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JURISDICTION OF PARENT COMPANIES' HOME STATE COURTS OVER FOREIGN SUBSIDIARIES ABROAD: A COMPARATIVE APPROACH BETWEEN THE NETHERLANDS AND THE UNITED KINGDOM

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ABSTRACT

With the increasing trend on liabilities of multinational corporations through foreign direct liability claims, more and more cases are brought before the home state courts of parent companies. In such cases, the victims abroad would aim to bring litigation against both the subsidiary company which operations caused the damage to the victims, and the parent company which arguable owes a duty of care towards its subsidiary. Therefore, a case in tort of negligence is filed against both defendants before one and the same court, the home state's court. Against this backdrop, the initial hurdle faced by the plaintiffs/claimants are issues regarding the jurisdiction of the court. This is particularly difficult when the defendant is a subsidiary based abroad, the plaintiffs are based abroad and the damage is abroad. This paper analysed the approach of the courts in the Netherlands and the United Kingdom based on existing and most recent case laws on the topic along with the applicable private international law, such as the Brussels I Recast Regulation that is binding on all European Union (EU) Member State.

Keywords: Foreign direct liability, jurisdiction, UK law, Dutch law, Multinational corporations

Introduction

The globalised society we are living in today has made it easier for multinational corporations in developed countries to transfer their operations to developing countries.¹ Although these multinational corporations have been a driving force for economic growth in developing states, it is arguable that they have also caused considerable damage in this respect.² For instance, in terms of environmental degradation, 'neoliberal economic globalisation encourages the pursuit of profit regardless of social and environmental costs.'³ Multinational corporations freely benefit from, or rather exploit, the advantages of monopoly of capital, cheap labour and natural resources, among

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¹ R. Mullerat, *International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century*, Alpen aan den Rijn: Kluwer Law International 2010, p. 120.

² L. Imade, 'How Globalization Underdeveloped Africa' in U. Tar, E. Mijah & M. Tedheke, *Globalization in Africa: Perspectives on Development, Security, and the Environment*, London: Lexington Books 2016, p. 55.

³ *Idem*, p. 66.

others.⁴ Moreover, in cases of damage to the environment or human rights violation in this respect, parent companies can possibly evade liabilities owing to the separate legal personality principle wherein parent companies and their subsidiaries abroad are construed as two distinct legal entities.⁵ Therefore, parent companies can generally escape liabilities in this regard.

The current solution to the issue of not being able to hold a parent company accountable is the emergence of foreign direct liability claims which refer to the approach in ‘holding companies legally accountable in their home state jurisdiction for negative environmental or health and safety impacts, or complicity in human rights abuses in developing countries where they operate.’⁶ In light of foreign direct liability claims as a current solution, the first hurdle faced by the victims remain to be the issues on jurisdiction due to the lack of uniform legal basis and varying interpretations depending on local courts.⁷ The ‘jurisdiction’ pertained to in this context is the power of the court to adjudicate a case and issue a decision.⁸ The mechanism to hold the parent company and the subsidiary company liable by bringing the subsidiary company under one jurisdiction, that is, of the parent company’s home state, is currently undergoing developments through local courts’ judgments, and attempts, at an international level to create uniform rules of private international law. Resolving this predicament would certainly contribute in resolving a fundamental procedural hurdle to hold companies accountable.

Against this backdrop, the intended purpose of research in this paper is to review how courts in the home country of parent companies establish jurisdiction over the subsidiary that is not domiciled in the same jurisdiction by means of “anchoring” such claims to the parent companies. Particularly, the focus is on the approach of the courts in The Netherlands and the United Kingdom (UK). These jurisdictions are few of the most advanced in the field of foreign direct liability with prominent cases ongoing before its courts. They also possess comparable aspects such as the type of cases and the starting point of the laws which govern them, although inherently differing in interpretation by the courts. This paper has the ultimate aim to contribute to the development of the international law, particularly the hard and binding laws that regulate the activities of multinational corporations that have vast operations abroad. The law-in-the-making pertained to this, it is the treaty in progress, the UNGA Res 26/9 ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ established on 14 July 2014.⁹ Legal certainty must be achieved for both

⁴ *Idem*, p. 58-71.

⁵ J. G. Ruggie, ‘Protect, Respect, and remedy: The UN Framework for Business and Human Rights’ in M. Baderin & M. Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond*, Oxon: Routledge 2016, p. 521.

⁶ L. Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability*, Eleven International Publishing 2012, p. 91-92. H. Ward, ‘Securing transnational corporate accountability through national courts: Implications and policy options’, *Hastings International and Comparative Law Review* 2001-24, p.451, 454. M. McVey, ‘A powerful Retort: Foreign direct liability as an essential mechanism of redress for victims of human rights violations by multinational extractive corporations’, *Queen’s University of Belfast Postgraduate HRC Working Paper* 2015-1.

⁷ M. Steinitz, ‘The Case for an International Court of Civil Justice’, *Stan. L. Rev. Online* 2014-67, p. 75.

⁸ L. Enneking, *supra* note 6, p. 133.

⁹ United Nations General Assembly, Res 26/9 (14 July 2014) UN Doc A/HRC/RES/26/9; United Nations Human Rights, Office of the High Commissioner Website, at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx> (accessed on 3 February 2018).

parties: for the victims, i.e. when can they file a claim implicating the parent companies along with the subsidiary companies; and for the parent companies, i.e. when can they be implicated in such cases in order to devise internal systems that can mitigate those circumstances.

I. The Netherlands: Dutch Court's Jurisdiction Over a Foreign Subsidiary

This chapter focuses on the approach of the Dutch courts when faced by a question whether it has jurisdiction over subsidiaries abroad of parent companies that are incorporated in The Netherlands. The following subsections analyse the methodology employed by the courts beginning from the application of the Brussels I Recast. Flowing from its application over the parent corporation domiciled in the Netherlands, the question of jurisdiction over the foreign subsidiary naturally prompts the departure from the auspices of Brussels I Recast. This is due to the fact that jurisdiction over foreign defendants fall outside its scope and the national rules of the Netherlands apply in this regard. The legal basis in the Dutch law to establish international jurisdiction over foreign subsidiaries is provided in Article 7(1) Dutch Code of Civil Procedure which pertains to a 'joint consideration of claims' that is 'justified for reasons of efficiency'.¹⁰

Against this backdrop, the decisions in the prominent *Akpan* case will be the main case in point for the purposes of this study, along with other decisions on jurisdiction that are related to the case, such as those filed by *Dooh*, *Oguru* and *Efanga*.¹¹ These four plaintiffs form the four Nigerian farmers who filed the tort claims before a court in the Netherlands against the companies Royal Dutch Shell Plc (RDS) and Shell Petroleum Development Company of Nigeria Ltd (SPDC), the former being the parent company and the latter being the subsidiary company. These claims were aided with the help of the Dutch brand of Friends of the Earth (*Vereniging Milieudefensie*). RDS is incorporated in the Netherlands while SPDC is a foreign corporation incorporated in Nigeria 'that had no branch, agency or other establishment in the forum state (the Netherlands)'.¹²

¹⁰ Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) (DCCP), Book 1, Litigation before the District Courts, the Courts of Appeal and the Supreme Court, English translation available at: <http://www.dutchcivillaw.com/civilprocedureleg.htm> (accessed on 16 February 2018), Art. 7(1). M. Kamminga, 'Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel' in C. Ryngaert, E. Molenaar & S. Nouwen, *What's Wrong with International Law: Liber Amicorum A.H.A. Soons*, Leiden: Brill Nijhoff 2015, p. 158.

¹¹ *Akpan v Shell*, The Hague Court of Appeal (18 December 2015) ECLI:NL:GHDHA:2015:3587 (*Akpan* 2015); *Dooh v Shell*, The Hague Court of Appeal (18 December 2015) ECLI:NL:GHDHA:2015:3586 (*Dooh* 2015); *Oguru/Efanga v Shell*, The Hague Court of Appeal (18 December 2015) ECLI:NL:GHDHA:2015:3588 (*Oguru/Efanga* 2015); *Akpan v Shell*, District Court of The Hague (30 January 2013) ECLI:NL:RBDHA:2013:BY9854 (*Akpan* 2013); *Akpan v Shell*, The District Court of Hague (24 February 2010) ECLI:NL:RBSGR:2010:BM1469 (*Akpan* 2010).

¹² C. Ryngaert, 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the *Akpan v Shell* Litigation in the Netherlands' *McGill International Journal of Sustainable Development Law and Policy - Revue internationale de droit et politique du developpement durable de McGill* 2013-8, p. 247, 251.

I.1. *Akpan v. Shell*: a Paradigm of Using an Anchor Defendant as a Key to Establish Jurisdiction Over a Foreign Subsidiary

Shell Group, the multinational corporation headquartered in the Netherlands, has been operating in Nigeria for years and every year there are incidents of oil spills from its oil pipelines and oil facilities.¹³ Several causes may have triggered such oil spills, for instance, the defective and/or obsolete materials used by the oil companies or a sabotage amalgamated with inadequate safety measures.¹⁴ Both RDS and SPDC are part of the Shell group and the relationship between the two companies is in a structure of a parent-subsiary company formation. RDS has been the head of the Shell Group since 20 July 2005 and holds all shares of SPDC, the subsidiary that conducts the oil operations in Nigeria for the Shell group.¹⁵ Akpan, on the other hand, is a Nigerian farmer and fisherman from the village of Ikot Ada Udo in Nigeria. His livelihood is centred on exploiting land and fish ponds near Ikot Ada Udo. *Milieudefensie* supported Akpan in the proceedings he filed against Shell which particularly pertains to the two oil spills in 2006 and 2007 from oil facilities of SPDC near the village of Ikot Ada Udo.¹⁶

RDS and SPDC are being held jointly and severally liable in tort for the damage that Akpan suffered and the consequential future damage that may arise.¹⁷ The claims by the plaintiffs are based largely on the tort law principle of ‘duty of care’ and argued that SPDC did not comply upon this duty.¹⁸ Moreover, RDS was contended to have committed tort of negligence for its failure to comply with its duty to induce its subsidiary, SPDC, to prevent the oil spills and to perform necessary actions as a response.¹⁹ Faced with a transnational tort claim involving two defendants which are merely connected by means of their company structure but are not one and the same legal entity, the court in the Netherlands need to first address whether it has jurisdiction to hear the claims before it. The court rendered its first judgments concerning the motion contesting jurisdiction in 2009 and 2010 followed by judgments in 2013 in which its decision regarding jurisdiction is elaborated further.²⁰

In the 2013 judgments, all the cases against the parent company RDS were dismissed as well as all the claims against the subsidiary SPDC except for the case involving Akpan. This case was appealed by SPDC and the 2015 decision affirmed the ruling in favour of Akpan. This is the ‘first

¹³ *Akpan 2013*, *supra* note 11, para 2.1.

¹⁴ *Ibid.*

¹⁵ *Idem*, para 2.2.

¹⁶ *Ibid.*

¹⁷ *Idem*, para 3.1. *Milieudefensie* argued that *inter alia* Akpan’s physical integrity is violated by living in a contaminated living environment. The court is also requested to order RDS and SPDC to commence clean-up and restoration of the damaged environment such as the purification of water resources and implementing contingency plan in Nigeria as a proper response to the oil spills. Lastly, compensation is being claimed against RDS and SPDC which includes the extrajudicial costs and the costs of the proceedings.

¹⁸ It argued the duty of care under tort of negligence based on the ruling in *Rylands v Fletcher* [1868] UKHL 1. Nigerian legal system on compensation for non-contractual obligations is based on the common law legal system of England, a part of Nigeria’s federal law applicable in all states of Nigeria.

¹⁹ *Akpan 2013*, *supra* note 11, para 3.1. (VIII-X).

²⁰ *Akpan 2010*, *supra* note 11. *Akpan 2013*, *supra* note 11. *Dooh v Shell*, District Court of The Hague (30 January 2013) ECLI:NL:RBDHA:2013:BY9845 (*Dooh 2013*). *Oguru/Efanga v Shell*, District Court of The Hague (30 January 2013) ECLI:NL:RBDHA:2013:BY9850 (*Oguru/Efanga 2013*).

time a western court held a multinational company liable for environmental damage caused in a non-western country'.²¹ The illustration how the Dutch court established its jurisdiction over the subsidiary can be summed up into a threefold process: (1) determine jurisdiction over the claims against the parent company under the Brussels I Recast; (2) establish jurisdiction over the subsidiary company by anchoring the claims to those against the parent company in accordance with the Dutch Code of Civil Procedure (DCCP);²² and, (3) there should not be an abuse of procedural law.²³

I.1.1. The Application of the Brussels I Recast as a Starting Point

In light of the Netherlands' membership to the EU, the rules on jurisdiction when it comes to cases in civil and commercial matters that has an international element is dictated by the Brussels I Recast and such rules take precedence over the Dutch rules on international jurisdiction.²⁴ Transnational torts fall within the scope of Article 1 Brussels I Recast and given the fact that the plaintiffs are Nigerian nationals (hence the international element), the provisions of the said regulation are to be applied by the Dutch courts.²⁵ This determination of jurisdiction by the courts is a rather straightforward process, however, only with respect to the parent company RDS.

The application of the rules in Brussels I Recast, however, is limited to defendants that are domiciled in the Member States, unless the situation falls under Article 24 or 25 Brussels I Recast which is not the case in most of the proceedings.²⁶ Establishing jurisdiction over the parent company is vital to the determination of jurisdiction over the subsidiary company as elaborated in the next subsection. The legal basis is Article 4(1) Brussels I Recast in conjunction with Article 63(1).²⁷ Accordingly, RDS is deemed to be domiciled in the Netherlands because it has its headquarters in the there. Consequently, RDS can be sued in the State where it is domiciled. Therefore, the Nigerian farmers can sue RDS before the Dutch courts and jurisdiction in this regard is not disputed.²⁸

²¹ C. van Dam, 'Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case' (14 January 2016) at: <http://www.ceesvandam.info/default.asp?fileid=643> (accessed on 7 May 2018).

²² DCCP, *supra* note 10.

²³ Akpan 2013, *supra* note 11, para 4.1.

²⁴ Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Lugano Convention) [2007] OJ L 339/3; P. Stone, *EU Private International Law: Third Edition*, Cheltenham: Edward Elgar Publishing 2014, p. 24; T. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, Cambridge: Cambridge University Press 2009, p. 20.

²⁵ Council Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) [2012] OJ L351/1, last amended [2014] OJ L 163/1, Art. 1; G. van Calster, *European Private International Law*, Oxford: Hart Publishing 2016, pp. 23-24; Situations under Article 24 pertain to, for instance, immovable property, companies and legal persons, public registers, and deposited or registered rights; Situations under Article 25 pertain to cases in which a choice of court clause is provided and agreed between the parties.

²⁶ *Idem*, Brussels I Recast, Arts. 24 and 25; *Supra* Introduction to Section 2.1.

²⁷ *Idem*, Brussels I Recast, Art. 4(1) in conjunction with Art. 63(1).

²⁸ Akpan 2010, *supra* note 11, para 3.1.

I.1.2. The Use of ‘Anchor Claims’ to Connect the Claims Against the Foreign Subsidiary

The Brussels I Regulation do not generally apply when it comes to determining jurisdiction over the foreign subsidiary because it ‘only applies to companies domiciled in an EU Member State’.²⁹ Consequently, the relevant Dutch rules in international jurisdiction apply. This is particularly relevant in cases of foreign direct liability claims where it is inherent that one of the defendants (foreign subsidiary) is not domiciled in the Netherlands. With respect to such cases, Article 6(1) Brussels I Recast provides that ‘(i)f the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall (...) be determined by the law of that Member State’.³⁰ In other words, Brussels I Recast hands back the discretion to the Dutch courts as long as it does not concern consumers, employees, matters stipulated in Article 24 which calls for exclusive jurisdiction of courts and choice of court clauses as provided in Article 25 Brussels I Recast.³¹

The relevant provision under the DCCP for jurisdiction over foreign defendants in consideration of cases in foreign direct liability claims, where establishing jurisdiction over the parent company is a prerequisite, falls under the rules on joinders.³² Therefore, the mechanism is rather related to the success of establishing jurisdiction over the parent company. In this regard, Article 7(1) DCCP provides that:

If (...) a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.³³

This test is applied similarly from the application of Article 8(1) Brussels I Recast by the European Court of Justice (ECJ).³⁴ This provision pertains to jurisdiction in cases involving more defendants. Accordingly, ‘(a) person domiciled in a Member State may also be sued where he is one of a number of defendants (...) provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.³⁵

Against these provisions, in the 2010 interlocutory judgment in *Akpan*, the subsidiary company contends that the Dutch court should not have jurisdiction over them because Article 7 DCCP does not offer a basis for international jurisdiction. Moreover, the criteria to be fulfilled, i.e. justifications for efficiency reasons to satisfy a joint hearing is not complied with. Nevertheless, the courts decided in favour of the plaintiffs considering that both RDS and SPDC are being held

²⁹ Brussels I Recast, *supra* note 25, Art. 6; *Akpan* 2010, *supra* note 11, para 3.4; L. Roorda & C. Ryngaert, ‘Business and Human Rights Litigation in Europe and Canada: the Promises of Forum Necessity Jurisdiction’, *Rabel Journal of Comparative and International Private Law* 2016-80, pp. 783, 804.

³⁰ Brussels I Recast, *supra* note 25, Art. 6.

³¹ Brussels I Recast, *supra* note 25, Art. 6 in conjunction with Arts. 18(1), 21(2), 24 and 25.

³² DCCP (n 10) Article 7(1).

³³ DCCP (n 10) Art. 7(1).

³⁴ *Akpan* 2010, 2013 and 2015 decisions, *supra* note 11; D. Augenstein & N. Jagers, ‘Judicial Remedies: The issue of Jurisdiction’ in J. J. Álvarez Rubio & K. Yiannibas, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, Abingdon: Taylor and Francis 2017, pp. 18-19.

³⁵ Brussels I Recast, *supra* note 25, Art. 8(1).

liable for the same damage which also follows from the claim for a joint and several order for both companies.³⁶ The court is satisfied with this fact alone and established connection to the extent that reasons of efficiency justify a joint hearing of the claims against both defendants.³⁷ Lastly, it did not matter for the court if all or part of the facts and circumstances of the case did not occur in the Netherlands.³⁸

Shell appealed relying on the ECJ *Painer* case where the court established that even if the basis of the claims is initiated against various defendants, this does not preclude the application of Article 8(1) Brussels I Recast.³⁹ Therefore, should the basis of the claims against the parent and the subsidiary would have been different, relying on the case law would seem that the court will not be deterred from concluding a sufficient connection that justifies a joint hearing. However, there is an important prerequisite to the *Painer* ruling; the defendants should have been able to foresee that they might be sued in the Member State where at least one of them is domiciled.⁴⁰ In other words, a subsidiary company must have foreseen that it will be summoned before the courts abroad where its parent company is domiciled.

RDS argued that SPDC could not foresee that it would be summoned in the Netherlands concerning the oil spills in Nigeria.⁴¹ Therefore, if *Painer* ruling would have been applicable, a Dutch court will not be able to establish jurisdiction over the claims against a foreign subsidiary due to lack of foreseeability on its part that it can be sued abroad. It must be regarded that *Painer* is only applicable insofar as a case falls within the scope of Brussels I Recast.⁴² Establishing jurisdiction over a foreign subsidiary in light of the fact that it is a ‘defendant not domiciled in a Member State’ prompts a departure from the application of Brussels I Recast.⁴³ However, even though EU case law is not directly applicable in this matter, a Dutch court did not preclude its application ‘to avoid creating a gap between Regulation and non-Regulation standards’ although such an application would depend on the courts’ own volition.⁴⁴

Nonetheless, the Dutch court found *Painer* irrelevant in *Akpan* because the claims against both defendants have the same legal basis anyway, i.e. ‘tort of Negligence under Nigerian law’.⁴⁵ The court still affirmed, however, that even if the claims do not coincide altogether, the connectivity of the claims will not be affected.⁴⁶ Moreover, the court addressed the foreseeability element by reasoning that ‘an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions’.⁴⁷

³⁶ *Akpan* 2010, *supra* note 11, para 3.6.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533, para 81; Then Article 6(1) Brussels I Regulation.

⁴⁰ *Ibid.*

⁴¹ *Akpan* 2013, *supra* note 11, para 4.4.

⁴² Augenstein & Jagers, *supra* note 34, pp. 18-19. In general, EU case law would be applicable only to cases that fall within the scope of EU law.

⁴³ Brussels I Recast, *supra* note 25, Art. 6(1).

⁴⁴ *Kalfelis*, *supra* note 52. Augenstein & Jagers, *supra* note 34, pp. 18-19.

⁴⁵ *Akpan* 2013, *supra* note 11, para 4.5.

⁴⁶ *Akpan* 2015, *supra* note 11, para 2.6.; Case C-98/06 *Freeport plc v Olle Arnoldsson* [2007] ECLI:EU:C:2007:595, paras 51 ff.

⁴⁷ *Ibid.*; L. Enneking, ‘Aansprakelijkheid via ‘foreign direct liability claims’: Den Haag is weer even de ‘Legal Capital of the World’, *Nederlands Juristenblad* 2010-7, pp. 400, 400-406.

This was enough for the court in its 2013 decision to be convinced that the subsidiary SPDC in Nigeria must have foreseen that it will be sued in the Netherlands before the court where its parent company is domiciled.

The foreseeability element was reinforced in the 2015 Appeals with more sources relied upon the court referring to the history surrounding the facts of the claim such as the many oil spills that occurred annually during the extraction of oil in Nigeria, the previous legal actions that have been conducted for many years in this regard, the problems caused by oil spills to humans and the environment, and the increased attention these problems have harboured.⁴⁸ With respect to the said considerations, it must have been foreseeable for the subsidiary company that it will be summoned before a court that has jurisdiction over the parent company in this matter.⁴⁹ The court also expanded its reasoning regarding the ‘connection’ requirement in its 2015 Appeals decision.

The factors taken into consideration in order to determine that the claims are so closely connected were the following: (1) the group link between the defendants who are held as joint and several parties at fault; (2) the claims filed against both defendants were identical; (3) the factual basis of the case is the same oil spill; (4) the discussion concerns mostly about what caused the oil spill and whether there was enough done to prevent and remedy the consequences; (5) further investigations are required; (6) these investigations are preferably carried out by one and the same court to prevent diverging findings and assessments.⁵⁰ In light of these considerations, the claims against the parent company RDS and subsidiary company SPDC are so closely connected that it justifies reasons of expediency.⁵¹ Otherwise, there will be a risk of having irreconcilable judgments should the claims against the parent company be adjudicated in the Netherlands while the claims against the subsidiary company be heard before Nigerian courts.⁵² A judgment would be ‘irreconcilable’ when the basis of the claim regarding the facts and law is the same but the outcome might turn out differently if heard separately.⁵³

I.1.3. The Absence of an Abuse of Procedural Law as a Prerequisite

The claims contesting an abuse of procedural law were decided in the 2010 decision on *Akpan*.⁵⁴ This claim is particularly brought forward by the subsidiary company SPDC contesting that the claims against RDS, which has an inadequate legal basis, are filed for the sole purpose of creating jurisdiction with respect to them.⁵⁵ In light of the analysis in the previous section pertaining to connection to justify a joint hearing, it is apparent that the absence of such connection would most likely warrant an abuse of procedural law.⁵⁶ However, such a claim can only be assumed in very rare circumstances, particularly in a situation where the plaintiffs knew or should have known that the facts and circumstances that serve as the basis of their claims are incorrect or that the plaintiff should have realised beforehand that the basis of their arguments had no chance of success and

⁴⁸ *Akpan* 2015, *supra* note 11, para 2.3. The 2015 Appeals decision cited more sources to support this reasoning: *Bowoto et al. v Chevron Texaco Corp*, U.S.C. App. 9th. Cir., (2010), No. 09-15641; *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Lubbe v. Cape Plc* [2000] UKHL 41.

⁴⁹ *Akpan* 2015, *supra* note 11, para 2.6.

⁵⁰ *Ibid*, para 2.4.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Akpan* 2015, *supra* note 11, para 2.6.

⁵⁴ *Akpan* 2010, *supra* note 11, para 2.4.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*, para 3.2.

thus are completely unsound.⁵⁷ The court, nevertheless, finds that claims against the parent company RDS were not fully unsound or certain to fail and rather accepted the possibility of assessing this in the merits phase.⁵⁸

Following the successful establishment of jurisdiction of the Dutch court over the Nigerian subsidiary, the interlocutory judgment of 2010 was appealed by the SPDC. In its appeal, it substantiated its arguments on the basis of Nigerian law, being the undisputed applicable law on the merits of the case.⁵⁹ It may seem logical to analyse the claims substantively to declare the lack of abuse of procedural law, however, the court only reasoned that, under Nigerian law, it is possible for a parent company to ‘be liable based on tort of negligence against people who suffered damage as a result of the activities of (its) subsidiary’.⁶⁰ Therefore, it cannot be declared that the claims against the parent company is clearly certain to fail beforehand.⁶¹ At the procedural part of the decision, this was enough to determine jurisdiction over the subsidiary company, hence the court was able to proceed with the merits of the claim.

I.2. Is the Ultimate Test to Jurisdiction over the Subsidiary: ‘Whether the Anchor Claims Could Possibly be Awarded’?

The 2010 and 2013 decisions of the court in *Akpan* favouring the court’s jurisdiction over the claims against the subsidiary were appealed by SPDC. As analysed in the previous sections, a threefold process was established wherein, first, the jurisdiction over the parent company under Article 4(1) Brussels I Recast is determined. This was undisputed in the appeal by the defendants. Second, the jurisdiction was extended to the claims over the subsidiary company under Article 7(1) DCCP prompted by the departure from Brussels I Recast via Article 6(1). The court was convinced that the ‘claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing’.⁶² Lastly, the court cleared the issue regarding the alleged abuse of procedural law. Accordingly, the claims against both defendants follow from the same legal basis, i.e. tort of negligence. Consequently, the court was able to decide on the merits aspect of the case and indeed liability was proven on the part of the subsidiary company SPDC, while the claims against the parent company RDS were dismissed. Although the threefold approach by the court were once again appealed by the defendants as reflected in the 2015 decision, it seemed apparent in this decision that the ultimate test is, ‘whether the claims against RDS could possibly be awarded’.⁶³

⁵⁷ *Ibid*; *Waterschap Regge en Dinkel and Waterschap Groot Salland v. Milieutech Beheer BV*, Netherlands Supreme Court (29 June 2007) NJ 2007 no. 353, ECLI:NL:HR:2007:BA3516.

⁵⁸ *Ibid*.

⁵⁹ *Akpan 2013*, *supra* note 52, para 4.8-4.10. The alleged harmful events in *Akpan* case fall out of the temporal scope of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Therefore, the court determined the applicable law based on the provision of the Dutch Conflicts of Law Act on Torts (*Wet Conflictenrecht Onrechtmatige Daad*) which was applicable since 11 April 2001. This Act is now replaced with the entry into force of the Book 10, Dutch Civil Code (Boek 10 *Burgerlijk Wetboek, Internationaal Privaatrecht*) on 1 January 2012.

⁶⁰ *Akpan 2013*, *supra* note 52, para 4.3. and 4.22; *Chandler v Cape Plc* [2012] EWCA (Civ) 525; Nigerian legal system on compensation for non-contractual obligations is based on the common law legal system of England, a part of Nigeria’s federal law applicable in all states of Nigeria.

⁶¹ *Ibid*.

⁶² *Akpan 2015*, *supra* note 11, paras 1.2. and 2.1.; *Dooh 2015*, *supra* note 11, para 3.1.

⁶³ *Akpan 2015*, *supra* note 11, para 2.2. ‘In hoger beroep herhaalt SPDC weliswaar al deze tegenwerpingen, maar concludeert zij uiteindelijk dat de ‘toets’ die moet worden aangelegd is of

This test was actually argued by SPDC and may be somewhat related to the third step of the process regarding the abuse of procedural law, although the focus is quite different. In the 2013 decision, the focus to declare that there was no abuse of procedural law is phrased on a negative note, i.e. ‘whether the claims are not certain to fail beforehand’ to which the answer is simply the existence of the possibility to hold the parent company liable for the damage caused by its subsidiary by citing *Chandler*. In other words, the claim is not certain to fail because the type of liability exists. To put simply, because the type of tort liability in question exists under Nigerian law, it falls within the material scope to establish jurisdiction (*ratione materiae*), hence there was no abuse of procedural law and jurisdiction over the claims against the subsidiary succeeds. The analysis would probably be different if the type of tort liability being claimed is non-existent under the applicable law to the substantive part of the claim.

What is peculiar in the 2015 Appeals decision is how the courts approached this test. Note that this does not necessarily mean that a liability of a parent company to the damage caused by the subsidiary can be decided upon right away at the procedural phase.⁶⁴ The court, however, sees this test more as implicit in the requirement of a connection under Article 7(1) DCCP.⁶⁵ Accordingly, ‘if it is clear in advance that the claim against RDS are obviously bound to fail and for that reason cannot be possibly allowed it is hard to imagine that reasons of efficiency nonetheless justify a joint hearing.’⁶⁶

To address this, the court enquired into the English law principles that tackles the liability surrounding the duty of care by a parent company. The court cited the foreseeability element in *Caparo*.⁶⁷ Accordingly, in light of the foreseeable consequences of oil spills to the local environment from a potential spill source, the parent company could have taken steps to prevent it especially when it has advocated for the prevention of environmental damage by the activities of group companies and because it is actively involved in and managing the business operations of such companies.⁶⁸ The elements in *Caparo* in combination with principle from *Chandler* marked the Dutch court’s approach in light of the ultimate test, though interpreted somewhat less rigorously when compared to the UK court as can be seen in the next chapter.⁶⁹ Conversely, once the Dutch court saw that the type of liability argued by the plaintiffs exist under the applicable law that alone suffices the possibility of awarding the anchor claims.

I.3. Jurisdiction over the Foreign Subsidiary if the Anchor Claims Fail

It is apparent in the threefold process applied by the Dutch court to establish jurisdiction against the subsidiary company that the jurisdiction over the claims against the subsidiary company does not stand on its own and is rather dependent on surrounding factors such as the successful jurisdiction over the parent company and the lack of abuse of procedural law. The ensuing question, therefore is, how firm in this jurisdiction will still prevail if the claims against the anchor defendant fails. Although jurisdiction may have been already established for both the parent

er een mogelijkheid bestaat dat de vorderingen bij voorbaat evident kansloos zijn’; *Dooh* 2015, *supra* note 11, para 3.2.

⁶⁴ *Akpan* 2015, *supra* note 11, para 2.2.

⁶⁵ *Ibid.*

⁶⁶ *Akpan* 2015, *supra* note 11, para 2.2., *Dooh* 2015, *supra* note 11, para 3.2.

⁶⁷ *Caparo Industries plc. v. Dickman* [1990] UKHL 2.

⁶⁸ *Akpan* 2015, *supra* note 11, para 2.2.

⁶⁹ *Chandler v Cape Plc* [2012] EWCA Civ 525.

company and the subsidiary company, there is still a possibility that the claims against RDS will be dismissed in the merits phase.

Should the anchor claims fail, it might be logical to think that the only connection with the Dutch court is out of way, hence it is better to hand over the assessment of the merits phase of the claims against SPDC to the Nigerian courts, since the plaintiff is Nigerian, SPDC is domiciled in Nigeria and the law applicable is Nigerian law on a damage that occurred on Nigerian territory.⁷⁰ The court, however, stated that *forum non conveniens* no longer play a role in today's international private law.⁷¹ Consequently, the jurisdiction of the Dutch court found on the basis of Article 7 DCCP does not cease to exist even in the case that the claims against RDS were dismissed and subsequently, even though no connection would remain with Dutch jurisdiction.⁷² It seemed, therefore, that the court did not concern itself with the question that necessitates digging deeper into the merits of the case and further analyse the substantial part that establishes whether there is liability.

Lastly, in the 2015 Appeals decision in *Akpan*, it is finally stipulated that Article 7(1) DCCP constitutes a sufficient basis for determining international jurisdiction over the claims against the subsidiary company.⁷³ Based on this foundation, the court further affirmed that the international jurisdiction established over the claims against the subsidiary company does not cease to exist even if the anchor claim is declared to be unfounded.⁷⁴ Furthermore, it was only necessary to prove jurisdiction over the subsidiary company by means of the connection under Article 7(1) DCCP at the phase of the when the proceedings are initiated at the first instance.⁷⁵ Once established, jurisdiction stands until the end of the case as per the principle *perpetuatio fori* or the continued jurisdiction of the court.⁷⁶

I.4. *Forum Necessitatis* as an Alternative

Forum necessitatis is a jurisdictional doctrine wherein a court is allowed to 'accept jurisdiction in cases where there is no other forum available in which the plaintiff could pursue his/her claims'.⁷⁷ It is made available for claimants in cases where justice would be denied because there are no alternative forums.⁷⁸ This doctrine is not provided for in the Brussels I Recast but is rather a mere national principle in establishing jurisdiction provided for under Article 9 DCCP.⁷⁹ Accordingly, Dutch courts have jurisdiction if: there is a tacit acceptance of jurisdiction (appearance without contesting jurisdiction); 'a civil case outside the Netherlands appears to be impossible'; or if the

⁷⁰ *Akpan* 2013, *supra* note 11, para 4.6.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Akpan* 2015, *supra* note 11, para 2.8.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Solvochem Holland B.V. v. Rasheed Bank*, The Hague Court of Appeal (30 October 2010) ECLI:NL:GHSGR:2010:BP3078.

⁷⁷ DCCP (n 10) Art. 9(1); Augenstein & Jägers, *supra* note 34.

⁷⁸ Francisco Zamora Cabot, Lukas Heckendorn Urscheler & Stéphanie De Dycker, *Implementing the U.N. Guiding Principles on Business and Human Rights* (Schulthess 2017) 43.

⁷⁹ DCCP, *supra* note 10, Art. 9(a)-(c).

case initiated by writ of summons 'have sufficient connection with the Dutch legal sphere'.⁸⁰ This is a well established principle in the Netherlands.⁸¹

The landmark *Kiobel* case which was first filed by the widow Mrs. Kiobel against Shell⁸² before a court in the US on the basis of the Alien Tort Statute, but dramatically failed, is now filed before a court in the Netherlands thanks to the success of the *Akpan* case.⁸³ What is peculiar this time is that, aside from the first argued basis of jurisdiction which is exactly how jurisdiction was successfully established above, the writ of summons contains an alternative ground for jurisdiction on the basis of *forum necessitatis*.⁸⁴ It particularly relied on Article 9(c) as it argues the connection of SPDC as a subsidiary of RDS, the fact that the subsidiary acted as a single entity with the parent company, and that SPDC received instructions from RDS in The Hague.⁸⁵ Moreover, it highlighted the lack of access to justice for Kiobel and other widows in Nigeria as they do not have any prospect of a fair trial there, further stating that such a judicial process would be traumatic and dangerous for them.⁸⁶

Lastly, the writ of summons stressed its arguments on *forum necessitatis* on the basis of a large-scale corruption in Nigeria and its judicial system.⁸⁷ Indeed, as cited in the writ of summons by

⁸⁰ *Ibid.*

⁸¹ *Saloum/Kuwait Airways Corp.*, Amsterdam Sub- District Court (27 April 2000), 2000 Nederlands Internationaal Privaatrecht 315, 472 (Kuwait Airways case II); *El-Hojouj v Unnamed Libyan Officials*, District Court of the Hague (21 March 2012) Case No 400882/HAZA11-2252, ECLI:NL:RBSGR:2012:BV9748; Augenstein and Jägers, *supra* note 34, pp. 29; L. Roorda and C. Ryngaert, 'Business and Human Rights Litigation in Europe and Canada: the Promises of Forum Necessity Jurisdiction', *The Rabel Journal of Comparative and International Private Law* 2016-80, pp. 783, 804; L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Alpen aan den Rijn: Kluwer 2012, pp. 234-235.

⁸² Royal Dutch Petroleum Company and Shell Transport and Trading Company Plc.

⁸³ Alien Tort Statute, 28 U.S. Code § 1350; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. N.Y. 2010); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); Amnesty International, 'In The Dock: Shell's Complicity in the Arbitrary Execution of the Ogoni Nine' (29 June 2017) at: <https://www.amnesty.nl/content/uploads/2017/06/In-the-Dock-Kiobel-Briefing.pdf?x32866> (accessed on 30 May 2018); J. Donovan, 'Final Extract Esther Kiobel Writ Served on Shell 28 June 2017' (9 August 2017) at: <http://royaldutchshellplc.com/2017/08/09/final-extract-esther-kiobel-writ-served-on-shell-28-june-2017/> (accessed on 29 May 2018); S. Martinetto, 'A Quest for justice: The 'Ogoni Nine' legal saga and the new Kiobel lawsuit against Shell' (Doing Business Right, 21 July 2017), at: <http://www.asser.nl/DoingBusinessRight/Blog/post/a-quest-for-justice-the-ogoni-nine-legal-saga-and-the-new-kiobel-lawsuit-against-shell-by-sara-martinetto> (accessed on 30 May 2018).

⁸⁴ *Supra* Sections 3.1.-3.3. The legal bases were Arts. 4(1) cj 63 Brussels I Recast and Art. 7(1) DCCP; Writ of Summons by Esther Duke Kiobel, Victoria Bera, Blessing Ken Nordu and Charity Vureka Levula against Royal Dutch Shell Plc, Shell Petroleum NV, Shell Transport and Trading Company Limited and Shell Petroleum Development Company of Nigeria Limited, Sec. 6.3 (Writ of Summons by Kiobel), at: <https://earthrights.org/wp-content/uploads/Writ-of-summons.pdf> (accessed on 30 May 2018).

⁸⁵ *Ibid.*, Writ of Summons by Kiobel.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*; M. Martini, 'Nigeria: Evidence of corruption and the influence of social norms' (*Transparency International*, 26 September 2014) 10 at: https://www.transparency.org/files/content/corruptionqas/Nigeria_overview_of_corruption_and_influence_of_social_norms_2014.pdf (accessed on 7 2018); F. Abiodun, R. Adeleke & O.

Kiobel, a Dutch court does not consider an absence of a proper judicial process as an impossibility to achieve justice but ‘(s)uch a circumstance may however give rise to serious onerousness that must be taken into consideration in the context of article 9, preamble and under c CCP in the sense that it may mean that it is unacceptable to expect a claimant to submit the case to the judgment of the courts of the state in question’.⁸⁸ The hearings with regard to this case was heard on 12 February 2019 and a decision is expected somewhere in May 2019.⁸⁹ However, since the case involves the same defendants in *Akpan*, it is highly likely that the court will first look into jurisdiction based on Article 4(1) in conjunction with Article 63 Brussels I Recast followed by Article 7 DCCP. Therefore, although the principle is an established one under the Dutch law, its effect on future claims against foreign subsidiaries in the total absence of any connection is still bleak in foreign direct liability cases.

II. The United Kingdom: English Court’s Jurisdiction over a Foreign Subsidiary

This chapter focuses on the approach of the English courts when faced by a question whether it has jurisdiction over subsidiaries abroad of parent companies that are domiciled in the UK. Following the pattern of the Dutch courts, English courts also extended its supposed domestic jurisdiction extraterritorially to subsidiaries abroad of parent companies housed in the UK. This chapter begins with the background to the UK’s most recent jurisprudence on establishing jurisdiction over a foreign subsidiary followed by the English rules on extending its jurisdiction on tort claims against a foreign defendant. It exhibits how English courts implements national rules in a similar fashion that the Dutch courts do when jurisdiction over foreign subsidiaries prompts a departure from the Brussels I recast.

II.1. UK’s Most Recent Jurisprudence on Establishing Jurisdiction Over a Foreign Subsidiary

This section analyses the most recent jurisprudence of the English courts with respect to its approach on establishing jurisdiction over the claims against the subsidiary. For the purposes of the analysis in this paper, three most recent case law will be analysed: *Lungowe v. Vedanta and KCM*;⁹⁰ *Okpabi v. RDS and SPDC*;⁹¹ and, *AAA v. Unilever PLC and UTKL*.⁹² Based on these

Funke Olayanju, ‘The role of the judiciary in combating corruption: aiding and inhibiting factors in Nigeria’, *Commonwealth Law Bulletin* 2014-40, pp. 589, 604-605; *Llanos Oil Exploration Ltd v Republic of Colombia and Ecopetrol SA*, Court of Appeal The Hague (15 October 2013) ECLI:NL:GHDHA:2013:3895, para 11.3; *Llanos Oil Exploration Ltd v Republic of Colombia and Ecopetrol SA*, Supreme Court (20 February 2015) ECLI:NL:PHR:2014:2344, Conclusion of A-G Vlas at para 2.5.

⁸⁸ *Ibid.*

⁸⁹ Green Peace, ‘Seeking justice: the rising tide of court cases against Shell’ (May 2018) at: http://www.greenpeace.nl/Global/nederland/report/2018/klimaat_en_energie/Investor%20Briefing%20Seeking%20justice%20the%20rising%20tide%20of%20court%20cases%20against%20Shell.pdf (accessed on 29 May 2018); Amnesty International, ‘Een Nigeriaanse weduwe v Shell’ at: <https://www.amnesty.nl/wat-we-doen/themas/bedrijven-en-mensenrechten/shell-in-nigeria/kiobel> (accessed on 15 April 2019).

⁹⁰ *Dominic Liswaniso Lungowe and Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528 (*Lungowe* 2017).

⁹¹ *His Royal Highness Emere Godwin Bebe Okpabi and Others and Lucky Alame and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Plc* [2018] EWCA 89 Civ 191 (*Okpabi* 2018).

⁹² *AAA and Others v. Unilever Plc and Unilever Tea Kenya Limited* [2017] EWHC 371 (QB).

cases, a general notion on how courts approach jurisdictional issues over a foreign subsidiary has emerged. The first step, and prerequisite to the second, is to properly establish jurisdiction over the claims against the anchor defendant, i.e. the parent company domiciled in the UK. The second step deals with a five-step process developed and adapted by courts in a form of questions to answer the issue whether the court has jurisdiction over the foreign subsidiary.

What is distinctive in the approach of English courts from that of the Dutch courts is the relevance, or rather, extent of interconnectedness of the analysis on jurisdiction over the parent company and the subsidiary company. In light of the issue in this paper, the jurisprudence of the English courts is very dynamic as can be noticed on the dates of the judgments and appeals decisions. In fact, as of writing, *AAA* is currently on appeal.⁹³ In *AAA*, the court did acknowledge the findings in the cases *Vedanta* and *Okpabi*, though both cases have diverging outcomes. On the one hand, the court affirmed jurisdiction in *Vedanta*.⁹⁴ On the other hand, jurisdiction was turned down in *Okpabi* for lacking the relevant merits because ‘it was not arguable that the parent company had a duty of care towards the claimants’.⁹⁵

II.1.1. Lungowe v. Vedanta and KCM

This case is between Zambian citizens (the claimants) and the companies Vedanta Resources Plc (Vedanta) and Konkola Copper Mines Plc (KCM), the parent and subsidiary company respectively. The Zambian citizens live in the Chingola region of the Copperbelt Province in the Republic of Zambia and brought proceedings against both defendants for alleged ‘personal injury, damage to property and loss of income, amenity and enjoyment of land’ as a result of the pollution and environmental damage allegedly caused by the discharges from the Nchangga copper mine since 2005.⁹⁶ KCM is the company that owns and operates the mine. It is a public limited company which is incorporated in Zambia. On the other hand, Vedanta is the holding company for a group of metal and mining companies to which KCM is a part of.⁹⁷

The proceedings began in 2015 when the claimants filed their claims before an English court against which both defendants contested the jurisdiction of the court.⁹⁸ Furthermore, KCM requested for the court to set aside the granted permission to the claimants to serve a claim form out of jurisdiction.⁹⁹ The first judgment on the case was decided in the High Court on 27 May 2016 in which the court decided to allow a legal claim against Vedanta and its Zambian subsidiary to be tried before the UK court and subsequently dismissed all challenges to jurisdiction.¹⁰⁰ Vedanta and KCM appealed and the judgment on this matter was rendered by the Court of Appeal on 13 October 2017.¹⁰¹

⁹³ J. Hughes-Jennett, A. Berthet, P. Hood & S. Prior, ‘Parent company liability and human rights – new claims against mining company filed in the English courts’ (*Hogan Lovells*, 14 May 2018) at: <https://www.hlregulation.com/2018/05/14/parent-company-liability-and-human-rights-new-claims-against-mining-company-filed-in-the-english-courts/#page=1> (accessed on 27 May 2018).

⁹⁴ *AAA*, *supra* note 92, para 9.

⁹⁵ *Ibid.*

⁹⁶ *Dominic Liswaniso Lungowe and Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528 (*Lungowe* 2017), para 1.

⁹⁷ *Idem*, para 2.

⁹⁸ *Idem*, paras 4-5.

⁹⁹ *Idem*, para 5.

¹⁰⁰ *Idem*, para 6; *Dominic Liswaniso Lungowe & Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) (*Lungowe* 2016).

¹⁰¹ *Ibid.*

The court structured its analysis of the claims quite differently from the Dutch courts as its approach digs deeper into the merits of the claims than the extent traversed by the Dutch courts. The court admitted in its 2016 judgment that the case at hand assumed ‘all the trappings of a State trial’ just to answer the question whether it has the power to try the cases before it.¹⁰² It noted the existence of *inter alia* ‘19 full lever arch files containing evidence and exhibits, and a further 5 lever arch files containing well over 100 authorities’ and the involvement of a comprehensive and detailed argumentation covering many facets of the case.¹⁰³ Accordingly, this case is a paradigm of what a mere procedural hearing should not be citing the *VTB* case.¹⁰⁴ Accordingly,

(...) hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost.¹⁰⁵

Nevertheless, the court proceeded with the analysis of the case which was logically divided into parts, the first part being the analysis of its jurisdiction over the parent company Vedanta. Following this, the court proceeded with its analysis on the claims against KCM and declared whether it has jurisdiction to hear such claims. The 2017 Appeals decision confirmed the 2016 judgment which decides in favour of jurisdiction over the claims against the subsidiary.

II.1.2. Okpabi v. RDS and SPDC

In the case *Okpabi v. RDS and SPDC*,¹⁰⁶ the claimants are seeking damages for the serious and ongoing pollution and environmental damage caused by the oil spills from the defendant’s oil pipelines and associated infrastructure in and around the *Ogale* community in Nigeria.¹⁰⁷ A claim is filed before a UK court because of the fact that RDS is incorporated and has a registered office in the UK. SPDC, on the other hand, is a Nigerian subsidiary incorporated in Nigeria. The court determined whether it has jurisdiction by considering first the claim against RDS and whether it satisfies as a relevant gateway under Paragraph 3.1(3) CPR PD 6B.¹⁰⁸ In other words, it must be determined whether there is an anchor defendant at all before the court exercises jurisdiction over the claims against the foreign subsidiary. Accordingly, it must be first and foremost determined whether the threshold requirements are met, i.e. whether there is a real issue between the claimant and the anchor defendant and whether it is an issue reasonable for the court to try.¹⁰⁹

It was concluded in the 2017 decision that there was no arguable case that RDS owed the claimants a duty of care.¹¹⁰ Accordingly, the court did have jurisdiction to try the claims against

¹⁰² *Idem*, para 6.

¹⁰³ *Ibid.*

¹⁰⁴ *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337; *Idem*, para 40.

¹⁰⁵ *Ibid.*

¹⁰⁶ *His Royal Highness Emere Godwin Bebe Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Plc* [2017] EWHC 89 (TCC) (*Okpabi* 2017). These claimants were the same in *Akpan*.

¹⁰⁷ *Idem*, para 2.

¹⁰⁸ CPR PD 6B, para 3.1(3).

¹⁰⁹ *Okpabi* 2017, *supra* note 106, para 19; *Erste Group Bank AG, London Branch v. JSC VMZ Red October’ and ors* [2015] EWCA Civ 379, para 38.

¹¹⁰ *Okpabi* 2017, *supra* note 106.

RDS but it did not have jurisdiction to try the claims against SPDC because there was no real issue between the claimants and RDS which was reasonable for the court to hear. Nevertheless, the claimants' statement of the case disclosed no reasonable ground for bringing the claim and hence the claim failed.¹¹¹ The claimants appealed which resulted to two apparent issues. First, in foreign direct liability claims such as this, the jurisdiction to be established is twofold, i.e. over two defendants, that is the parent company and the subsidiary. Second, the role of the merits of the case such as the duty of care in this regard plays a substantial role in determining jurisdiction.

In the 2018 Appeals decision, errors were pointed out as to the evidence admitted, the attributable actions to RDS and non-acceptance of the public statements published by Shell. All these factors were argued as relevant by the claimants and were acknowledged by the Appeals' court.¹¹² However, despite these errors, the 2018 decision on appeal still upheld the ruling in 2017 that the claims against RDS were bound to fail because it was not arguable that RDS owed a duty of care after actually proceeding with the analysis on the issue.

II.1.3. AAA v. Unilever PLC and UTKL

This case is between the plaintiffs, AAA and others, against the defendants, Unilever Plc (Unilever) and Unilever Tea Kenya Limited (UTKL). The claimants are Kenyan nationals who claim to be victims of ethnic violence that erupted in the plantation in Kenya operated by one of the defendants.¹¹³ This violence was caused by armed criminals in the plantation after the presidential election in Kenya in 2007.¹¹⁴ Murders, rape and destruction of property were committed against the victims and this was blamed on the defendants arguing that such violence was foreseeable. The victims claim that even though there are no physical borders around the 13,000 hectare tea plantation, there remains a limited number of obvious entry points to the plantation.¹¹⁵ Moreover, the plaintiffs argue that a duty of care is owed by Unilever Plc to UTKL in order to protect them from the risks of violence.¹¹⁶

On the other hand, Unilever is the holding company registered in the UK while UTKL is the subsidiary company registered in Kenya which operates the tea plantation. Both defendants argued that the case should be dismissed for two reasons: first, the claims should be brought before Kenyan courts and not before UK courts; second, the claims were improperly brought before the UK court because it was merely done to bring UTKL before it, instead of to Kenyan courts.¹¹⁷ Moreover, the order of 12 January 2016, which permitted the plaintiffs to serve the claim form and general particulars of the claim on them, were asked to be set aside.¹¹⁸

The relevant issues faced by the courts are related to CPR PD 6B para 3.1.¹¹⁹ As aforementioned, this provision allows for a claim form to be served out of jurisdiction if: the claim is made against a defendant on whom the claim form has been served; there is a real issue between the parties

¹¹¹ *Idem*, para 6.

¹¹² *His Royal Highness Emere Godwin Bebe Okpabi and Others and Lucky Alame and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Plc* [2018] EWCA 89 Civ 191 (*Okpabi* 2018), paras 184-189.

¹¹³ *AAA* (n 92) paras 1-23.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Idem*, para 2.

¹¹⁸ *Idem*, para 3.

¹¹⁹ *Ibid.*

that is reasonable for the court to try; and the defendant, to whom the claim form is to be served, is a necessary and proper party to the claim.¹²⁰ Furthermore, even though such jurisdiction may be established, it acknowledges that such decision is discretionary and can refuse the permission given to the plaintiff to serve the claim form out of jurisdiction unless it is satisfied that the UK is the *forum conveniens* to bring the claim. The decision of the court in these issues, which is analysed below, is currently under appeal as of writing.

II.2. The Claim Against the Anchor Defendant as a Prerequisite: Overcoming the Challenge of *Forum Non Conveniens*

In *Lungowe*, the analysis of the court with regards to Vedanta is quite straightforward. The basis is none other than Article 4 Brussels I Recast, which relies on the place where the defendant is domiciled.¹²¹ Since Vedanta is domiciled in the UK, as per Article 63 Brussels I Recast, it is rightly of the claimants to sue the company before a UK court.¹²² Moreover, as aforementioned, jurisdiction established within the premises of the Brussels I recast is nondiscretionary unlike when national courts decide on jurisdiction based on its own rules.¹²³ Moreover, the court could not refuse jurisdiction even if it is of the opinion that Zambia would be a more appropriate forum to hear the cases.¹²⁴ Similarly, in *AAA*, Unilever did not argue for the court to refuse jurisdiction on the basis of Art. 4(1) Brussels I Recast.¹²⁵

Against what would have been a seemingly straightforward application of the Brussels I Recast regarding jurisdiction over a domiciled defendant, the barred *forum non conveniens* principle owing to the *Owusu* was argued in both cases.¹²⁶ The doctrine of *forum non conveniens* means that another court is considered more appropriate to hear the claim.¹²⁷ However in *Owusu*, this reasoning became irrelevant to today's interpretation of Article 4(1) Brussels Recast. Moreover, the court in *Okpabi* declared that no exception based on the *forum non conveniens* doctrine can be applied, otherwise it will defeat the principle of legal certainty.¹²⁸

Arguments brought forward by Vedanta that inevitably affected the court's jurisdictional analysis over KCM. Accordingly, the facts in *Owusu* must be singled out due to its different factual scenario and that the decision was flawed, therefore, it should not be applied in this case.¹²⁹ Vedanta even demanded a preliminary reference of the case to the ECJ in order to determine the effects of the *Owusu* case in the circumstances in the case at hand.¹³⁰ Moreover, Vedanta argued that the *Owusu* case should not be referred to in order to rightfully establish jurisdiction over the UK-domiciled parent company if the non-EU claimants are filing a claim against them merely as a device to bring the claims against the foreign subsidiary to the UK courts.¹³¹ Furthermore, the parent company Vedanta argued that the *Owusu* case cannot be relied upon if

¹²⁰ *Idem.*, para 7; *Supra* Section 4.1.

¹²¹ *Lungowe* 2017, *supra* note 96, para 31.

¹²² Brussels I Recast, *supra* note 25, Art. 4(1) in conjunction with Art. 63(1).

¹²³ *Supra* Section 4.1.

¹²⁴ *Lungowe* 2017, *supra* note 96, para 32.

¹²⁵ *AAA*, *supra* note 92, para 63.

¹²⁶ Case C-281/02, *Andrew Owusu v N. B. Jackson and Others* [2005] ECR I-1445.

¹²⁷ *Ibid.*

¹²⁸ *Okpabi* 2017, *supra* note 106; *Owusu*, *supra* note 126, paras 41-46.

¹²⁹ *Lungowe* 2017, *supra* note 96, para 33.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

proceedings amount to an abuse of EU law.¹³² Lastly, the principle in the *Owusu* should not apply to defend jurisdiction over the anchor defendant in a case where there is a lack of real issue between the anchor defendant and the claimants or if the claim is so weak that the court's discretion in establishing jurisdiction over the subsidiary should result to a negative result.¹³³

The court affirmed the mandatory nature of the EU case law by stating that the English court is not in the position to decline jurisdiction over the parent company under the Brussels 1 Recast due to its mandatory nature.¹³⁴ Moreover, the court rejected the arguments against the clarity of the principle in the *Owusu* case and refused to submit the case to the ECJ for a preliminary reference.¹³⁵ As regards the abuse of EU procedural law, sufficient evidence is necessary to prove that the claimant 'has conducted itself in such a way as to distort the true purpose of that rule of jurisdiction'.¹³⁶ The threshold in this regard is high, e.g. the defendant needed to prove that the 'sole object' of the claim by the claimants is to bring the foreign subsidiary before UK courts.¹³⁷ The court in *AAA* followed the precedent *Lungowe* not to uphold *forum non conveniens* argument in light of *Owusu*.¹³⁸ To the contrary, the court in *Okpabi* analysed the case dissimilar to the approach in *Lungowe*. Accordingly, jurisdiction over RDS would only be satisfied if there is a legitimate claim in law against RDS that should be resolved and/or if there is a real issue which is reasonable for the court to try.¹³⁹

As regards the existence of a 'real issue to be tried', the court in the 2017 Appeals decision in *Lungowe* affirmed that this should only be based on the *prima facie* analysis of the case.¹⁴⁰ This is simply a result of the fact that the claims against the parent company, i.e. liability based on duty of care by a parent to its subsidiary, is recognised in *Caparo* and *Chandler* and is, therefore, a possibility.¹⁴¹ In other words, the claims against the parent company is not a mere device and that the parent company can actually be held liable in this regard, hence the absence of an abuse of EU procedural law. What the court in *Okpabi* did different is that it went on to determine whether there was indeed a duty of care owed by RDS, a step way beyond what was done in *Lungowe*.¹⁴²

It is relevant at this point to understand what the effect of a positive establishment of jurisdiction over the parent company in the UK to the discretion over the claims against the foreign subsidiary by permitting a service out jurisdiction. In this regard, the acceptance of jurisdiction over the parent company in the UK does not automatically warrant a service out of jurisdiction to the subsidiary based on Paragraph 3.1 CPR PD 6B.¹⁴³ Nevertheless, a successful result of jurisdiction over the anchor defendants would have 'weighed very heavily' in favour of jurisdiction over the

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*, paras 33-38; *UBS AG v. HSH Nordbank AG* [2009] 2 Lloyd's Rep 272, Lawrence Collins LJ at 103; *A v. A (Children: Habitual Residence)* [2014] AC 1, Lady Hale JSC at 31.

¹³⁵ *Lungowe* 2017, *supra* note 96, para 38.

¹³⁶ *Lungowe* 2017, *supra* note 96, paras 33-38; *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and others* [2015] QB; Case C-352/13; *CDC* (n 37) para 86.

¹³⁷ *Lungowe* 2016, *supra* note 100, para 58; *Freeport Plc v Arnoldsson* [2008] QB 634; *CDC* (n 36) para 86.

¹³⁸ *AAA*, *supra* note 102, para 71.

¹³⁹ *Okpabi* 2017, *supra* note 106, para 69.

¹⁴⁰ *Lungowe* 2017, *supra* note 96, para 38.

¹⁴¹ *Lungowe* 2016, *supra* note 100, para 77; *Chandler*, *supra* note 69; *Caparo*, *supra* note 67

¹⁴² *Okpabi* 2017, *supra* note 106, paras 113-116.

¹⁴³ *Lungowe* 2016, *supra* note 100, para 94.

foreign subsidiary.¹⁴⁴ This view of the court in *Lungowe* is much different than that in *Okpabi*. Since the court in *Okpabi* went into the substance of the case whether an actual duty of care exists between the parent and the subsidiary and the result of that inquiry is negative, it no longer considered whether it has jurisdiction over the subsidiary. Consequently, if the claim against the anchor defendant fails, there is no need to deal with the claim against the subsidiary in the UK Courts.

II.3. English Rules on Private International Law Regarding Foreign Subsidiaries Post-Departure from Brussels I Recast

In cases involving cross-border commercial disputes such as foreign direct liability cases, English courts have the power to grant an order for the service of proceedings on a defendant outside its territory.¹⁴⁵ This power is a well-established part of its national rules of jurisdiction.¹⁴⁶ In other words, an English court may have jurisdiction over a foreign defendant in cases that do not fall within the ambit of the Brussels I Recast.¹⁴⁷ The law applicable is provided in Part 6 of the Civil Procedure Rules (CPR).¹⁴⁸ To establish jurisdiction over foreign-based defendants, CPR Rule 6.36 provides for cases in which the claimant is seeking permission to serve proceedings on a foreign-based defendant.¹⁴⁹ It stipulates that ‘the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in Paragraph 3.1 of Practice Direction (PD) 6B apply’.¹⁵⁰ In this regard, Paragraph 3.1 PD 6B provides for the general grounds through which a ‘claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36’.¹⁵¹

There are three basic requirements that the claimants must prove in order for the court to establish “service out” jurisdiction. Firstly, there must be a ‘serious issue to be tried on the merits of the claim’.¹⁵² Secondly, the claim should fall within the confines of one of the jurisdictional ‘gateways’ currently listed within Paragraph 3.1 CPR PD 6B.¹⁵³ Lastly, the UK must be considered as the appropriate forum to hear the case (*forum conveniens*).¹⁵⁴ Aside from the requirements that need to be met, one has to bear in mind that the power of the English courts to decide on jurisdiction in light of the CPR Part 6 is discretionary in nature.¹⁵⁵

As regards foreign subsidiaries as a second defendant to the parent companies domiciled in the UK, the relevant jurisdictional gateway is provided under Paragraph 3.1(3) CPR PD 6B:

¹⁴⁴ *Ibid.*

¹⁴⁵ P. Rogerson, *Collier’s Conflict of laws: Fourth Edition*, Cambridge: Cambridge University Press 2013, p. 147; A. Arzandeh, ‘The English Court’s Service-Out Jurisdiction in International Tortious Disputes’ *Law Quarterly Review* 2017-133, pp. 144.

¹⁴⁶ *Ibid.*

¹⁴⁷ Brussels I Recast, *supra* note 25, Art. 6(1); Rogerson, *supra* note 145, pp. 148.

¹⁴⁸ Civil Procedure Rules (CPR), entry into force 26 April 1999, Part 6.

¹⁴⁹ CPR, r 6.36.

¹⁵⁰ *Ibid.*

¹⁵¹ CPR Practice Direction (PD), *supra* note 148, para. 3.1.

¹⁵² CPR PD 6B, *supra* note 148, para 3.1(9); Rogerson, *supra* note 145, pp. 148.

¹⁵³ *Ibid.*

¹⁵⁴ CPR, *supra* note 148, r. 6.37.

¹⁵⁵ *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] AC 438; Arzandeh (n 145); Albert Venn Dicey, John Humphrey Carlisle Morris, Lord Collins of Mapesbury, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell 2012) Rule 34, para 11.141.

A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and: (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

This gateway, otherwise called as 'necessary and proper party' gateway, 'allows a claimant who has made a claim against a defendant who has been or will be served' for the means of serving 'another party who is a necessary and proper party to the claim'.¹⁵⁶ What is necessary is the existence of a 'real issue which is reasonable for the court to try between the claimant and the anchor defendant', i.e. the parent company.¹⁵⁷

Aside from the requirements mentioned, a certain prerequisite must also be met in order to bring a foreign subsidiary as a defendant before English courts. This pertains to whether an action had been properly brought against an anchor defendant in the UK.¹⁵⁸ This means that a claim must have been filed against the anchor defendant, being the parent company, before the UK courts. By 'properly', this refers to jurisdiction over defendants domiciled within a Member State under Article 4(1) Brussels I Recast.¹⁵⁹ What is vital to the success of bring foreign subsidiaries before the UK courts is the existence of a 'serious issue to be tried in the action against the anchor defendant' or it should not be just a claim but certainly 'bound to fail'.¹⁶⁰ It does not even matter whether the motive of the claimant is merely to bring the claims against the foreign subsidiary before the UK courts.¹⁶¹ The absence of a serious issue to be tried against the parent company domiciled in the UK would otherwise mean that the UK courts may not establish jurisdiction over the foreign subsidiary on the basis of the 'necessary or proper party' gateway.

II.4. Five Questions Whether the UK Courts Can Establish Jurisdiction Over the Foreign Subsidiary

In *Lungowe*, KCM contested the order of the court which allowed the claimants to serve the claim form out of jurisdiction on the basis of Paragraph 3.1 CPR PD 6B. As in the main issue tackled in this paper, the subsidiary company rightly argued during its appeal that the entire focus of the case is in Zambia as it is where the alleged torts were committed, the damage occurred, the subsidiary is domiciled and the law applicable is Zambian law.¹⁶² In this light, the court needed to interpret the application of Paragraph 3.1 CPR PD 6B.¹⁶³ Accordingly, a claim form served out of jurisdiction is valid if the claim is made against the defendant and: (a) there is a real issue reasonable for the court to try between the claimant and the defendant; and, (b) the defendant is a necessary or proper party to that claim.¹⁶⁴ This is also called as the 'necessary or proper party' gateway.¹⁶⁵

¹⁵⁶ CPR PD 6B, *supra* note 148, para. 3.1(3); Rogerson, *supra* note 145, p. 150.

¹⁵⁷ *Ibid.*

¹⁵⁸ Brussels I Recast, *supra* note 25, Art. 4(1); Rogerson, *supra* note 145, pp. 150.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Multinational Gas v Multinational Gas Services* [1983] Ch. 258 (CA); Rogerson, *supra* note 145, pp. 151.

¹⁶¹ Rogerson, *supra* note 145, pp. 150.

¹⁶² *Lungowe* 2016, *supra* note 100, para 93; *Lungowe* 2017, *supra* note 96, para 40.

¹⁶³ CPR PD, *supra* note 148, para 3.1.

¹⁶⁴ CPR PD, *supra* note 148, paras. 3.1(3)(a) and (b).

¹⁶⁵ *Lungowe* 2017, *supra* note 96, para 41.

Moreover, aside from fulfilling the requirements in the said provision, Rule 6.37 CPR PD Part 6 still retains discretion which provides that ‘(t)he court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim’.¹⁶⁶ In order to analyse whether the requirements under Paragraph 3.1 CPR PD 6B are fulfilled, the court formulated a five-point question which it finds as the correct approach to establishing jurisdiction over the subsidiary company. The court in *AAA* followed the precedent in *Lungowe* which affirmed the five-part test approach in dealing with the questions brought forward by UTKL.¹⁶⁷ Moreover, the court also affirmed the approach that it is necessary to analyse the merits of the case to answer the question regarding the permission to serve the claim out of jurisdiction.¹⁶⁸

The five-part test are as follows: (1) whether there is a real issue between the plaintiffs and the parent company; (2) if the first question is affirmative, whether the claim against the subsidiary has real prospect of success; (3) whether it is reasonable for the court to try that issue; (4) whether the subsidiary is “a necessary or a proper party” to the plaintiffs’ claims against the parent company; and lastly, (5) whether the courts of England and Wales (the UK) are the proper forum for the claim.

II.4.1. Question 1: Whether the Claims Against the Foreign Subsidiary Have a Real Prospect of Success

To answer this first question, the claimant must show a substantial question of fact or law, or both.¹⁶⁹ In practice, the claim should not be fanciful or trivial.¹⁷⁰ In *Lungowe*, without going into the merits of the case, the court was satisfied with the fact that ‘KCM was the operator of the Nchanga mine’ when ‘there had been recorded discharges of toxic effluent from the mine’ which triggers strict liability for consequences of toxic discharge under some of the *Zambian statutes*.¹⁷¹ In *AAA*, it was stated that the underlying question regarding the first part of the test is whether the claim against the parent company is bound to fail.¹⁷² In this regard, the court adopted an approach which zooms into the applicable law and the elements of the *Caparo* test.¹⁷³

The court’s assessment of these sub-questions in *AAA* was as follows. First, the law applicable in this case is Kenyan law as accepted by both parties.¹⁷⁴ Second, the *Caparo* test composed of three important elements has to be fulfilled: foreseeability of the damage, proximity between the party who owes the duty and the party to whom the duty is owed, and the situation should be considered

¹⁶⁶ CPR PD, Part 6, *supra* note 148, Rule 6.37.

¹⁶⁷ *Lungowe* 2016, *supra* note 100, para 97.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Altimo Holdings and Investments Ltd. v. Kyrgyz Mobil Tel Ltd and Others* [2012] 1 WLR 1804, para 71; *Lungowe* 2017, *supra* note 96, para 54.

¹⁷⁰ *Carvill America Inc v. Camperdown UK Ltd* [2005] 2 Lloyd’s Rep 457, para 24.

¹⁷¹ *Lungowe* 2017, *supra* note 96, para 56.

¹⁷² *AAA*, *supra* note 92, paras 73-124.

¹⁷³ *Caparo v. Dickman* [1990] 2 AC 605.

¹⁷⁴ *Ibid.* *SOMA Properties Limited v. HAYM* [2015] eKLR, Civil Appeal No 74 of 2005; Occupiers’ Liability Act, Ch 34 [1980] Revised Edition 2012; Even though UK law would be applicable, it would have made no substantive difference as to the merits of the case for UK law would be treated as very persuasive in Kenya. With regards to the claim against UTKL, the law applicable regarding the duty imposed is the Occupiers’ Liability Act which includes a duty to take reasonable care to protect the plaintiffs against the foreseeable criminal acts of third parties.

by the courts as ‘fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other’.¹⁷⁵

As regards foreseeability, the court determined that an act is foreseeable ‘if something comparable has happened on the defendant’s land in the past’.¹⁷⁶ In the application to the case, there was no evidence that the damage has occurred at the land of UTKL in the past. Hence the plaintiffs were not able to show that there is a real issue in which the losses and damage suffered as the result of the criminal violence caused by the ethnic groups were foreseeable by Unilever.¹⁷⁷ Lack of foreseeability by the parent company results to the conclusion that the claim is bound to fail.¹⁷⁸ Consequently, a claim against the subsidiary would have also been found as ‘bound to fail’.¹⁷⁹

The question of proximity is answered in light of the relationship, for instance, between a parent company registered in a different country and third parties who caused damage concerning its subsidiary.¹⁸⁰ It is a matter of whether it is fair just and reasonable to hold that the parent company owed a duty of care to the subsidiary. The case in point is *Chandler*, in which the relationship between the parent company and the subsidiary was primarily explored.¹⁸¹ Accordingly, since the subsidiary had inherited its working practices from the parent company and it did control the subsidiary when it felt it appropriate, the parent company owed a duty of care to the plaintiffs due to a ‘systemic failure of which the defendant had been fully aware of’.¹⁸² This duty to intervene to prevent the occurrence of damage to another arises ‘where there was a relationship between the parties which gave rise to an imposition or assumption of responsibility on the part of the defendant’.¹⁸³

It is important to note, however, that the court acknowledged the separate legal personalities that both companies enjoy and imposition of liability does not arise merely out of a parent-subsidiary relationship.¹⁸⁴ Furthermore, it was not necessary for the parent company to have absolute control of its subsidiary in order to establish duty of care.¹⁸⁵ The situation in which the court would find that the law might impose responsibility on the parent company over the subsidiary is if, the business of the two companies were in relevant respect the same; the parent has, or ought to have superior knowledge on some relevant aspect of health and safety in the particular industry; the subsidiary’s system of work is unsafe as the parent company knew or ought to have known; and the parent knew, or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.¹⁸⁶ This analysis extends to third parties and not only to employees.¹⁸⁷

¹⁷⁵ *Caparo*, *supra* note 67, paras 618-619; *AAA*, *supra* note 92, para 79; G. Stephenson, *Sourcebook on Torts*, Cavendish: Cavendish Publishing Limited 2000, p. 221.

¹⁷⁶ *AAA*, *supra* note 92, paras 93, 105-106; *SOMA* (n 174).

¹⁷⁷ *Ibid*, para 93.

¹⁷⁸ *Ibid*, para 125.

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid*, para 96.

¹⁸¹ *Chandler*, *supra* note 69, para 30; The following cases were also referred to by the parties: *Chandler v. Cape plc* [2012] 1 WLR 3111; *Thomson v Renwick Group Plc* [2014] EWCA Civ 635; *Lubbe v Cape Plc* [2000] 1 WLR 1545.

¹⁸² *Ibid*.

¹⁸³ *Ibid*; *AAA*, *supra* note 92, para 99.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Chandler*, *supra* note 69, para 80.

¹⁸⁷ *SOMA* (n 174).

Regarding the last *Caparo* criterion, i.e. the fairness, justness and reasonableness to impose a duty on the parent company abroad to keep the victims safe from criminal acts of third parties concerns the connection between the ‘scope of duties pleaded and the conduct which is said to constitute a breach of those duties’.¹⁸⁸ This issue lies on the duty pleaded, which in this case is whether all reasonable steps were taken or to ensure that the plaintiffs will not suffer loss and damage. What was pleaded in the case is not of reasonable efforts but a guarantee of specific result.¹⁸⁹ If the plead pertains to a guarantee of a specific result, this would mean a burden too onerous for the defendants.¹⁹⁰ Therefore, the claim to impose a duty on the parent company either to anticipate and protect the plaintiffs against a breakdown of law and order, or to keep law and order when it had broken down and to ensure that the plaintiffs did not suffer as they did from the criminal acts of the ethnic groups is not fair, just and reasonable.¹⁹¹

II.4.2. Question 2: Whether There is a Real Issue Between the Claimants and the Anchor Defendant

The court in *Lungowe* finds that ‘a real issue between the relevant parties is to be equated with a properly arguable case or serious question to be tried’.¹⁹² Questions of law and fact are explored in this regard. In *AAA*, this second question is only addressed if the answer to the first question is positive.¹⁹³ Furthermore, the threshold is low because the fact that the chances of success in the claim are not “fanciful” suffices to say that there is a real prospect of success.¹⁹⁴ However, for instance in *AAA*, since foreseeability was not established, it was immediately concluded that the claim against the subsidiary would be found as ‘bound to fail’.¹⁹⁵

As regards the point of law, the main legal basis argued is the duty of care under English law. In this regard, the court conceded with the idea that since duty of care is arguable under English law, it accepted the claim as arguable with respect to *Zambian* law.¹⁹⁶ However, strict interpretation is necessary to avoid exposing the defendant to an ‘indeterminate class, for an indeterminate amount, for an indeterminate time’.¹⁹⁷ What the court developed here is a guide to determine whether duty of care owed by a parent company to the claimants who were affected by the operations of the foreign subsidiary is arguable in the present claim. An affirmative answer equates to the real issue requirement being met.

A summary of the court’s conclusion whether a duty of care owed by a parent company towards the claimants is arguable is as follows. First, the starting point is the *Caparo* test on foreseeability,

¹⁸⁸ *AAA*, *supra* note 92, para 96.

¹⁸⁹ *Ibid*, paras 109-111.

¹⁹⁰ *Ibid*, para 110. To guarantee a specific result that no damage will be suffered by the visitors (the plaintiffs), the parent company would have had to arrange in advance for the subsidiary to evacuate all the potential victims, i.e. the thousands of employees and their families. This should have happened also before the results of the elections were out, i.e. before law and order broke down.

¹⁹¹ *Ibid*.

¹⁹² *Ibid*, para 63.

¹⁹³ *Ibid*, para 8.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*, para 126.

¹⁹⁶ *Ibid*, paras 91-92.

¹⁹⁷ *Ibid*, para 68; *Ultramares Corporation v. Touche*, 174 N.E. 441 (1932).

proximity and reasonableness to ascertain that a duty of care is owed by a parent company.¹⁹⁸ Second, it is possible in certain circumstances that such duty may be owed towards ‘a party directly affected by the operations of that subsidiary’ as well as employees.¹⁹⁹ Third, the duty of care may also arise if the parent company: (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim; or (b) controls the operations which gave rise to the claim.²⁰⁰ Fourth, a duty of care can be owed if the knowledge and expertise of the parent and subsidiary are similar and they must have jointly taken decisions about the safety which were implemented by the subsidiary.²⁰¹ It is not sufficient that the ‘businesses of the parent and the subsidiary are in the relevant respect the same’.²⁰² Fifth, the evidence is limited to what is presented at the early stages of the case. It is inappropriate for the court to engage in a mini-trial at the procedural stage.²⁰³ Therefore, the court cannot be strict into its analysis of facts presented before it.

It is evident that the application of the above mechanism developed in this case will highly depend on the facts of the case. Nevertheless, the court in *Lungowe* stated that even though the claimants may not succeed against the parent company at the merits phase, the ‘claims cannot be dismissed as not properly arguable’.²⁰⁴ In other words, the court was not at haste in disposing the case just because it did not have all the facts to establish duty of care at this point, hence affirmative on establishing jurisdiction.

II.4.3. Question 3: Whether it is Reasonable for the Court to Try the Issue Between the Claimants and the Anchor Defendant

The importance of the question regarding an issue which is reasonable for the English court to try, lies on the facts of the case.²⁰⁵ Although the *Red October* has been cited in the analysis of this element, its facts were simply different than the one in this case.²⁰⁶ The same case has been argued by defendants in *Lungowe* to contest the reasonability element, arguing that the only connection the claims has with the UK is the exclusive jurisdiction clause agreed upon in the contract.²⁰⁷ The court clarified, however, the peculiarity when the anchor defendant is brought before the UK courts pursuant to a mandatory jurisdictional rule under Article 4(1) Brussels I Recast.²⁰⁸

If the anchor defendant has ‘sufficient funds to meet any judgment of the English court’ which the foreign subsidiary may not be even able to meet, then it cannot be said that the mere purpose of suing the anchor defendant is to bring the claim against the foreign subsidiary before the UK court.²⁰⁹ Hence, in the assumption that there is a real issue between the plaintiffs and parent company, the court does not find any reason why it will not be reasonable for the UK court to try

¹⁹⁸ *Ibid*, paras 69-83.

¹⁹⁹ *Idem*.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid*.

²⁰² *Ibid*.

²⁰³ *Ibid*, para 86.

²⁰⁴ *Ibid*, para 90.

²⁰⁵ *Ibid*, paras 128-131.

²⁰⁶ *Red October*, *supra* note 109

²⁰⁷ *Ibid*.

²⁰⁸ *Lungowe* 2016, *supra* note 100, para 96.

²⁰⁹ *Ibid*.

against the anchor defendant if that claim is heard in isolation from the claim against the foreign subsidiary.²¹⁰

II.4.4. Question 4: Whether the Foreign Subsidiary is a Necessary and Proper Party to the Claim Against the Anchor Defendant

This question is simply answered whether the claimants' claim against the anchor defendant and the foreign subsidiary are based on the same facts and same legal principles.²¹¹ Moreover, the foreign subsidiary would plainly be a proper defendant in the proceedings if it were already within the jurisdiction and both can be regarded as 'broadly equivalent defendants'.²¹² In *AAA*, however, what would suffice to say that the subsidiary is the proper defendant to the claims against the parent company is if there is a 'serious issue involving the foreign defendant which is connected to the matters in dispute in the proceedings, and it is desirable to add the foreign defendant so that the court can resolve that issue'.²¹³

The court in *AAA* referred to *Lungowe's* reasoning which cited *Sabbagh* and stated that the 'necessary or proper party' test is at least as broad as the court's power to add or substitute a party under CPR 19.2 (2).²¹⁴ Assuming that there is a real issue between the plaintiffs and Unilever, the court would not hesitate to decide that UTKL would be a necessary and a proper party to that claim.²¹⁵ What is considered are the facts that the claims against both defendants are closely connected that their resolution would require only one investigation, and that the claims are based on the same core facts and on similar legal principles.²¹⁶ Therefore, the parent and subsidiary companies would be sued in respect of the same losses.

II.4.5. Question 5: Whether the UK is the Proper Place to Bring the Claim

This is an outright question of *forum conveniens* under Rule 6.37(3) CPR PD Part 6.²¹⁷ The straightforward answer to this concerning the foreign subsidiary in *Lungowe* is "no": the claimants are all Zambian citizens and residents, the damage concerns the land in Zambia; the place where the alleged tort occurred is in Zambia; the Nchanga mine is owned and operated by a Zambian subsidiary; and the applicable law is Zambian law.²¹⁸ Even when analysed in other cases, a damage in a foreign land caused by foreign subsidiaries to foreign nationals will naturally fall outside the appropriate jurisdiction of English courts. However, ever since the principle in *Owisu* was brought up, and considering the 'choice between the most appropriate forum and where the claimant can access to justice', it would be 'inappropriate for the litigation to be conducted in parallel proceedings involving identical or virtually identical facts, witnesses and documents, in circumstances where the claim against Vedanta would in any event continue in England'.²¹⁹

²¹⁰ *AAA*, *supra* note 92, paras 128-131.

²¹¹ *Idem*, paras 98-100.

²¹² *Ibid.*

²¹³ *Ibid.*, para 8.

²¹⁴ *Sana Hassib Sabbagh v Wael Said Khoury et al* [2014] EWHC 3233 (Comm), para 96; *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416, paras 36-38; *Altimo Holdings v Krygyz Mobil Tel Ltd* [2011] UKPC 7, para 87; CPR (n 148) Para. 19.2(2).

²¹⁵ *AAA*, *supra* note 92, para 133.

²¹⁶ *Ibid.*

²¹⁷ CPR PD, Part 6, *supra* note 148, r. 6.37.

²¹⁸ *Lungowe* 2016, *supra* note 100, para 153.

²¹⁹ *Lungowe* 2017, *supra* note 96, paras 108-117.

Therefore, the UK would be the proper courts in light of setting aside the *forum non conveniens* principle and in consideration of the ‘interests of all the parties and for the ends of justice’.²²⁰

The court in *AAA*, once again, adopted the approach in *Vedanta* which cited that ‘the task of the court is to identify the forum in which the case can be suitably tried for the interests of the parties and the ends of justice’.²²¹ Accordingly, the proper forum test involves two separate issues. First, the defendant must show that ‘there is another available forum which is clearly or distinctly more appropriate than the English forum in which jurisdiction had been founded by the plaintiff as of right’.²²² What is determinant in this regard are the ‘connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection’.²²³ Second, if the choices were between an inappropriate jurisdiction but where a trial could in fact be held, and on the other hand, the most appropriate jurisdiction but where a trial could never be held, ‘the interests of justice would tend to weigh, and weigh strongly, in favour of that forum in which the plaintiff could assert his rights’.²²⁴ The burden on this second test lies on the plaintiff to prove that substantial justice cannot be done in the appropriate forum.²²⁵

The last point pertaining to the issues on access to justice was further analysed in *Lungowe* in light of the *Zambian* judicial system. The requirement here is to establish that there is a real risk in this regard and would logically need empirical evidences and facts. In *Lungowe*, however, the 2016 judgement may have seemed to be a ‘criticism of the *Zambian* legal system’ because the court concluded that beyond what was required of the claimants and rather proclaimed that the claimants would ‘almost certainly’ not obtain justice in *Zambia*.²²⁶ Ultimately, in the Appeals judgment, the court added that access to justice is not only reliant on merely exporting the case, but relies on several factors such as the ‘availability of local lawyers, experts, and sufficient funding to enable the case to be tried locally’.²²⁷

III. Existing Common Principles and Challenges

In light of the cases and principles studied under both jurisdictions above, several determining factors can be established as the main determinants whether a battle on jurisdiction over a foreign subsidiary can be won or it is certain to fail. First among these factors is undeniably that the outcome of the case is heavily reliant on the facts and many considerations. Secondly, the application of the *Brussels I Recast* is vital to first establishing jurisdiction over the parent company. Thirdly, what is arguably the most important determining factor is the threshold for the ‘connection’ element under the *DCCP* and the *CPR PD*. Fourthly, it is important to understand the effectiveness of any alternative legal mechanism. Lastly, after analysing all these factors, possibilities and challenges, the question remains whether it is really needed to sue before parent company’s home state courts and if it is worth it.

²²⁰ *Spiliada Maritime Corp v. Cansulex Ltd* [1987] 1 AC 460, Lord Goff at paras 475-476.

²²¹ *Lungowe* 2016, *supra* note 100, para 148; *Altimo Holdings v Krygyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, para 88.

²²² *AAA*, *supra* note 92, para 136; *Spiliada Maritime Corporation v Cansulex Limited* [1987] AC 460, p 476.

²²³ *Idem*, p 871F.

²²⁴ *Connelly v RTZ* [1998] AC 854, p 866C.

²²⁵ *AAA*, *supra* note 92, para 137; *Connelly*, *supra* note 224, 873A.

²²⁶ *Lungowe* 2017, *supra* note 196, paras 118-135.

²²⁷ *Ibid.*

III.1. Outcomes are Heavily Reliant on a Case-to-Case Basis

Each case possesses their own set of facts. This concerns the type of damage, the type of tort argued depending on the applicable law, the involvement of each defendant in each case and the group structures in which both defendants are a part of. The most usual cause of damage is environmental pollution caused due to the operations of the subsidiary which affects the livelihood of the plaintiffs. It is only in *AAA* that the facts are slightly different because of the existence of a political chaos at that time. Consequently, the claim was not about the duty of care towards the affects of operation by its subsidiary but the duty of care in relation to protecting the victims from damage while in the property of UTKL.

If there is something common in all of the cases above, it is the type of tort relied upon by the plaintiffs, i.e. tort of negligence rooted on the principle of duty of care owed by parent company towards a subsidiary.²²⁸ It should be noted that this principle is borne out of an English law principle which is the law applicable, directly or indirectly, in all the cases analysed. The question remains, therefore, on the limitations on the type of tort available to establish jurisdiction over a foreign subsidiary. In other words, if English law is not applicable in any manner and the duty of care by a parent towards a subsidiary is not a well-established principle in the law applicable, it is questionable whether there will still be sufficient connection between the claims that they can be possibly be brought before the parent company's home state court.²²⁹ Inquiry to all the paradigms in parent company's liability towards a subsidiary would be necessary and consequently can open floodgates for cases before developed country courts, e.g. the Netherlands, say for all the subsidiaries of Shell worldwide.

Notably the group structure of companies that at some point enables or prevents the mechanism to establish jurisdiction over foreign subsidiary also plays an important role. For instance, in *Akpan*, both RDS and SPDC belong to a group structure (Shell Group) where the former is the head and holds all shares in the latter.²³⁰ The court took into account the active involvement in and 'managing the business operations of such companies, which is not to say that without this attention and involvement a violation of the duty of care is unthinkable and that culpable negligence with regard to the said interests can never result in liability'.²³¹ In *Lungowe*, the group structure is more complex because Vedanta is a mere holding company for KCM, although indirectly owns 79,42 percent of the company in 2008. This only proves that the complexity of

²²⁸ *Chandler*, *supra* note 69.

²²⁹ Duty of care owed by parent company towards subsidiaries is an established common law principle. However, this is not always the same in civil law countries, eg Germany wherein, although there is a concept of 'enterprise liability' (*Konzernrecht*), the same cannot be said of the laws in most developing countries. Furthermore, this concept as an example under German law is limited on its own, usually applicable only to liability to creditors. See M. Roth, 'Corporate Boards in Germany' in P. Davies, P. Lyndon Davies, K. J. Hopt, R. Nowak & G. van Solinge (eds), *Corporate Boards in European Law: A Comparative Analysis*, Oxford: Oxford University Press 2013, pp. 263; P. Nygh, 'The Liability of Multi-national Corporations for the Torts of Their Subsidiaries', *European Business Organization Law Review* 2002-3, 51.

²³⁰ *Akpan* 2013, *supra* note 11, para 2.2; D. Ong, 'Litigation against multinational oil companies in their home state jurisdictions: An alternative legal response to pollution damage in foreign jurisdictions' in C. Tan & J. Faundez (eds), *Natural Resources and Sustainable Development: International Economic Law Perspectives*, Cheltenham: Edward Elgar Publishing 2017, p. 288-289.

²³¹ *Akpan* 2015, *supra* note 11, para 2.4.

group structures makes it harder to come up with a single roadmap on establishing jurisdiction over foreign subsidiaries, as such relationship is already a challenge to prove.

III.2. The Important Role of the Brussels I Recast and *Forum Non Conveniens*

In both jurisdictions where Brussels I Recast is applicable, it can be concluded that there is some degree of necessity to first establish jurisdiction over the parent company as an anchor defendant. However, it cannot also be set aside that there are national principles existing even before the Brussels I Recast that has become irrelevant thanks to the goal for a uniform interpretation by the ECJ. The main provision applicable are Articles 4(1) and 63(1) Brussels I recast, which pertains to jurisdiction over defendants domiciled in a Member State. The difference in the approaches emerges when it talks about the effects of the success of establishing jurisdiction over the parent company. As analysed above, while this is a straightforward process for the Dutch courts on the basis of Article 4(1), this was not as easy for the English courts, because some deeply embedded national principles are obviously fought for by recalcitrant legal professionals, who are creative in arguing the case for their clients, but are also not completely set aside by the UK court.

The basis of jurisdiction over domiciled defendant in conjunction with the non-application of *forum non conveniens* via *Owusu* coupled with the mandatory nature when jurisdiction is established certainly gives a guarantee for the existence of an anchor defendant, evidently in all cases discussed above on both jurisdictions except in *Okpabi*. The UK court decided against jurisdiction over the parent company despite the existence of all the applicable rules of Brussels I Recast, hence the court did not find it necessary to further analyse the claim against the subsidiary. The problem is that it did proceed with a mini-trial at a jurisdictional phase. A similarity, on the other hand, between the approaches of the courts on connection is when the mere existence of the probability that duty of care can be owed by a parent company towards a subsidiary based on *Caparo* and *Chandler* proved sufficient in *Akpan* and *Lungowe*.

Moreover, the difference matters the most to the extent that this affects the jurisdiction over the subsidiary. There are two important aspects that matter in this regard: either the successful establishment of jurisdiction over the anchor defendant or the successful establishment that a claim is 'arguable' against the anchor defendant. While in the Netherlands, jurisdiction over the subsidiary stands even if the claims against the anchor would fail in the merits phase, the effect in the UK is quite to the contrary. It did not matter if the claim against RDS would fail anyway in the Netherlands, what mattered for the Dutch court is that once jurisdiction on both defendants were established, the claims against the subsidiary is certainly hooked as the courts respect *perpetuatio fori*, i.e. jurisdiction stands until the case ends. In the UK, a successful jurisdiction over the parent company affects the discretion of the court whether to permit the claimant to serve a form out of jurisdiction.

III.3. Threshold of the 'Connection' Element Between Claims

In the Netherlands, the court seemed to have a lighter approach than that of the courts in the UK. For one, the Netherlands has listed a somewhat simpler and practical considerations why the claims are connected to justify hearing them both in the Netherlands. To the contrary, UK courts employed a very complex interrelated five-step process in the form of five questions. Such an approach makes it difficult to follow a certain precedent in the UK. The five questions will not be repeated but factors that stood out in similarity with the connection test in the Dutch jurisprudence will be mentioned. Amidst the interrelated five-point question in the UK approach, it is worthy to mention that the fourth question in *AAA* inquiring whether the foreign subsidiary is the necessary and proper party to the claims against the anchor defendant somewhat basically

compose the connecting factors required in *Akpan*, such as the similar facts that closely connected that their resolution would require only one investigation, and that the claims are based on the same core facts and on similar legal principles.

Duty of care owed by parent company to the subsidiary is one of the main deciding factors whether to prove connection or existence of real issue on establishing jurisdiction over a foreign subsidiary in all cases discussed either via DCCP or CPR PD 6B. Although the courts did not analyse the relevance of this principle at the same level in the process in different cases, they came up with the same conclusion at least in *Akpan* and *Vedanta* wherein it was accepted that a mere existence of the probability that duty of care can be owed by a parent company towards a subsidiary based on *Caparo* and *Chandler*.

Another similar element in both cases is ‘foreseeability’. In *Akpan*, this referred to the foreseeability of the subsidiary that it will be one day brought before the home state court of its parent company. The court cited the current international trend on foreign direct liability in this regard but also the history of the facts of the claim such as the frequency of the recurrence of the oils spills, the previous legal actions and the problems it has caused to humans and the environment. Similarly, in *AAA*, a past event would most likely prove foreseeability, however, pertaining to foreseeability of the parent company. A lack of foreseeability means that the claim against the parent is bound to fail, and consequently the claim against the subsidiary is also bound to fail which is the case the result in *AAA*. Foreseeability here is analysed as one of the elements in *Caparo* test. This was not delved into by the Dutch courts at a procedural phase.

Lastly, the abuse of procedural law has always been argued by the defendants. The courts are nevertheless not quick to rule on this considering a high threshold. In *Akpan*, this would only be plausible if it can be proven that the plaintiffs knew that their claim is based on incorrect facts and circumstance or if they knew that their claims have no chance of success. In *AAA*, abuse of EU procedural requires sufficient evidence to prove that the sole object of the claim by the claimants is to bring the foreign subsidiary before UK courts.

III.4. Existing Alternative Legal Mechanism

An existing alternative mechanism discussed in this paper to solicit jurisdiction of Dutch courts is codified in the Netherlands in Article 9 DCCP, i.e. through *forum necessitatis*. However, this principle is not well established in the UK, which courts will primarily consider its appropriateness as a forum to hear the case but also ‘will consider the availability and suitability of other foreign forums for the case to be heard’.²³² For instance, in *AK Investments*, the court acknowledged that claimants will not be able to pursue any of their claims in Kyrgyzstan and that if they would follow *forum conveniens* principle, the claimants will have no practical remedy at all.²³³ Nevertheless, if it finds a foreign court more suitable, it will not hesitate to decide in favour of the foreign court. Although not directly based on the principle of *forum necessitatis*, this approach was somewhat applied in *Lungowe*, which is addressed on the fifth question under the five-point process.

²³² C. Woodruff & K. Reed, ‘Comparative Study of “Residual Jurisdiction” in Civil and Commercial Disputes in the EU: National Report on Residual Jurisdiction England’ (year published n/a), 12, at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2359&context=ilj> (accessed on 29 May 2018).

²³³ *AK Investments CJSC v Kyrgyz Mobil*, [2011] UKPC 7; C. Nwapi, ‘Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor’, *Utrecht Journal of International and European Law* 2014-30, pp. 24, 33.

Accordingly, if a choice is to be made between an inappropriate forum but where a trial could in fact be held, and on the other hand, the most appropriate forum but where a trial could never be held, the interests of justice would tend to weigh, and weigh strongly, in favour of that forum in which the plaintiff could assert his rights.

Forum necessitatis was once incorporated in the draft of the Brussels I Recast.²³⁴ However, such proposal did not prosper as it will in effect open the door to universal jurisdiction of EU Member States' courts.²³⁵ This arises from the possibility of exercising jurisdiction even in the absence of any connection with the forum but because of a 'legal or practical impossibility of initiating proceedings in the (*forum conveniens*) and the unreasonableness of requiring that such proceedings be brought there'.²³⁶ It was acknowledged that the implication of the mutual trust is limited only between EU Member States and, therefore, it was eventually discarded stating that Brussels I regime has a closed nature which 'does not lend itself to extension to disputes involving third state defendants'.²³⁷

Several justifications for the acceptance of *forum necessitatis* as an emerging trend in establishing jurisdiction were also brought forward by scholars such as that, it is in line with customary international law and that it is an 'emerging doctrine' based on 'fundamental objective of modern international law', i.e. 'avoiding a denial of access to justice'.²³⁸ Nevertheless, the truth of the matter is that this doctrine is not an established state practice.²³⁹ Lastly, this could potentially mar relationships between sovereign states and create a impression or stigma over the ineffectiveness of the judicial system of the other. Therefore, the question whether *forum necessitatis* can be a viable option to establish jurisdiction over foreign subsidiaries in home state courts is still not yet sufficiently supported to conclude in the affirmative. Further, we are still yet to hear how the Dutch courts will react in this regard in the claim submitted before it by Kiobel.

III.5. The Need to Sue Foreign Subsidiary Before Parent Company's Home State Courts: Is it Worth it?

This research is limited in its scope although interestingly involve other aspects such as the economic analysis and the political perspective in bringing a claim such as this to the courts of

²³⁴ Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (21 April 2009) COM/2009/175 final, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0175> (accessed on 29 May 2018); Draft report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), PE467.046v01-00 [28 June 2011] (EP Draft Report).

²³⁵ C. Ryngaert, *Jurisdiction in International Law*, Oxford: Oxford University Press 2015, pp. 139-140.

²³⁶ *Ibid*; Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor', *Utrecht Journal of International and European Law* 2015-30, pp. 24.

²³⁷ Advies ontwerp-Verordening Brussel I (document COM (2010) 748 d.d. 14 december 2010), No. 5689654/11/6, at: <https://www.parlementairemonitor.nl/9353000/1/j9vviij5epmjl1ev0/visphupxjpo5> (accessed on 5 June 2018); D. Augenstein & N. Jagers, *supra* note 34.

²³⁸ *Ibid*; C. Kaeb & D. Scheffer, 'The Paradox of *Kiobel* in Europe', *American Journal of International Law* 2013-107, pp. 852, 853.

²³⁹ *Ibid*; *Bouzari v Islamic Republic of Iran*, (2004) 71 OR (3d) 675, sec. 35 [Ontario Court of Appeal].

parent company's home state. To close this chapter, some contemplations are left for consideration. When the ultimate aim of the victims in filing their claims against the defendants before the parent company's home state court is to obtain justice by means of damages and admission of liability on the part of the defendants, one can be thinking in light of the lengthy procedural trial on jurisdiction, the very slim chance of success in these claims and the long payroll for big law firms representing the claimants, the question is: is it worth it? In this light, a balance must be struck between access to justice *versus* costly and long overdue battle on the procedural phase alone.

Ultimately, this boils down to lack of an level playing field at an international level that will, on the one hand, allow for globalisation and trade liberalisation to grow, and on the other, will protect the rights of peoples and the environment. It is undeniable that there remains a necessity to come up with an agreed international framework that would provide legal certainty both to the victims and the multinationals alike. As of writing, there are only guiding principles and voluntary soft law that are in place to bind multinationals and the effects of which are limited as regards to enforcement.²⁴⁰ Although the soft laws in this regard should not be discredited, it is acknowledged that its effects are quite limited particularly with regards to the implementation.²⁴¹

Moreover, if such a framework to level the playing field will not be available in the near future by means of an international instrument, what options are left on our 20th century globalisation to balance the rights and obligations between large multinational corporations and people whose lives are affected from the operations of the former. The long-haul battle on jurisdiction will continue just the same, and at this rate, it is highly likely more favourable for the claimants to agree with a settlement with the multinational corporations instead of pursuing an uncertain litigation claim.

Conclusion

This paper explored on the approach of the courts in the UK and the Netherlands with regards to how they establish jurisdiction over foreign subsidiaries of parent companies housed in their jurisdiction. The introduction laid down the background and the aim of this paper. The current increasing international trend on foreign direct liability has brought several cases before the UK and Netherlands' courts in the past couple of years. It is, therefore, evident that there must be some sort of practice or common approach developed by courts. Moreover, since this is a relatively current wave of litigation, many of the cases have been back and forth between the parties just merely contesting and defending jurisdiction. The purpose of this paper was to zoom into the details of the approaches in order to identify the commonalities and challenges that have to be addressed with the aim of any regulatory contribution this may serve in light of the treaty-in-progress being tackled by the UN HRC resolution 26/9, particularly addressing the challenges on establishing jurisdiction to enable access to victims and achieve legal certainty. However, it is important to clarify that the purpose of this paper is not to view the issue from a victim's perspective, rather to emphasise on the realities of the courts' approach and what could be further addressed for the development of a future framework.

²⁴⁰ P. Werhane, 'Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?' *Business and Human Rights Journal* 2016-1, pp. 5.

²⁴¹ E. Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility', *Human Rights and International Legal Discourse* 2010-4, pp. 66, 80.

The first chapter centres on the approach of the Dutch courts in establishing their jurisdiction over a foreign subsidiary, the case in point being the landmark case *Akpan*. It is the case in which for the first time, a western court decided that it has jurisdiction over a foreign defendant, which facts has no connection with the territory of the Netherlands. *Akpan* is a perfect paradigm of how anchor defendants can be an effective strategy to bring foreign subsidiaries before Dutch courts. The success lies on the mandatory nature of Article 4(1) in conjunction with Article 63(1) Brussels I Recast and on the fact that courts may not refuse jurisdiction based on the principle *forum non conveniens* as per *Owusu*. Moreover, the success here lies on the arguably leniency of the courts on the application of its rules. This is because the threshold followed by the court is the fact that the type of tort being claimed is “arguable” under the law applicable. It did not find it necessary to take a step further and actually apply the test on whether the parent owed a duty of care to the foreign subsidiary. It is the same approach it applied to the seemingly ultimate test, i.e. whether the anchor claims could possibly be awarded.

It is evident that the jurisdiction over the parent company plays a certain role. But this role for the Dutch courts ends at the moment jurisdiction has been established over both claims. In other words, it does not matter whether the claims against the parent company are going to fail or that duty of care will not be proven as owed by the parent company to the subsidiary. Nevertheless, once proven, jurisdiction over the foreign subsidiary stands. Such an approach can be said to be more reliable than the inconsistent approach exhibited by the UK courts. The main provision that needed to be satisfied is Article 7(1) DCCP which demands a connection that justifies a joint hearing for reasons of expediency. Moreover, aside from being able to rely on anchor defendants, Article 9(1) DCCP provides for an alternative mechanism, i.e. jurisdiction based on *forum necessitatis*. Such a prospect is hopeful, although case law concerning foreign direct liability claims is rare in the Netherlands due to the fact the Brussels I Recast in conjunction with Article 7(1) DCCP already offers a viable venue to establish jurisdiction over foreign subsidiary. As of writing, the *Kiobel* case that was formerly dismissed before US courts was heard before the Dutch courts on 12 February 2019 and a decision is expected on 8 May 2019.²⁴² One of the argued basis of jurisdictions is *forum necessitates*, citing the lack of justice to be obtained in Nigeria should the claims be heard there.

The second chapter then focuses on the approach by the UK courts. Unlike the Dutch approach, UK cases have inconsistent interpretations of the implementation of the Brussels I Recast and its own national provision. Particularly in *Okpabi*, the court did not move on further in analysing the jurisdiction over the subsidiary as it already have proven that no duty of care is owed by the parent to the subsidiary after performing a mini trial at the procedural phase. Nevertheless, although the Appeals decision has pointed some errors in the ruling, it nevertheless upheld the decision to dismiss the claims. *Lungowe* is where a concrete process is more evident. It started, similar to the Netherlands, with the provisions of the Brussels I Recast. Moreover, it did employ a five-point question approach to determine its jurisdiction. However, instead clarifying the position, this five-point question process have a complex intertwined questioning that ultimately leads to varying interpretation. The courts in *AAA* strived to follow this precedent, nevertheless, the analysis on each point is not clear cut and further development is necessary for the sake of legal certainty.

The last chapter summarised the findings based on the comparison of the two jurisdictions. Five main factors were pointed as fundamental determining factors in establishing jurisdiction over foreign subsidiaries. First it is obvious that the decision of the court is still largely dependent on

²⁴² Business and Human Rights Resource Center, at: <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa> (accessed on 15 April 2019).

the specific facts of the case. Nevertheless, certain facts can be drawn out as common in all the cases such as the type of tort, damage and relationships of defendants in a group structure. Secondly, the importance of the implementation of the Brussels I Recast is highlighted as it provides for a mandatory nature of jurisdiction. Consequently, a stable anchor defendant aids largely to establishing jurisdiction over a foreign subsidiary. Moreover, the role of *forum non conveniens* being set aside contributes to the legal certainty and uniform application of the rules. Thirdly, the threshold of the connection element required in both jurisdictions is not as concrete as can be aspired enough to form the foundations of an international framework. Nevertheless, certain vital elements have been addressed in the approaches such as *inter alia* the relevance of 'duty of care' as a tort, foreseeability and the lack of abuse of EU procedural law. Fourthly, the existing alternative mechanism is put to light. There is an alternative, however, its effectiveness as a mechanism has not yet been tested and is definitely a subject for further research. Moreover, it might carry with it negative implications to the extent that it will create a possible problem on relationship between states due to issues surrounding the effectiveness of their judicial system.

Lastly, to close the last chapter of this paper, it is worth it to ponder whether after all what the victims have been through already and the certain long haul battle on jurisdiction they are to face to litigate the defendants before the home state courts of the multinational corporations, is it really worth all the cost, time and effort. Admittedly, a level playing field needs to be created to balance certain rights, on the one hand, the rights and obligation of multinational corporations as they reap the benefits of globalisation and lowered barriers to trade, and on the other, human and environmental rights that are affected due to the operations of multinational corporations' subsidiaries abroad. However, with the current approaches in both jurisdictions, it cannot be said that it is ready to establish a common approach at an international level. If this will take time, it is perhaps more viable for the claimants to agree with a settlement in the end instead of litigating against giant multinational corporations with very deep pockets and who can afford the best legal team to defend them, and arguably prolong the case starting already at the procedural phase.