

# The Role of Private International Law in Corporate Social Responsibility

Geert Van Calster\*

## Abstract

This contribution firstly reviews developments in the EU and in the United States on corporate social responsibility and conflict of laws. It concludes with reference to some related themes, in particular on the piercing of the corporate veil and with some remarks on compliance strategy, and compliance reality, for corporations.

**Keywords:** CSR, conflicts of law, Kiobel, Shell

Environmental protection and human rights are core elements of the so-called ‘corporate social responsibility’ (CSR) agenda. The European Commission has previously defined corporate social responsibility (CSR) as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’.<sup>1</sup> It has in the meantime changed this to ‘the responsibility of enterprises for their impacts on society’<sup>2</sup> in order to realign the EU approach to CSR, with international developments, in particular the *Ruggie* report.<sup>3</sup>

The law is one instrument which can be employed to further the CSR agenda and the implementation of its priorities. The United Nations has perhaps somewhat optimistically referred to the extraterritorial application of national law as a key element in operationalising human rights, labour rights and environmental protection. This proposition suggests ‘developed’ countries with strong regulatory law (environment, human rights, labour, even tax) ought to design their laws and their courts’ application of same in a manner which catches corporate behaviour outside their territory. In this way, as long as there is some, even strenuous, link to the developed state in question (through corporate headquarters, shareholder structure, board meetings, marketing of goods and services into those countries, etc.), the laws of that state would be used as a jack for regulatory performance abroad. The United States has been keen in recent years to pursue this route for a

select number of statutes, particularly in the area of corruption and export controls. In the EU, the debate has more generically focused on how conflict of laws could be employed to increase application of EU law to companies abroad.

These developments join an older cousin in the use of highly regulated countries (and their courts) in attempting to up the regulatory stakes in the developing (or less regulatory caring) world: US case law on the Alien Torts Statute is often cited as the textbook example of employing national and international law, applied by national courts, to further the international community. This case law, however, was reversed by the same circuit which launched its application and was subsequently drastically curtailed by the US Supreme Court.

This contribution firstly reviews developments in the EU and in the United States on the topic under consideration. I am of course keenly aware of the core differences between both approaches. The eye-catching developments in the United States concern the application of *public* rather than private international law. It is however the commonality of object (the regulatory jack identified above) of both developments I am interested in, rather than the distinction in mode of delivery (public vs private international law).

I will conclude with reference to some related themes, in particular on the piercing of the corporate veil.

This paper is not meant to be exhaustive but rather explorative.

## 1 The United States: Litigation Based on the Alien Tort Statute

### 1.1 ATS Discovered by the CSR Community

The Alien Tort Statute, a product of the United States’ first congress, creates a domestic forum for violations of international law. It is a litigation based on the ATS which forms the centrepiece as to how the law in the United States might further the international CSR agenda.

It is noteworthy that over and above the ATS controversy which we review below, more classic problems involving in particular recognition and enforcement have an impact on the CSR debate, too. There is no better illustration than what is informally known as *Ecuador*

\* Geert van Calster is professor at the University of Leuven and Head of Leuven Law’s department of European and international law.

1. COM(2001) 366.

2. COM(2011) 681.

3. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011, available via <[www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> (last visited 28 March 2014).

v. *Chevron*,<sup>4</sup> which goes back to Chevron's acquisition of Texaco and the pollution caused by Texaco operations in the area affected, in the 1980s and 1990s. The case throws light on the difficulties which arise in enforcing a judgment of a third country in a jurisdiction such as the United States. Chevron essentially argued that rule of law principles have been violated in the Ecuadorian rulings on the liability, consequently barring enforcement in the United States. (It is interesting to note in this respect that rule of law considerations, in particular rights of the defence, are one of the very few grounds which may lead an EU court to reject enforcement of a judgment of another EU court, under the Brussels I Regulation.<sup>5</sup> The hesitation by US courts to enforce the Ecuadorian judgments therefore to not ring entirely alien to EU ears.)

Turning to the subject of the current heading, the relevant text of the ATS reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.<sup>6</sup> Though there has been some debate over the original intention of Congress in creating the statute, the accepted use of ATS litigation, in its broadest terms, has become one in which aliens may bring suit against other foreign nationals or American citizens for breach of commonly accepted international norms. The statute remained unused in the courts for roughly 200 years after its creation until *Filartiga v. Pena-Irala* (1980).<sup>7</sup> The US Second Circuit Court of Appeals, the court that serves Connecticut, New York and Vermont, upheld the claims of the defendants, Paraguayan nationals, that the rights of their family member, as defined by international law, were violated when another Paraguayan tortured and killed him. Following the success of the trial, ATS litigation has had an increased presence in US courts, though the vast majority of claims do not find the success that *Filartiga* did. The original trial also set a precedent for the use of ATS in cases regarding human rights. A few notable cases have arisen in the last few decades and have helped to further define the goal of ATS litigation, though not to an extent that has made the statute any less controversial.

The ATS case most commonly cited in scholarly attempts to define the statute and its acceptable uses is *Sosa v. Alvarez-Machain* (2004).<sup>8</sup> In *Sosa*, a Mexican national claimed violation of his right to be free from arbitrary detention when he was abducted and detained overnight by other Mexican nationals. Though the court determined that one night of detention followed by being turned over to lawful authorities and a prompt arraignment was not a major violation of international norms, the results of the case significantly narrowed the scope of jurisdiction in ATS cases. The court held that

4. For the most recent state of affairs, see my blog at <<http://gav-claw.com/>>.

5. Regulation 44/2001, OJ [2001] L12/1.

6. Alien Tort Statute, 28 U.S.C. §1350 (2000).

7. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

8. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2769 (2004).

in order to qualify for ATS, a plaintiff must provide significant evidence for the violation of well-defined and universally accepted norms of common international law. The *Sosa* court made clear the argument that the statute was not intended to be read broadly, and as such, future courts should be conservative in terms of recognising new violations of international law. The Court writes, 'The judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today'.<sup>9</sup>

Post *Sosa*, plaintiffs are burdened with the task of not only proving that a defendant has violated international law but that the international law in question is amply defined as well as a universally accepted and documented international norm. In the original text of the 1789 statute, there were three requirements: the plaintiff had to be an alien, allege a tort, and offer evidence towards the defendant's guilt in violation of 'the law of nations'. The specific 'law of nations' was not further defined in the original text of the document but with the 200-year gap in cases using ATS, the language did not become controversial until recent years. After, *Sosa* plaintiffs have to provide evidence for a law's validity by 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law'.<sup>11</sup> The plaintiff also had to demonstrate a level of consensus among nations as well as international treaties and statutes to demonstrate the validity of an international norm; however, the *Sosa* decision drastically narrowed the scope of documents that may be used to claim common international law.<sup>12</sup> For 200 years, the Alien Tort Statute was an ill-defined unused piece of legislation. Until recently more commonly used, each case brought before US courts employing ATS litigation further restricted the acceptable use of the statute.

## 1.2 Corporate Liability under ATS and the Setback under *Kiobel*

Whether corporations may be held liable for violations of international human rights law has long been a topic of debate in the legal community. At the Nuremberg trials, various German industrialists were convicted of war crimes including the use of slave labour.<sup>13</sup> However, while the Nuremberg Courts were allowed to find organisations guilty of war crimes, they could do so only through the trial of an individual. Essentially, a corporation could be found criminal but could not be

9. See *Sosa*.

10. D.D. Carbon and R.M. Buxbaum, 'The Alien Tort Statute: An Overview of Current Issues', 28 *Berkeley Journal of International Law* 2, at 514 (2010).

11. S.M. Morris, 'The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims after *Sarei* and *Sosa*', 41 *Columbia Human Rights Law Review*, at 281 (2010).

12. *Ibid.*, at 283.

13. D. Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', 6 *Northwestern Journal of International Human Rights* 2, at 306 (2008).

tried separately, only through an individual who facilitated the corporation's criminal enterprises.<sup>14</sup>

The Nuremberg trials are relevant to American ATS litigation in that their precedents are often consulted by judges in ATS cases. Notably, in *Kiobel v. Royal Dutch Petroleum*<sup>15</sup> (2010), the second circuit's verdict relied heavily on precedents set by international tribunals, including the Nuremberg trials, in relation to corporate liability for violation of international law.<sup>16</sup>

In recent years, the debate has become more focused to the question of corporate culpability for violations of human rights rather than simply corporate liability. Plaintiffs often find corporations a desirable opponent as they do not have sovereign immunity, and if the trial is successful, corporations' resources can more readily be used to compensate plaintiffs.

*Kiobel* found that due to what it perceived as a lack of precedent in international law, corporations cannot be held liable for violations of customary international law in US courts under ATS litigation.<sup>17</sup> However, this decision only added to a growing list of corporate ATS cases with incongruent results. In *Doe I v. Unocal Corporation* (2002),<sup>18</sup> the Ninth Circuit Court unanimously decided that corporations can be sued for aiding and abetting foreign human rights violators. Similarly in *Khulamani v. Barclay National Bank Limited* (2007),<sup>19</sup> the court agreed that corporations can be held liable for aiding and abetting in violations of international law.<sup>20</sup>

This lack of congruency among ATS cases involving corporations was largely due to the fact that most of the cases are presented before the circuit courts rather than the Supreme Court.

### 1.3 The 'Touch and Concern' Test of the USSC in *Kiobel*

The USSC's eventual finding in *Kiobel*<sup>21</sup> was eagerly awaited. The central question in the Court's finding on *Kiobel* turned out to be as follows: whether and under what circumstances US courts may recognise a cause of action under the Alien Torts Statute, for violations of the law of nations, occurring within the territory of a sovereign other than the United States. In focusing on this question (and replying in the negative), the SC did not entertain the question which actually led to certiorari, namely, whether the law of nations recognises corporate liability.

Certiorari at the Supreme Court was keenly awaited by the CSR community, for, as noted, ATS litigation by

default had become the flag bearer for pursuing alleged violations of international law (whether in human rights or environment) by multinational corporations.

Before *Kiobel*, extraterritorial application of US law had been under consideration in *Morrison v. National Australia Bank*,<sup>22</sup> in the area of securities. In *Kiobel*, the SC relies on its extensive review of extraterritoriality in *Morrison*. It did so even if in *Morrison* (and other cases before it), the question of extraterritoriality was one of merits (also known as 'jurisdiction to prescribe'): that is, whether an Act of Congress regulating conduct applies abroad. By contrast, in *Kiobel*, the question concerns jurisdiction *pur sang* (also known as jurisdiction to adjudicate). For the SC, this did not dent precedent value of *Morrison*: 'we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS'. In *Morrison*, the SC held that when a statute gives no clear indication of an extraterritorial application, it has none. In *Kiobel*, the Court did not find convincing argument in either text, history or purpose of the ATS, which could rebut the presumption against extraterritoriality. The closest such rebuttal arguably lay in the historic (and more current) examples of employing ATS against piracy: as the SC notes,

piracy normally occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country, [however] applying U.S. law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences.

The latter of course is where the core of the argument lies and where public and private international law principles of comity come into play: the degree to which, in upholding jurisdiction, the courts in ordinary might be obstructing US foreign policy. This, in my view, is particularly interesting when one considers the *communis utilitatis* roots of modern conflict of laws. The conviction in Dutch conflict of laws in the seventeenth century (later exported via Scotland to the United States) that foreign laws needed to be applied if and when they so wanted, on the basis of reciprocity, and in line with *communis utilitatis* has now been turned on its head: comity is now being used as a presumption *against* such application of foreign laws or, here, public international law.

The SC concludes as follows:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. \_\_\_\_ (slip op. at 17–24). Corpora-

14. *Ibid.*, at 315.

15. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. Sept. 17, 2010).

16. J.R. Crook, 'Contemporary Practices of the United States Relating to International Law: International Human Rights: Second Circuit Panel Finds Alien Tort Statute Does Not Apply to Corporations', 105 *American Journal of International Law* (2011), at 139.

17. Crook, above n. 16, at 139.

18. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003), and *vacated and appeal dismissed following settlement*, 403 F.3d 708 (9th Cir. 2005).

19. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

20. Cassel, above n. 13, at 319.

21. USSC No. 10–1491 decided 17 April 2013.

22. No. 10–1491 decided 24 June 2010.

tions are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

The Court therefore answers Kiobel-type cases (a foreign plaintiff suing a foreign defendant for acts or omissions occurring wholly *outside* of the United States that allegedly violate the law of nations); however, it did leave open many questions which fall outside the factual Kiobel box.

Does the reference to ‘claim’ and ‘territory’ of the United States refer to the tortious *action* (thus requiring that to take place in the United States), or would a US defendant suffice (in all likelihood: no)? What ‘link’ would be enough for the action to take place in the United States, in particular lack of corporate oversight over foreign subsidiaries?

#### 1.4 Post-Kiobel Case Law

Further distinguishing of the USSC test in *Kiobel* was / is required and indeed very soon ended up at the SC again: the US Supreme Court on 14 January 2014 rejected US jurisdiction in *Daimler v. Bauman*.<sup>23</sup> Chief Justice Roberts’ and concurring opinions in *Kiobel* as noted above leave room for further distinguishing. *Daimler* does less so. The Court in the end did not focus too much on the issue of agency and attributability of a subsidiary’s actions to the mother company. (*Daimler* is a German corporation that was sued in California by Argentinian plaintiffs for human rights violations in Argentina. The Californian link was a subsidiary which distributes cars there but which is not incorporated there: its corporate home is Delaware.) Per *International Shoe*<sup>24</sup>, general jurisdiction other than in the state of incorporation applies only (in the case of foreign companies) when a foreign company’s ‘continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities’.

*Daimler* therefore establishes firmly that if you want to sue a company on the basis of its having its ‘home’ in the forum, then that home better be exactly that. Not, as here, merely a condo in the United States when its true home lies in Germany.

Interestingly (writing for the majority) Judge Ginsburg (p.23) noted the difference between the Court of Appeal’s approach and the EU approach when it comes to overall personal jurisdiction over corporations (she referred to the recast Brussels I Regulation, 1215/2012, which is yet to apply but which in substance on this issue does not differ from the previous version). However, in reality, there is quite a different direction (compared to *Daimler*) which the EU takes vis-à-vis foreign corporations, in the particular context of B2B

consumer contracts as well as employment contracts (an entirely different subject matter, I appreciate).

Finally, in the ‘Apartheid litigation’ [*Lungisile Ntsebeza et al v. Ford General motors and IBM*], the Southern District of New York picked up the issue where SCOTUS had left it: can corporations be held liable under the Alien Tort Statute (‘ATS’) for violations of ‘the law of nations’? Scheindlin USDJ held on 17 April 2014.<sup>25</sup> She firstly held that it is federal common law that ought to decide whether this is so – not international law itself (ATS being a federal US statute). Next, she argued that the fact in particular (withheld by Jacobs J in *Kiobel*) that few corporations were ever held to account in a court of law for violations of public international law was not instrumental in finding against such liability.

Counsel were instructed to brief on the ‘touch and concern’ test put forward by the Supreme Court in *Kiobel*, with the warning that they had to show in particular that the companies concerned acted ‘not only with the knowledge but with the purpose to aid and abet the South African regime’s tortious conduct as alleged in these complaints’. The case was eventually dismissed at the end of August 2014, with the decision that the high bar set by the USSC in *Kiobel* was not met in current case. The alleged violation of international law was inflicted by the South African subsidiaries of the US defendant corporations, over whom defendants may have exercised control however control alone, it transpires, is not enough to create sufficient link with the US to meet the *Kiobel* test. Applicants had previously already argued that critical policy level decisions were made in the US, and that the provision of expertise, management, technology and equipment essential to the alleged abuses came from the US. This has now, so it would seem, been further backed up by detailed facts however even these facts did not graduate so to speak the US companies’ involvement from management and effective control to ‘aiding and abetting’ as Scheindlin USDJ had instructed counsel to show.

#### 1.5 Summary on the United States

In summary, with *Kiobel* and *Daimler*, it is clear that the scope for ATS litigation has been severely diminished. Counsel in *Apartheid* failed to convince the judge that the touch and concern test was met. (It remains to be seen whether the issue of corporate culpability will reach the USSC, too.)

Attention may now be reignited in what has been brewing in the EU for some time: using national courts to apply national law for conduct abroad – in other words, classic private international law / conflict of laws coming to the limelight once again.

23. USSC No. 11–965.

24. *International Shoe v. State of Washington* – 326 U.S. 310 (1945).

25. See <<http://opiniojuris.org/wp-content/uploads/17-Apr-SDNY-Opinion.pdf>> (last visited 26 June 2014).

## 2 The European Union

In European Private International Law, as with the ATS, the two main concerns that arise when addressing matters of corporate violation of rights are whether or not EU Member State courts have jurisdiction, and if so, what laws, national or international, apply.<sup>26</sup> In the succinct review below, the analysis will be guided by the application of the ‘Brussels I’ Regulation,<sup>27</sup> also known as the Judgments Regulation, the EEX Regulation or even the JR. It is the main piece of European harmonisation, in the area of jurisdiction, for ‘civil and commercial’ matters, *i.e.* the mainstream of corporate and individual litigation.

### 2.1 Jurisdiction

#### 2.1.1 General Jurisdictional Rule: Article 2 of the Jurisdiction Regulation

Following the Brussels I Regulation, it is enough for a court in an EU Member State to establish jurisdiction, if the defendant is domiciled in an EU Member State. For corporations, this place is their corporate or registered seat. Consequently, truly multinational corporations may in theory at least be quite easily pursued in the courts of an EU Member State, even for actions committed outside of the EU: the principal jurisdictional ground of the defendant’s domicile, included in Article 2 of the Jurisdiction Regulation, operates independently of the activities to which the action relates.

A good example of the ease in bringing a case against European holding companies, in the EU, is *Milieudefensie et al v. Shell*.<sup>28</sup> Shell’s top holding was hauled before a Dutch court by a Dutch environmental NGO (Milieudefensie), seeking (with a number of Nigerian farmers) to have the mother holding being held liable for environmental pollution caused in Nigeria.

The media were somewhat wrong-footed in reporting on the issue. Establishing jurisdiction in an EU court vis-à-vis a company with seat in the EU is not exactly string theory. It is a simple application of the Brussels I Regulation. The European Court of Justice (‘ECJ’) has gone as far as to bar national courts from even pondering rejection of such jurisdiction. In Case C-281/02 *Owusu*, the ECJ rejected *forum non conveniens* considerations in a case where the only link to the EU was the incidental domicile of one of many defendants in the EU. (The case concerned an action in tort. Defendants were largely Jamaica based. Facts had taken place in Jamaica. Under European harmonisation of applicable law, this law was undoubtedly Jamaican law. The even-

tual judgment would have to be recognised and enforced in Jamaica. Under English conflict of laws, an English court would have undoubtedly relinquished jurisdiction in favour of Jamaica.)

What is interesting is the fact that Milieudefensie and the individual applicants are also pursuing the Nigerian daughter company in the Netherlands. In an interim ruling going back to 2009,<sup>29</sup> the court held that the case against the Nigerian daughter could *prima facie* at least be joined with the case against the mother holding. (The judgment on the merits, which I refer to in more detail below, confirmed this interim finding.)

Pursuing a holding company with domicile in the EU, therefore, is easy from the jurisdiction point of view. However, subjecting that company to EU law (or the national implementation thereof) is more challenging with respect to applicable law (see below). Staying with the jurisdictional level, being able to sue the mother company does not give one an easy day in court vis-à-vis any daughter companies. Corporate reality dictates that even though the firms concerned may operate under one global brand, in practice they are organised in separate corporate entities. As a result, one will find that International Business Inc. is actually made up of most probably as many separate corporate entities as the countries in which it operates. This reality of singular corporate domicile for each daughter company rules out jurisdiction under the Brussels I Regulation vis-à-vis those daughters with corporate seat outside of the EU.

For those companies lacking domicile in the EU, national conflicts law (in EU conflicts jargon called ‘residual jurisdiction’) takes over. Some EU Member States more readily accept jurisdiction against non-EU-domiciled companies than others. Some, for instance (notably France), are fairly flexible, allowing plaintiffs with the nationality of the forum to bring cases to be brought against anyone incorporated or domiciled anywhere. Others operate some form of a *forum necessitatis* rule, allowing anyone with a minimum contact with the jurisdiction to sue in exceptional circumstances, typically in some fashion linked to the rule of law.

#### 2.1.2 Special Jurisdictional Rule: Article 5(5) Jurisdiction Regulation – Operations Arising Out of a Branch

In the case of corporations, Article 5(5) of the Brussels I Regulation extends to branches of international companies by virtue of Article 2(5)’s special jurisdictional rule:

A person domiciled in a Member State may, in another Member State, be sued: (...)

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated; (...)

26. Augenstein, n 557 above, 16. See also V. Van Den Eeckhout, ‘Promoting Human Rights within the Union: The Role of European Private International Law’, 105 *European Law Journal* 127 (2008).

27. Note 5 above.

28. English version of that judgment may be obtained from me by simple e-mail request. See for analysis also L. Enneking, ‘The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case’, *Utrecht Law Review*, at 44-54 (2014); and C. Van der Heijden, ‘De Shell Nigeria Zaak: de eerste Nederlandse foreign direct liability zaak voor de civiele rechter’, *TVR* 3, at 71-85 (2013).

29. BK8616, Rechtbank ‘s-Gravenhage, HA ZA 330891 09-579, *Vereniging Milieudefensie et al v. Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd.*

The use of the words ‘arising out of’ however indicates the limited potential for this rule in the case of international litigation in a CSR context.

This concept of operations (...) also comprises (...) actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.<sup>30</sup>

It can hardly be said that the non-contractual obligations of International Business Ruritania Ltd can automatically be allocated to International Business [EU Member State]. They do not ‘arise out of’ the operation of the EU Member State. Moreover, Article 5(5) requires International Business Ruritania Ltd to be domiciled in another EU Member State: it concerns only defendants already domiciled in a Member State (Article 5), that is, companies or firms having their seat in one Member State and having a branch, agency or other establishment in another Member State. Companies or firms which have their seat outside the Union but have a branch in a Member State are covered instead by Article 4 of the Jurisdiction Regulation. (This defers to national or residual) (see above) rules of jurisdiction in the case of non-EU-based defendants.)

#### 2.1.3 Special Jurisdictional Rule: Article 5(3) Jurisdiction Regulation – Tort

The special jurisdictional rule for tort may seem appealing at first sight. Per *Bier*,<sup>31</sup> the ECJ held that Article 5(3) allows litigation in both the *loci delicti commissi* (the place where the harmful event leading to, or potentially leading to, the harm occurred) and the *locus damni*: the place where the damage occurred. In cases where the plaintiff is able to show that International Business with registered seat in an EU Member State is behind the actions which led to the tort, this grants a jurisdictional trigger. However, as already noted, this is not in itself a big help for pursuing EU-based multinational corporations. They can already be pursued on the basis of Article 2. The bigger issue, as dealt with below, is how one can pursue that EU mother company on the basis of EU law.

#### 2.1.4 Special Jurisdictional Rule: Article 5(4) Jurisdiction Regulation

Courts which have jurisdiction in a criminal procedure also have jurisdiction for the civil leg of the prosecution.

#### 2.1.5 Review of the Jurisdiction Regulation: The ‘International Dimension’ of the Regulation

The review of the Brussels I Regulation proposed both an assets-based jurisdictional rule and a *forum necessitatis* option, which would have had an impact on the issue

discussed here. However, neither of these proposals were withheld in the eventual Brussels I-bis Regulation.<sup>32</sup>

## 2.2 Applicable Law

Establishing jurisdiction leaves open the question of what law to apply to the facts at issue – as also illustrated by the challenges hitting the application of the ATS. The EU does not operate an ATS-like system, which employs *international* law to advance the case of plaintiffs seeking ‘justice’ in environmental or human rights cases. The CSR-proactive route which must be followed in the EU is one of *Gleichlauf* between having a court in the EU hear the case and having that court apply the human rights/environmental law of that same forum.<sup>33</sup> The most likely route to pursue a corporation in a court in the EU is via an action in tort. This generally entails the application of the *lex loci damni*: that is, the core rule of the EU’s ‘Rome II’ Regulation.<sup>34</sup> Applicable law is the law of the place where the damage first occurred, not where the action leading to that damage occurred or where subsequent indirect damage is felt. Given that plaintiffs generally do not pursue the case with a view to having the law of a non-EU Member State apply (they aim to have EU law being applicable), this general rule of the Rome II Regulation in all likelihood is not the goal of the plaintiffs concerned.

Might any of the exceptions in the Rome II Regulation apply?

If both parties are habitually resident in the same country when the damage occurs, the law of that country applies (Article 4(2) Rome II). This may be relevant in exceptional cases; however, the more standard CSR scenario is for victims resident in the *locus damni*, outside of the EU, to sue in the EU. Even if the victims of the tort subsequently move to the same EU Member State as the state of incorporation of defendant, this would not assist: Article 4(2) looks at the time of occurrence of the damage.

Article 4(3) more generally includes an escape clause: when it is clear from the circumstances of the case that it is *manifestly* more closely connected with a country other than the one indicated by 4(1) or 4 (2), the law of that country shall apply instead. ‘The’ tort has to have that manifestly closer relationship: in particular in the CSR context, this is problematic given the occurrence of the damage abroad.

Finally, Article 7 Rome II contains a special rule for environmental damage:

30. Case 33/78, *Somafer* [1979] ECR 2183, para. 13.

31. Case 21/76, *Mines de Potasse d’Alsace* [1976] ECR 1735.

32. Regulation 1215/2012. See G. Van Calster, ‘Le nouveau EEX est arrivée’, *Rechtskundig Weekblad*, ter perse (2014).

33. Given the high degree of harmonisation of environmental law, as well as (to a slightly lesser degree) of occupational health and safety laws, and of course the impact of the European Convention on Human Rights as well as the EU’s Charter of Fundamental Rights, the relevant laws of EU Member State do display a certain amount of harmony.

34. Regulation 864/2007 on the law applicable to non-contractual obligations, OJ [2007] L199/40. See detailed analysis in G. Van Calster, *EU Private International Law* (Oxford, Hart, 2013) (2nd edn forthcoming January 2015).

## Article 7

### Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

This article ties in with one of the options for establishing jurisdiction for an EU court, as highlighted above. One would have to convince a court in an EU Member State that either direct instructions or negligent lack of oversight by International Business [EU Member State] led to the damage at issue and hence constitutes ‘the event giving rise to the damage’. This is not an easy burden of proof (and one reminiscent of the US judge’s instruction to counsel in *Apartheid*<sup>35</sup>).

Finally, I would argue that the additional rule on ‘rules of safety and conduct’ of Article 17 arguably have less of a calling for environmental litigation than may be *prima facie* assumed.<sup>36</sup>

In summary, therefore, while it is relatively straightforward in the case of acts committed abroad, to sue a corporation in the EU, in the case of that corporation having a corporate bridgehead in the EU, applicable law almost certainly will *not* be European law.<sup>37</sup> There does not, at this moment, seem much of a constituency in EU institutions to have this changed.

In the aforementioned case of Shell, the Court at The Hague held on 30 January 2013 *not* on the Basis of the Rome II Regulation, but rather on the basis of Dutch conflicts law, for Rome II did not apply *ratione tempore*. Therefore, it did not entertain any of the options outlined above in that Regulation which may have led to Dutch law: the events which gave rise to the damage occurred before the entry into force of that Regulation.

Generally, the judgment is quite comforting for Shell (and other holding companies in similar situations). It stuck to its decision to join the cases, hence allowing Shell Nigeria to be pursued in the Dutch courts, together with the holding company (against which as noted jurisdiction was easily established under the Brussels I Regulation). The court applied *lex loci damni*. (If I am not mistaken, prior to Rome II, the Netherlands applied a more or less complex conflicts rule, not necessarily leading to *lex loci damni*, neither to *lex loci delicti commissi*, which was the rule in most EU Member States prior to the entry into force of the Rome II Regulation.)

Nigerian law applied and any route to apply Dutch law was rejected. Incompatibility with Dutch *ordre public*,

for instance, was not withheld. Nigerian law running along common law lines, the court ran through negligence in tort, applied to environmental cases, leading among others to the inevitable English case of *Rylands v. Fletcher*. The court found that the damage occurred because of sabotage, which under Nigerian law in principle exonerated Shell Nigeria. Only for two specific instances of damage was liability withheld, for Shell Nigeria had failed to take basic precautions. The conditions of the Court of Appeal in *Chandler v. Cape*<sup>38</sup> to establish liability for the holding company were not found to be met in the case at issue. The court did not establish a specific duty of care under Nigerian law (with the loop to the English common law) for Royal Dutch Shell (RDS), the mother company. A general CSR commitment was not found not to alter that.

## 3 Piercing of the Corporate Veil and Compliance Strategies

As the Shell case shows, some form of piercing of the corporate veil is generally required to lead to successful pursuit of international holding companies on the basis of activities of their subsidiaries carried out in less CSR active jurisdictions. Even in the EU, there is no general EU rule on the piercing of the corporate veil. Neither company law nor tort law is sufficiently (or in the case of tort law even embryonically) harmonised to be able to speak of much EU influence here.

### 3.1 Inspiration from Competition Law?

In EU competition law, the principle is more or less established and may, one suspects, inspire in other areas, too. In *ENI*,<sup>39</sup> for instance, the ECJ confirmed the strong presumption of attribution in the case of shareholder control.

It is established case law under EU competition law that the conduct of a subsidiary may be imputed, for the purposes of the application of Article 101 TFEU (the core article disciplining cartel behaviour), to the parent company particularly where, although having separate legal personality, that subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given to it by the parent company. The ECJ (and national courts taking its lead) will have regard in particular to the economic, organisational and legal links which unite those two legal entities. In such a situation, since the parent company and its subsidiary form part of a single economic unit and thus form a single undertaking for the purpose of Article 101 TFEU, the Court of Justice has repeatedly held that the Commission may address a decision imposing fines to the

35. Note 25 above and accompanying body text.

36. Contra: V. Van Den Eckhout, ‘Corporate Human Rights Violations and Private International Law’, *Contemporary Readings in Law and Social Justice* 2 (2012).

37. Similarly, see C. Van Dam, ‘Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights’, 221 *Journal of European Tort Law*, at 231-32 (2011).

38. [2012] EWCA Civ 525.

39. Case T-39/07, not yet published in ECR.

parent company without being required to establish its individual involvement in the infringement.

In the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company exercises an actual decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption is fulfilled.

In addition, in the specific case where a holding company holds 100% of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of EU competition law, there is also a rebuttable presumption that that holding company exercises a decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of that subsidiary.

In ENI, for the entire duration of the infringement in question, Eni held, directly or indirectly, at least 99.97% of the capital in the companies which were directly active within its group in the sectors in which there had been a violation of competition law. The ECJ held that in particular the absence of management overlap between Eni and the daughter companies was not enough to rebut the presumption of the companies being a single economic unit.

### 3.2 Outside of Competition Law

In competition law, therefore, the corporate veil may be quite easily pierced in a holding context, at the very least for transfer of fines. This is undoubtedly *not* the approach which many Member States take outside of the competition law area. The waters on the piercing of the corporate veil other than in the area of competition law remain quite deep. This has an impact on the conflicts area, in particular in the application of the Rome II Regulation (as noted, the core rule for conflict of laws in torts) and the debate on corporate social responsibility. This point was also made by, *e.g.* the UK Supreme Court on 12 June 2013 in *Petrodel v. Prest*<sup>40</sup> (a matrimonial assets case which was decided on the basis of trust), where Lord Neuberger stated obiter 'if piercing the corporate veil has any role to play, it is in connection with evasion'. Lord Sumption's take was

there is a limited principle of English law which applies when a person is under an existing legal obligation...which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

He added

The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.

Lord Clarke, agreeing with Lord Mance and others, stated 'the situations in which piercing the corporate veil may be available as a fall-back are likely to be very rare'. Piercing issues were also sub judice in *VTB*<sup>41</sup> – without much holding on the merits. VTB's case was that it was induced in London to enter into a Facility Agreement, and an accompanying interest rate swap agreement, by misrepresentations made by one of the defendants, for which it claims the other respondents are jointly and severally liable. Parties are of suitably diverse domicile (appellant incorporated in England however controlled by a state-owned bank in Moscow; defendants two British Virgin Island-based companies owned and controlled by a Moscow-based Russian businessman). Defendants not being EU-based, the Brussels-I Regulation did not apply.

The issues involved were essentially:

1. Lord Neuberger made the point that settling the presence (or not) of jurisdiction is an early procedural incident in a trial and ought not to lead to protracted legal argument, costs and time, lest the discussions centre around whether the potential other jurisdiction can guarantee a fair trial or not. In contrast with other recent high-profile cases before the UK courts, the alternative, Russian forum, would by common agreement have also offered a fair trial. Lord Neuberger also emphasises, with reference to Lord Bingham in *Lubbe v. Cape*, that in *forum non conveniens* considerations, appeal judges should defer in principle to the trial judge and that this should be no different in proceedings concerning service out of jurisdiction. The majority therefore opted to defer to Arnold J (at the High Court) and the Court of Appeal in their finding of jurisdiction, in the absence of any error which ought to have made the former change their conclusion.
2. Applicable law for tortious misrepresentation. This the law of the jurisdiction in which they are ultimately received and relied upon (the *forum connogati* if you like). In the case at issue, this was held to be England.
3. Applicable law for piercing the corporate veil. The Court emphasises the foundation of individual personality of a company established in *Salomon and A Salomon and Co Ltd* (1897). The presumption must be against piercing. The Supreme Court did not however set out a definitive test for it was not necessary for its resolving of the case, neither did it decide

40. [2013] UKSC 34.

41. [2013] UKSC 5.



what law should apply to the issue. In theory, Lord Neuberger suggested

the proper law governing the piercing of the corporate veil (may be) the *lex incorporationis*, the *lex fori*, or some other law (for example, the *lex contractus*, where the issue concerns who is considered to be party to a contract entered into by the company in question).

However, common ground among parties in the case thus far had been to apply English law, and the issue of choice of law for piercing the corporate veil was not further reviewed.

That would seem to be the general line held by case law across the EU: if the relevance for deciding applicable law to the piercing issue is at all identified, parties and courts generally happily continue with the application of *lex causae*<sup>42</sup> rather than conducting the analysis using traditional conflict of laws methodology.

## 4 Conclusion

It may be the cynic's view that in the absence of internationally followed principles, in particular on piercing the corporate veil, companies will continue to organise their corporate structure with a view to forum and applicable law shopping. However, paraphrasing Judge Jacobs in *Kiobel*, immoral behaviour is few companies' business plan. This does not mean that one need not address the current uncertainty with respect to the possibility to pursue business in EU or other courts on the basis of arguably stricter tort, health and safety, environmental, etc. laws in those states. For if nothing else, the current disparate approach does not exactly assist in creating the level playing field necessary for international business integration.

42. See also S. Demeyere, 'Liability of a Mother Company within the EU for a Foreign Subsidiary – Study under French, Belgian and English Law', forthcoming.