnote{Rogerson, note 49, 52.} There are two principal conceptual responses for measuring the claimants’ choice of jurisdiction to litigate with procedural fairness to the defendant: the allocation of jurisdiction by the international agreement and the concept of the natural forum.\footnote{Airbus Industrie GIE v Patel [1999] 1 AC 119, 131–132. For a thorough analysis, see Andrew Bell, \textit{Forum Shopping and Venue in Transnational Litigation} (Oxford: Oxford University Press, 2003) 50–131.} EU member states
have followed the first route by determining the jurisdiction of national courts according to a strict set of rules contained in Brussels I. Its central philosophy rests on the acceptance that it is always appropriate to sue a defendant in the courts of the state of its domicile. This is largely because Brussels I has a peculiar political heritage because it was developed to facilitate the sound operation of the EU’s internal market.81

The second response to the mediation of the parties’ interests is the common law rule of the natural form, the cornerstone of the doctrine of FNC. This jurisdictional test is designed to identify the most appropriate forum for litigation by assessing the relative strength of the states’ nexus with the dispute and the parties. It grants courts a wide discretionary choice to decline jurisdiction in suitable cases. The exact parameters of the doctrine differ in each state in which it is applied. In the past, the FNC has presented significant difficulties for claimants in several common law jurisdictions, and its application in the Tort Liability Claims frequently came under strong criticism from academics and non-governmental organizations.82 The principal problem of employing the analysis in litigation against TNCs lies in the fact that courts of home states are primarily concerned with identifying the forum which is geographically closest to the events giving rise to the dispute, and corporate defendants regularly employ the doctrine to stop home state courts from accepting the jurisdiction. In Canada83 and US,84 several Tort Liability Claims have been previously dismissed on the FNC grounds. As a result, international organizations and commentators have often claimed that the doctrine should not be applied in the Tort Liability Claims.85

In the UK, none of the Tort Liability Claims has previously failed on forum [non] conveniens grounds. Considerations of fairness are the cornerstone of the concept of the natural forum in the English legal tradition.86 In Spiliada, Lord Goff insisted that the meaning of the doctrine is ‘not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction’.87 As already noted, the House of Lords ruled in Connelly and Lubbe that, even though Namibia and South Africa respectively were the more appropriate fora for hearing the disputes, the English courts had jurisdiction because of the claimants’ inability to continue litigation in the host country

83 See, e.g., Cambior v Recherches internationales Quebec J.E. 98-1905 (Sup Ct) [1998].
84 See, e.g., In re Union Carbide Corporation Gas Plant Disaster at Bhopal India, 634 F Supp 842 (SDNY 1986); Aguinda v Texaco, Inc., 303 F3d 470 (2d Cir 2002); Acuña-Atalaya v Newmont Mining Corporation, 308 FSupp 3d 812 (D Del 2018).
86 Bell, note 80, 90–95.
87 Spiliada, note 57, 494.
due to a lack of funding. In a similar vein, the Supreme Court in Vedanta ultimately resolved the forum conveniens challenge in favour of the foreign claimants relying on access to justice considerations. It would be practically impossible for rural Zambian villagers living in extreme poverty to fund complex proceedings. Moreover, the absence of Zambian lawyers experienced to handle mass tort litigation against multinationals would impact the effectiveness of the trial.

Although the outcome of these proceedings has been widely welcomed and even considered to be a victory for access to justice, the cases revealed considerable shortcomings of the application of the doctrine of forum [non] conveniens to Tort Liability Claims. First, the English courts have approached determination of the natural forum in Lubbe, Connelly and Vedanta without consideration of the TNCs’ structure and economic reality which resulted in the disputable conclusion that England was not appropriate to try the claims brought against English-based parent companies and its foreign subsidiaries under Spiliada’s first limb. In identifying the natural forum for litigating Tort Liability Claims, the English courts have focused exclusively on the connecting factors that link the disputes with the host states but have failed to consider the strength of the factors that link the case to England, such as that English-domiciled parent companies orchestrate TNCs’ operations from England and, hence, the human rights performance of their foreign subsidiaries is often also arguably shaped from England.

Thus, in Vedanta, the Supreme Court asserted that the only factor connecting the case with England was the risk of irreconcilable judgments. No consideration was given to the issue of how the claim on the breach of duty of care by the parent company impacts the operation of the rules of jurisdiction in Tort Liability Claims. Several commentators have argued persuasively that the English courts should have approached identification of the natural forum in the context of the integrated nature and organizational structure of TNCs’ operations. Muchlinski rightly suggested that the role of the parent company in managing its foreign subsidiaries from England should inform the jurisdictional analysis in Tort Liability Claims, ‘so as to avoid the denial of English jurisdiction against English-based parent companies on the basis of a false, or at best incomplete, characterisation of the underlying issues’.

Second, Connelly, Lubbe and Vedanta show that search of the most appropriate forum in Tort Liability Claims can be expensive and lengthy. Uncertainty over the identification of the most appropriate forum in the Tort Liability Claims increases the likelihood of lengthy jurisdictional battles. The claimants with limited financial resources and serious medical conditions may not have the luxury of engaging in years of complex legal

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88 Connelly, note 16; Lubbe, note 16.
89 Vedanta, note 12, paras 93–95.
92 Muchlinski, note 91, 25.
proceedings. Indeed, hearings on the application of the FNC in Lubbe took four years, during which approximately 1,000 out of 7,500 claimants died. By contrast, TNCs are more likely to possess the necessary resources for engaging in a protracted jurisdictional dispute which delays the trial of substantive matters.

Third, the Supreme Court’s ruling in Vedanta has also highlighted another common complexity in the operation of the forum [non] conveniens doctrine in Tort Liability Claims, namely the significance of the parent company’s submission to the jurisdiction of the host state’s courts after proceedings had been already initiated in the home state. The courts of host states generally lack powers to assert jurisdiction over a parent company domiciled in the foreign state. However, the parent company (as was the case in Vedanta) may nonetheless voluntarily submit to the jurisdiction of the host state. The practical consequence of such submission for the application of the forum [non] conveniens inquiry is to recognize that the courts of the host state are available to the claimants. Arguably, allowing a parent company to choose to make the host state available for trying Tort Liability Claims by way of a voluntary submission enables jurisdiction-shopping by TNCs and adds uncertainty in the exercise of jurisdiction.

The success of Connelly, Lubbe and Vedanta decisions in the English courts could be largely explained by the pro-claimants’ approach to rely on the access to justice considerations in resolving the question of jurisdiction. However, if the claimants fail on the second limb of Spiliada, the foreign jurisdiction will be most likely recognized as the proper place for trying the case. The burden of satisfying the second limb of Spiliada is on the claimants who must present cogent evidence on the denial of substantial justice in the host state. The threshold is high, and its interpretation is subject to a significant judicial discretion. In this context, there is an outstanding question of the extent to which the English courts are ready to make comparative judgments about the operation of the legal system of another sovereign state. For instance, in Okpabi, claimants argue that access to justice is not available for them in Nigeria by virtue of the extraordinary delays in legal proceedings that are characteristic for the Nigerian legal system. There are important policy considerations about international comity and political and economic interests of the host states raised by the application of the forum

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93 Meeran, note 13, 385.
95 The ability of the parent company to submit to the jurisdiction of the foreign courts may be limited by the provisions of the international investment law. In this case, the jurisdiction of the host court will not be available under the forum [non] conveniens test. An analysis of this issue is beyond the scope of this article.
96 In fact, the Court of Appeal in Lubbe recognized that giving a defendant a choice of jurisdiction and the right to consent to foreign proceedings ‘becomes almost a forum shopping in reverse’, but this statement was not upheld by House of Lords. [1998] CLC 1559, 1571.
97 See note 88, 89 and accompanying text.
98 Vedanta, note 12, para 88.
[non] conveniens doctrine.101 It is also worth noting the Court of Appeal’s comment in *Vedanta* that ‘there must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally’.102

The *forum [non] conveniens* doctrine remains a potential barrier to victims seeking a judicial remedy in the UK in the post-Brexit environment. As of 1 January 2021, the English courts have re-gained discretionary powers to rely on common law rules and (under appropriate circumstances) decline jurisdiction against both the parent company and the subsidiary. Even if the UK accedes to the Lugano Convention and thus prevents the courts from staying proceedings against the parent, it would still be possible for corporate defendants to rely on the *forum conveniens* formula under the *Vedanta* decision to dispute jurisdiction over the foreign subsidiary.103 Considering the issues at stake, the *forum [non] conveniens* inquiry has the potential to evolve into protracted jurisdictional battles bouncing from one court to another. The claimants may ultimately win the argument on the suitability of England to try the dispute, but the jurisdictional analysis shifts the focus away from the determination of the parent company’s liability under substantive law.104 The Committee on Civil Litigation and the Interests of the Public of the International Law Association has rightly noted that private international law should assist the parties with resolving the dispute but refrain from providing ‘a playing-field for prolonged, expensive, tactical disputes’.105 Putting speculation aside, the next section explores how the rules of jurisdiction applied by the English courts can be improved by revisiting the analysis under the first limb of the *Spiliada* test.

**IV. REVISITING THE *SPILIADA* TEST: SUGGESTED ANALYSIS**

The most extreme way of addressing the deficiencies of national courts’ discretion to stay proceedings in favour of the foreign forum is to discard the search of the most appropriate forum completely.106 This is the approach followed by CJEU in *Owusu* to ensure

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101 The overbroad assertions of jurisdiction by the home states could even raise concerns about judicial imperialism and the paternalistic imposition of regulatory standards by developed states on developing states. These concerns are well addressed by Chilenye Nwapi, ‘Adjudicating Transnational Corporate Crimes in Foreign Courts: Imperialism or Assertion of Functional Jurisdiction’ (2014) *19 African Yearbook of International Law* 143. A thorough consideration of these concerns is not within the scope of this article. For the current purposes, it is important to stress that the acceptance of jurisdiction by home states is not a panacea for holding TNCs accountable, nor is it a substitute for the proper functioning of the judicial systems in host states. Rather, it is one of the means by which victims can be provided with a remedy where host states are unwilling or unable to do so.

102 *Vedanta*, note 67, para 133. The Supreme Court has not commented on this conclusion.

103 It would still be possible for the claimants to proceed with the claims solely against the English-domiciled parent company without joining the foreign subsidiary and, therefore, avoid the jurisdictional challenges. The history of litigating Tort Liability Claims in the English courts suggests that foreign claimants rarely choose to sue the English-based parent on its own.


106 See references in *note* 85.
predictability of the Brussels I regime and, therefore, limiting the flexibility of the national rules on the decline of the jurisdiction in favour of another court. At the same time, the common law rules of jurisdiction are grounded in the idea that ‘two inherent powers, to adjudicate and not to adjudicate, belong together’.

Thus, Fentiman claims that adjudicatory discretion ‘is highly prized by English lawyers as a means of ensuring procedural justice and efficiency, and responding to the complexities of cross-border litigation in which the balance of interests and policies differs markedly between cases’. Moreover, a wide range of gateways towards the assertion of jurisdiction over foreign defendants justifies the need for balancing the claimants’ access to the courts.

This article does not remove the doctrine of forum [non] conveniens completely from the private international law framework applied to adjudicate Tort Liability Claims. Instead, it suggests revisiting the concept of the natural forum under Spiliada’s first limb to reflect that (1) finding a single most appropriate forum for trying Tort Liability Claims which have significant connections with the territory of two states may be counterproductive; and (2) the consideration of the managerial organization of TNC should be incorporated in the forum [non] conveniens rule to justify whether England is a suitable forum for trying Tort Liability Claims. The conceptual basis of the new doctrinal model is further explained below.

First, the identification of the forum that is clearly the most appropriate to try Tort Liability Claims (i.e., having the closest connection to a dispute) may be extremely challenging, if not impossible. These complex disputes involving the English-domiciled parent companies and their foreign subsidiaries have a significant nexus with both home and host states. The nexus with the home state is established through the parent company’s domicile and the breach of duty of care within the jurisdiction, whilst the host state is linked to the dispute as a place where hazardous operations were conducted and claimants sustained injuries. TNCs by definition conduct their operations in multiple jurisdictions through an integrated economic and control system. Powerful multinationals often have a business presence on several continents through foreign subsidiaries, branches and representative offices, joint ventures, supply chains, distributors, or independent commercial agents. The history of litigating Tort Liability Claims demonstrates that parent companies occasionally centralize the decision-making processes over certain issues at the TNCs’ headquarters, having an impact on the subsidiary’s human rights and environmental performance that led to the alleged harm.

Section II of this article demonstrated that Tort Liability Claims are usually framed through an argument that the parent company’s wrongful conduct, as a matter of fact, resulted in harm to the claimants. Although the English-domiciled parent company is...

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109 See discussion in Fentiman, note 12, 301.
110 In Vedanta, the parent company has been actively involved in the Zambian operations by providing various services to the subsidiary according to the Management Agreement. In Okpabi, the parent company issued mandatory policies and group-wide operating standards for the subsidiaries.
geographically distanced from the operations of the foreign subsidiary, its decision to
pursue a particular environmental policy or alleged failure to secure the health and safety
of the subsidiary’s employees forms part of the causal chain of events leading to the
personal injuries in the host state. Much of the evidence material to this inquiry, either
documentary or testimonial, would be found in the offices of the parent company in
England, such as corporate documents of the group, management agreements between the
parent company and its subsidiary, minutes of meetings, and reports of the parent
company’s employees on overseas visits and correspondence.\textsuperscript{111} Consider, for
instance, allegations against Vedanta advanced in the English courts. The evidence
showed that Vedanta undertook to procure feasibility studies into large-scale mining
projects of its Zambian subsidiary and publicly admitted the adoption of a well-funded
programme to address environmental problems in Zambia.\textsuperscript{112} For jurisdictional purposes,
the claimants’ success in presenting an arguable claim against an English-domiciled
parent company on the breach of duty of care implies that tortious conduct is deemed
to have taken place in England leading to a genuine causal relationship and, hence, an
apparent territorial link between England and the locus of the tort.\textsuperscript{113}

Tort Liability Claims fall within the category of cases where the natural forum is not
easily identified.\textsuperscript{114} The tort is connected with both jurisdictions as there is an alleged
causal connection between the acts and omissions of each legal entity within respective
jurisdiction and sustained damage in the host state. The preferable approach to the forum
\textit{[non] conveniens} analysis is, therefore, to depart from choosing a single best jurisdiction
with the most real and substantial connection to the Tort Liability Claim in question and
focus on examining whether England as a forum of the first choice is sufficiently
connected with the dispute.

The above analysis leads to the second proposition of the revised doctrinal model of
\textit{Spiliada}’s first limb, i.e., the need to analyse connecting factors that link Tort Liability
Claims with England. I will suggest that personal connections of the English-domiciled
parent companies and England and the underlying managerial structure and economic
reality of TNCs impact the strength of the connections between England and the
substance of the dispute in Tort Liability Claims.\textsuperscript{115} As a starting point, the rule of
domicile is based on a strong personal connection between England and parent
companies and remains a suitable connecting factor as a foundation of the jurisdiction
in Tort Liability Claims.\textsuperscript{116} Indeed, English-domiciled parent companies often maintain a
significant political and economic nexus with England. TNCs enjoy the benefits of a

\textsuperscript{111} Lubbe, note 16, 1555.
\textsuperscript{112} Vedanta, note 67, para 84. These allegations were not tried on the merits since the case has settled.
\textsuperscript{113} On this point and the following arguments, see also Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas
International Law Review 939.
\textsuperscript{114} Bell, note 80, 125.
\textsuperscript{115} This argument was made previously by Muchlinski and Rogerson. See references in note 91.
\textsuperscript{116} In 2012, the Committee on Civil Litigation and the Interests of the Public of the International Law Association has
unanimously agreed that reliance on the parent company’s domicile in cases of business-related human rights abuses is
predictable and assists with closing the governance gaps with remediying the abuses when they occur. Committee on Civil
Litigation and the Interests of Public, \textit{International Civil Litigation for Human Rights Violations} (International Law
stable political climate, access to capital markets, the possibility of economic expansion, advanced corporate law and an impartial and efficient judicial system, as well as many other benefits.\textsuperscript{117} The corporate headquarters of the English-based multinationals sued as defendants in Tort Liability Claims often accommodate some of the key functions pertinent not only to the existence of the parent company itself but the TNC as a whole, such as strategic and business planning, finance, tax, legal and marketing.\textsuperscript{118} The relationship of a company to the state of its domicile gives the state a derived interest in the conduct and responsibilities of the company. Overall, the connection between English-domiciled parent companies and England as a forum of its domicile is clearly significant to give English courts plenary power to adjudicate any controversies regarding its operations.

Second, England as a jurisdiction of the first choice is also sufficiently connected with the underlying substance of the dispute in Tort Liability Claims. Some commentators have submitted that litigation against English-based multinationals raised concerns about the risks of ‘potential vexatious litigation’ and ‘jurisdiction shopping by foreign claimants’.\textsuperscript{119} It is, however, important to remember that the jurisdiction of the English courts is not invoked solely on the basis of the parent company’s presence within the forum. Rather, the English-domiciled parent companies are brought to court to answer allegations that they have breached their duty of care through decision-making in England which led to overseas harm. The nature of the dispute is to determine to what extent the human rights performance of the foreign subsidiaries of the English-based TNCs is monitored from England.

The reform of the \textit{forum non conveniens} analysis in the Tort Liability Claims would lead to the following position: to obtain a stay of proceedings commenced in England, the burden is on the defendant to show that England is the \textit{clearly inappropriate} forum to try the dispute.\textsuperscript{120} Suggested FNC rule removes a requirement to make a comparative judgment as to where a dispute should be tried and evaluate the strength of competing connections with different forums. The classic \textit{Spiliada} inquiry of the most \textit{appropriate} forum transforms into a question of why England is the \textit{clearly inappropriate} forum to try Tort Liability Claims.\textsuperscript{121} If English court is satisfied that England as a home state of the

\textsuperscript{117} Rogerson, note 91, 101.

\textsuperscript{118} The actual degree of the parent company’s managerial control and the subsidiary’s operational autonomy will, as demonstrated by the existing case law, differ significantly depending on a wide range of factors, such as the size of TNC, the specific market and/or industry, the ownership structure and the corporate governance model adopted.


\textsuperscript{120} Analysing the post-Brexit rules of jurisdiction, Dickinson has recently suggested a similar construct for the operation of the \textit{Spiliada} discretion. Acknowledging the costly and time-consuming requirements of the existing model, he suggests ‘shifting the onus to the defendant in all cases and an emphasis on the requirement that another forum be “clearly [i.e. manifestly] more appropriate” than England […]’. He also proposed ‘more pro-active case management throughput (e.g.) strict costs capping, a limit in the number of pages of evidence and submissions for each side […]’. See Andrew Dickinson, ‘Walking Solo – A New Path for the Conflict of Laws in England’, \textit{ConflictsofLaws.net} (4 January 2021), https://conflictoflaws.net/2021/walking-solo-a-new-path-for-the-conflict-of-laws-in-england/ (accessed 1 February 2021).

\textsuperscript{121} The proposal draws inspiration from the application of the FNC doctrine in Australia, where the courts place on the defendant a burden of showing that Australia is the \textit{clearly inappropriate} forum. The guidance on the
corporate defendant has a genuine nexus with the dispute, then the stay application would be rejected, and the case would be heard by the English courts. If, however, the English court decides that the Tort Liability Claim in question is not closely connected with the dispute, it should stay the proceedings unless the claimants can show that they will face a denial of justice in the host state.

The focus of the English court’s analysis under the first limb of Spiliada would be on the strength of connections between England and individual Tort Liability Claim. The Tort Liability Claims should not be considered as disputes arising solely out of the subsidiary’s operations in the host state. They constitute claims addressed to TNCs as complex economic units with the international nature of business operations. Where the claimants succeed in presenting an arguable claim against an English-based parent company for its alleged involvement in the subsidiary’s overseas operations, the issue of the appropriate forum under the first limb of Spiliada is likely to be satisfied. Indeed, it might not be particularly persuasive to establish that England is a clearly inappropriate forum for trying Tort Liability Claims when the parent company is allegedly in breach of a duty of care to ensure claimants’ safety by virtue of the acts and omissions taken within England. It is, therefore, anticipated that the English courts would more readily accept jurisdiction over Tort Liability Claims on the basis that England is a natural forum on Spiliada’s first limb.

The proposed reconsideration of the doctrine would render the English forum [non] conveniens control more predictable as the claimants would be able to commence in England arguable claims against English-based parent companies and their foreign subsidiaries as co-defendants in the Tort Liability Claims. It would also make legal proceeding more efficient, allowing the court and the parties to move more quickly to the merits stage, as (at least some of) the disputes would be likely resolved on the first limb of Spiliada. The forum [non] conveniens inquiry would be less resource-intensive because the court and the parties are not confronted with the necessity to prove that only one forum

122 This article does not call for a formal presumption of jurisdiction in cases where the parent company and the subsidiary are sued as co-defendants and the alleged parent company liability arises from the integrated nature of their activities. Instead, it calls for a more nuanced analysis of the significance of the connections between the parties, the subject matter and England as a forum. Third, it shifts the onus to the defendant which is beneficial for the claimants who already face a challenge of substantiating the claim with limited access to the internal documents of the corporate groups.

123 One of the anonymous peer-reviewers of the article has rightly noted that the appropriateness of England as a forum to try Tort Liability Claims would be exercised following the weight of presented evidence. The argument advanced here does not imply that the domicile of the parent company in England should effectively resolve the Spiliada inquiry. It is suggested that the nature of allegations and the substance of the claim should be taken into consideration during the jurisdictional analysis along with other factors. Presently, connections of the parent company with England are consistently overlooked when exercising the court’s broad discretion.
is mostly connected to the dispute.\textsuperscript{124} A more narrowly focused approach to the determination of the appropriate forum would require less detailed evidential analysis and help to avoid tactical jurisdictional litigation in the interests of a wealthy party.

Suggested doctrinal models of the \textit{forum [non] conveniens} analysis could be objected to on several grounds. The first objection relates to the increased risk of forum shopping by the claimants and overbroad assertions of jurisdiction over English-based parent companies and their foreign subsidiaries. It echoes a dissenting opinion by Lord Hoffmann in \textit{Connelly} delivered in 1998 with a note of caution: ‘If the presence of the defendants, as parent company and local subsidiary of a multinational, can enable them to be sued here, any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world.’\textsuperscript{125}

In response, it may be argued that over the past twenty years noticeable changes have occurred in the perception and understanding of corporate accountability for human rights violations. Many states have tightened controls over overseas business activities in various fields ranging from bribery to modern slavery and mandatory human rights due diligence.\textsuperscript{126} The emergence of Tort Liability Claims in recent years has raised the question of home states’ engagement in remediing the consequences of overseas abuses arising from their subsidiaries’ operations in host states. Civil liability cases against TNCs have received increasing attention as a possible means of addressing the global problems arising from cross-border business activities. To date, there is a significant degree of consensus that home states should ensure that their domestic courts have jurisdiction over civil claims concerning the overseas activities of local companies domiciled within their jurisdiction and, in certain circumstances, their foreign subsidiaries.\textsuperscript{127} More importantly, the application of the ‘real issue to be tried’ test allows English courts to dismiss unarguable claims against the English-based parent companies at the jurisdictional stage of the proceedings.

Another objection relates to the necessity of distinguishing between the jurisdictional and the substantive liability issue in Tort Liability Claims. In these complex disputes, the jurisdictional issues are inextricably intertwined with the merits. The English courts are increasingly facing the challenge of deciding jurisdiction over English-domiciled parent companies and their foreign subsidiaries without also having to engage in a mini-trial of the substantive claims. There is a chance that the proposed reform of the FNC doctrine could present further challenges given the fact that identification of the natural forum under the first limb is directly concerned with the examination of the underlying nature of the relationship between the parent company and its subsidiary. Yet, the jurisdictional test requires a lower standard of proof and is easier to meet than proving the parent company’s

\begin{footnotes}
\item[124] In this context, it is also important to note a sensible suggestion from Dickinson on the limit in the number of pages of evidence and submissions from the parties to resolve the jurisdictional inquiry. See Dickinson, note 120.
\item[125] \textit{Connelly}, note 16, 876.
\end{footnotes}
liability during the full trial. The assertion of personal jurisdiction by the English court over English-based multinationals does not in itself create a presumption of liability.

Finally, it may be argued that proposed reform disregards relevance of the geographical and physical factors which justify practical convenience of litigating in the host states, such as the location of witnesses and documents related to the operation of the subsidiaries. The significance of these factors should not be overstated. Not only does modern technology have wide implications for obtaining access to evidence in international litigation, but the English courts have also had some success in holding part of the hearing in Tort Liability Claims in the host state. In February 2018, for instance, the High Court convened in Sierra Leone to take evidence from witnesses and experts in the proceedings against iron ore producer Tonkolili Iron Ore Ltd, whose parent company African Minerals Ltd was previously headquartered in England. Tort Liability Claims inevitably increase the costs of litigation and make trials involving evidence in several jurisdictions lengthy and complex. Yet, it does not necessarily follow that English courts should refrain from trying disputes against English-based multinationals.

V. CONCLUSION

The rules of jurisdiction in international litigation have become increasingly prominent in recent decades. This is particularly clear in relation to problems of concurrent jurisdiction that are raised by Tort Liability Claims. 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 group headquarters. The traditional jurisdictional paradigm is often inadequate in acknowledging the global nature of multinationals’ activities and factual connections that their constituent units have with multiple jurisdictions.

This article has suggested revising the concept of the natural forum under the doctrine of forum [non] conveniens by placing a burden on the defendant to show that England is the clearly inappropriate forum to try the dispute and taking into account personal connections of the English-domiciled parent companies with England and the underlying nature of the liability issue in the dispute. The proposal is relatively innovative and will undoubtedly attract controversy. The complete removal of the

128 In Vedanta, the Court of Appeal specifically acknowledged that engagement in a mini-trial on substantive liability issues was not appropriate at the jurisdictional stage of proceedings before full disclosure had taken place. It was noted that the claimants may fail at the trial, but for jurisdictional purposes present evidence sufficient to allow the claims to proceed in the English courts. Vedanta, note 66, paras 86 and 90.
129 The COVID-19 pandemic has also demonstrated that the civil justice system could adjust to social distancing, enabling hearings to take place remotely, where possible.
doctrine from the jurisdictional analysis in Tort Liability Claims could have remedial advantages for the victims of business-related human rights abuses. Yet, in the post-Brexit environment, the search of the appropriate forum is a prominent question for the English courts. The article has articulated a normative justification for the reconsideration of the conventional *forum non conveniens* inquiry. The future of Tort Liability Claims in home states is inextricably linked with the willingness of the courts, as part of its jurisdictional analysis, to integrate considerations of the underlying nature of TNCs and the substance of the dispute.