

Multinational Corporations in Transnational Litigation: UK and us Perspectives

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[Abstract]

This article addresses the specific question of holding MNCs, to legal account for the consequences of their unlawful actions that has been emphasized in recent years. MNCs are protected by the legal principles of “forum non conveniens” and “separate of corporate identity”. This topic is quite broad and requires extensive research, so I have decided to divide the article into two parts, with this being the first one. This part examines the complex issue of suing multinational corporations (MNCs) and the challenges of forum shopping in transnational litigation. It first outlines the conceptual framework of MNCs and explores the legal and procedural difficulties plaintiffs face when pursuing claims either in a corporation’s home or host jurisdiction. The discussion then focuses on the doctrine of forum non conveniens a key legal tool for determining the most appropriate forum for litigation. It is the aim of this paper to analyse and discuss the principal legal and policy issues raised cases involving multinational corporations in the U.S and U.K. courts and to reach complex analyses and a conclusion on the subject.

[Keywords]

Multinational Corporations (MNCs), Corporate Legal Accountability, Forum Non Conveniens, Separate Legal Personality, Parent-Subsidiary Liability, Comparative Legal Analysis (U.S and U.K Law), Corporate Governance and Responsibility, Jurisdictional Challenges, Transnational Litigation, Procedural and Substantive Law.

I. Introduction

Is it possible to hold U.K and U.S based multinational corporations liable in English and American courts? This article considers a specific question that has been highlighted in recent years by the growing concern over the operations of Multinational corporations.¹ Without any doubt, MNCs should be held liable. But it is extremely difficult in current situation, whereby MNCs are protected by the legal principles of “forum non conveniens” and “separate of corporate identity”. The effects of these principles enable MNCs to apply “double standard” in developing countries.²

The question of holding MNCs to legal account for the consequences of their unlawful actions has been a recurring theme in litigation over the past two decades. MNCs in general (with all advanced enterprises) have the potential to harm very large numbers of people through the use of hazardous technologies. However, unlike national enterprises, MNCs apply such technologies in their worldwide operations where such a technology injures people in the overseas location in which it is used, this may lead to transnational tort litigation, as it was the case in relation to the Bhopal accident in India 1984.³

It is the aim of this article to analyse the principal legal and policy issues raised by such cases in the U.S and U.K. courts. Two main issues arise in relation to this subject: first, does the forum before which the case has been brought have jurisdiction to hear the case; secondly, is the parent company liable for the alleged breach of the substantive law?

The current English litigation has been concerned mainly with the first question and certain matters pertaining to jurisdiction have been perfectly clarified; in particular the development of a “due process” element in the forum non conveniens doctrine. Although it is clear that second question awaits a final judicial pronouncement, the Court of Appeal’s decision has opened new door for the issue of direct liability for breaches of a duty of care of parent company. If proper balance is to be achieved, the law must continue to develop to reflect the reality of MNC operations and adapt to counter MNC method of avoiding legal responsibility.⁴

¹ Muchlinski, P. 2002. Holding multinationals to account: recent developments in English litigation and the Company law review. *The Company lawyer*, Vol. 23, No.6, p.168

² Richard Meeran, “Liability of Multinational Corporations: A Critical stage in the U.K” in Menno & Sam Zia- Zariifi (eds), 2000 Liability of multinational corporations under international law. Kluwer law international, The Hague, pp.249

³ It is believed that the consequences of this litigation have yet to be finally resolved some 17 years on. Muchlinski. op. cit. p.168

⁴ Meeran, op.cit. p.249

By contrast, American experience of this issue is extremely different from the English. It is believed that there has been some guarded success for such plaintiffs, and it is apparent that cracks are beginning to form in defence of the conveniently inconvenient forum. Nevertheless, American approach to this complex issue still remains in favour of MNCs. It is true that in academic and some practical level the substantive issue of liability of MNC has been discussed in the U.S. Consequently, the “single legal entity” doctrine has been developed so as to tackle substantive problems of liability of MNCs. Yet, the jurisdictional hurdle, that is to say the doctrine of non forum conveniens, still remains strongly as to protect MNCs from any legal liability in the U.S.

As Mr. Muchlinski clearly noticed, one of the novel problems raised by the Multinational Corporation is that the issue of jurisdiction and liability are becoming harder to separate.⁵ Indeed, it seems that the issue should be examined with both substantive and jurisdictional contexts together. Before that is done, the article will begin with an overview of the conceptual issue of MNC. Attention will then turn on to the issues raised by the doctrine forum non conveniens.

II. Multinational corporation: The conceptual framework

Before answering main questions, it is necessary to understand something of that organisation. Good starting point is to clarify some terminological problems of multinationals and to review certain common definitions. It is said that the use of the term ‘multinational’ in relation to corporation has been attributed to David E. Lilienthal, who in April 1960, gave a paper to the Carnegie Institute of Technology on ‘Management and Corporations 1985’, which was later published under the title ‘*The multinational corporation*’. Lilienthal defined MNCs as ‘corporations ... which have their home in one country but which operate and live under the laws and customs of other countries as well.’⁶ This definition sees the MNC as a uninationaI enterprise with foreign operations. It is believed that the approach is oriented towards the experience of US firms. Firms of multiple national origins, such as the Anglo-Dutch corporations Unilever and Shell, are not considered.

The existence of such firms alongside uninationaI MNCs has prompted a distinction to be made between these two groups of international business associations. Unfortunately, usage has not always been uniformly applied and some terminological confusion has resulted. The type of

⁵ Muchlinski, P.1987. The Bhopal case: Controlling ultra hazardous industrial activities undertaken by foreign investors. *Modern Law review*, Vol. 50, No. 5, p. 580

⁶ Muchlinski, P. 1999. *Multinational enterprises and the law*. Oxford UK and Cambridge USA: Blackwell, p. 12

business organization that is being considered is usually referred to the terms multinational or transnational alongside corporation or enterprise. So, the first task is to clarify difference between term multinational and transnational.

Although, transnationals are commonly thought to be synonymous with multinationals, it is occasionally said that they are different in fact. In useful, if now somewhat dated, study entitled *Multinational enterprise*, Dr Robert Tindall defines a multinational enterprise as a combination of companies of different nationality, connected by means of shareholding, managerial control or contract and constituting an economic unit.⁷ He then distinguishes between multinationals and transnationals. When multinational has one parent company of a particular nationality it is a national multinational. When it has two or more controlling parent companies of different nationalities, it is called international multinational or transnational. Examples of the first are ICI, Ford Motor Co and Mitsubishi. Examples of the second are Royal Dutch/Shell. The difference is also discussed in economic contexts. From economic point of view, a control of a parent company upon a subsidiary is a decisive criteria. Professor Dunning⁸ defines a multinational enterprise as “an enterprise that engages in foreign direct investment and owns or controls value-adding activities in more than one country”. Thus, it is believed that the multinational is a business organization that engages *direct investment* outside its home country.⁹

Second point is to clarify terms ‘*corporation*’ and ‘*enterprise*’. Both of these terms commonly used in legal literature in respect to multinationals. According to P. Muchlinski one of the leading experts of this area law in UK “the term ‘enterprise’ is favoured over ‘corporation’ as it avoids restricting the object of study to incorporate business entities and to corporate groups based on parent/subsidiary relations alone”.¹⁰

Legally, a corporation refers to a for-profit organization with a legal standing apart from its shareholders and with the ability of transacting business-hence providing such synonyms for ‘corporation’ as a ‘legal person’, ‘legal entity’ or ‘*personne juridique*’. Under this fiction, the law creates a corporate entity and then vests it with certain powers and responsibilities, or rather, right and duties. In the case of multinational corporations, this corporate entity is highly peculiar since no single law creates the MNC and thus no single law delineates the limits of its proper

⁷ Tindall. *Multinational enterprise* (1975), p 16; in Farrar, J.H. 1998. *Farrar's company law*. London: Butterworths, p.770

⁸ Dunning, J. H. 1993. *Multinational enterprise and the economy*. Addison Wesley, p. 3

⁹ Muchlinski, op.cit. p. 12

¹⁰ Muchlinski, op. cit. p. 169

activity. According to above authors to deal with this peculiarity, the terms 'corporation' signifies a unified entity that can be held liable, as opposed to the liability of a MNCs' officers or shareholders as individuals under international law or liability of individual business subsidiaries in different states.¹¹

One might argue that what has been just concluded quite matches American approach, where in certain circumstances a multinational corporation is regarded as a "single legal entity", whereas, in contrast, English legal system does not recognise single entity approach to multinational corporations. It is clear that a usage of term a 'multinational corporation' cannot represent a "single entity" at least in UK. On the whole, what has been noted above should be seen as no more than broad conceptual guidelines as to what kinds business organisations are a Multinationals. For the purposes of this article it is not intended to define or find a precise definition this kind of business organisations. May be it is not possible to offer wide and absolute concepts of this kind of business organization. Instead it suffices that the group operates across national borders. Nor need the group necessarily be large; it suffices that it consists of two or more companies in different states and one of them has a managerial and financial control upon the other.

III. Suing MNC and problems of forum shopping

Forum, which is determined as a court that has jurisdiction to hold a trial a particular lawsuit, is sometimes understood as a venue, the proper most convenient location for trial of a case.¹² Multinational corporations likely to be involved in international litigation frequently have a presence in more than one forum. They may be 'physically' present in several jurisdictions by virtue of the existence either of a branch office or an agency arrangement or else subsidiary.¹³

Legal form of the entity within the forum jurisdiction may be crucial in determining the amenability of the non-resident unit to suit. In particular legal distinction between establishment through a branch or a subsidiary may be of considerable practical importance given that a branch does not possess separate legal personality from that of its parent whereas a subsidiary does.¹⁴ Therefore, where nonresident unit has acted directly on its own behalf within the jurisdiction through its branch or agency, no difficulty should arise in suing the parent company. More problematic when in case where the non-resident unit acts outside the jurisdiction or

¹¹ *ibid.*, p. 3-4

¹² Definition available on <http://dictionary.law.com/>

¹³ *Bell, A. S. 2003.* Forum shopping and venue in transnational litigation. *Oxford*, p.6

¹⁴ *Muchlinski, op.cit.* p. 135

through its subsidiary, but those acts have damaging effects on persons within the forum jurisdiction.

This article is mainly concerned with where non-resident parent of MNC is sued. Generally, a non-resident parent of MNC could be sued either in home or in host country's court. Each will be examined in turn.

A. Suing MNE in home jurisdiction

Every advanced legal system accepts a power to issue process against a nonresident defendant provided that there are sufficient factor connecting that defendant with the forum, which can justify the assertion of personal jurisdiction over him or it.¹⁵ MNCs, even if not physically present in particular forum, may still be subject to 'assumed', 'exorbitant', or 'long arm' jurisdiction in that forum.¹⁶

The English and American approaches to personal jurisdiction over a nonresident parent company are extremely different. It is seemed that personal jurisdiction over non-resident is deeply influenced by core doctrines: "single legal entity" and the separate existence of companies. Basically, as long as the parent and subsidiary observed separate corporate formalities, a court would not impute the contacts of each other in either U.S or U.K. Yet, during this century, U.S. courts have significantly expanded the standards for the personal jurisdiction as the Supreme Court has moved away from strict territorial limits on jurisdiction towards more generous approach.¹⁷ Especially, last few decades courts have become more willing to find an *alter ego* relationship between parent and its subsidiary and thus, to impose jurisdiction.¹⁸ A clear example is the U.S case of *Bulova Watch Co. Inc. v. Hattori & Co. Ltd*, which involved a non-resident Multinational Company as defendant. The facts of the case were that a Japanese company which manufactured watches, in order to penetrate the U.S market, formed three wholly owned subsidiaries in New York concerned with the sale of its watches under different brand names. The plaintiff, a New York company manufacturing watches, alleged that there was *inter alia*, a conspiracy to injure its business by all four companies. A US district court, applying New York law, had to decide whether there was jurisdiction against the Japanese parent company.

By the contrast to U.S law, English law remains highly territorial in its approach to suing a non-resident parent of MNC. Thus in *Multinational Gas & Petrochemical Services Co. v. Multinational gas & Petrochemical*

¹⁵ See, The third restatement of the foreign relations law of the United States. *American law institute 1987, s. 401*

¹⁶ Bell. op. cit. notes 18 above, at. p. 9.

¹⁷ See *International Shoe Co. v. Washington. 326 U.S. 310 (1945)*

¹⁸ Dorward. D.J. 1998. The forum non conveniens and the judicial protection of MNCs from forum shopping plaintiffs. *UPAJIEL 19/141*. at. p. 145

*Services Ltd*¹⁹ the Court of Appeal refused to accept jurisdiction over American, French and Japanese parent companies, the sole shareholders in joint venture operating within the jurisdiction through an agent company, in claim brought against them by the liquidator of the joint venture. The Court of Appeal held *inter alia* that the foreign parent companies could not be regarded as proper parties to the action, in that the joint venture was a separate enterprise for whose acts the parent companies had no responsibility in accordance with the doctrine established in *Salomon* and culminating in the *Re Horsley & Weight Ltd* case.

How that company is defined for jurisdictional purposes and legal form of MNCs plays decisive and crucial role in suing MNCs. From the above notes, it is clear that it is difficult to sue a non-resident parent company for the acts of its subsidiary in the U.K. because of English common law generally respects the separate legal status of subsidiaries for jurisdictional purposes. Therefore, as has been just said, personal jurisdiction over MNCs remains extremely territorial for the U.K. plaintiffs. Notwithstanding the fact, Mr Fawcett argues that a plaintiff should have the right to sue any foreign company, which has an economic presence in England without considering whether it is formally represented by a subsidiary. In this way, it is suggested to get away from territorial connections and, instead, should concentrate on the economic connection a foreign company has with the forum.²⁰ Of course this approach works in some kind of cases, especially under product's liability theory. In these cases, it is not necessary to examine precise internal organisation of MNC group. The defendant (parent directly not through subsidiary) MNC becomes the direct party to litigation.

By contrast, there is a quite high opportunity bringing the foreign parent company legitimately within the personal jurisdiction of an American court for acts its subsidiary, providing any significant degree of *de facto* control or supervision over its subsidiary company.²¹ This provides an advantage for American plaintiffs to sue foreign non-resident manufacturing MNC in the American forum.²²

B. Suing MNE in host jurisdiction

There are often very good reasons to sue a parent of MNC rather than its subsidiary and proceed against the parent corporation in its own jurisdiction. Most obvious reason is that the subsidiary often has limited

¹⁹ (1983) 2 A11 ER563; (1983) 3 WLR 492 (CA)

²⁰ *Fawcett, op.cit. note 25 above. See also Asahi Metal industry Co. v Superior Court of California (1987) 26 I.L.M. 702, World-Wide Volkswagen Co. v. Woodson (1980) 444 US 286*

²¹ Bell, *op.cit. note 18 above, at. p. 6*

²² Birbaum & Dunham, 1990. Foreign Plaintiffs and Forum Non Conveniens, *BKNJIL* 17/717. p.242

assets and offers little scope for recovery. It may even have disappeared altogether.²³ In *Lubbe* Lord Hope of Craighead said in the House of Lords:

“In the present case the asbestos mines and mills in South Africa which were operated by the dependant’s subsidiaries are all closed, and its subsidiaries are no longer present or available to be sued in that country’. In that case, as his Lordship concluded, there is little hope of recovery for the plaintiffs unless the parent company can be made liable”.

First of all, economic factors motivate the attorneys, but their success in convincing foreign clients to sue in the United States is best explained by the advantages for plaintiffs in the American legal system. Principal advantages include contingent fee representation, extensive discovery more favourable substantive law (including choice of law), and significantly greater scope and amount of recoverable damages due in large part of jury assessment.²⁴ Contingency fees are illegal in England receive unfavourable mention by the English judiciary. Lord Denning has described²⁵ the role of the contingency fee in the American legal system like, “as a moth drawn to the light, so is a litigant drawn to the US. If he can only get his case in the courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case ‘on spec’ as we say, or on a contingency fee as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent of the damages, if they win the case in court, or out of court on a settlement”.

On the other hand, in the U.S litigants generally, and personal injury plaintiffs particularly, perceive the contingency fee arrangement as advantageous. Melvin Belli calls it “poor man’s ticket to courtroom”. Occasionally, foreign plaintiffs mention the contingency fee especially as a reason for litigating in the U.S. Most common criticism of the contingency fee is that it reduces plaintiffs recovery significantly. The observers of the growing *Bhopal* litigation note that asbestos victims in the United States had their recoveries drastically reduced by legal fees and litigation costs, and one editorial predicted that the *Bhopal* plaintiffs would be fortunate to realize thirty-five cent on each dollar of damages awarded.²⁶

Despite the significant advantages to the foreign plaintiff, it is true that litigation in U.S is not free from risk of course. Contingency fees may mean paying one’s attorney a great deal of money for very little work. The

²³ Nygh, P.2002. the liability of MNCs for the torts of their subsidiaries, EBOR. Vol.3. p.55

²⁴ Boyce.D. 1985. Foreign plaintiffs and forum non convenience: going beyond Reyno. *TXLR* 69. at. p. 196. See also *Piper Aircraft Co. v. Reyno*, (1981) 454 U.S. 235,252 n.18

²⁵ *Smith Kline & French Laboratories Ltd. v. Bloch*, (1983), p. 72, 74

²⁶ *ibid.* at. p. 199

advantages of American substantive law may well be overstated, and there is always possibility that an American forum, while retaining jurisdiction, will apply a foreign law. In the U.K because of the sanctity of the separate legal entity, the courts may refuse the jurisdiction at all. In spite of this, on the whole, the seat of the parent of MNC is the best choice for foreign litigants.

C. Problems of forum shopping

As has been mentioned, corporations likely to be involved in international litigation frequently have a presence in more than one forum. They may be physically present in several jurisdictions by virtue of the existence of either of a branch office or an agency arrangement or else a subsidiary, which could not be said to be wholly independent at all. In addition its products are sold all around the world. It makes MNCs ubiquitous and vulnerable to litigation and creates problems of forum shopping.

Forum shopping has been defined as a litigant's attempt "to have his action tried in particular court or jurisdiction where he feels he will receive the most favourable judgement or verdict". American and English approaches to the issue forum shopping are very controversial. Compared to the U.S courts, even the English courts, which have adopted the forum non conveniens doctrine, and which have discretion to deny writs to summon defendants who cannot be served in England, positively welcome forum shoppers.

By the contrast, as has been mentioned, American legal system currently tends to discourage forum shopper to great extent, because of (as it is commonly believed) a dramatic increase in the number of international litigation in the Unites States against MNCs. It is thought that economic and legal reasons raise forum shopping in the U.S.

Firstly, this century has been the development of the large scale MNC, an entity whose transactions can span several continents and establish contacts with many nations. As one of biggest super economic power, the U.S has more MNCs than any developed country and thick international and economic relationship with world.

Secondly, it is seemeci that legal factors such as the contingency fee system and adoption "single legal entity" doctrine in the U.S, which makes parent of MNC liable for the acts of its subsidiary, are certainly main reasons for the "forum shopping" in the U.S.

On the whole, forum shopping in the international context almost always occurs when defendant is a large MNC, rather than a natural person. It is commonly believed that the growth of businesses, along

with procedural innovations and relaxation in jurisdiction, has created an environment easily exploded by forum shopping plaintiffs seeking to recover large awards against MNCs in the U.S. It is thought that the result has been a dramatic increase in the number of international or foreign disputes brought in the United States against MNCs. American courts have responded through certain procedural reforms and refinements, to the increase in forum shopping involving foreign plaintiffs. The most notable of these is an expansion of the old doctrine of *forum non conveniens*.²⁷

IV. Forum non conveniens in the US

A. Development of the doctrine forum non conveniens in the U.S.A

(1) The abuse process approach: *Gulf oil Corp. v. Gilbert*

The origin of the doctrine of *forum non conveniens* is predominantly found in Scottish law, which provided for dismissal actions under the term of *forum non conveniens* as early as eighteenth century.²⁸ It was arguably one of the Scottish legal system's most successful exports. It was originally referred to in Scotland as *forum non competens*, but in later half of nineteenth century the modern wording was adopted, as it better reflects the true nature of the plea.²⁹

As has been mentioned, it is commonly believed the doctrine of *forum non conveniens* intended to limit and reverse international forum shopping as for the U.S courts. It is also said that the origin of the doctrine *forum non conveniens* in U.S is unclear, but it first gained official approval in the U.S federal courts with the Supreme Court case *Gulf oil Corp. v. Gilbert*³⁰ in 1974. First of all, it should be made clear that the *Gulf* case involved the dismissal of an action to another federal forum, not dismissal to a foreign forum.

In the Case, the Court affirmed the lower court's dismissal of a tort action that filed in New York when all of the relevant events took place in Virginia, which was also where the plaintiff resided, and where the defendant conducted business. In affirming the lower court's dismissal of the action, the Court set forth the standard, which courts were to follow in conducting a *forum non conveniens* analysis. The court directed trial courts to weigh both private and public interest factors implicated by the particular litigation.³¹

²⁷ *ibid*, at. p. 143

²⁸ Reus, A. 1994. Judicial discretion: a comparative view of the doctrine of *forum non conveniens*. *LYLAICLJ* 16. p. 459

²⁹ Braucher, R. 1947. The Inconvenient Federal forum. *HLR*. 60. p.908

³⁰ (1947) 330 U.S. 501

³¹ See, *Gulf oil Corp. v. Gilbert* (1947) 330.U.S. 501 v. *Gilber*. Suanders, J.M. 1991. *Dow chemical Co. v. Castro Alfredo: the problems with current application of forum non*

In evaluating the private interest factors, a court should examine the relative easy access to proof; the availability and cost of the compulsory process for the attendance of unwilling persons; and possibility of viewing the premises and all other practical problems that make trial of a case relatively easy, expeditious, and inexpensive.”³²

In considering public interest factors, the Court stated that trial courts should examine whether there are administrative difficulties for the court to overcome and whether there is a local interest in the controversy. The court emphasized that “localized controversies should be decided at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign itself”. The Court also concluded that a plaintiff may not “vex, harass, or oppress” the defendant in its choice of forum. The Court insisted oif its general believes that “unless the balance is strongly in favour of the defendant, the plaintiff’s choice of forum should rarely be disturbed”. The court stressed the fundamental principle underlying forum non conveniens that a trial court may, in its discretion, refuse to exercise jurisdiction over a case even though jurisdiction is authorized by a general venue statue.³³

(2) Development of the Section 1404(a) Transfer

The next step in the development of the federal application of forum non conveniens occurred when Congress enacted the section 1404(a) change of venue transfer. Enacted in 1948 in response to the Supreme Court’s decision in the *Gulf*, the statue states: “for the conveniens of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought”.³⁴

Because the result of a section 1404(a) transfer is not dismissal, but rather transfer, courts have required a lower threshold of inconvenience than originally required for forum non conveniens. The statue limited the applicability of forum non conveniens for most cases in federal courts. Cases were no longer subject to dismissal under forum non conveniens, if there was alternative forum within the U.S federal court system.³⁵

Obviously, this legislation only applies to domestic actions. Consequently, the issue of forum non conventions dismissal only arouse in

conveniens: is Texas solution a sensible one or an open invitation to the world to bring suit there? *BKNJIL*. 17. p.723

³² *Gulf oil Corp. v. Gilber (1947) 330.U.S. 508*

³³ *ibid.*, at.p.508. See also, Dunham, D.W. 1999. Forum non conveniens and foreign plaintiffs. *BKNJIL* 24. p.669

³⁴ United States Code annotated title 28. Section 1404(a) (1990)

³⁵ Duval-Major, J. 1992. One way ticket home: the federal doctrine of forum non-conveniens and the international plaintiff. *CNLLR*. 77.p. 657

transnational cases.³⁶ In such instances, courts applied the *Gulf* factors in considering whether a dismissal should be granted.

During the initial period following *Gulf*, courts typically applied the “abuse process” version of the forum non conveniens doctrine, refusing to dismiss on the forum non conveniens grounds unless the defendant would be “unfairly prejudiced” or “vexed” or harassed by the plaintiffs choice of forum. Relatively few forum non conveniens’ cases were decided during this initial period. In the mid 1970s, U.S courts began shifting away from the “abuse of process” approach to a “most suitable forum” approach. This shift was primarily the result of the continued increase in transnational litigation coupled with the growth of international business transactions. Consequently, courts found their dockets crowded with foreign actions, and dismissals on forum non conveniens ground became more frequent as court adopted and applied the “most suitable forum” approach.

(3) Most suitable forum approach: Piper Aircraft Co. v. Reyno

In *Piper Aircraft Co. V. Reyno*³⁷ the Supreme Court reformulated the doctrine of non forum conveniens when the alternative forum was a foreign country. *Piper Aircraft* involved a product liability action arising out of an airplane crash in the Scottish highlands that killed the pilot and five passengers. The plaintiff sued the airplane maker, Piper Aircraft Company, and the propeller manufacturer, Hartzell Propeller Inc for strict liability and negligence in federal district court in California. It is said that plaintiffs admitted that the action was filed in the U.S in order to take advantage of strict liability and the higher damages award typically available in the U.S. In an historical irony, the Court sent the case back to Scotland on a forum non conveniens dismissal.³⁸

Although the *Gulf* Court held that “unless the balance is strongly in favour of the defendant, the plaintiffs choice of forum should rarely be disturbed”, in the *Piper* court modified this standard and held that the plaintiffs choice of forum carried “little weight” when the plaintiff is not a U.S citizen or resident.³⁹ In order to dismiss a foreign case, he court must first determine whether there exists an “alternative” forum in which the case can be heard. According to the *Piper* this is satisfied “when the defendant is amenable to process in the other jurisdiction.”

The next question is whether the alternative forum is an “adequate” forum, that is, whether the available remedies and procedures are sufficient to continue viable alternative venue. In *Piper* it was made clear that a mere

³⁶ Robertson, 1987. Forum non conventions In America and England: A rather fantastic fiction. *LQR*. p. 402, Saunders p. 724-724

³⁷ (1981) 454. U.S. 235

³⁸ Bies, J. 2000. Conditioning forum non conveniens. *UCHILR* 67/489. p. 501

³⁹ Duval-Major, p. 658

change in the law, unfavourable to the plaintiff, does not of itself render the alternative forum inadequate,⁴⁰ thus in *Piper* Scottish law provided an appropriate alternative forum even though it was less advantageous to the plaintiffs than United States law. Only where the remedy provided by the alternative forum is “so clearly inadequate or unsatisfactory that it is no remedy at all” will unfavourable change in the law be given substantial weight.

To put it more simply, the Supreme Court in the *Piper* case adumbrated a “public interest” consideration whereby jurisdiction can be declined by the jurisdiction of residence of a U.S defendant if the plaintiff was a foreigner and the relevant events giving rise to the litigation had taken place in the plaintiffs country of residence.⁴¹ This approach was clearly based on an alarm of an influx of foreign litigation into the U.S. In the words of Marshall J. “the American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the U.S would increase and further congest already crowded courts”.⁴² This consideration would not necessarily apply to U.S plaintiffs suing foreign defendants in U.S courts. It is the foreign plaintiff whose interest demanded “less deference” than the U.S one. With *Piper* then, Court clearly abandoned the “abuse of process” approach since it is usually impossible for a defendant sued at home to make a credible claim of vexation or harassment. Unfortunately, this current perception of non forum conveniens greatly diminishes a foreign plaintiffs chances of success in bringing a personal injury action in federal court since the injury occurred aboard and most of the evidence of injury remains there.⁴³

B. Rejection from the non forum conveniens in Texas

Dow Chemical Co. v. Alfaro

Is it possible for the citizens of developing countries to bring a class action suit in American courts for the negligent actions of a U.S based MNCs? The experience of the plaintiffs from developing countries show that it is extremely difficult. Almost invariably, in mass international tort actions, MNCs invoke the common law doctrine of the inconvenient forum, forum non conveniens, as a first line defence. The doctrine has proven time and again to be a significant obstacle for plaintiffs in developing countries who are seeking to sue a U.S-based MNC in U.S. However, there has been some guarded success for such plaintiffs, and it is apparent that crackle

⁴⁰ Muchlinski, p.553

⁴¹ Nygh, op.et. at. p. 60

⁴² Piper Aircraft. Co. Reyno, p.252

⁴³ See Robertson, p.405. also, Robertson & Sperck, 1990. Access to State Courts in Transnational Personal Injury Case: Forum non conveniens and Antisuit Injunctions, *TEX.L.REV.*68 p.940

may be beginning to form in the defence of the conveniently inconvenient forum.⁴⁴

The *Alfaro* case involved a group of Costa Rican banana plantation workers who were injured as a result of exposure to a pesticide to Costa Rica by Dow Chemical Co. (Dow) and Shell Oil (Shell).⁴⁵ In 1977 the Environment Protection Agency banned dibromochloro propane (DBCP) for use as a pesticide in the U.S since it had been found to be powerful carcinogen in animals possibly caused damage to human reproductive functions. In spite of this ban, Dow sales to Standard Fruit in Costa Rica continued until at least November 1978, over year after Dow recalled all DBCP from U.S users.⁴⁶

The plaintiffs brought their suit in a U.S court. The Texas Court of Appeal held that *forum non conveniens* cannot be used to divest a court of jurisdiction validly obtained under section 71.031 of the Texas Civil Practice and Remedies Code creates “jurisdiction for personal injury and wrongful death claims arising outside the state ...” to mean that a foreigner has an absolute right to bring a cause of action in Texas and the trial court is precluded from invoking the doctrine of *forum non conveniens* in any situation.⁴⁷

A bitterly divided Supreme Court of Texas affirmed the appellate court’s dismissal. In deciding so Justice Doggett opinion played tremendous role. He argued that the doctrine does not promote fair, sensible, and effective judicial administration as its proponents suggest, but instead achieves the opposite. In fact, the doctrine violates public policy. The abolition of *forum non conveniens*, will further important public policy considerations by providing a check on the conduct of MNCs. The refusal of a Texas corporation to face a Texas judge and jury because of *inconveniens* is ridiculous and suggested that what is really involved is not convenience but connivance to avoid corporate accountability. Some United States MNCs will continue to endanger human life and the environment until it becomes unprofitable to operate in this manner. By dismissing a case against a United States MNC on *forum non conveniens* grounds, the court is often removing the most effective restraint on corporate misconduct. Judge Doggett concluded by stating that the doctrine of *forum non conveniens* is obsolete in a world in which markets are global, and it therefore should be abolished.

⁴⁴ Rogge, M.J. 2001. Toward transnational accountability in the global economy: Challenging the doctrine of *forum non conveniens* in pre: Union Carbide, Alfaro, Sequihua, and Aguinda. *TXILJ*. 36. at. p. 299

⁴⁵ *Dow Chemical, v. Alfaro* (1990) 5786 S.W.2d 674

⁴⁶ Saunders, note 56 above, p.728

⁴⁷ Alfaro, 751 S. W. 2d at 210-11

C. Current application of forum non conveniens doctrine in the U.S:

Inre Union Carbide Cow. Gas Plant Disaster

It is said that there are currently thirty two States currently apply the doctrine as federal court do. It is thought that the forum non conveniens originated as a check on attempted abuse of the justice system, but its modern application services as a protection of MNCs from any liability. The *Bhopal* case is most infamous case that illustrates the true application of the doctrine forum non conveniens in the U.S.

The Bhopal litigation involved a gas leak from a chemical plants, owned and operated by Union Carbide India Limited (UCIL), in Bhopal India.⁴⁸ The disaster at Bhopal occurred when a large quantity of methyl isocyanate leaked from a pesticide plant and drifted over a densely populated suburb of the city of Bhopal. As a result of the accident, over 2000 people were killed and approximately 200,000 others were injured.

Alternative forum

Keenan J undertook the forum non conveniens analysis set forth in *Gulf* and *Piper*. First, as *Piper* requires, the court considered whether an alternative forum existed. The major thrust of the plaintiffs' argument was that the Indian legal system was incapable of handling the litigation.⁴⁹ On the order hand, Union Carbide challenged "India is a civilised country operating under democratic country under democratic principles with a common law legal system adopted, like our own, from the British legal system. It was therefore an adequate alternative forum." Judge Keenan finally, rejected any grounds of complaint against the Indian legal system and forum. The court then engaged in the analyses of the public and private interest factors required by *Gulf*.

Private interest factor

First, while analysing the private interest factors, the plaintiffs' argument was based on the concept of "enterprise liability". There was a sufficiently direct relationship of control between the parent company and the acts of its subsidiary, which led to the accident, for the parent to be primarily liable. The evidence of this liability could be found in the U.S.

In contrast, the essence of the U.C' s argument that the Bhopal plant and UCIL were run as virtually autonomous entities over whom it had little day-to day control. Relatively few witnesses resided in the US. Moreover, the plant was managed and operated entirely by Indian nationals, who were employed by UCIL. UCIL had virtually no contact with the US. According

⁴⁸ In re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp.842 (SDNY1986)

⁴⁹ Muchlinski, p. 555

to Union Carbide all these facts pointed to India as the forum most closely connected with the relevant evidence. The relevant records and witness were all ‘in India. Such an argument encouraged the court to get into the merits of the plaintiffs’ theory of liability, an issue unrelated to forum non conveniens, which considers only venue. Finally Keenan J felt that India was a more appropriate forum when the possibility of viewing the site of the accident was considered.

Public interest factor

The court also considered public interest factors. It acknowledged the huge administrative burden this litigation would impose on the court. The court stated no American interest in the outcome of this litigation outweighed the interest of India in applying Indian law and Indian values to the task of resolving this case. Ultimately, the court granted the dismissal due to there was a very strong connection between the litigation and India and only a tenuous one to the US.

D. Analysis of the current application of forum non conveniens

There are a lot of arguments on this topic. However, it could be said that conclusions are divided into three main tendencies: pro or against application of the doctrine forum non conveniens and modification.

Firstly, certainly the economic and legal policy of the U.S is in favour of the doctrine. It is thought that the American MNCs should be insulated from international foreign plaintiffs who are seeking justice in the U.S. In their point of view, it is fair. In academic level one can easily find such idea. For example, Mr. Dorward strongly argues in favour of forum non conveniens doctrine by his article “*The forum non conveniens doctrine and the judicial protection of MNCs from forum shopping plaintiffs*”. From the name of the article, it is clear that the purpose of “forum non conveniens” originally intended to limit burdens on courts and as a check on attempted abuse of the justice system, has dramatically been changed. It is clear that the doctrine is generally applied as a protection of MNCs from any liability in the modern American legal system.

Secondly, many authors like Mr Saunders for instance, admit that MNCs should not be allowed to escape liability for causing death and injury aboard because of the expansive application of forum non conveniens.

At the same time, some of them insist the doctrine should not be abolished. Mr Saunders suggests a modification, which may work well in some instance. According to him it is “the most suitable forum approach” which has led to abuse of the doctrine of forum non conveniens.⁵⁰ Therefore, a return to an “abuse of process” approach is necessary, whereby courts

⁵⁰ Generally, see, Saunders, Robertson, also, Robertson&Sperck, Duval-Major, Bies,

focus more on the litigation's connection with the chosen forum and whether this chosen unfairly prejudices the defendant. This proposal contracts with the currently applied in the U.S "most suitable forum" approach in which *conveniens* is the dominant concern and often outweighs the litigation's strong connection with the forum.⁵¹

He explains his proposal on two cases: *Alfaro* and *Bhopal*. As far as it concerned, in the *Alfaro* defendants were sued under the theories of products liability. In order words, MNCs were the direct party of the litigations. By contrast, in the *Bhopal* plaintiffs argued that the parent company was responsible for the acts of its subsidiary. According to Saunders, the *Alfaro* had very close connection with the U.S forum, whereas *Bhopal* did not. He admits that the Texas Supreme court's decision was fair in the *Alfaro*, but strongly opposed that *Bhopal* kind of cases would be taken in the United States courts. To quote his words "consider the unfairness that would result if a *Bhopal* type litigation was filed in a Texas court!"

Thirdly, it is not really clear that what kind of unfairness Mr Saundres meant in respect to the *Bhopal* litigation. But, it is generally accepted that the doctrine does not insure fairness to international relationship. The application of the doctrine non forum *conveniens* is immensely criticised by international, ecological, human right, moral aspects as opposed to American economic interest. Their demands are same. MNCs should not be allowed to escape liability because of the application of forum non *conveniens*. The forum non *conveniens* should be abolished.

V. Forum non conveniens in the U.K

A. Development of the doctrine in the U.K

Whilst there has been such a powering Scotland and the United States for a number of years, it is only recently that a general doctrine of forum non *conveniens* has been accepted in England.⁵² It is controversial that the English legal system, that positively welcomes forum .shoppers for economic and other reasons, somehow adopted the doctrine forum non *conveniens*. Anyway, one can find an answer to some extent, the relatively late development of a modern doctrine of forum non *conveniens* in English law. The development of the modern doctrine involved a rather long and hard process in England.⁵³

It is said that in 1974 England moved toward a more restrictive forum non *conveniens* doctrine, similar to the early U.S model. Although *the Atl. Star* court explicitly denied a general recognition of forum non *conveniens* doctrine, the court promoted a more liberal interpretation of

⁵¹ *ibid*, p.743

⁵² North & Fawcett, p. 334

⁵³ Morse, p.544

stay proceedings on “abuse of process” grounds.⁵⁴

In 1978, the court in *MacShannon v. Rockware Glass, Ltd* launched de facto incorporation of forum non conveniens doctrine into English law. The court however, still did not explicitly acknowledge the forum non conveniens doctrine; rather, it achieved this result by applying the “most suitable forum” approach to stay proceedings. The MacShannon decision signified the end of the restricted possibilities to stay an action under the “abuse of process” approach.

Ten years later in *The Abidin Daver*⁵⁵, the court confirmed the development towards the “most suitable forum” approach and, thus, the *de facto* incorporation of the forum non conveniens doctrine into the English law.⁵⁶ Lord Diplock declared that “judicial chauvinism has been replaced by judicial comity” to extent that it was now time to acknowledge that the English discretions to stay was undistinguishable from the Scottish doctrine of forum non conveniens.⁵⁷ The final stage of the development came with the decision of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd*.

B. Basic principle: The Spiliada: two stage inquiry

Spiliada Maritime Corp. v. Cansulex Ltd

The plaintiffs (Spiliada) let their vessel Spiliada to Minerals & Metal Trading Corporation for the carriage of bulk sulphur from Vancouver in British Columbia to India.⁵⁸ Plaintiffs contended that the cargo was wet it was loaded and that as a result it caused severe corrosion and pitting to the holds and tank tops of the vessel. They therefore claimed damages and the cost of remedial works against the defendant (Casulex) the shippers of the cargo. Lord Goff summarised the basic principle as follows:

“The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, for example in which the case may be tried more suitable for the interest of all the parties and the ends of justice.”

This basic principle is generally seen as involving a two-stage inquiry. The first stage is concerned with whether there is another available forum which clearly more appropriate than the English forum; the second stage with requirements of justice. First stage clearly consists of two elements:

⁵⁴ See *the Atlantic star* (1974) Ac 436, at, 454, 468. Also, Reus, at, p.148

⁵⁵ (1984) AC 398

⁵⁶ Slater, A.G. 1988. Forum non conveniens: a view from shop floor, 104 *LQREV.* 554, 554-75, In Reus, p. 148

⁵⁷ *The Abidin Dover.* p. 411

⁵⁸ *Spiliada Maritime Corp. v. Cansulex Ltd (1985) LLR.116.CA*

“available” and “clearly more appropriate”. In order to establish another “available” forum courts have to find out whether substantial justice is likely to be achieved in the forum other than English.

But, in ascertaining whether there is clearly more appropriate forum aboard, the search is for the country with which the action has the most real and substantial connection. The courts will look for connecting factors “and these will include but also other factors affecting conveniens or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transactions, and the place where the parties respectively reside or carry on business. However, it is seemed that in almost every case, the place of the injury would seem to be the most suitable forum since it is reasonable to assume that most of the witnesses and evidence will be second country.⁵⁹

The second stage is connected with the requirements of justice. As Lord Goff has clarified, “if there is some other available forum which prima facie is clearly more appropriate for the trial of the action, the court will originally grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted”.⁶⁰ Once it has been shown that there is clearly more appropriate forum for trial aboard the burden of proof shifts to the claimants to justify coming to England. The court is concerned with the question of whether justice requires that a stay should not be granted. This second stage of the inquiry has been considered and further explained by Lord Goff in the House of Lords in *Connelly v. RTZ Corp. pic*.⁶¹

C. Clarification of second stage: The Connelly

It is true that *The Connelly* opened doors and raised some hope for victims of tort that could proceed against English parent companies in English courts. In the case plaintiff (who was domiciled in Scotland) worked for four years in Namibia at uranium mine operated by a Namibian subsidiary of the first defendant, an English company. Three years later he was found to be suffering from a cancer. He commenced proceedings in England against the first defendant and one of his English subsidiaries claiming damages for negligence. Immediately, the defendant applied to court for a stay of the proceedings on the ground forum non conveniens due to Namibia was most appropriate forum.

The House of Lords refused the application of the forum non conveniens doctrine on the ground that substantial justice cannot be achieved in Namibia. It was plainly held that “where a plainly more appropriate from

⁵⁹ Saunders, p. 742

⁶⁰ *The Spiliada* at. p. 478

⁶¹ (1998) AC 854

had been identified, in general, the plaintiff would have to take that forum as he found it, albeit it was in certain respects less advantageous to him than the English forum; but that the nature and complexity of the plaintiff's case was such that it could not be tried at all without the benefit of financial assistance and that of expert scientific evidence; and that, accordingly, in the exceptional circumstances, if the case was tried in England, the plaintiff would either obtain legal aid or receive the benefit of a conditional fee agreement with his solicitor, so that substantial justice could not be done in the appropriate forum but could be done where the appropriate recourses were available". Thus, the English forum was granted, the application of forum non conveniens was rejected.

D.Recent developments in England: Lubbe v. Cape

The litigation arose out of a series of claims brought against the parent company by employees of its Southern African subsidiaries and by claimants who lived in the vicinity of facilities operated by those subsidiaries. The claimants alleged that they had suffered serious injury to their health by reason of their exposure to asbestos dust caused by the negligence of the defendant company in the conduct of their asbestos mining and milling activities.⁶² In the first instance the court ruled that the case had distinctly more connection with South Africa than England. The court decided to stay English proceedings and found that South Africa was natural forum on the ground first stage of the *Spiliada* principle.

There were bewildering varieties of views in following instances. But the House of Lords unanimously removed the stay. In arriving at its decision, the House of Lords was asked to consider three sets of questions. First what was the scope of the *Spiliada* doctrine in the context of MNC operations?

Secondly, should the English courts take into account public policy considerations when determining whether jurisdiction should be exercised over English based parent companies for the alleged torts committed by their subsidiaries in another country?

Thirdly, should the Brussels Convention, with its emphasis on the principle of jurisdiction over corporations based on domicile, be mandatory in all cases?

As to the first question, the House of Lords did not go so far. Instead the House of Lords came to its conclusion by relying on second limb of *Spiliada*. The House of Lords had no doubt at all that the defendants had discharged the burden of showing that South Africa was a clearly and

⁶² Muchlinski, P. 2001. Corporations in international litigation: problems of jurisdiction and the United Kingdom Asbestos cases. *International and Comparative Law quarterly*. Vol.50. p. 3. See generally, *Lubbe v. Cape*

distinctly more appropriate forum for the trial. But at the second stage of the application of the *Spiliada* principles, there were convincing reasons to indicate that substantial justice would not be done if these claims were litigated in South Africa. First there was no convincing evidence to suggest that legal aid might be available in South Africa. Secondly, there was evidence to suggest that legal representation, on a conditional fee bases, would not be available for a variety of reasons in the case.

As Lord Bingham put it: if these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and expert evidence which would be essential if the claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion, provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here.

As for second question, the House of Lords expressly rejected the U.S approach, evident in cases such as *Bhopal*, of weighing the public interest of the home and foreign forums in conducting the litigation.⁶³ This appears to be a correct analysis and courts should leave the public policy considerations to the legislature or administrative bodies that have the mandate and capacity to decide whether or not such actions should be allowed to take place within a jurisdiction in general. Also there is a possibility that there seems to be no good reason why essentially private suit between individual parties should be decided on the basis of public interest which is a notoriously by elusive concept.⁶⁴

As to the third question, the House of Lords did not feel it necessary to deal with this point, in view of its finding under the *Spiliada* doctrine.⁶⁵ However, this questions opens interesting discussion in respect to future development of the forum non conveniens doctrine in U.K. Therefore, the question will be briefly discussed next.

E. The forum and relevance of corporate domicile:

The rules of Brussels Convention

The domicile of a defendant company is the important factor in an international litigation, particularly, when it is being considered a litigation involving a Multinational corporation. It is well known that the concept of domicile is serves as a “connecting factor” in conflict laws. English

⁶³ Muchlinski, op.cit note 1 above, p. 172

⁶⁴ Magaisa, A.T. 2001. Suing Multinational Corporate groups for torts in wake of the *Lubbe* case. *LGD*. at. p. 5

⁶⁵ Muchlinski, op.cit. note 1 above, at. p. 172

courts have personal jurisdiction over corporations that incorporated and domiciled in England. However, it does not mean that the domicile of a corporation always determines the forum.

So, is the domicile of a defendant corporation most convenient location for trial? As far as it is concerned the European legislation says yeas! Article 2(16) of the Brussels Convention provides that “person domiciled in a Contracting State shall, whatever their nationality, be sued in the Courts of that state”. As it can be seen, the concept of domicile of a defendant corporation is very important in European legislation. Indeed, the domicile of a defendant corporation determines the forum.

But, what about a plaintiff who’s domicile is in non-contracting State. Can the plaintiff sue a defendant company domiciled in England? Again, Yeas Can! In order words, a plaintiff, who is either in contracting or non-contracting state, is able to sue the defendant company that domiciled in England. However, it is not easy for a plaintiff who is in non-contracting state due to traditional rules, especially, the application of “forum non convenice” could make potential hindrance for determining the forum in England. In order words, a particular collision comes up on differences of the Brussels Convention and the traditional rules of English courts. This is particularly important in that it raises the matter of whether English law should continue to treat cases involving claimants from non-Brussels Convention countries differently from cases involving claimants from contracting states?⁶⁶ Again the *Lubbe*’s case could be a perfect example in all of these issues.

Alongside with South African plaintiffs in the *Lubbe*, another action was commenced by writ on 3 October 1997 by four Italian claimants who are claiming damages for personal injury suffered while working in or living near the Turin factory operated by defendant (Cape Industrial) company. That action could not be stayed as the defendant company was domiciled in England and so was rightly sued by Italian claimants in an English court by virtue of Article 2(16) of the Brussels Convention provides that subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the court of that State.

So, how far should the domicile of the defendant corporation determine the issue of forum? It has been clearly acknowledged in the *Lubbe*’s case that a plaintiff either domiciled in contracting or non-contracting State could sue an English corporation in England. But, how to sue is important question. Arguably many of the jurisdictional problems raised by the *Cape* litigation could be solved by applying the general principle of domicile as the basic of the jurisdiction for all cases involving litigation against

⁶⁶ Muchlinski. op.cit. p. 7

English based MNCs for the acts of their subsidiaries. This would have the advantage of predictability as any claimant, wherever he/she may be domiciled, will know that he/she can sue the English domiciled parent in England.

However, the extension of the Brussels Convention approach to establishing jurisdiction to cases involving non-Convention countries may be objected, first, due to the case law, especially the case *Re Harrods (Buenos Aires) Ltd*, which has been followed in number of cases.⁶⁷ The court of Appeal in *Re Harrods (Buenos Aires) Ltd* held that the Brussels Convention does not apply where defendant is domiciled in England but the plaintiff is not.⁶⁸ Harrods (Buenos Aires) Ltd was a company incorporated in England and with its registered office in England, but whose business was exclusively carried on in Argentina, where its central management and control was also exercised. Plaintiffs were domiciled in Switzerland, which is a non contracting country. In this case the court decided that the domicile principle has no application to cases where there is a choice of jurisdiction between the English forum and the court of non-Convention country.⁶⁹ Although, at the first sight, it is quite logical that the Convention applies only so as to regulate jurisdictional issues between the courts of contracting states, but the decision has been deeply criticized as being contrary to true meaning of the Brussels Convention.⁷⁰

Secondly, the objection is made on the ground that it creates a presumption of parent company responsibility that is inappropriate for the issue of jurisdiction in that it confuses jurisdiction to adjudicate and jurisdiction to prescribe and furthermore, conflates the issue of jurisdiction with that of substantive liability.⁷¹ Muchlinski argues that this point can be answered by the fact the requirements for establishing the domicile of the parent are factually distinct from those that will establish its substantive liability for the acts of its overseas affiliate. Thus the risk of confusion between jurisdictional issue and the merits of the case should not be overstated. Indeed, the adoption of the domicile principle will simplify the jurisdiction issue, and allow the parties to move more quickly to the substantive question of liability, at which point the alleged control of parent for the acts of its overseas subsidiaries will be tested.

⁶⁷ *Williams. J. M. 2001. Forum non conveniens, Lubbe v. Cape and Group Josi v. Universal general insurance. J.P.I.L.1/01. p77*

⁶⁸ *Re Harrods (Buenos Aires) Ltd [1991] 4 ALL. E.R 334*

⁶⁹ Muchlinski. op.cit. p.13

⁷⁰ See, Cheshire and North op.cit. pp. 264-6 (Where a company is domiciled within the EC, service of process will be subject to the provisions of the Brussels Convention incorporate into English law by the Civil Jurisdiction and Judgement Act 1982)

⁷¹ Quoted in Muchlinski. See. Institute of international law yearbook vol.65 part 1, Session of Milan 1993 Preparatory work, p. 306-7. (Paris, editions A. Pedone)

VI. Concluding Remarks

As mentioned in the abstract, this article is divided into two parts for publication purposes. This first part has examined the procedural and jurisdictional barriers that frequently hinder efforts to hold multinational corporations accountable before courts in the United States and the United Kingdom. In particular, doctrines such as *forum non conveniens* and the inherent complexities of transnational litigation contribute to a legal environment that often operates to the advantage of corporate defendants. The second part, to be published in a subsequent issue of NUM Law Review, will address the substantive legal dimensions of corporate accountability, including separate legal personality, limited liability, parent company responsibility, and the recognition and enforcement of foreign judgments.

Writing about multinational corporations is, in many respects, comparable to shooting at a moving target. The phenomenon is inherently complex. On the one hand, multinational corporations undeniably exist as powerful economic actors operating across borders. On the other hand, from a strictly legal perspective, no single legal system creates or recognizes the multinational corporation as a unified entity. Rather, it exists as a network of legally separate corporate entities. This paradox that multinational corporations exist economically but not juridically as a single subject of law makes the question of accountability particularly difficult.

Traditionally, jurisdictional and substantive issues have been examined separately. However, the central inquiry of this dissertation demonstrates that such separation is increasingly artificial. Effective analysis of multinational corporate accountability requires simultaneous consideration of both procedural access to courts and substantive liability rules. Without addressing these dimensions together, meaningful legal conclusions remain incomplete.

A particularly controversial issue in this context is the application of the doctrine of *forum non conveniens* in the United States. While the doctrine is theoretically intended to prevent forum shopping and promote fairness, its practical application has attracted sustained criticism. Many scholars argue that its contemporary use disproportionately benefits multinational corporate defendants by redirecting litigation to jurisdictions where claimants may face significant procedural, financial, or institutional disadvantages. It therefore remains uncertain whether the doctrine reflects a principled limitation on judicial reach or functions, intentionally or otherwise, as a mechanism shielding corporations from accountability for transnational harm.

If *forum non conveniens* operates primarily as a protective device for corporate or national interests, serious concerns arise regarding fairness,

equality before the law, and access to justice. The litigation following the Bhopal disaster illustrates these challenges vividly. The dismissal of claims against Union Carbide by U.S. courts compelled victims to pursue remedies in India, a result formally consistent with established doctrine but one that ultimately exposed the limitations of existing legal frameworks in responding to transnational corporate wrongdoing.

Accordingly, there is an increasing recognition that the present application of *forum non conveniens* requires reconsideration. As global commercial activity expands beyond national borders, legal accountability mechanisms must evolve correspondingly. A balanced and principled approach is necessary — one that preserves judicial efficiency while ensuring that multinational enterprises do not operate beyond the effective reach of justice.

This article therefore concludes that procedural doctrines governing jurisdiction play a decisive role in determining whether substantive corporate responsibility can ever be meaningfully enforced. Without reform at the jurisdictional level, advances in substantive corporate liability risk remaining largely theoretical.

The second part of this article, intended for submission to a subsequent journal issue under the title “Holding Multinationals to Account: Substantive Legal Doctrines and Liability Structures,” will build upon this procedural analysis by examining the substantive mechanisms through which multinational enterprises may be held legally responsible. It will address issues relating to recognition and enforcement of judgments, parent company liability, structural limitations of corporate law, and broader doctrinal approaches to multinational accountability, followed by comments, analysis, and concluding observations.

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