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A return to the doctrine of *forum non conveniens* after Brexit and the implications for corporate accountability

Francesca Farrington*

On 1 January 2021, the European Union's uniform laws on jurisdiction in cross-border disputes ceased to have effect within the United Kingdom. Instead, the rules governing jurisdiction are now found within the Hague Convention 2005 where there is an exclusive choice of court agreement and revert to domestic law where there is not. Consequently, the doctrine of *forum non conveniens* applies to more jurisdictional issues. This article analyses the impact *forum non conveniens* may have on victims of human rights abuses linked to multinational enterprises and considers three possible alternatives to the *forum non conveniens* doctrine, including (i) the *vexatious-and-oppressive* test, (ii) the Australian *clearly inappropriate forum* test, and (iii) Article 6(1) of the European Convention on Human Rights. The author concludes that while the English courts are unlikely to depart from the *forum non conveniens* doctrine, legislative intervention may be needed to ensure England and Wales' compliance with its commitment to continue to ensure access to remedies for those injured by the overseas activities of English and Welsh-domiciled MNEs as required by the United Nation's non-binding General Principles on Business and Human Rights.

Keywords: Brexit; foreign direct liability; corporate accountability; jurisdiction; *forum non conveniens*

A. Introduction

On 1 January 2021, the United Kingdom's transition period ended, and the United Kingdom (UK) left the European Union (EU) customs union and single market. The many consequences of this change in the UK's relationship with Europe, and by extension the broader world, are yet to fully materialise. This article considers one such consequence of the UK's departure – the impact of Brexit on the law governing jurisdiction in cross-border disputes.[1] Following the end of the

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[1]For the effect of Brexit on private international law more generally see, P Beaumont, "Some Reflections on the Way Ahead for UK Private International Law after Brexit"

transition period, Regulation (EU) 1215/2012 on jurisdiction and enforcement of judgments in civil and commercial matters (recast) (the Brussels Ia Regulation) no longer has force in the UK. While the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention) remains in force[2] the Hague Convention has a number of limitations. Most importantly the Convention only applies to exclusive choice of court agreements. In all other circumstances the matter reverts to domestic law. The UK's approach to jurisdiction in cross-border disputes is found at common law, supplemented by statute. Consequently, there is an extension of the scope of the common law doctrine of *forum non conveniens* (*FNC*). The *FNC* doctrine allows the English courts to stay proceedings where a more appropriate forum is available and a stay would be in the interests of the parties and the ends of justice. Whilst the doctrine had never been completely eliminated from the English courts' arsenal, the application of the doctrine had been substantially curtailed under the Brussels regime, as interpreted by the Court of Justice of the European Union (CJEU) in *Owusu v Jackson* (*Owusu*).[3]

This article specifically examines the impact Brexit may have on foreign personal injuries claimants seeking to use the courts of England and Wales to hold English and Welsh-domiciled multinational enterprises (MNEs) and related non-resident entities accountable for human rights abuses occurring overseas (hereinafter Foreign Direct Liability or FDL litigation).[4] Given the difficulties with imposing human rights and criminal law obligations on legal persons,[5] many victims use private international law (PIL) as a means of redress.[6] Consequently, any changes in English and Welsh PIL may substantially impact victims of human rights abuses.

To analyse the impact of Brexit on jurisdictional rules in FDL litigation Section B begins by outlining the law governing jurisdiction in cross-border disputes pre-Brexit. Section C details the law governing jurisdiction post-Brexit.

(2021) 17 *Journal of Private International Law* 1; R Mortensen, "Brexit and Private International Law in the Commonwealth" (2021) 17 *Journal of Private International Law* 18.

[2]Civil Jurisdiction and Judgments Act 1982 as amended by the Private International Law (Implementation of Agreements) Act 2020.

[3]Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

[4]R Widdis, "Corporate Accountability in Business and Human Rights: An Investigation of the Development of Foreign Direct Liability Litigation and Feasibility in Ireland" (PhD Thesis, University of Dublin, Trinity College, 2021) 40, http://www.tara.tcd.ie/bitstream/handle/2262/94293/e%20THESIS%20Rachel%20Widdis%20final.pdf?sequence=3&isAllowed=y accessed on 15 March 2021.

[5]PT Muchlinski, "Human Rights and Multinationals: Is There a Problem?" (2001) 77 *International Affairs* 31.

[6]*Needs and Options for a New International Instrument in the Field of Business and Human Rights* (International Commission of Jurists, 2014) 18, https://business-humanrights.org/en/pdf-needs-and-options-for-a-new-international-instrument-in-the-field-of-business-and-human-rights accessed on 17 March 2021.

Section D analyses the specific disadvantages faced by FDL plaintiffs.[7] Section E examines three possible alternatives to *FNC* which may provide greater certainty for FDL plaintiffs, including the *vexatious-and-oppressive* test, the Australian *clearly inappropriate forum* test, and Article 6(1) of the European Convention on Human Rights (ECHR) as protected by the Human Rights Act 1998. Ultimately, Section F concludes that FDL claimants (and defendants) would benefit from targeted legislative interventions that enhance the certainty of jurisdictional rules. This might be achieved by adopting a strictly interpreted rule based on the defendant's domicile. This general rule could be supplemented by limited exception, including the power to grant a stay where there are pending parallel proceedings that produce a risk of irreconcilable judgments, where proceeding with the case would be practicably impossible, or where the proceedings amount to an abuse of process. However, any departure from a narrowly construed domicile rule introduces a measure of uncertainty. It is also important to note that a departure from the *FNC* doctrine may not be appropriate in all circumstances, rather there are particular issues faced by FDL claimants that warrant such a departure; these issues are explored throughout this article.

B. Jurisdiction in cross border disputes before Brexit

MNEs are not yet duty-holders under public international law.[8] Consequently, many victims of MNE-related injuries seek redress through private law remedies, particularly seeking damages in personal injuries litigation. Personal injuries litigants whose injuries are directly or indirectly linked to MNEs are often faced with the circumstance where a non-resident entity, such as a subsidiary or agent of the parent company, may have been *directly* involved in the abuse, but where the victims also wish to hold the parent company responsible for breaching their duty of care. As such, while the incident may have occurred in one country, those liable may be based in another. There are a number of issues that arise from such cross-border disputes: the initial question of who to sue is followed by the questions of where to sue, what law to apply, and how to enforce a judgment. This article addresses issues concerning jurisdiction in FDL litigation. Establishing a court's jurisdiction to hear FDL litigation has been a notoriously difficult, lengthy and costly process for

[7]For a comprehensive analysis of the implications of Brexit for international commercial disputes, see Fentiman, in *EU Civil Procedure Law and Third Countries, supra* n *.

[8]Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Office of the UN High Commissioner for Human Rights, 2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf accessed on 8 February 2021 (Legally Binding Treaty).

FDL plaintiffs.[9] The EU's Brussels regime, a series of regulations designed to provide clarity on cross-border disputes, had introduced a measure of certainty for claimants, however the rules governing jurisdiction now revert to domestic law where not captured by the Hague Convention.

1. *The Brussels Ia Regulation*

Article 4 of the Brussels Ia Regulation provides, as a general rule of jurisdiction, that EU-domiciled defendants can be sued where they are domiciled and requires the courts of other Member States to stay proceedings until such time as the court first seised has made a determination on jurisdiction (Article 29). Similarly, where the actions are related, the regulation provides that courts other than the court first seised may stay their proceedings (Article 30). Actions are related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments (Article 30(3)).

Whilst the Brussels Ia Regulation is primarily directed towards cross-border disputes involving parties from Member States, the regulation is not completely silent on cross-border disputes involving litigations in third states.[10] Articles 33 and 34 provide that the court of a Member State may stay proceedings, even where jurisdiction is properly established, if identical or related proceedings are *pending* before a court of a third state. Proceedings may be recommenced where the parallel proceedings are discontinued, the proceedings will not be concluded in a reasonable time, or the proper administration of justice requires it. Consequently, Articles 33 and 34 provide some respite to the strict application of the general rule contained in Article 4.

After the CJEU had an opportunity to consider the operation of the Brussels regime in the international legal order in the *Group Josi* case,[11] in *Owusu*, it was asked to consider whether the English courts were entitled to invoke *FNC* to refuse jurisdiction. The English common law *FNC* doctrine provides that a national court may decline to exercise jurisdiction where a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, and to stay the proceedings would be in the interests of all the parties and the ends of justice.[12] However, in *Owusu*, the CJEU held

[9]P Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the UK Asbestos Cases" (2001) 50 *International & Comparative Law Quarterly* 1; P Muchlinski, "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 *Cambridge Journal of Economics* 915; P Blumberg, *The Multinational Challenge to Corporation Law* (Oxford University Press, 1993).

[10]For a recent commentary on the application of the Brussels Ia Regulation to third-country defendants see M Poesen, "Civil Litigation Against Third-Country Defendants in the EU: Effective Access to Justice as a Rationale for European Harmonization of the Law of International Jurisdiction" (2022) 59 *Common Market Law Review* 1.

[11]Case C-412/98 *UGIC v Group Josi* [2000] ECR I-5925.

[12]*Owusu supra* n 3 para 8; relying on *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 476.

that the *FNC* doctrine is not available where jurisdiction has been established on the basis of the domicile of the defendant (now Article 4 of Brussels Ia). The CJEU's reasoning flowed from the EU general principle of legal certainty and the overarching aim of supporting the functioning of the internal market. An indirect consequence of *Owusu* was that a defendant from a third state could not invoke the *FNC* doctrine if to do so would produce a risk of irreconcilable judgments. As such, *Owusu* substantially limited the scope of application of the *FNC* doctrine.[13] Yet, an extension of the *FNC* doctrine was foreshadowed by the judgment of the UK Supreme Court in *Vedanta Resources PLC v Lungowe*[14] (*Vedanta*) delivered before the end of the withdrawal period.

2. *The UK Supreme Court extends the FNC doctrine in Vedanta*

Vedanta concerned water pollution in Zambia from a copper mine owned and operated by Konkola Copper Mines plc (KCM), a subsidiary of Vedanta Resources Plc (Vedanta). A group of Zambian citizens brought proceedings against Vedanta and KCM in England for common law negligence and breach of statutory duty. Vedanta and KCM challenged the English court's jurisdiction, and the case was appealed through to the Supreme Court. The lower courts accepted that there was a real triable issue against the anchor defendant, Vedanta, such that jurisdiction could be grounded in Article 4 of Brussels Ia. As for KCM, they found that the "necessary or proper gateway" test had been satisfied, ie that KCM was a necessary or proper party to the proceedings against Vedanta. Following *Owusu,* the lower courts found themselves obliged to proceed with the case against KCM to avoid the possibility of irreconcilable judgments, even if Zambia would have been a more appropriate forum. A primary defence against such a jurisdictional claim is to challenge the court's jurisdiction over the anchor defendant, particularly by claiming an abuse of EU law, ie establishing that the claimant is using the Brussels Ia Regulation to circumvent the application of national law. The High Court and Court of Appeal both rejected this argument.[15]

The Supreme Court took a different approach. Although the Court acknowledged that *Owusu* limited the application of the *FNC* doctrine, they came to a somewhat unexpected decision on the scope of *Owusu*. The Court was highly critical of the implications of *Owusu* and suggested that *Owusu* had effectively

[13]BJ Rodger, "Forum Non Conveniens Post-Owusu" (2006) 2 *Journal of Private International Law* 71; *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3612 (Ch); *Attorney General of Zambia v Meer Care & Desai (A Firm)* [2006] 1 CLC 436; *BS AG v HSH Nordbank* [2009] 2 Lloyds Rep 272; *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* [2018] AC 439; *A v A (Children: Habitual Residence)* [2014] AC 1.
[14]*Vedanta Resources PLC v Lungowe* [2019] UKSC 20.
[15]*Ibid*, para 36.

revoked the Court's capacity to stay proceedings against a foreign defendant. To release itself from the stranglehold of *Owusu* the Court significantly altered the English law governing the avoidance of irreconcilable judgments. The Court did not, it thought, depart from the CJEU's authoritative ruling in *Owusu* by amending such rules. The Court found that irreconcilable judgments could be avoided where the anchor defendant is willing to submit to the jurisdiction of the foreign court. In this case, as Vedanta had agreed to submit to the jurisdiction of the Zambian courts, the risk of irreconcilable judgments (a risk prejudicial to the claimants) had, in the court's opinion, been brought upon the claimants by their choice to bring the proceedings in the UK. The Court was of the opinion that the risk of irreconcilable judgments should not be a decisive factor, and the claimant should bear the burden of accepting this risk rather than burdening the English courts.[16] However, the Court concluded that substantial justice could not be obtained in Zambia due to a lack of funding and legal expertise and accepted jurisdiction given these exceptional circumstances.[17] The *Vedanta* judgment gives a strong indication that the Supreme Court is motivated to extend the scope of the first part of the *FNC* doctrine.

C. Jurisdiction in cross-border disputes after Brexit

The Brussels Ia Regulation, and the CJEU's related judgments no longer have force in the UK. As Fentiman observes, these rules were familiar, their advantages and disadvantages known to litigants and courts alike, yet a post-Brexit UK could not adopt these provisions without submitting itself to the CJEU's jurisdiction.[18] This result would be unpalatable for a pro-Brexit government who would not see English law once again subordinated to the rulings of EU judges. At present, the Hague Convention governs exclusive choice of court agreements, and is consequently unlikely to provide any respite for FDL claimants. Furthermore, the UK's application to join the Lugano Convention was rejected as the UK is now outside the single market.[19] Therefore, domestic PIL rules now typically govern FDL litigation.

English and Welsh (hereafter referred to as English) jurisdictional rules are found in common law and the Civil Procedural Rules (CPR). The common law rules on jurisdiction are triggered by the presence – even transient presence –

[16] *Ibid*, para 40.
[17] *Ibid*, paras 89–93.
[18] Fentiman, *supra* n *.
[19] "Communication from the Commission to the European Parliament and Council: Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention" Com(2021) 222 final (European Commission 2021), https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf accessed on 17 November 2022; see "Impact of Brexit on the Lugano Convention" (Federal Office of Justice, 2021), https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html accessed on 17 November 2022.

of a defendant in England and Wales (the "presence rule"), while the CPR provides the rules on service out of jurisdiction. Even where these conditions are satisfied the action may be stayed by the *FNC* doctrine where there is a more appropriate forum elsewhere and a stay would be in the interests of the party and the ends of justice. This discretionary power to stay proceedings allows the English courts to balance the values that guide determination of adjudicatory competence in cross-border disputes, namely *party autonomy, connectedness*, and the *avoidance of parallel or related proceedings*.[20] The first two values allow jurisdiction to be established in line with the wishes of the parties (eg where there is an exclusive jurisdiction clause) and/or by establishing a connection between the case and the forum. The third value serves the important function of ensuring the effective administration of justice by reducing the possibility of conflicting judgments being issued. These values may, at times, conflict or be violated by the presence rule. When they do, the judiciary has a number of legal devices at hand to dispense with the issue of jurisdiction. The *FNC* doctrine is one of these devices. Therefore, whilst we might criticise the application or construction of the doctrine it must be appreciated that the doctrine itself protects certain fundamental values in PIL, and any proposed revision of the doctrine should take these values into consideration.

The contours of the *FNC* doctrine were first laid out in England and Wales in *Spiliada Maritime Corporation v Cansulex*[21] (*Spiliada*). The Court found that the bounds of the presence rule were met when there was a more appropriate forum elsewhere. As such, the test has come to be known as the *more appropriate forum* test.[22] The test consists of two parts, first there must be a more appropriate forum available, and second a stay must be in the interests of the parties and the ends of justice. The court will use the values detailed above – party autonomy, connectedness and the avoidance of parallel or related proceedings – to determine the first stage of the *Spiliada* test. In relation to connectedness the court will consider, "connecting factors including (a) the availability of witnesses, (b) the law governing the relevant transaction, and (c) the places where the parties reside or carry on business."[23] It is for the defendant to establish that there is a more appropriate forum, and for the plaintiff to bear the burden of showing that justice requires the court to accept jurisdiction regardless. To do so, the alternative forum must be more than disadvantageous to the plaintiff, there must be a risk that substantial justice cannot be obtained in the *forum conveniens*. This will only be established,

[20]A Arzandeh, *Forum (Non) Conveniens in England: Past, Present, and Future* (Bloomsbury Publishing, 2019) 11; J Hill, "Jurisdiction in Civil and Commercial Matters: Is There a Third Way?" (2001) 54 *Current Legal Problems* 439.
[21][1987] AC 460.
[22]Arzandeh, *supra* n 20, 2.
[23]RA Brand and SR Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford University Press, 2007) 22, 33–35.

for lack of funding the litigation in the more appropriate forum, in exceptional circumstances.[24]

D. Analysing the peculiar disadvantages faced by FDL plaintiffs

The *more appropriate forum* test has been the subject of some criticism, particularly the second limb of the test. These criticisms have tended to focus on the broadness of the judicial discretion to refuse a stay if the "ends of justice" demand it, and the lack of certainty on when the "ends of justice" are offended by a stay.[25] However, in reality, this "overly broad" discretion has been used infrequently, and plaintiffs face a heavy burden to prove that substantial justice is unavailable abroad. Briggs comments that "the law has struggled to respond to the party who complains that justice on offer in the relevant foreign court is just not good enough. […] aside from egregious examples where the facts need no commentary, the courts had gone out of their way to discourage litigants."[26] He goes on to observe that the standard for what qualifies as "clear and cogent" evidence has been placed so high that even evidence from Transparency International or the Human Rights Institute, has not been sufficient to persuade a court that justice is not forthcoming in the foreign jurisdiction.[27]

Therefore, there are only limited cases in which the courts have been willing to accept a substantial justice argument. This was confirmed in the non-FDL case of *Cherney v Deripaska*[28] in which the Court rejected the plaintiff's argument that they would not receive a fair trial in Russia. In that case evidence supplied from Professor William Bowring – who had extensive knowledge of the Russian legal system, having trained Russian judges and lawyers, and advised the UK government – that Cherney would not receive a fair trial in Russia was not sufficient to convince the court. Courts are sensitive to the political undertones of making statements on the quality of justice available abroad. The Judge in *Cherney* stated that comity requires the court to start from the position that the ends of justice will be satisfied in the *forum conveniens*.[29] As such, in practice more pragmatic arguments have been successful, particularly an absence of legal aid. This, of course, was the outcome in *Vedanta* and *Lubbe v Cape*[30] (*Cape*).

Despite acknowledging the challenges claimants face Briggs remains critical of widening the second limb of the *Spiliada* test to encompass perceived rather

[24] *Vedanta*, *supra* n 14, at para 93.
[25] DW Robertson, "Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction'" (1987) 103 *Law Quarterly Review* 398, 414.
[26] A Briggs, "Forum Non Satis: Spiliada and an Inconvenient Truth" (2011) 3 *Lloyd's Maritime and Commercial Law Quarterly* 329, 329.
[27] *Ibid*.
[28] *Cherney v Deripaska* [2008] EWHC 1530.
[29] *Ibid*, para 238.
[30] *Lubbe v Cape Plc* [2000] UKHL 41.

than demonstrated risks, particularly in service out of jurisdiction proceedings.[31] This is not altogether objectionable and speaks to concerns that the *FNC* test is already overly broad. Extending the second limb of *Spiliada* to encompass perceived rather than demonstrated risks may enhance the fairness of proceedings where there is an imbalance of power between the parties. However, in doing so, we would be, as Briggs suggests, sacrificing certainty for fairness. Balancing the core values of PIL proves particularly difficult. As Brand and Jablonski observe, the doctrine of *FNC* pursues a legitimate goal, but does not provide "a perfect combination of predictability, efficiency, and equity in all circumstances."[32]

Whilst the aforementioned criticisms are warranted, there is little discussion of FDL litigation in this critical literature. The *Spiliada* test, arguably, creates a different form of injustice for FDL plaintiffs. As Chalas recognises in the US context, the doctrine has created a form of "jurisdictional immunity" for US domiciled companies that opt to relocate their hazardous activities abroad.[33] The likelihood of a similar outcome in England and Wales applying the *more appropriate forum* test is, it is submitted, not beyond the realm of possibility. Chalas cautions,

> [i]t must then be hoped that the re-appropriation of the freedom to dispose of their international jurisdiction does not lead the British judges to make their country an asylum at the gates of Europe for multinationals who in searching for judicial immunity would install their headquarters there in the hope of escaping their possible liability for damages caused by their foreign activities through the exception of FNC.[34]

Consequently, pre-emptive measures could be introduced to ensure that the doctrine does not become a form of jurisdictional immunity for English- and Welsh-domiciled MNEs. Furthermore, such an approach will signal to MNEs that they will not escape responsibility by outsourcing or offshoring their riskier business operations. The *FNC* doctrine must not become a sword rather than a shield. However, in reformulating the courts' discretion to stay proceedings the above-mentioned values of party autonomy, connectedness, the avoidance of parallel proceedings, and legal certainty must be respected. Section E considers a number of possible alternatives.[35]

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[31]Briggs, *supra* n 26, 330.
[32]Brand and Jablonski, *supra* n 23, 210.
[33]C Chalas, "Uncertainties Regarding the Application of the European Jurisdiction Regime Vis-à-Vis Non Member States" in HM Watt et al (eds), *Global Private International Law: Adjudication Without Frontiers* (Edward Elgar, 2019) 37; see also EF Smith, "Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening US Courts to Victims of Corporate Human Rights Abuses" (2010) 44 *Columbia Journal of Law and Social Problems* 145.
[34]Chalas, *supra* n 33, 44.
[35]More recently, Aristova proposed an interesting alteration to *FNC* in post-Brexit UK in E Aristova, "The Future of Tort Litigation against Transnational Corporations in the English

Before considering possible alternatives, we must first consider the peculiar hurdles faced by FDL claimants, many of which are difficult to quantify as those cases which make it to court, and past the jurisdictional hurdle often produce just outcomes. However, this article is more concerned with the procedural hurdles that may allow defendants to use the courts to frustrate access to both procedural and substantive justice for genuine plaintiffs. Therefore, while cases like *Vedanta* and *Cape* have resulted in favourable judgments for the plaintiffs, plaintiffs may be deterred by the uncertainty of jurisdictional rules, the cost of lengthy appeals, and consequently motivated to settle out of court or forego legal proceedings altogether.

Furthermore, delay can be more than a mere inconvenience or financial barrier. In *Cape,* 1000 of the 7500 claimants died during the lengthy proceedings. While the outcome in that case, with regards to jurisdiction, ultimately favoured the claimants, delay and uncertainty resulted in justice being forever unobtainable for those claimants who did not live to see justice done. Similarly, in *Ngcobo v Thor Chemicals*[36] (*Thor*) the Court accepted jurisdiction, however, by the date of the application the first and second defendants had already died from mercury poisoning. In *Connelly v RTZ*[37] (*RTZ*) appealing the initial grant of a stay of proceedings on the basis that Namibia was the appropriate forum to hear the action taken against RTZ by a worker who had developed cancer of the larynx from working in RTZ's Namibia based uranium mine, took four years to resolve. Therefore, we should not underestimate the potential for the

Courts: Is Forum [Non] Conveniens Back?" (2021) 6 *Business and Human Rights Journal* 399–422. Aristova rejects calls to remove or restrict the *FNC* doctrine. Instead, Aristova proposes that the economic realities of multinational corporations, their managerial structure and the nature of their business operations form part of the factors to be considered under the first limb of *Spiliada* (ie the requirement to identify the natural forum for the dispute). This approach echoes proposals by P Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" (2001) 50 *International and Comparative Law Quarterly* 1 and P Rogerson, "The Common Law Rules of Jurisdiction of the English Courts over Companies' Foreign Activities", in Piet Slot and Mielle Bulterman (eds), *Globalisation and Jurisdiction* (Kluwer Law International, 2004) 91. However, adding to the factors to be taken into consideration under the first limb of *Spiliada* may introduce further uncertainty into FDL proceedings, produce lengthy battles over jurisdictional issues, and consequently increase the cost of FDL litigation. Ultimately, adding to the *Spiliada* test could further deter FDL claimants. Additionally, the scope of these additional considerations would have to be worked out over several judgments. Finally, while Aristova notes that her proposal might be understood as a move towards a "clearly inappropriate forum" test she does not address concerns that the Australian approach is not functionally distinct from the *Spiliada* approach (considered below in Section E).

[36] *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (Times Law Reports 10 November 1995).

[37] *Connelly v RTZ Corporation Plc* [1998] AC 854.

FNC doctrine to frustrate the securing of procedural justice and, consequently the doctrine's capacity to undermine substantive justice.

Furthermore, it should be emphasised that FDL litigation is an emerging area, with Meeran estimating that FDL litigation has only begun to develop significantly over the past 25 years.[38] This period generally corresponds with the application of the Brussels Regulations. Therefore, the certainty created by EU law may have contributed to positive outcomes for FDL claimants and empowered the English courts to accept jurisdiction, particularly following the *Owusu* judgment which was notably decided after *Cape.* Meeren concludes that "cases for example against Trafigura and Monterrico Metals were not plagued by FNC tactics and delay."[39] Similarly, Avocats San Frontières noted that "the Owusu case halted further year-long debates on the question of territorial jurisdiction in [FDL] cases,"[40] and welcomed the judgment "given the resources and time wasted on this issue in the litigation against Thor, RTZ and Cape."[41] After the UK government considered reintroducing *FNC* (as barred by *Owusu*) in 2009,[42] the claimants' lawyers in *Thor, RTZ* and *Cape*, called the proposal, "a denial of justice especially for impoverished developing country victims who are frequently subjected to standards of health and safety that are lower than in the UK."[43]

Therefore, we should be critical of the impact that a return to *FNC* may have on FDL claimants. As Meeran, explains,

> whilst in a commercial context, FNC entails a zero-sum game between businesses trying to have the dispute heard in the forum which is likely to produce the best outcome for them, in a human rights context, FNC for victims is generally all or nothing, that is access to justice is only available in practice in the [MNE] home courts.[44]

[38]R Meeran, "Multinational Human Rights Litigation in the UK: A Retrospective" (2021) 6 *Business and Human Rights Journal* 255, 255; Claire Buggenhoudt and Sophie Colmant, "Justice in a Globalised Economy: A Challenge for Lawyers – Corporate Responsibility and Accountability in European Courts" (Avocats Sans Frontières 2011), https://www.asf.be/wp-content/publications/GandJ_CRAEuropeanCourts.pdf accessed on 20 April 2022: the authors note John Ruggie's comments in his 2006 report that there was an increasing demand for corporate accountability.

[39]Meeran, *supra* n 38, 259; citing *Motto & Others v Trafigura* [2011] EWCA Civ 1150 and *Guerrero & Others v Monterrico Metals plc* [2009] EWHC 247.

[40]Buggenhoudt and Colmant, *supra* n 38, 24.

[41]*Ibid*.

[42]"'Green Paper on the Brussels I Regulation – Report with Evidence' (London: The Stationery Office Limited, 2009)", (House of Lords – European Union Committee, 2009) Report of Session 2008–09 HL Paper 148, https://publications.parliament.uk/pa/ld200809/ldselect/ldeucom/148/148.pdf accessed on 20 April 2022.

[43]Quoted in Buggenhoudt and Colmant, *supra* n 38, 25.

[44]Meeran, *supra* n 38, 259.

This section identifies three issues that disadvantage FDL claimants: the inequality of arms between natural and legal persons, the changing nature of business relations, and the complexity of the corporate structure.

First, there is robust empirical evidence of a significant imbalance of power between FDL claimants and the defendant companies. The Business and Human Rights Resource Centre (BHRRC) reviewed 200 cases taken against MNEs and found that 80% of cases profiled were filed by marginalised individuals and communities, "indicating that those at heightened risk of human rights abuse within a company's sphere of influence are also the ones that have the most to gain by resorting to the courts to remedy these abuses."[45] BHRRC concluded that "business generally enjoys vast privilege of power and wealth over the communities and workers in their operations and supply chains."[46] Additionally, BHRCC found that access to courts is an important tool for disempowered communities, through litigation these communities can fight corporate impunity, develop new standards to hold industry accountable, and rebalance the scales of justice. However, at present, PIL rules often act as barriers rather than avenues to justice.

In another report, BHRRC found that companies often use the courts as a weapon against claimants, this finding underpins concerns that the *FNC* doctrine could become a form of jurisdictional immunity, acting as a sword rather than a shield. BHRRC further found that "prospects of success in civil claims for business-related abuses continue to shrink – with virtually no effective remedies in companies' home countries for most victims of abuses that occur abroad."[47] This trend is reversed in some countries, where the courts in the company's home country have begun to hear civil claims concerning human rights abuses involving suppliers and subsidiaries and require companies to provide information to plaintiffs. These measures, BHRRC suggest, represent a major step towards rebalancing the scales of justice. Likewise, OHCHR found that there were insurmountable hurdles for victims to overcome.[48] Specifically, tackling the issue of jurisdiction in civil cases, the OHCHR found that many of the

[45]"Corporate Human Rights Litigation: Trends from 200 Seminal Lawsuits" (Business and Human Rights Resource Centre, 2020) 37, https://www.business-humanrights.org/en/from-us/updates-from-bhrrc/corporate-legal-accountability-quarterly-update-issue-37-december-2020-corporate-human-rights-litigation-trends-from-200-seminal-lawsuits/ accessed on 29 January 2021.
[46]*Ibid*.
[47]"Corporate Legal Accountability Annual Briefings" (Business and Human Rights Resource Centre, 2017) 2, https://media.business-humanrights.org/media/documents/files/documents/CLA_AB_Final_Apr_2017.pdf accessed on 29 January 2021.
[48]J Zerk, "Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies" (Office of the UN High Commissioner for Human Rights, 2013) 7, https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf accessed on 29 January 2021.

cases they had studied had been challenged and/or dismissed as a result of domestic rules on jurisdiction.[49]

Second, the changed nature of business relations in an increasingly globalised world has allowed legal persons to outsource or offshore their riskier activities. This reduces the already limited liability of legal persons, and consequently further disempowers foreign claimants from holding corporations responsible for injuries sustained by a MNE's transnational operations. For instance, in *Thor* the discovery of high mercury levels in the air and urine of workers at the Margate plant in England led to operations being moved overseas to a South African subsidiary where the plaintiffs subsequently suffered from mercury poisoning.

Even more concerning is the evidence of collusion between MNEs and governments to evade accountability for human rights violations.[50] Recently, Aristova found that since the beginning of the twentieth century,

> English based [MNEs] are regularly alleged to have polluted or threatened existing water resources in host states and/or to engage in other environmentally destructive activities which have adverse consequences for the traditional lifestyles of local communities. Moreover, several cases seek to establish direct involvement of corporate defendants with (or complicity in) killings, kidnapping, or torture of the local population by state or private security forces.[51]

Whilst states may be sanctioned for human rights abuses at the international level, MNEs, as private actors, are able to evade justice with their victims left reliant on PIL. Therefore, whilst MNEs avail, as legal persons, of human rights protections – particularly private property rights – they have no corresponding obligations as private actors. This has, Muchlinski suggests, created an almost insurmountable conceptual barrier to justice.[52]

Arzandeh recognises the contemporary challenge posed by globalisation.[53] However, he draws the conclusion that increased globalisation requires the second limb of the *Spiliada* test to be refined, and the discretion afforded to the court to be reduced. While this author agrees that greater certainty and less flexibility should be afforded to the court, this author disagrees with Arzandeh on the

[49] *Ibid*, 49.
[50] Muchlinski, *supra* n 5, 31.
[51] Aristova, *supra* n 35, 402; Aristova cites, *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC); A*rroyo v Equion Energia Ltd* [2016] EWHC 1699 (TCC); *His Royal Highness Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; *Guerrero v Monterrico Metals plc* [2010] EWHC 3228 (QB); *Kesabo v African Barrick Gold plc* [2013] EWHC 4045 (QB); *Kalma v African Minerals Ltd* [2020] EWCA Civ 144; *Vilca v Xstrata Ltd* [2018] EWHC 27 (QB); *AAA v Unilever plc* [2018] EWCA Civ 1532.
[52] Muchlinski, *supra* n 5, 33.
[53] Arzandeh, *supra* n 20, 125.

means to enhance certainty, ensure efficiency, and advance fairness. Arzandeh and Briggs' approaches would allow transnational corporations to evade more robust human rights regimes by using complex corporate structures to capitalise on the shortcomings of emerging economies' legal systems, that have, to quote Arzandeh, "just begun the arduous process of social, political and economic modernisation."[54]

There have been attempts at an international level to hold businesses accountable for their transnational operations, including the UN Guiding Principles (2011),[55] the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)[56] and the proposed binding treaty on business and human rights.[57] However, the law has struggled to adapt to the specific issues raised by MNEs. Currently, the abovementioned interventions are non-binding rendering them practicably unenforceable. Furthermore, these measures have been criticised for failing to meaningfully address barriers to justice, specifically the doctrine of *FNC*.[58] Nevertheless, these measures acknowledge the risks posed by globalisation, ones that can potentially be mitigated through private – rather than public – international law.

Third, and relatedly, the complexity of the corporate structure, offshoring and outsourcing business operations, and global supply chains all combine to create additional layers of limited liability or plausible deniability. Such complexity and uncertainty can make justice unobtainable and keep corporations beyond the reach of the law. As Muchlinski observes,

> the question of whether a forum has jurisdiction over disputes arising out of the operations of non-resident entities of the MNE brings into contrast the mismatch between the territorial reach of the legal system and the transnational reach of the enterprise.[59]

[54]A Arzandeh, "Should the Spiliada Test Be Revised?" (2014) 10 *Journal of Private International Law* 89, 101.
[55]*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Office of the UN High Commissioner for Human Rights, 2011) HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed on 8 February 2021.
[56]*ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Fifth Edition)* (International Labour Organization, 2017), https://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf accessed on 8 February 2021.
[57]Legally Binding Treaty, *supra* n 8.
[58]T Thabane, "Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles" (2014) 14 *African Human Rights Law Journal* 43.
[59]Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" *supra* n 9, 1.

Muchlinski suggests that the *Cape* litigation demonstrates how complex corporate structures can be used to disadvantage already disempowered claimants.[60] In these circumstances, there is a glaring conflict between the purpose of limited liability and its practical implications. Limited liability was intended as

> a device for the protection of the ultimate human and institutional shareholders. It was never envisaged as a means of insulating from liability separately incorporated entities within the same enterprises. Indeed, one effect of such an extension of limited liability is to shift the risk of liability onto the involuntary creditors of the group, the clearest example being victims of torts committed by the group enterprise in the course of its operations. This goes well beyond the acceptable consequences of limited liability, especially where the economic process that gives rise to the injuries is carried on as a single enterprise within the group.[61]

In short, these three issues, the inequality of arms between natural and legal persons, the changing nature of business relations, and the complexity of the corporate structure, combine to disadvantage FDL claimants.

E. Alternatives to the *more appropriate forum* test

The foregoing illustrates that the risks posed to FDL claimants by the *FNC* doctrine are not illusory or hypothetical. Therefore, the UK should consider whether a departure from the EU approach to jurisdiction is warranted, particularly given the UK's commitment under its National Action Plan (NAP) 2016 to "continue to ensure that the UK provides access to judicial and non-judicial remedies to victims of human rights harms linked to business activity"[62] and to "keep the UK provision of remedy under review."[63] Following Brexit, the government might be advised to review the jurisdictional rules governing FDL litigation. It is possible that legislative intervention could produce more equitable procedural rules for FDL claimants and enhance access to justice, particularly for claimants located in lower- and middle-income countries where courts may be overburdened or underfunded. It is unlikely (and not advisable) for the UK Supreme Court to intervene on what is essentially a divisive political issue. Therefore, changes might be more appropriately initiated by parliament.

The following subsections consider some viable alternatives including past approaches to jurisdiction in the UK, present approaches in Australia, and any relief provided by Article 6(1) of the ECHR. However, it may be more

[60] *Ibid.*
[61] *Ibid*, 16.
[62] "Good Business: Implementing the UN Guiding Principles on Business and Human Rights" (The Secretary of State for Foreign and Commonwealth Affairs, 2016) Cm 9255 22, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf accessed on 20 April 2022.
[63] *Ibid.*

straightforward to implement a general rule based on the defendants' domicile strictly construed or allowing for limited and exhaustive exceptions. The more narrowly or strictly construed a domicile-rule is the greater certainty afforded to both plaintiffs and defendants. Therefore, contrary to Arzandeh and Briggs' proposals, certainty can be achieved by altering the first rather than second leg of the *FNC* doctrine and dispensing with the need for judicial discretion altogether.

1. *The earlier vexatious-and-oppressive test in England*

Prior to adopting the Scottish *more appropriate forum* test, the English courts would only order a stay where the continuance of the action would be (a) vexatious or oppressive to the defendant such as to produce injustice, or (b) would be an abuse of process of the court.[64] Additionally, the defendant had to show that the stay did not cause an injustice to the plaintiff. Arzandeh considers that the *vexatious-and-oppressive* test was almost insurmountable for a defendant.[65]

The *vexatious-and-oppressive* test has a deep-rooted history in English law. Arzandeh explains that

> the vexatious-and-oppressive test is likely to have come into existence as early as the fifteenth century, when the English Court of Chancery began to issue "common injunctions", to restrain the commencement (or continuation) of proceedings in other courts of the kingdom which it considered to be vexatious-and-oppressive.[66]

The existence of multiple courts within the domestic sphere required similar interventions to those we now see within transnational litigation. The discretionary power was intended to ensure the efficient administration of justice by avoiding the risk of irreconcilable judgments and permitting the court to order a stay where there are parallel proceedings underway. Additionally, this discretionary power was a means to maintain comity between courts and, later, nations. As civil procedural rules for service out of jurisdiction developed so too did the discretionary power to stay proceedings.

The English courts first adopted the *vexatious-and-oppressive* test in cross-border disputes in *McHenry v Lewis*[67] (*McHenry*). The *McHenry* court was anxious to prevent service out of jurisdiction rules being used to harass defendants or pervert the course of justice elsewhere. Cotton LJ in *McHenry* went so far as to state that the discretion to stay proceeding was "to be used with very considerable

[64] *St Pierre v South American Stones (Gath & Chaves) Ltd* [1936] 1 KB 382 (CA) 398 (*St Pierre)*.
[65] Arzandeh, *supra* n 20, 41.
[66] *Ibid*, 32.
[67] *McHenry v Lewis* (1882) 22 Ch D 397 (CA).

caution."[68] Therefore, initially, the discretion to decline jurisdiction was considered a means to prevent abuses of court process, rather than as a means to support defendant autonomy.[69]

At first the bounds of the *vexatious-and-oppressive* test were stretched to encompass more than abuse of process, and to include more pragmatic considerations such as whether the unavailability of witnesses and evidence might work an injustice against the defendant.[70] This brought the *vexatious-and-oppressive* test closer to the Scottish approach, until it was finally replaced with the *more appropriate forum* test in *Spiliada*. However, until then, the mere fact that another forum was more convenient was not sufficient to grant a stay. As Arzandeh notes, "from the decision in *St. Pierre*, in 1935, until the mid-1970s, there appears to be only one reported case in which a stay was granted in England."[71] This gives the appearance that the *St Pierre* rule essentially established a *prima facie* right for the plaintiff to pursue their case in their forum of choice once jurisdiction was properly established. Only if the proceedings were an abuse of process or a form of harassment could a defendant expect to receive a stay.

The absence of stays granted in England during this time may indicate a welcome level of certainty, precisely the certainty that Arzandeh found lacking in the *more appropriate forum* test. It is also important to note that, more recently, the courts have been willing to decline jurisdiction where the proceedings amount to an abuse of process. Recently, in *Municipo de Marina v BHP Group and ors*[72] (*BHP*) the High Court declined jurisdiction to hear the case taken by victims of the Fundão Dam collapse on the grounds of abuse of process. Turner J was satisfied that the claim was an abuse of process as there were ongoing proceedings in Brazil and a compensation mechanism already in operation, from which many of the claimants had already received redress. Therefore, a stricter approach to jurisdiction would not necessarily amount to a carte blanche for claimants. Rather it would be a recognition that this discretionary power was envisaged to be a shield against abusive or vexatious litigants, rather than a sword to cut down properly established jurisdiction.

Overtime, the English courts began to move away from the *St. Pierre* rule. The approach began to liberalise in *The Atlantic Star*[73] where the House of Lords held that "in considering whether a stay should be granted the court must take into account (i) any advantage to the plaintiff; (ii) any disadvantage to the defendant."[74] The more subjective approach, which looked for bad faith in the mind of the plaintiff was replaced by a more objective approach which

[68] *Ibid*, 406.
[69] Arzandeh, *supra* n 20, 31.
[70] *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 (CA) 150 (*Logan*); *Egbert v Short* [1907] 2 Ch 205; *In re Norton's Settlement* [1908] 1 Ch 471 (CA).
[71] Arzandeh, *supra* n 20, 43–45.
[72] *Municipo de Marina v BHP Group and ors* [2020] EWHC 2930.
[73] *The Atlantic Star* [1974] AC 436 (HL).
[74] *Ibid*, 468.

considered the circumstances faced by the defendant.[75] Furthermore, it signalled a shifting of the burden of proof to the plaintiff to point to a disadvantage in moving the proceedings abroad. This period of liberalisation, that started with *The Atlantic Star* culminated in the *Spiliada* decision which, as outlined above, brought the *more appropriate forum* test to England.

2. *The clearly inappropriate forum test in Australia*

Australian PIL is in a state of flux producing a noted incoherence in Australian jurisdictional rules.[76] Due to a mixture of common and statute law, the Australian approach varies from a *clearly inappropriate forum* test to a *more appropriate forum* test depending on the circumstances. The *more appropriate forum* test applies to transfers of proceedings within Australia or to stays of proceedings in favour of the New Zealand courts[77] whereas "the common law test applied in respect of most other overseas courts permits a stay on forum grounds only if the Australian court is a 'clearly inappropriate forum'."[78]

The nature of the *clearly inappropriate test* is set out in *Oceanic Sun Line Special Shipping Co. Inc. v Fay*[79] (*Oceanic*) where Justice Deane held that

> [t]he power of a court whose jurisdiction has been regularly invoked to dismiss or stay proceedings on the ground that they should have been brought in some tribunal in another country is limited to the case where the court is persuaded that it is such an unsuitable or inappropriate forum for their determination that their continuance would work a serious injustice in that it would be oppressive and vexatious to the defendant. On that traditional approach, the clear inappropriateness of the local forum may justify dismissal or a stay. The mere fact that some foreign tribunal would represent a "more appropriate" forum will not.[80]

The Australian approach echoes the *vexatious-and-oppressive* test where the burden is on the defendant to show that allowing the case to proceed before the court would produce an injustice or would amount to an abuse of process. Later, the High Court of Australia in *Voth v. Manildra Flour Mills Pty. Ltd*[81] (*Voth*) confirmed that the *clearly inappropriate forum* test was the approach adopted in Australia, declining to adopt the *more appropriate forum* test.

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[75]MG Bridge, "Changing Attitudes to Jurisdiction" (1973) 36 *The Modern Law Review* 649.
[76]A Dickinson, T John and M Keyes (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing, 2014).
[77]Jurisdiction of Courts (Cross-vesting) Act 1987; *BHP Billiton Ltd v Schultz* [2004] HCA 61; 221 CLR 400; Trans-Tasman Proceedings Act 2010.
[78]J Allsop and D Ward, "Incoherence in Australian Private International Laws" in Dickinson et al *supra* n 76, 55.
[79]*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.
[80]*Ibid*, 242.
[81]*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

There has been some debate as to the scope of the test, and the emphasis placed on the plaintiff's prima facie right to their chosen forum.[82] Indeed, it has been commented that in practice, "the relevant factors determining whether proceedings should be stayed are the same as those that are used in England to determine whether another forum is more appropriate than the English courts."[83] The test has moved closer to the *Spiliada* judgment, however, this is primarily (and justifiably) where there are proceedings pending before another court.[84] In such circumstances, there is no presumption that a claimant has a right to their preferred jurisdiction once jurisdiction is correctly established.[85] The Australian courts have also been willing to use their discretionary power to stay proceedings where it would be practicably impossible to conduct the proceedings in Australia. For instance, in *PCH Offshore Pty Ltd v. Dunn (No.2),*[86] the Court granted a stay due to the real difficulties with accessing witnesses, evidence, and translating vast quantities of documents.

In sum, where the *clearly inappropriate forum* test is applicable the Australian courts consider (i) the right of the plaintiff to choose their forum (ii) whether the litigation is vexatious or oppressive, (iii) whether there is an abuse of process (iv) whether there are parallel proceedings already commenced abroad, and (v) connecting factors including the availability of witnesses and evidence.[87] While the *clearly inappropriate forum* test is technically available to stay proceedings concerning an Australian-registered company, competence is *only* ever established by service within the relevant state or by submission to the jurisdiction of that state's courts. Therefore, the almost inevitable – although not the necessary – outcome is that an Australian court will not be considered a clearly inappropriate forum to hear an action taken against an Australian-registered corporate defendant. However, most FDL litigation will have an international element as foreign subsidiaries are commonly joined to proceedings against the parent company. The addition of a non-Australian registered corporate defendant increases the likelihood that the *clearly inappropriate forum* test may be relied upon.

Given the complexity of Australian jurisdictional rules in FDL proceedings, an example may be useful. The case of *OK Tedi*[88] presents the typical factual matrix of FDL litigation. In *OK Tedi* jurisdiction ultimately turned on the issue

[82]A Arzandeh, "Reconsidering the Australian Forum (Non) Conveniens Doctrine" (2016) 65 *International and Comparative Law Quarterly* 475.
[83]M Keyes, "Improving Australian Private International Law" in Dickinson et al, *supra* n 76, 24.
[84]*Henry v Henry* (1996) 185 CLR 571.
[85]P Nygh, "Voth in the Family Court Re-Visited: The High Court Pronounces Forum Non Conveniens and Lis Alibi Pendens" (1996) 10 *Australian Journal of Family Law* 20.
[86]*PCH Offshore Pty Ltd v Dunn (No2)* (2010) ALR 167.
[87]R Garnett, "Stay of Proceedings in Australia: A Clearly Inappropriate Test" (1999) 23 *Melbourne University Law Review* 30, 36.
[88]*Dagi and Others v. BHP* [1997] 1 VR 428.

of whether the claim concerned property in Papua New Guinea. However, the factual matrix may act as a useful foil to contrast Australian and English jurisdiction rules. In that case, proceedings were taken against BHP in the Victorian Supreme Court for environmental damage that resulted from the operations of the OK Tedi copper mine in Papua New Guinea (PNG), which BHP jointly owns with a Canadian mining corporation and the PNG government. Jurisdiction *in personam* was not contested over BHP as BHP is incorporated in Australia. The Australian rules in these circumstances are notably clear, where a "defendant has been served in the jurisdiction, it is immaterial that the dispute has no connection with the forum."[89] However, OK Tedi Mining Ltd (the PNG-based subsidiary) could have challenged jurisdiction on the basis that Australia was a clearly inappropriate forum, as understood in *Voth* and *Oceanic*.

In the English context, a case like *OK Tedi* could become even more complicated. First, the jurisdiction of the English court over the English-domiciled defendant could be challenged (with a significant likelihood of success) on the basis that there is a *more appropriate forum* than England to hear the dispute. This differs from the more strictly interpreted Australian rule for jurisdiction *in personam*. The primary mechanism for joining the foreign-domiciled party as a "necessary and proper" party to proceedings against the English-domiciled parent company (the "anchor defendant") is comparable. Jurisdiction could also be challenged over the foreign defendant on the basis that there is a *more appropriate forum* than England; as compared to the Australian *clearly inappropriate forum* test. Furthermore, in cases of service out of jurisdiction with the permission of the court, "the court will generally require the claimant to show England to be the most appropriate forum for the trial of the claim."[90] If this argument was accepted against the foreign defendant, we could see a situation where the case against the English-domiciled parent company is transferred abroad due to a risk of irreconcilable judgments emerging, precisely the uncertainty prevented by *Owusu*. Even if proceedings against the parent company are not transferred abroad, the plaintiff is then faced with taking proceedings across jurisdictions – further complicating proceedings.

In considering the *OK Tedi* case, and whether Australia's approach was superior to the English approach, Prince determined that the Australian approach

> has much to commend it. In particular, by retaining harassment as the standard against which to judge inconvenience to the defendant, it makes it difficult for Australian residents and companies to escape local jurisdiction if taken to court in Australia by a foreign plaintiff. Thus it acts as an incentive for companies based in Australia to adopt similar industrial safety and environmental standards in their

[89]M Davies, A Bell, P Le Gay Brereton (eds), *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 8th edn, 2010) 27.
[90]L Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th edn, 2006) 534.

> overseas activities as they are required to domestically. In contrast, current British and American law does little to prevent local companies escaping domestic legal standards when operating overseas. The "most suitable forum" doctrine adopted in the United States and the United Kingdom – with its balancing of local versus foreign interests – places foreign plaintiffs at an immediate disadvantage.[91]

There is also a social justice rationale for advancing the Australian approach, by suing companies in their jurisdiction of domicile, their actions abroad are more likely to be publicised, this may result in social pressure with reputational costs that motivate MNEs to clean up their transnational operations. However, Australia might be better praised for its rules regarding jurisdiction *in personam* that allow little exception than for its *clearly inappropriate forum* test, which may not be as functionally distinct from the *more appropriate forum* test as it appears at first glance.

The above hypothetical shows how the construction of jurisdictional rules impact FDL litigation. Given the peculiar hurdles and disadvantages faced by FDL claimants (outlined in Section D), this article has attempted to highlight a need to reduce complexity in FDL proceedings by altering the rules on jurisdiction. The *clearly inappropriate forum* test, like the vexatious-and-oppressive test, still adds a layer of legal complexity and creates another hurdle for claimants to overcome. Additionally, the *clearly inappropriate test* has been brought much closer to the *more appropriate forum* test in recent years. Finally, Australian rules are, at present, notably incoherent and therefore may themselves benefit from revision.

3. *The relationship between the ECHR and a plaintiff-friendly approach*

Finally, it is appropriate to consider how *FNC* may be supplemented by ECHR arguments, particularly Article 6(1) of the ECHR which protects the right to a fair trial. The provisions of the ECHR are protected under domestic law by the Human Rights Act 1998 which remains unaffected by Brexit. As Fawcett observes, there are three ways in which Article 6 might be implicated in decisions involving the *FNC* doctrine: denial of access, delay in trial, and breach of a right to fair trial abroad.[92] However, there are also three primary barriers to making an ECHR argument against the application of the *FNC* doctrine. First, a claimant must establish that the simple bringing of proceedings in a contracting state is sufficient to trigger the application of the ECHR. Second, the scope of the ECHR's application to jurisdictional issues is uncertain. For instance, should Article 6(1) be broadly or narrowly construed in such instances. This is a point of contention

[91]P Prince, "Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach Is Better" (1998) 47 *International and Comparative Law Quarterly* 573, 574.
[92]JJ Fawcett, "The Impact of Article 6 (1) of the ECHR on Private International Law" (2007) 56 *International and Comparative Law Quarterly* 9.

amongst the scholars considered below. Third, the English courts consider that the second arm of the *FNC* doctrine already protects the same rights as those contained in Article 6(1) ECHR. These barriers will be considered in turn.

The ECHR's scope is set out in Article 1 of the Convention and mandates that the Contracting Parties will secure to everyone *within their jurisdiction* the rights and freedoms defined in the Convention. As a result, it is unclear whether declining to exercise jurisdiction over a dispute and instead transferring the action abroad triggers the application of the Convention and Article 6(1).[93] Kiestra suggests that the act of instituting proceedings in a contracting state is enough to trigger the application of the ECHR, regardless of whether the claimant is from a contracting state or a third state.[94] Kiestra presents a convincing argument that a contracting state cannot use its civil procedure rules to limit the applicability of the ECHR.[95] In *Markovic and Others v Italy*, the court at para 54 stated that, "the Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a 'jurisdictional link' for the purposes of Article 1 [ECHR]."[96] However, in *Gauthier v Belgium*,[97] the Commission in Strasbourg found that a Belgian court who had refused to reject a jurisdiction clause in favour of Zaire had not violated their obligations under the ECHR by failing to consider the availability of justice in the non-contracting state. This judgment illustrates that the ECHR will not operate to override an exclusive jurisdiction agreement. As mentioned above, these will come under the scope of the Hague Convention.

In short, there appears to be a strong argument that a contracting state cannot render the ECHR inapplicable through a finding that there is another *forum conveniens*. Once proceedings have been instituted this is enough to satisfy the jurisdictional requirement in Article 1 ECHR. Therefore, a claimant from a non-contracting state would be entitled to invoke Article 6(1) to challenge a contracting state's refusal to assert jurisdiction in a purely civil matter, unless the claimant has waived their rights by entering into an exclusive jurisdiction agreement.

However, contracting states have a certain margin of appreciation in delineating the limitations on access to justice. These limitations must be proportionate to the pursuit of a legitimate aim and not render the right ineffective.[98] This is affirmed by the English courts in *Mark v Mark,*[99] where the court considered

[93] *Ibid*, 4.
[94] LR Kiestra, "The Impact of the ECHR on Private International Law: An Analysis of Strasbourg and Selected National Case Law" (PhD Thesis, University of Amsterdam, 2013) 108–09.
[95] *Ibid*, 109.
[96] *Markovic and Others v Italy* [GC], no 1398/03, ECHR 2006-XIV.
[97] *Gauthier v Belgium* (dec), no 12603/86, 6 March 1989.
[98] Kiestra, *supra* n 94, 113.
[99] *Mark v Mark* [2004] EWCA Civ 168.

that Article 6 does not provide an unfettered right of access to one's court of choice. In *OT Africa Line Ltd v Hijazy*[100] the court identified two requirements arising from Article 6: the trial must be heard *somewhere*, and that there must be a fair and public hearing before an independent and impartial tribunal established by law.[101] Of consequence for PIL, Article 6(1) does not provide a right of access to courts where there are no grounds arguable under the domestic civil law. Therefore, this could complicate access claimed in cross-border disputes where the applicable law is foreign law.[102] On the more positive side, Article 6(1) could extend to the provision of legal aid.[103]

In principle then, Article 6(1) could be used to block the English courts from invoking the doctrine of *FNC* where access to justice cannot be obtained in the *forum conveniens*. However, in *Cape* the House of Lords considered that the current interpretation of the *FNC* doctrine does not contravene the rights enshrined in Article 6(1) ECHR. In *Cape* the question before the House of Lords was whether England was the proper forum. Bingham J, applying the *Spiliada* test, found that the defendant had satisfied the first arm. However, he went on to find that there was a risk that substantial justice could not be obtained in South Africa due to an absence of legal aid. On Article 6, Bingham J commented that, those rights contained within Article 6 ECHR are protected by the *Spiliada* principles.[104] Additionally, paragraph 19.4 of the Civil Procedural Rules (CPR) requires those rules to be interpreted in conformity with the ECHR.[105] Consequently, Grolimund suggests, "if, in future, the Strasbourg Court should set up minimum standards of jurisdiction, [these] will have to be observed by English courts."[106] As of yet, such minimum standards are not forthcoming, and may not be possible to enunciate solely through the jurisprudence of the ECtHR, particularly in an area of law that must carefully balance legal certainty with flexibility.

Fawcett has been critical of the court's approach in *Cape*. In particular, Fawcett has criticised the court's sequencing of the issues; the court having considered the PIL issue before the human rights issue.[107] Fawcett is justifiably concerned that courts will proceed on the assumption that a consideration of PIL satisfies the human rights concerns, and therefore fail to consider these rights independently. To avoid a breach of Article 6, Fawcett suggests that ECHR

[100] *OT Africa Line Ltd v Hijazy* [2001] 1 Lloyd's Rep 76.
[101] Fawcett, *supra* n 92, 7.
[102] Kiestra, *supra* n 94, 112.
[103] *Ibid*, 113; *Airey v. Ireland.* 9 October 1979, para 26, Series A no. 32.
[104] Kiestra, *supra* n 94, 113..
[105] *Ibid*, 109.
[106] P Grolimund, "Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of FNC and Forum Conveniens" (2002) 4 *European Journal of Law Reform* 87 at 110.
[107] Fawcett, *supra* n 92, 10.

arguments should be considered on their own independent merits, as required by section 2 of the Human Rights Act 1998. Fawcett calls this a hybrid human rights/private international law approach, one that considers each element separately, with human rights being considered first.[108] This approach may also aid the courts in interpreting the interests of the parties and the ends of justice.[109] However, human rights should not become mere interpretive devices.

Conversely, engaging Article 6(1) may trigger a more rigid application of the *FNC* doctrine, one recently advocated for by Arzandeh.[110] To recall, Arzandeh considers that the discretionary power under the second limb of the *Spiliada* test is overly broad. As such, he is more concerned with the court using this discretionary power to accept jurisdiction than to stay proceedings.[111] Consequently, Arzandeh argues that a stricter approach is necessitated.[112] He considers that this broad discretion could be tempered by the application of Article 6(1). However, to accomplish this, he advocates a strict application of the *FNC* doctrine, one that interprets Article 6(1) narrowly in line with the ECtHR case law on expulsion. In expulsion cases "deporting an individual from a Contracting State would only amount to a breach of his Article 6(1) rights if there is a real risk of a 'flagrant denial of justice' in the receiving country of the deportee's right to fair trial."[113] A "flagrant denial of justice" has been defined as a breach of Article 6 "which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."[114] Arguably, an absence of legal aid may not amount to a flagrant denial of justice, thus severely limiting the scope of *Cape* and *Vedanta*.

This is a strikingly more conservative approach than the hybrid approach proposed by Fawcett. Arzandeh's approach shows the limitations of invoking Article 6(1) as a means to protect weaker parties in cross-border disputes. Furthermore, while Fawcett's approach is inviting, it seems somewhat unworkable when there

[108] *Ibid*, 36.
[109] Grolimund, *supra* n 106. Grolimund has also looked at the possibility of Art 6(1) providing minimum standards against which rules on international jurisdiction can be measured in the context of a uniform approach to European Civil Procedure.
[110] Arzandeh, *supra* n 54.
[111] *Ibid*, 118; see also A Briggs, "Russian Oligarchs and the Conflict of Laws" (2008) 79 *British Yearbook of International Law* 543; A Briggs, "Forum Non Satis: Finding Fault with a Foreign Court" (2009) 80 *British Yearbook of International Law* 575; A Briggs, "Forum Non Satis: Spiliada and an Inconvenient Truth" (2011) 3 *Lloyd's Maritime and Commercial Law Quarterly* 329.
[112] Arzandeh, *supra* n 54, 118–19.
[113] *Ibid*, 130; citing, *Soering v United Kingdom* (Application No 14038/88) (1989) 11 EHRR 439, *Einhorn v France* Reports of Judgments and Decisions 2001-XI, *Tomic v United Kingdom* (Application No 17837/03) Judgement of 14 October 2003 (unreported), *Mamatkulov and Askarov* (Application No 46827/99 and 46951/99) (2005) ECHR, *Al-Saadoon v United Kingdom* (Application no 61498/08) (2010) 51 EHRR 9, and *Othman v United Kingdom (*Application No 8139/09) (2012) 55 EHRR 1.
[114] *Ibid*.

is a paucity of jurisprudence from the ECtHR on the application of Article 6(1) to PIL. Additionally, the matter appears to be resolved by the *Cape* judgment. Of course, any proposed reform of the law, and any subsequent application must be in conformity with the ECHR by virtue of the Human Rights Act 1998. Therefore, the proposed sequencing suggested by Fawcett could stand regardless of any alteration to or departure from the *more appropriate forum* test.

F. Conclusion and recommendations

In sum, FDL claimants face specific barriers to justice. In addition to the complexity of corporate structures, the globalised nature of business operations, and the inequality of arms between FDL claimants and corporations, PIL rules can further frustrate FDL claimants' attempts to hold MNEs responsible for injuries caused by their transnational operations. While the UK government has committed to continue to ensure access to remedies for victims of human rights abuses perpetrated overseas by UK domiciled corporations more could be done to improve access to justice for FDL claimants.

This article considered the impact Brexit has had on the scope of the *FNC* doctrine, and the doctrine's potential to negatively impact FDL claimants. To provide certainty to FDL claimants and ensure that procedural rules do not deter FDL claimants or pose insurmountable hurdles to accessing substantive justice, certain revisions should be considered. However, it appears both unlikely and not advisable that such revisions come from the courts. Rather it would be more appropriate for there to be legislative intervention specifically designed for and limited to FDL litigation. The vexatious and oppressive test, the Australian clearly inappropriate test, and possible respite from Article 6(1) ECHR were all considered. As these approaches all introduce various measures of uncertainty, it is concluded that greater certainty could be more simply provided by a strictly interpreted rule whereby jurisdiction is based on the defendant's domicile. Alternatively, parliament could include limited and exhaustive powers to grant a stay where (i) there are *pending* parallel proceedings that produce a risk of irreconcilable judgments, (ii) proceedings would be practicably impossible to conduct in England, or (iii) there is an abuse of process. However, a strict interpretation would be most welcome as this would avoid the complications that arise when a foreign-domiciled subsidiary is joined to proceedings against an English domiciled company, meaning a defendant from a third state could not invoke the *FNC* doctrine if to do so would produce a risk of irreconcilable judgments.

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