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Foreign direct liability in Europe for environmental damage

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Table of contents

TABLE OF CONTENTS	I
1 INTRODUCTION	1
1.1 Background.....	1
1.1.1 Definition	1
1.2 Questions and outline	2
1.3 Method.....	4
1.3.1 EU legislation and EU case law	4
1.3.2 Other legislation	5
1.3.3 Case law on foreign direct liability	5
1.3.4 Literature	6
2 JURISDICTION	7
2.1 The parent company -The Brussels I Regulation	7
2.1.1 Scope of application	8
2.1.2 Main provision	9
2.1.3 Special jurisdiction.....	9
2.1.4 Forum non conveniens	14
2.2 Revision of Brussels I.....	16
2.3 The subsidiary –Domestic rules	19
2.4 Conclusion	22
3 APPLICABLE LAW	23
3.1 The Rome II Regulation	23
3.1.1 The general rule.....	24
3.1.2 General exception.....	25
3.1.3 Overriding mandatory provisions and public policy.....	26
3.1.4 Environmental damage.....	27

3.1.5	Rules of safety and conduct	31
3.1.6	The relationship between article 7 and article 17.....	32
3.2	Placing the tortious event with the parent company	34
3.2.1	Relation to substantive law	35
3.2.2	Relation to company law and EU law	42
3.3	Conclusion	52
4	FOREIGN DIRECT LIABILITY IN THE DEVELOPMENT OF CSR	54
5	CONCLUSION	57
6	TABLE OF REFERENCES	59

1 Introduction

1.1 Background

With economic globalization and multinational corporations' expansion and increasing influence, new legal issues arise. These corporations sometimes have a negative impact on local communities in developing countries in form of damage to health, environmental damage or human rights violations. Due to lack of sufficient legal regulation in these countries the victims of such harm caused by these activities run the risk of being left with no means of compensation.¹ The question is then if and how multinational corporations can be held legally accountable. As a possible solution to this problem, a new form of legal trend called "foreign direct liability" has emerged and is now gradually finding its way into European court rooms.²

1.1.1 Definition

The question of foreign direct liability arises when victims of for example environmental damage or human rights violations caused by the activities of typically a subsidiary company aim to hold the parent company legally responsible on the basis of tort law. The damage is usually sustained in a developing country where the subsidiary company is located (the host state). The parent company is often located in a western country where the tort law provides higher standards of care, regulatory standards and damage awards (the home state).³ These cases are often filed as class actions where the claimants are locals in the host country and are sometimes accompanied by non-profit organizations.⁴ This form of litigation has already been going on in the US for some time by applying the Alien Tort Claims Act (ATS). However,

¹ Buggenhoudt (2011) pp. 7-8

² Enneking (2009) pp. 903-904

³ Enneking (2012) p. 92; Enneking (2009) p. 928

⁴ See chapter 2.1.3.1.

the differences between the two continents' legal systems give rise to different questions.⁵

The proceedings in a foreign direct liability case brought before European courts can roughly be separated into three legal issues or obstacles which, from the plaintiff's point of view, need to be overcome. These obstacles can consist of rules of private international law and EU-law as well as domestic law. The first obstacle is jurisdiction. The relevant rules concerning choice of jurisdiction must be applied in order to decide whether the case can be heard in the court of the parent company's home state by appointing jurisdiction to the home state forum. The second obstacle is the choice of law. The claimant will in most cases wish for the home state's law to be applicable. The court found eligible to hear the case will then have to apply the relevant choice of law rules. If the rules governing the choice of law appoint the law of the home state to be applicable, the final obstacle will be the domestic rules of law in the forum state. One question that arises under this issue, and also in relation to the two foregoing obstacles, is how the parent company can be held liable for the subsidiary's tortious activities despite the long accepted notion of the shareholders limited liability.⁶ It is important to emphasize that these are only legal obstacles. The geographical distance and other practical or procedural circumstances both in the home country and host country may entail other.⁷ The focus of this thesis will be on the three aforementioned legal obstacles.

1.2 Questions and outline

With the foregoing background, this thesis will have its emphasis on foreign direct liability in a European context and on cases concerning environmental damage. The

⁵ Enneking (2009) p. 904-905

⁶ Vanderkerckhove (2007) p. 1

⁷ Enneking (2012) p. 7

legal focus will be on the relevant rules of EU law and case law related to foreign direct liability.

- In order for the claimant to have the case heard where the parent company is located, this country must be selected as the forum state. How can such jurisdiction be established in a foreign direct liability case under relevant EU regulations on jurisdiction?
- For the claimant to benefit from the environmental standards and tort law of the home country these laws must be found applicable. How can this be obtained under EU regulations regarding choice of law?
- The claimant seeks to hold the parent company liable for the damage. How does foreign direct liability for environmental damage correspond with the traditional principle of EU company law of the shareholders limited liability?

To place these issues in a wider perspective, the question of what role foreign direct liability might play in the development of corporate social responsibility in Europe will also be tentatively indicated.

The ambition of this thesis is to contribute to answering these questions. The structure will be as follows; Chapter two to three will focus on whether and how each of the above-mentioned obstacles, namely jurisdiction, choice of law and issues of the parent company's liability, can be overcome. The fourth chapter will tentatively indicate the foreign direct liability cases' effect on the promotion of corporate social responsibility within the EU.

1.3 Method

This thesis is written in English mainly due to practical reasons, seeing as most of the relevant sources are in English. Norwegian legal terminology does not even offer a Norwegian alternative to the English term “foreign direct liability”.

1.3.1 EU legislation and EU case law

Since the geographical perspective of this thesis is European the applicable sources of law will be the same, more specifically the law applicable to countries in their capacity as EU Member States.

Europe is probably the area of the world that has gotten furthest towards harmonization of private international law.⁸ The instruments that will be referred to most frequently are *Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (Brussels I) and *Regulation 864/2007 on the law applicable to non-contractual obligations* (Rome II) in addition to related case law from the Court of Justice of the European Union (“the Court”).

When applying these EU instruments the focus will be on the provisions that are relevant in the proceedings of a foreign direct liability case. They will be given a general interpretation and included in a further discussion on how they can promote or obstruct the establishment of foreign direct liability in Europe.

A challenge when applying these instruments is that some of them are fairly new and yet to be applied in the context of the topic for this thesis. No legislature, let alone a law student, can predict with certainty the future effect of a new provision. However, these instruments’ predecessors⁹ and preparatory works as well as related case law

⁸ Calster (2013) p. 2

⁹ Calster (2013) p. 19--20

can give a fairly good indication of how they might apply in future foreign direct liability cases.

1.3.2 Other legislation

Despite the movement towards European harmonization, domestic legislation specific to each Member State still plays an important role.¹⁰ Domestic rules of private international law, procedural law, tort law and company law from selected Member States will be introduced in order to illustrate, to the limited extent that is possible within the boundaries of time and space of this thesis, how, despite the harmonization of European private international law completed so far, the applicable domestic law may affect the final outcome of a foreign direct liability case.

1.3.3 Case law on foreign direct liability

To get an impression of how foreign direct liability works it is necessary to examine some of the cases brought before courts within the EU where this approach has been attempted. The cases I have found have mainly been brought before Dutch and British courts. Even though a great deal of the rules regarding private international law in Europe are unified in international regulations, the issue of whether foreign direct liability shall be established is in the end solved in a domestic court.¹¹ This case law might provide information on whether European courts are open to establish this form of liability for environmental damage, and if they do not, what barriers would have to be overcome in order for them to do so. Most of the cases referred to in the following presentation have previously been described as a foreign direct liability case by authorities in this area or been applied as an example in discussions on this issue.¹² However, it is quickly evident that none of them comprise all the characterizations that are usually given to such cases.¹³

¹⁰ Enneking (2009) p. 928

¹¹ Calster (2013) p.2

¹² Enneking (2012) p. 92-104 and Cordero-Moss (2013) p. 358

¹³ See definition in chapter 1.1.1.

Applying this case law is a bit of a challenge. First of all, with foreign direct liability being a fairly new phenomenon in Europe, case law on this topic is scarce. Secondly, not all the judgments are available in English. I have therefore had to rely on translations and secondary sources such as articles and press releases. This case law will only serve as illustrative examples without any attempt at a proper comparative analysis.

1.3.4 Literature

There is an ample amount of literature on private international law and corporate social responsibility. However, there is not all that much devoted specifically to the concept of foreign direct liability. A very interesting new study on the topic is the one by Liesbeth Enneking from 2012 which will therefore be referred to frequently.

2 Jurisdiction

The first obstacle in the procedure of a foreign direct liability case is for the European domestic court to determine whether it has jurisdiction. This will be the premise for the court to hear the relevant case. The procedural rules of the home state may be better suited for the circumstances characteristic to such a case than those of the host country.¹⁴

2.1 The parent company -The Brussels I Regulation

In EU Member States the question of jurisdiction over foreign direct liability cases will usually be determined by *Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*, commonly referred to as “Brussels I”. Brussels I has recently undergone revision and will be replaced by Regulation No. 1215/2012. The new regulation will apply from 2015.¹⁵ What effect the revision may have on future foreign direct liability cases will be examined in a separate chapter.¹⁶ The content of Brussels I is similar to its predecessor The Brussels Convention and it may, together with other sources related to this convention, be relevant when interpreting the current regulation.¹⁷

It is worth mentioning that some European states have developed common rules on jurisdiction similar to the provisions in Brussels I laid out in The New Lugano Convention. All Member States, including some outside the EU, are party to this convention. The purpose of Lugano is to extend the application of Brussels I. In order to carry out this purpose it is desirable to obtain an autonomous interpretation of both instruments and the Court has authority to interpret this convention. The sources ap-

¹⁴ Enneking (2012) pp. 133 and 146

¹⁵ Regulation No. 1215/2012 Article 81

¹⁶ See chapter 2.2

¹⁷ Calster (2013) p. 19-20

plied when establishing the content of Brussels I will therefore also be relevant to the interpretation of the Lugano convention.¹⁸

2.1.1 Scope of application

The regulation concerns “civil and commercial matters whatever the nature of the court or tribunal”.¹⁹ It is common to specify what “civil and commercial” law is by making a distinction between this and “public” law. Although the correct distinction has not been fully settled between the Member States²⁰ it is unlikely that this would be an issue in a foreign direct liability case since these would deal with tort which is traditionally considered to be civil and commercial matters.²¹

The existence of an international element is required for the regulation to apply in the particular case.²² This requirement is also unlikely to be a difficult issue in a foreign direct liability case, seeing as one of the characterizations given to such cases is the element of transnational litigation. This view finds support in the Court’s case law on the matter, as for example the Owusu case, which provides that the involvement of a Member State and a non-Member State is sufficient to make the case international in nature.²³

It is also required mentioning that the parties are for the most part free to enter into an agreement concerning the jurisdiction over a dispute between them.²⁴ However, it is unlikely for the parties to enter into an agreement on jurisdiction before the damage occurs, seeing as a relationship between them in form of a contractual obligation

¹⁸ Cordero-Moss (2013) p. 31

¹⁹ Brussels I article 1

²⁰ Calster (2013) p. 27

²¹ Rogerson (2012) p. 55

²² Calster (2013) p. 25

²³ C-281/02 para. 26

²⁴ Brussels I article 23

does not exist. It is also unlikely that parties would enter into an agreement after the dispute arises, due to the incompatible interests involved. In conclusion, the provisions in Brussels I will most likely be fully applicable in these cases.

2.1.2 Main provision

According to article 2 of the Regulation a person domiciled in a Member State shall be sued in the courts of that Member State. The further question would then be when a company is considered “domiciled” in a Member State. The answer is provided by article 60 which stipulates that a company is domiciled where it has its statutory seat or central administration or principal place of business. Brussels I thus seems to give a simple answer to the question of jurisdiction; the parent company is to be sued in the court where it is domiciled and the company is domiciled where it has its statutory seat etc. In a case concerning foreign direct liability these provisions would give an EU Member State’s court jurisdiction where the parent company has its main location within that Member State. Thus, the regulation provides a fairly simple solution to the question of jurisdiction in cases concerning European-based companies.²⁵ As provided by article 2, the Member State court will have jurisdiction regardless of the claimant’s nationality. However, there are other provisions of the regulation which, based on the specific circumstances of the case, can offer additional options of competent EU forums.²⁶

2.1.3 Special jurisdiction

The rules of special jurisdiction laid out in article 5 might be of use for the claimant in a foreign direct liability case. While the basic rule in article 2 is based on the connection between the defendant and the forum, the result in article 5 depends on a connection between the claim and the forum.²⁷ These provisions give the option of

²⁵ Calster (2013) p. 237

²⁶ Enneking (2012) p. 146

²⁷ Clarkson (2011) p. 80

granting jurisdiction to another Member State in cases where there is more than one potential EU-based defendant. Being able to choose between forums can be beneficial where one country has procedural rules that are more favorable to the claimant's case and particularly when the case might only be admissible under the procedural rules of one of the Member States.

2.1.3.1 Class actions as a general illustration

This option of choice in article 5 can have a decisive influence on the outcome where the choice of jurisdiction under the main provision in article 2 does not allow class actions,²⁸ which are quite common in cases concerning foreign direct liability. One example of a case where a class action was filed is the *Trafigura* case. *Trafigura* is an international commodities trading and logistics company.²⁹ In 2006 the ship *Probo Koala*, chartered by *Trafigura*, unloaded a shipment of toxic waste in the Ivory Coast. Over 30 000 Ivorians brought a class action against the company in the UK claiming that the exposure to the toxic waste caused them personal injuries. The parties reached an out of court settlement in 2009, so the question of jurisdiction was never settled before a court.³⁰ Another example is the case of *Lubbe and others v. Cape plc* where the number eventually amounted to over 7 500 claimants.³¹

The access to file a class action was an issue for the court in the most recent cases on foreign direct liability, The Royal Dutch Shell cases. Four Nigerian farmers and fishermen initiated lawsuits against Royal Dutch Shell (RDS) and its Nigerian subsidiaries, including Shell Petroleum Development Company of Nigeria Ltd. (SPDC), claiming that they were responsible for oil spills in their local community. The claimants held that the spills caused damage to their health and livelihoods. The

²⁸ Enneking (2013) p.146

²⁹ *Trafigura* (2013)

³⁰ Enneking (2012) p. 102-103

³¹ Ward (2002) p. 8

spills were proven to have been caused by sabotage.³² The environmental organization Milieudefensie also initiated proceedings against the companies. The court found Milieudefensie's claims admissible under Dutch procedural law, more specifically section 3:305a of the Dutch Civil Code, despite Shell's arguments that the basis for this was a rule of substantive Dutch law. Shell argued this because, when assessing the choice of laws, Nigerian law was found by the court to be applicable and therefore only Dutch rules of a procedural character were to be applied.³³ In this case the organization did not get much further than that however. Even though Dutch procedural rules did indeed give organizations like this the access to defend the right of third parties, Nigerian law did not provide Milieudefensie with the right to compensation, since no damage occurred to them as a result of the oil spills.³⁴

The Cape plc case, the Trafigura case and the Royal Dutch Shell case, all containing class actions, show that the access within the procedural rules of a forum state can have a crucial impact on the outcome of a foreign direct liability case and that the options the special rules of jurisdiction in article 5 provide can be of good use. Indeed, none of them serve as a perfect example, due to the particular facts of the cases. However, they do show the possibilities for the claimant in a foreign direct liability case that might be initiated against a company domiciled in a Member State in the future and that, if there are multiple EU defendants, the choice of forum can be decisive. The different circumstances that the provisions in article 5 apply to will be further explored in the following.

³² De Rechtspraak (2013) p. 1; Enneking (2012) pp.104-105

³³ LJN BY9854 para. 4.11

³⁴ De Rechtspraak (2013) p. 1

2.1.3.2 The provisions in article 5

2.1.3.2.1 Article 5(3)

Article 5(3) gives the option of assigning jurisdiction to the court of another Member State where a harmful event occurred or may occur in cases regarding “tort, *delict* or *quasi delict*”. According to the Court “the place where the harmful event occurred” can be interpreted as both the place where the damage occurred and the place of the event giving rise to it.³⁵ This gives the claimant an opportunity to sue in another Member State if this is the place where the event giving rise to the damage occurred, provided that the parent company’s actions can be considered as such an event.³⁶ In a foreign direct liability case, where the defendants are international corporations with establishments in several countries, it is not unlikely that the event giving rise to the environmental damage outside the EU is constituted by the sum of decisions made in different Member States. The options offered the claimants where there are multiple corporate defendants in different Member States will be discussed under article 5(5).

2.1.3.2.2 Article 5(4)

In some cases the tortious activity giving rise to the civil claim also constitutes a criminal offence. Also here, the *Trafigura* case can serve as an example. In 2010 *Trafigura* was convicted for the same incident in the Amsterdam Court under EU-law and Dutch law for importing the hazardous waste to Amsterdam and for subsequently exporting it to Africa. The company had to pay one million euros in penalties.³⁷ *Trafigura* appealed to the Dutch Appeal Court which came to the same conclusion.³⁸ In 2012 a settlement was reached with the Dutch authorities. The settlement included the original one million euro fine in addition to 300 000 euros paid to the Dutch au-

³⁵ Case 21/76 Para. 24

³⁶ Enneking (2012) p. 146

³⁷ Enneking (2012) p. 103-104

³⁸ *Trafigura* (2013)

thorities.³⁹ If criminal proceedings is already pending in one country it might be practical for the liability claims to be heard within the same forum state. In this connection Article 5(4) provides that the company may be sued in another state where a civil claim for damages or restitution also gives rise to criminal proceedings and these criminal proceedings are held in this other state.

2.1.3.2.3 Article 5(5)

Where the dispute arises “out of the operations of a branch, agency or other establishment”, article 5(5) provides the claimant with the choice to use the courts where this branch, agency or other establishment is situated. The rationale behind this option is that the defendant who has voluntarily extended its business through an establishment should also be held liable through such establishments.⁴⁰

This provision can prove difficult to find applicable when the company is located outside of Europe due to the wording “may in another Member State”.⁴¹ On the other hand, if the establishment is also located in a Member State this provision can be useful. It is not unlikely that there are several potential defendants responsible for the damage located in different parts of Europe when the defendant is an international corporation. This could give the claimant a choice.⁴²

“Establishment” is to be defined as a place of business possessing the appearance of permanency, such as the extension of a parent body, which is equipped to do business on behalf of the parent body. Whether the establishment is a subsidiary or a dependent branch does not matter as the factual relationship here prevails over definitions under company law. The terms “branch” or “agency” do not involve a separate

³⁹ Reuters (2012)

⁴⁰ Mankowski (2012) p. 277

⁴¹ Calster (2013) p. 238

⁴² Enneking (2012) p. 146

definition. They only serve as illustrations for describing the notion of “establishment”.⁴³

Where there are multiple defendants the criterion in article 6(1) must be met in order for both or all cases to be heard within the jurisdiction that is regarded the most favorable by the claimant.⁴⁴ According to article 6(1) several defendants can be heard together if the claims are so closely connected that it is “expedient” to avoid irreconcilable judgments. The wording “expedient” does not give the impression that there has to be compelling reasons to unite the cases under the same jurisdiction, but rather that there has to be merely practical considerations favoring this solution.

In relation to responsibility for environmental damage or other tort claims, these must naturally have some sort of connection with the actions of the establishment. In most cases, the place of the establishment will also be the place where the event giving rise to the damage occurred, thus giving article 5(3) application to the same matter.⁴⁵ Defining “the event giving rise” to the damage will be further discussed in chapter 3.

2.1.4 Forum non conveniens

One domestic rule that has been an obstacle for foreign direct liability cases, both in Europe and for the ATS-based cases in the United States⁴⁶, is the *forum non conveniens* doctrine which provides that the court may decline jurisdiction for the benefit of a court in another state considered to be a more appropriate as a forum for the particular case.⁴⁷ This would be a basis for the court to refer the case to the courts of the

⁴³ C-33/78 paras. 12-13; Mankowski (2012) pp. 277-282

⁴⁴ Enneking (2012) p. 146

⁴⁵ Mankowski (2012) pp. 285-286

⁴⁶ Enneking (2012) p. 86

⁴⁷ Calster (2013) p. 107

host country. This doctrine has been used in common law jurisdictions such as English courts. One case relevant in this context is the case of *Lubbe and others v. Cape plc*.

The case concerned South African plaintiffs who sought compensation for asbestos-related health injuries caused by the activities of The Cape Asbestos Company Ltd by suing the parent company Cape plc situated in London. The claimants could expect a higher compensation if the case was decided in England. Cape plc argued that a South African forum would be more suitable to hear the case. Eventually the House of Lords concluded in 2000 that the proceedings could continue in England. The court's reason for this decision was that the plaintiff would not receive the necessary legal assistance and expert advice and evidence needed if the case was referred to a South African court. These conditions were essential to the claimants in order to obtain justice in this case.⁴⁸

In 2005 the Court ruled in the *Owusu* case that a Member State court cannot decline jurisdiction conferred to it by article 2 in the Brussels convention for the reason that a non-Member State would be a more appropriate forum.⁴⁹ The case concerned the interpretation of the Brussels convention, however the wording in Brussels I article 2, as well as article 4 of the new regulation⁵⁰, is practically identical and is therefore likely to be given the same interpretation. This basically rules out the possibility of applying *forum non conveniens* on cases falling under the application of article 2 of the Regulation in the future and makes jurisdiction of the Member State court the only option. Foreign direct liability cases which fall outside the scope of the Regulation could still be subject to the *forum non conveniens* doctrine. This would typically

⁴⁸ Ward (2002) p. 6-8; [2000] UKHL 41

⁴⁹ Case 281/02 Para. 53

⁵⁰ Regulation No. 1215/2012

be cases brought against non-EU-based companies before a Member State court, which will be discussed further below.⁵¹

2.2 Revision of Brussels I

As mentioned above, the Brussels I Regulation has currently undergone revision. The original proposal might have had significant consequences to future foreign direct liability cases in Europe.⁵² This could serve as an illustration of how amendments to EU legislation can affect the outcome of a foreign direct liability case.

For the new regulation, a new article 4(2) was proposed added, which would extend the application of the Regulation to defendant companies domiciled outside the union.⁵³ This revision could have made it easier for a claimant in a foreign direct liability case to sue a company before a Member State court, with the procedural and practical benefits that may follow, regardless of whether the company is domiciled in a Member State. A situation where jurisdiction could be extended in this way under the proposed revision, was through a new article 26 providing for the option of establishing jurisdiction based on *forum necessitatis* when there is no other EU forum available which can guarantee a fair hearing and where there is a “sufficient connection” between the dispute in question and the Member State concerned.⁵⁴ According to article 26(a) this option would particularly be available if the proceedings cannot “reasonably” be brought or conducted in a third state with which the dispute is closely connected or if this is “impossible”. Another situation where forum necessitates may be invoked is, according to article 26(b), where recognition and enforcement of a judgment in a Member State is not possible under the law of a third state and such recognition and enforcement is necessary to ensure the claimants rights. It should be

⁵¹ Enneking (2012) p. 149

⁵² Enneking (2012) p. 150

⁵³ COM/748/2010 p. 23

⁵⁴ COM/748/2010 p. 8

noted that this provision only applies “on an exceptional basis”.⁵⁵ Thus, given the choice of wording, it seems to have been meant as a narrow exception. This new rule would, in the Commission’s view, be of particular relevance to companies based in the EU investing in countries with immature legal systems.⁵⁶

These proposals were however removed under the revisions by the European Parliament. The Committee on Legal Affairs agreed with the Parliament’s position that such an extension of the jurisdictional rules of the Regulation would require further consultation and debate. The original proposal was therefore narrowed down to extending jurisdiction to third states where it is needed to protect the weaker party, such as in disputes regarding employment, consumer and insurance contracts.⁵⁷

The *forum necessitates* rules would have been a welcome addition for claimants seeking to hear its case in a Member State that does not already have similar provisions included in their domestic rules of jurisdiction. The proposed addition to article 4, together with the new *forum necessitates* rules may have given the claimant in a foreign direct liability case the possibility to hear the case in a Member State even if the dispute is closer connected to the host country and even if the defendant company is not domiciled in the EU. This would be particularly beneficial for a claimant seeking compensation from the host state subsidiary.⁵⁸

However, even if a *forum necessitates* rule applying to non-Member States had been included in the new regulation, this would not necessarily be all good news for the progress of foreign direct liability. The original proposal, extending the application to non-member defendants, left no room for invoking other domestic grounds for juris-

⁵⁵ COM/748/2010 p. 34

⁵⁶ COM/748/2010 p. 8

⁵⁷ A7-0320/2012 p. 139

⁵⁸ Enneking (2012) p. 150-151

diction and therefore leaving no other option than *forum necessitatis*. The new provision would then be the only option in a case against a non-EU based defendant.⁵⁹ Seeing as the proposed rule was only to apply in exceptional cases this could make it even more difficult to have such cases heard than it would under some of the current domestic rules on jurisdiction. Thus, from the view of a claimant in a foreign direct liability case, one might be better off the proposed changes.

The committee also proposed for a new set of *lis pendens* rules extending the application to third states.⁶⁰ These provisions were included in the new regulation's article 33 and 34. It provides that the Member State court may stay the proceedings if similar proceedings are already initiated in another state within or outside the union. This might give a corporate defendant expecting to be summoned before a Member State court an incentive to bring an action before the courts of the host country. The European court may then choose to stay the proceedings subsequently brought by the claimants based on the new rules of *lis pendens*.⁶¹ However, the new provisions provide a set of cumulative requirements for the court to be able to stay its proceedings. The case might not fulfill all these requirements. In addition, if continuation of the proceedings is required for "the proper administration of justice"⁶² or if it appears that the proceedings initiated in the third state is unlikely to be included within a reasonable time, the Member State court may continue the proceedings. Furthermore, the court does not have an obligation to stay the proceedings, even if the requirements are met⁶³, as the wording only provides that the court "may"⁶⁴ do so. It is

⁵⁹ Eeckhout (2011) p. 7

⁶⁰ COM/748/2010 p. 38

⁶¹ Eeckhout (2011) p. 8

⁶² Regulation No. 1215/2012 article 33(2)(c), 33(2)(d)

⁶³ Eeckhout (2011) p. 8

⁶⁴ Regulation No. 1215/2012 article 33(1), article 34(1)

therefore not likely that these provisions will have significant impact on foreign direct liability cases.

2.3 The subsidiary –Domestic rules

In foreign direct liability cases, the claimant may do wise in suing both the subsidiary and the parent company. This is especially a wise strategy seeing as holding the parent company liable for the subsidiary's actions can prove to be a difficult task.⁶⁵ In addition, both cases will be governed by the same procedural rules of the home state if the court of the home state has jurisdiction over the case against the subsidiary as well. The subsidiary however, is usually not domiciled in a Member State and Brussels I article 4 then provides that the national rules of the Member State concerning jurisdiction will apply. This is especially relevant now that the proposals for extending the regulation's application to third states were rejected. The question of jurisdiction in these cases is therefore left to be decided by the domestic rules of private international law in force in the particular forum. Some of these rules may play a significant role in a foreign direct liability case.⁶⁶ A full presentation of these rules would be too extensive in this context but a few require mention.

How the claimant can have the case against the subsidiary heard in a Member state is illustrated in The Royal Dutch Shell cases. On the question of jurisdiction the court had concluded in an earlier decision that the case would proceed in The District Court of The Hague. There was no dispute concerning the jurisdiction of the court in the case against the parent company, where the court merely stated that article 2 applied.⁶⁷ Since Brussels I did not apply to SPDC the court applied the Dutch Code of Civil Procedure section 7(1) which provides that the where court has jurisdiction over one defendant it also has jurisdiction over another defendant in the same pro-

⁶⁵ As will be examined further in chapter 3

⁶⁶ Enneking (2012) pp. 145-148

⁶⁷ LJV BK8616 para. 3.1

ceedings, provided that the two cases are “connected to such an extent that reasons of efficiency justify a joint hearing”.⁶⁸ In the present case the court held that the relationship between the two defendants constituted a sufficient connection to hear both cases in The Netherlands.⁶⁹ In all cases, the claims against the parent were dismissed, while the subsidiary was held liable in one of them.⁷⁰

In countries where there are similar rules of procedure and private international law which allows cases concerning two defendants of different nationality to be heard jointly, it would therefore be a smart move of the defendant to sue both companies. Most Member States do have similar provisions allowing consolidation of related claims where only one of the defendants is domiciled in the forum state. Most of these domestic provisions require a connection between the claim, but the extent of this requirement, and how it is to be applied, differs.⁷¹

A provision that may serve as an obstacle for hearing the case of the subsidiary is the earlier mentioned *forum non conveniens* rule of common law systems which can still be applicable to cases where Brussels I does not apply. The case of *Lubbe and others v. Cape plc* has shown that the *forum non conveniens* doctrine will not be applied in English courts if the court is not convinced that the parties will obtain a fair trial in the alternative forum.⁷² This exception to the application of *forum non conveniens* may be useful to a claimant in these cases, as the motivation for targeting the parent company in the home country is precisely to achieve a level of legal protection that the host country’s forum is unable to provide.

⁶⁸ LJM BK8616 para. 3.4

⁶⁹ LJM BY9854 para. 4.1

⁷⁰ De Rechtspraak (2013) p. 1

⁷¹ Nuyts (2005) pp. 50-53

⁷² Ward (2002) p. 8; [2000] UKHL 41 para. 16

The court's argumentation in this case is similar to the reasoning behind the *forum necessitates* doctrine which is also a common rule within some Member States.⁷³ In these situations where *forum necessitates* is argued, it is usually the plaintiff who has the burden of proof. The conditions for establishing this kind of jurisdiction differs. Some domestic rules require that proceedings in the alternative forum are legally impossible, while others only require that a referral would be unreasonable.⁷⁴ As previously argued under the proposed revisions of Brussels I, this basis for jurisdiction can be a useful for the claimant in a foreign direct liability context.

Several Member States have rules enabling a non-EU defendant to be sued within a Member State when the defendant has some sort of secondary establishment within the EU. Some countries require that the claim must be connected with the establishment. However, some countries also allow unrelated claims to be heard by the court. In England and Malta the presence of a branch or agency within the country's territory allows for the defendant to be sued in that state. In Finland it is sufficient for the company to have assets present within the territory of the forum state, thus, triggering the application of jurisdiction based on property.⁷⁵ This would enable the claimant to benefit from the procedural rules of a Member State, even if the event giving rise to the claim has no close connection to the forum state. This form of basis for jurisdiction is similar to the one used to justify jurisdiction over ATS-based claims in the United States. It has been argued that this is one of the reasons why US courts offer a more beneficial jurisdictional framework concerning foreign direct liability cases than Europe does under the provisions in Brussels I which requires the defendant to be domiciled in the forum. However, the *forum non conveniens* doctrine still constitutes a threat to claimants aiming towards having the case heard in US courts,

⁷³ COM/748/2010 p. 8; Nuyts (2005) p. 64

⁷⁴ Nuyts (2005) p. 64-65

⁷⁵ Nuyts (2005) pp. 36- 37

while Brussels I now excludes the application of this doctrine if the defendant is already found to fall under the scope of the Regulation based on domicile.⁷⁶

2.4 Conclusion

If the corporate defendant in a foreign direct liability is domiciled in a Member State, the claimant can be quite confident that the court in that state will have jurisdiction under article 2 the Brussels I Regulation. If domicile is established, the application is pretty straight forward. In certain cases the claimant is even given the opportunity to choose between different EU forums where there are multiple corporate defendants. The new *lis pendens* rules in the revised regulation may provide difficulties if applicable, but they do not represent a considerable threat. All in all, the new regulation is not likely to have any profound influence on the feasibility of foreign direct liability cases brought before Member State courts.

In cases where the claimant seeks to sue a non EU-based corporate defendant within the union, some of the rules provided by domestic private international law will make it possible to hear the case in a member state. The *forum necessitatis* provision can especially prove to be useful, seeing as host countries may lack the procedural system enabling the claimant to obtain justice.⁷⁷ The rule of *forum non conveniens* may however prove to be an obstacle if the forum does not have an exception similar to the one demonstrated by English courts in the *Lubbe and others v. Cape plc*.

⁷⁶ Enneking (2009) pp. 916-918

⁷⁷ Eeckhout (2011) pp. 9-10; Enneking (2008) pp. 292-293

3 Applicable law

In a case of foreign direct liability the court must establish whether the law of the home country or the host country is to be applied. This would be the second obstacle for the claimant. This is a crucial point in the proceedings since the standards of care, regulatory standards and damage awards is likely to be much higher in the home state than in the developing country where the subsidiary company is located.⁷⁸ The choice may in particular be decisive for the outcome of the case where the host country does not have any rules giving basis for the claim at all. In order for the plaintiff to benefit from the legal regime in the home country, the relevant rules of domestic substantive law must first of all be regarded applicable by the court. Furthermore, if the substantive rules of law in the Member State are found applicable, the question of the parent company's liability will depend largely on these rules. This will be the topics for discussion in this chapter.

3.1 The Rome II Regulation

With foreign direct liability cases being tort-based, the answer to the question of applicable law, when served to European courts today, would largely depend on the rules regarding conflict of laws in *Regulation No. 864/2007 on the law applicable to non-contractual obligations*, commonly referred to as "Rome II". Rome II governs the choice of laws in cases concerning non-contractual obligations arising out of a tort or delict.⁷⁹ The scope of the applicable law is provided in article 15. It includes inter alia the basis and extent of liability and the assessment of damage or remedy claimed. One of the main objectives when implementing this regulation as an attempt to harmonize the rules regarding choice of laws within the Union was to create clear and predictable rules providing foreseeability and certainty as regards to their application.⁸⁰

⁷⁸ Enneking (2008) pp. 292-293

⁷⁹ Rome II article 2

⁸⁰ COM/427/2003 p. 5

According to article 32 of Rome II it shall apply from 11 January 2009 on damages occurring after the time of its entry into force, which is 2007.⁸¹ The relevant decisions on foreign direct liability so far have concerned damages occurring before this date of entry into force. In the Royal Dutch Shell case, which is the latest example of relevant case law from Europe, the court simply referred to article 31 and 32 of the Regulation and applied the Dutch Torts act instead.⁸² The main question is therefore whether the application of Rome II will have any effect on the access to establish this form of liability in future cases in Europe.

The parties are free to agree on what should be the applicable law concerning a dispute between them.⁸³ They are, however, unlikely to have done so due to the same reasons for not entering into an agreement on jurisdiction.

3.1.1 The general rule

The general rule is according to article 4(1) *lex loci damni*;⁸⁴ the law applicable is that of the country where the damage occurred. The reasoning behind this rule is the need for certainty in the law and that a connection with the country where the damage occurred strikes a fair balance between the interests of the parties involved. Making this the basic rule would deprive the victim of the damage to choose the law most favorable to him. This would, in the Commission's view, go beyond the victim's legitimate expectations.⁸⁵ Thus, the applicable rules will be the one of the country where the damage occurred. It is clear that this does not correspond with the victim's motivation in a foreign direct liability case to make the claim, namely, to draw bene-

⁸¹ Rome II article 31

⁸² LJN BY9854 para. 4.8

⁸³ Rome II article 14

⁸⁴ Calster (2013) p. 163

⁸⁵ COM/427/2003 pp. 11-12

fit from the security that the home state's law can provide. There are other provisions in the regulation which provide a different solution in cases where the general rule is not considered to provide a fair balance to be struck between the interests involved.⁸⁶

3.1.2 General exception

According to article 4(3) of the regulation, if it is clear from the circumstances of the case that it is manifestly more closely connected to another country than the one article 4(1) indicates, the law of this country will apply instead. Such a connection can for example be a contract between the parties that is closely connected to the tort in question.⁸⁷ In a foreign direct liability case it is highly unlikely that such a previous relationship exists between the parent and the claimants. Furthermore, it is unlikely that a connection would be sufficiently strong for the exception to apply. The wording of the provision; “*manifestly*⁸⁸ more closely connected”, indicates that it is only meant to be given effect in exceptional cases. This restricted application is also emphasized by the Commission.⁸⁹ In the making of Rome II the Parliament proposed for a more flexible exception. This proposal contained several examples of factors to be taken into consideration, one of which were “the policies underlying the foreign law to be applied and the consequences of applying that law”.⁹⁰ This factor may play a role in the proceedings of a foreign direct liability case. Where a policy in the home country implies deterrence against harmful transboundary activities by international corporations this could give the court an adequate reason for applying the home country's law instead. However, the subsequent failure to include this factor in the final text (as opposed to other factors) and the emphasis on the need for choice of law rules providing predictability, in preference to flexibility, implies that this would

⁸⁶ Rome II recital 19

⁸⁷ COM/427/2003 p. 12-13

⁸⁸ My italicization

⁸⁹ COM/427/2003 p. 12

⁹⁰ A6-0211/2005 pp. 17-19

not be sufficient grounds for applying the general exception under the current regulation.⁹¹

3.1.3 Overriding mandatory provisions and public policy

The regulation contains several provisions allowing recourse to provisions in the law of the forum state even if the law of another country is found to be applicable by Rome II. In connection to the Rome Convention the Court has defined overriding mandatory rules as national provisions so important to the protection of political, social or economic order of the Member State that they require compliance of everyone within the territory of that state and all legal relationships within that state. A typical example of such rules is provisions intervening in private law relations in order to protect public interests. This would also include environmental regulations.⁹²

Article 16 provides that the court shall always apply rules of the forum state's "overriding mandatory provisions". The Rome Convention contained the same provision. Contrary to what was provided by the convention,⁹³ only the rules of the forum state can have this overriding ability and not those of a third state. Whether a provision in the law of the forum state (*lex fori*) is of such a character that it demands application is to be decided by the legal system of the forum state itself. Rules of a mandatory nature are not easy to identify because their inherent features are not indicated through the explicit wording but rather by an interpretation of the intention of the legislator of that forum.⁹⁴

Article 26 gives priority to the "public policy" of the forum regardless the law found applicable by the Regulation. This is a typical *ordre public*-rule. Contrary to article

⁹¹ Enneking (2008) pp. 301-303

⁹² Enneking (2008) p. 304

⁹³ Rome Convention article 7(2)

⁹⁴ Enneking (2008) p. 304; Bogdan (2006) p. 134

16 on overriding mandatory provisions, article 26 does not authorize the court to give overriding effect to *lex fori*. Article 26 excludes the applicability of a rule that would otherwise apply under the Regulation.⁹⁵ In connection to article 27 of the Brussels Convention concerning the similar provision regulating enforcement of judgments, the Court has expressed that it is up to the domestic courts to determine the content of its public policy, but the Court has authority to review the limits within which the Member State can apply such rules.⁹⁶ The same is likely to be given to article 26 in Rome II.⁹⁷

Both article 16 and 26 are intended to have a narrow application. According to recital 32 of the Regulation they shall only be applied in exceptional circumstances. It is difficult to foresee the applicability of overriding mandatory rules in a foreign direct liability case because the question of what rules should be given this characteristic and the content of them is subject to the forum state's own discretion. These provisions are generally not cast with the protection of third parties in a host country in mind and are usually only meant to regulate legal relationships within the territory of the home country.⁹⁸ If such rules are applicable, they may well have an impact on the outcome in a foreign direct liability claim. This would for example be the case if the home country has higher standard rules concerning the environment that are considered to have this character, such as for example "the polluter pays" principle.

3.1.4 Environmental damage

Article 7 of Rome II regulates the choice of law when the non-contractual obligation arises out of environmental damage. According to this article the choice will be governed by the general rule in article 4 (1). In addition, an exception is added to the

⁹⁵ Dickinson p. 631

⁹⁶ C-7/98 para. 22

⁹⁷ Dickinson p. 627

⁹⁸ Enneking (2008) p. 304

general rule in matters of environmental damage. Article 7 also provides an opportunity for the person sustaining the damage to choose the law of the country of the event “giving rise” to damage. The reasoning behind this freedom of choice is environmental protection. Recital 25 refers to article 174 of the Treaty as a justification for discriminating in favor of the person sustaining the damage in such cases. This rule would contribute to removing the incentive of the operator to establish production in a low-protection country. In addition the interests of the victim of environmental damage would be protected through the laws of the tortfeasor’s home country. Thus, these considerations prevailed over the general *lex loci damni* rule in the shaping of this provision, because the solution provided by the general rule would be contrary to the underlying philosophy of European substantive environmental law and the “polluter pays” principle.⁹⁹

3.1.4.1 Scope of application

There are several elements in the wording of the provision and its initial purpose challenging the applicability in the context of a foreign direct liability case.

3.1.4.1.1 *Environmental damage*

What qualifies as “environmental damage” is described more closely in the preamble. According to recital 24 of the Regulation this should be understood as “adverse change” in a natural resource such as land, water or air. This implies that there would have to be a damage of certain significance, either in terms of quantity (such as number of persons affected or size of impact on natural resources) or quality (such as the seriousness of the problems caused).¹⁰⁰ “Impairment of function” of such a natural resource “for the benefit of” another resource or for the public also falls under the definition. Damage to biodiversity is also covered as an “impairment of the variability among living organisms”. The next step would then be to establish a causal link

⁹⁹ COM/427/2003 p. 19-20

¹⁰⁰ Bogdan (2009) p. 224

between the environmental damage and the damage “sustained by persons or property”. It is important to note that if the damage is considered to be environmental within the Regulation’s definition, the general exception in article 4(3) will not be applicable. Article 7 only refers to article 4(1). Accordingly, if the exception from the *lex loci damni* rule does not give application to the home country’s law, the claimant’s case may be considered under the law of the host country, regardless of whether a manifestly closer connection can be proven under article 4(3).

3.1.4.1.2 *Non-EU claimants*

The claimant in a foreign direct liability case will most likely not be based in a Member State. In regards to article 7’s scope of application an important question is therefore whether the Regulation is also meant to apply to environmental damage in non-Member States.¹⁰¹ Article 3 provides a universal application. According to article 3 the law chosen by the provisions in the regulation shall be applied “whether or not it is the law of a Member State.” Such a universal application is nothing new, as the same rule is included in the Rome Convention, The Hague conference conventions and domestic private international law.¹⁰² This implies that the provision on environmental tort will also apply to non-Member States. On the other hand, the Commission gives the impression that article 7 is meant to regulate the “classic” scenarios of transboundary environmental damage such as pollution by dumping toxic waste an international river. The Commission refers to “the international dimension” of environmental damage and “neighboring countries” when arguing in favor of the need for such a provision.¹⁰³ This implies that article 7 was not initially meant to apply in cases where the environmental damage occurred on another continent and that the provision is therefore not constructed to be given application to the sort of

¹⁰¹ Enneking (2012) p. 217

¹⁰² COM/427/2003 p. 9

¹⁰³ Enneking (2012) p. 217

environmental tort claims promoted in foreign direct liability cases.¹⁰⁴ On the other hand, the Commission does not explicitly limit the scope of article 7 to transboundary harm. The Commission may have emphasized this form of harm as the most practical example, without intending it to be a limitation. Furthermore, the actual wording of the provision itself does not invite for such a narrow interpretation. In addition, article 3 explicitly provides for the Regulation to have universal application, thus giving it application to cases involving parties outside the EU. According to the Commission, article 3 narrows down the number of possible sets of choice of law rules applicable in accordance with one of the overall purposes of the Regulation which is to provide legal certainty.¹⁰⁵ The wording of article 7, together with the universal application laid out in article 3, therefore suggest that the provision is also applicable to claimants outside of Europe. This interpretation of the wording is also in accordance with the overall purpose of article 7, which is not to provide the claimant with the benefit of a choice, but to promote the Member States interests in preventing the occurrence of pollution and thus, raising the general level of environmental protection. Giving the claimant the opportunity to choose the law of the highest standard merely promotes this interest.¹⁰⁶ Thus, article 7 must be interpreted as having application also to foreign direct liability claims.

With that being said, one might argue whether it is fair for to have EU-based company risk litigation and ultimately be held liable under its own country's environmental regulations and, by doing so, being deprived of the benefit of establishing a subsidiary abroad. This consideration is likely to have been in the legislators mind since interest behind the provision seems to be limited in favor of the defendant by the application of rules of safety and conduct in article 17, which will be discussed further below.

¹⁰⁴ Castermans (2009) p. 53; COM-427/2003 p. 19-20

¹⁰⁵ COM/427/2003 pp. 9-10

¹⁰⁶ Symeonides (2008b) p. 209-210; Enneking p. 217

3.1.4.1.3 “Giving rise”

For the option of choice in article 7 to be applicable to a foreign direct liability case it must be established that the event “giving rise” to the damage occurred in the parent company’s country. Thus, the claimant must prove that there is some form of connection between the parent company’s actions or omissions and the damage sustained by the subsidiary.¹⁰⁷ What degree and type of connection is required here and if an omission is even sufficient to establish a causal link, is unclear. The same issue appears in regards to the application of article 17 below and gives rise to a series of questions concerning the parent company’s role in the subsidiary’s operations. This will therefore be discussed in a separate section below.¹⁰⁸

3.1.5 Rules of safety and conduct

Article 17 provides that when the rules of the place where the event giving rise to damage occurred is not applicable, the rules of safety and conduct in force where the events giving rise to the liability shall still be taken into account when assessing the conduct of the person claimed to be liable.¹⁰⁹

One question is whether these rules of safety and conduct in article 17 refer to rules of public law or if this also includes conduct-regulating rules of tort.¹¹⁰ According to recital 34 “rules of safety and conduct” includes all regulations “having any relation to safety and conduct”. The commission’s report refers to these rules as “public” when describing the relationship between this provision and article 7.¹¹¹ The legislative history and drafting of this provision favor the conclusion that only public law rules are included.¹¹²

¹⁰⁷ Calster (2013) p. 240

¹⁰⁸ See chapter 3.2

¹⁰⁹ COM/427/2003 p. 25

¹¹⁰ Enneking (2012) p. 164

¹¹¹ COM/427/2003 p. 20

¹¹² Enneking (2012) p. 164

The Commission notes that taking into account the other country's rules does not correspond with applying them. The provision is based on the fact that a person must act in accordance with such rules in force in the country where he operates. The court should therefore be able to apply these as a point of fact when assessing the character of the tortious act. This could for example be when assessing the seriousness of the alleged act or the good or bad faith of the author of the damage.¹¹³ If the provision is meant only to regulate the use of such rules as a matter of facts relating to the case, which the preparatory works seems to be clear on, it is not really a true choice-of-law rule¹¹⁴ that would give the claimant in a foreign direct liability case the opportunity to benefit much from it. As will be illustrated in the following, this is one of several issues indicating that article 17 was not formed with the case circumstances characteristic to a foreign direct liability case in mind, and that the provision may not have much to offer in favor of the claimant in this context.

3.1.6 The relationship between article 7 and article 17

Article 17 appears to be relevant to a foreign direct liability case where the parent company has moved its activities through a subsidiary to another country where the rules of safety and conduct do not reach as high standards as the rules of the home country.¹¹⁵ It appears to give the court the opportunity to take such rules of the home country into consideration when assessing the alleged tortious activity, even though the rules of the country where the damage occurred is found to be the applicable law, namely the law of the host country.¹¹⁶ This would of course be under the assumption that the parent company's actions or omissions are seen as "giving rise" to the damage as required by article 17.

¹¹³ COM/427/2003 p. 25

¹¹⁴ Symeonides (2008a) p. 1756

¹¹⁵ Enneking (2008) p. 305

¹¹⁶ Enneking (2012) pp. 163-164

However, if the home country can be considered the place where the event giving rise to the damage occurred, then the claimant would already have the opportunity of choosing the law of the home country by virtue of article 7. Nothing indicates that the expression “giving rise” in both provisions is meant to be understood differently. Thus, article 17 does not appear to offer any additional opportunities for the claimant in a foreign direct liability case in relation to article 7. Furthermore, when describing the relationship between this provision and article 7, the commission provides the same impression.¹¹⁷ In a situation where the author of the environmental damage has acted in accordance with the rules of safety and conduct in a low protection country the court should, in the Commission’s view, be able to consider the fact that he acted in accordance with the rules in force at the time in the country where he is in business.¹¹⁸ This implies that article 17 is meant to offer the perpetrator some relief when the court is to assess the character of his conduct, and not the victim of the damage. Thus, article 17 seems to curb the effect of article 7’s purpose which is to strengthen the position of the claimant located in a low-protection country. It has even been argued that such an application of article 17 works contrary to the very spirit of article 7 and “polluter pays” principle.¹¹⁹

How the relationship between article 17 and article 7 will influence cases on environmental damage in general and foreign direct liability cases concerning environment specifically remains to be seen. The regulation is still fairly new and not much case law from Member State courts or the Court has been produced yet.¹²⁰ Having regard to the above interpretation, it does however not look like article 17 will have

¹¹⁷ Symeonides (2008b) p.213

¹¹⁸ COM/427/2003 p. 20

¹¹⁹ Symeonides (2008b) pp. 213-214

¹²⁰ Enneking (2008) pp. 305-306

the influence on the outcome of such cases as might have been previously estimated.¹²¹

3.2 Placing the tortious event with the parent company

As has been demonstrated above, in attempts to seek compensation from an EU-based parent company in its home country for damage sustained in the host country, the main rule laid out in article 4 is certain to give applicability to the law of the host country where the damage occurred. Thus, the claimant will not enjoy the higher standards of protection in the home countries law. There is however one possible exception; Foreign direct liability cases concerning environmental damage have been given a special position through the choice of law rule in article 7. If the event giving rise to the damage is proven to be defined as the actions or omissions of the parent company, the law of the home state will consequently be applicable to the case by virtue of article 7. The question is therefore how such operations of the parent company can fall under this definition.

This is also has relevance to other provisions in European private international law where the event giving rise to damage is decisive. In regards to jurisdiction, Brussels I article 5(3) and 5(5) raises the same issues.¹²² In regards to choice of law, the interpretation and application of article 7 will influence the application of article 17 as they contain the same term.

Furthermore, this issue also leads to the necessity of exploring the question concerning the role of the parent company in a foreign direct liability case in general; such as how this corresponds to the idea of the subsidiary as a separate legal entity and the parent company's limited liability as a shareholder, and how the parent company can be held liable for the damage under substantive law.

¹²¹ See Calster (2013) p. 240 *referring to* Eeckhout (2011)

¹²² Calster (2013) p. 239; Eeckhout (2011) p. 5

This will be the background for the following discussion.

3.2.1 Relation to substantive law

The issue of placing the event giving rise to damage with the parent company is also closely linked to issues that will inevitably arise when the question of jurisdiction and applicable law in a foreign direct liability case is settled. The parent company's liability for the damage is then to be decided by the applicable substantive law. Many foreign direct liability cases seek to hold the parent company liable by arguing that this company has failed to act in accordance with its own duty of care towards third parties in its involvement with the operations of its subsidiary abroad.¹²³

Placing the tortious act with the parent company will then to a large degree be equal to identifying the parent company as the tortfeasor. The event giving rise to damage does not necessarily correspond to an act that the applicable law identifies as "unlawful".¹²⁴ On the other hand, it is difficult to establish whether the parent company is the source of the event giving rise to damage, through failure to comply with such a duty, without establishing the content of the duty and the extent of it. In order to do so, recourse must be made to substantive law.¹²⁵ Thus, identifying the operations of the parent company as "the event giving rise to damage", within the meaning of article 7 and other provisions in the relevant EU-regulations raises the similar questions as in regards to holding the parent company liable for the damage.

In addition, the application of article 7 on parent companies in relation to environmental damage executed by subsidiaries outside the EU would require a fairly broad interpretation of the wording in article 7. This question will eventually have to be

¹²³ Enneking (2012) p. 176

¹²⁴ Dickinson (2008) p. 312

¹²⁵ Mankowski (2012) p. 246

answered by the Court.¹²⁶ Due to the current lack of an authoritative interpretation of article 7 however, approaches to parent company liability already developed in theory and by domestic case law may serve as directions on how article 7 can be interpreted as to place the tortious event with the parent company.

3.2.1.1 Direct parent liability

There are several different approaches to choose from when seeking to hold the parent company liable depending on the specific circumstances of the case and the options provided by the law that is found to be applicable. Based on case law examples from Europe that are available so far, there is particularly one approach that has been applied. The common approach in foreign direct liability cases brought before European courts is that the claimants have argued in some way that the parent company is directly liable for the damage sustained. This form of liability is typically based on an alleged negligence of a duty of care for the parent towards third parties. In such cases the duty of care is usually considered to derive from the parent's control over or involvement in the subsidiary's operations in the host country. What separates this form of liability from indirect liability is in general the scope of the parent company's control. Direct parent liability focuses on the parent's control over the harmful operations and the damages caused by them, while indirect liability for the parent is based on its control over the subsidiary as such.¹²⁷ To ignore the legal separation between the parent company and its subsidiary by "piercing of the corporate veil" is considered a type of indirect liability.¹²⁸

A particular question in regards to direct liability based on the parent company's control is whether this also applies where the controlling company is set to have neglected its duty of care through omissions rather than actions. For example where the par-

¹²⁶ Enneking (2012) p. 217

¹²⁷ Enneking (2012) p. 176-177; Joseph (2004) p. 136

¹²⁸ Enneking (2012) p. 182; Zerk (2006) p. 228

ent company has knowledge of the subsidiary's operations and that these operations cause environmental harm to the local community, does the parent company then have a duty of care to prevent or minimize such damage? It is generally more difficult to establish an active duty to prevent harm than a duty to refrain from harmful activity through affirmative actions. Such a line of argumentation would enable the parent company to be held liable for the failure *not* to control the other company. This also challenges the doctrine of the shareholders limited liability.¹²⁹ Extending the duty of care in such a way may result in a duty for multinational corporations to actively engage in the subsidiaries business and exercise control over them in order to prevent any kind of harm that they may be held liable for. That would entail a much more extensive obligation than a duty to act with due diligence when exercising such control. In cases where the claimant seeks to hold the parent responsible for their inactions, as opposed to their actions, will probably have difficulties being heard on an argument based on this form of liability.¹³⁰

The direct parent liability-approach provides several advantages for the claimant in a foreign direct liability case. Firstly, this locates the event giving rise to the damage in the home state of the parent company.¹³¹ As demonstrated above, this is an important factor in the question of jurisdiction, as well as the application of the choice of law rules. Secondly, the focus on the parent's own actions may relieve the claimant from having to argue in favor of the less attainable result of piercing the corporate veil as an exception to the principle of limited liability for the shareholder.¹³²

¹²⁹ Joseph (2004) p. 136-137

¹³⁰ Enneking (2012) p. 177

¹³¹ Joseph (2004) p. 134

¹³² Joseph (2004) pp. 129-130 and 134

3.2.1.2 A domestic example of direct parent liability

The following example of case law shows how a court argues when it establishes direct parent liability based on a duty of care and how the approach of this court is later applied by another court in a different case concerning environmental damage.

In some common law jurisdictions the rule of direct parent liability is applied on parent companies for the damaging activities based on a breach of the parent's duty of care towards the third parties abroad. This ground for liability was applied in the case of *Chandler v. Cape* case (Cape case). This case is similar to the *Lubbe v. Cape plc* case as they both concerned asbestos injuries caused by a subsidiary.¹³³ On the other hand, this case does not have the international aspect, as both the claimant and the defendant were located in the UK. The claimant, Mr. Chandler, was a former employee with the subsidiary, Cape Building Products Ltd, who discovered years later that he had contracted asbestios from working there. The subsidiary no longer existed at the time of the lawsuit.¹³⁴ The claimant consequently sought compensation from the England-based parent company, Cape plc, instead.

The English Court of Appeals presented the three-stage test used in English law to establish whether a duty of care existed, namely; that the damage must be foreseeable, that the relationship between the parties is one of proximity and whether it is fair, just and reasonable to impose such a duty.¹³⁵ It referred to previous foreign direct liability cases¹³⁶ like *Connelly v. Rio Tinto Zino Corporation* and *Ngcobo v. Thor Chemicals Holdings Ltd v others* and held that there is nothing in either judgments or general law supporting the defendant's argument that a duty of care can

¹³³ See chapter 2.1.4.

¹³⁴ [2011] EWHC 951 (QB) para. 1

¹³⁵ [2011] EWHC 951 (QB) para. 32

¹³⁶ Enneking (2012) p. 179

only exist where the parent company has absolute control over the subsidiary.¹³⁷ In this case, the court emphasized that the question at hand did not in any way concern an issue of piercing the corporate veil. It noted that “There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.”¹³⁸ It further noted that “The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary’s employees.”¹³⁹ The court held that there was a direct duty of care owed by the parent company towards the subsidiary. The parent company’s omission to advise the subsidiary on precautionary measures concerning the operations, despite their lack of certain knowledge of the link between asbestosis and asbestos dust, was a breach of this duty of care.¹⁴⁰

This case demonstrates that English tort law contains a rule establishing liability for a parent company toward third parties. It also shows that the idea of the parent company and its subsidiary as separate legal entities does not necessarily stand in the way of establishing liability. In the context of foreign direct liability, the reference to foreign direct liability cases also implies that this may also occur when the subsidiary is located abroad.¹⁴¹ It is important to note that the company in this case was held liable because they did not encourage or instruct its subsidiary to implement precautionary measures despite its knowledge of the risks. This does not mean that the parent was liable for its omissions alone, because it was already exercising control over the subsidiary’s health safety issues.

¹³⁷ [2011] EWHC 951 (QB) para. 66

¹³⁸ [2011] EWHC 951 (QB) para. 69

¹³⁹ [2011] EWHC 951 (QB) para. 70

¹⁴⁰ [2011] EWHC 951 (QB) para. 79

¹⁴¹ Enneking (2012) p. 179

This case specifically concerns the relationship between the parent company and its subsidiary's employees. It is not clear whether this precedent would be feasible at all to environmental damage or if this basis for liability is limited to situations where there is (or has been) a clear connection between the third party and the subsidiary, in form of for example a contract, which makes the distance between the claimant and parent company shorter than for example between the parent and a local claimant falling victim to pollution caused by the subsidiary's operations. It is hard to estimate beforehand how environmental damage will affect the surroundings, and to what extent, which might affect the conclusion under the foreseeability-criteria. However, one could also argue that for this particular reason it may be fair to expect the companies involved in such business to take extra precautionary measures.

For the same reasons, the proximity-criteria may also be difficult to fulfill since the damage can affect an entire local community. The three-stage test that the court applied in this case was a test established in preceding English case law through the case of *Carparo Industries plc v. Dickman* where the court referred to a relationship characterized by the law as one of "proximity" or "neighborhood".¹⁴² The word "Neighborhood" implies a looser connection than what was in fact the situation in the Cape case where the claimant was a former employee and may extend the application of this criterion to a local community or other claimants who are not in contractual relationship with the defendant.

The court in the Royal Dutch Shell cases referred to this decision when determining liability for the parent. It concluded that a parent company could be held liable under English and Nigerian tort law for harm caused by its subsidiaries, but also that such liability could not be established in the case at hand. The court did not find the criteria of proximity to be fulfilled. It held that the relationship in question was not nearly as close as the one between the two companies in the Cape case. The duty of care of

¹⁴² [2011] EWHC 951 (QB) para. 32

a parent company towards the employees of a subsidiary in the same country, comprising only a limited group of people, was not comparable to the duty of care of a parent in an international group of oil companies towards people living in the vicinity of a subsidiary's facilities. In the latter situation, the company would consequently owe a duty of care towards an unlimited group of people in several countries. The court did not find that extending a duty of care in this way would be fair, just or reasonable. The court also noted that, even though the subsidiary's business in both cases involved health risks, there were several differences. The business of RDS and SPDC were not considered to be the same. While RDS formulated general policy lines from its home country and was involved in worldwide strategy and risk management, SPDC's business consisted of oil production in Nigeria. In addition, there was nothing indicating that the parent company should have more knowledge of the risks connected to the subsidiary's operations in Nigeria. The parent in the Cape case on the other hand, had superior knowledge of the health risks related to asbestos.¹⁴³ Another distinction between the cases was made. The subsidiary in the Cape case directly inflicted the damage by allowing employees to work in an unhealthy environment, while liability for SPDC would be based on the fact that it failed to prevent third parties from indirectly causing damage to the locals by sabotage. Accordingly, the court rejected the applicability of direct liability based on negligence of a duty of care in this case.¹⁴⁴

It appears that the nature of oil spills of being unpredictable in respect to the extent of the damage and the group and number of people affected was one of the decisive factors leading to the court's conclusion on this matter. Based solely on the Dutch court's application of these criteria for parent company liability under common law, this approach is not likely to be successful in a foreign direct liability case concerning environmental damage. On the other hand, both cases also illustrate how the

¹⁴³ [2011] EWHC 951 (QB) paras. 76-78

¹⁴⁴ LJM BY9854 paras. 4.26-4.32

evaluation is closely connected to the specific circumstances of the case at hand, which implies that a parent company may be held liable for environmental damage if the “right” case is brought before English courts or courts within a jurisdiction with similar applicable provisions. One can only speculate what the conclusion would have been if the oil spills were caused by lack of maintenance and not by sabotage. In addition, damage occurring due to lack of sufficient health and safety measures towards employees may in some cases also materialize in a way that can be classified as environmental damage and therefore also be subject to article 7.

3.2.2 Relation to company law and EU law

Different areas and definitions under EU law may be eligible to shed light on the issue of placing the tortious act with the parent company and also how this would relate to the shareholders limited liability.

3.2.2.1 The notion of limited liability and corporate groups in EU law

Despite several previous efforts there are currently no EU instruments regulating corporate groups.¹⁴⁵ A reflection group established by the Commission submitted a report in 2011 on the future of EU company law acknowledging that the international group of companies has become the dominant form of European large-sized enterprises, with subsidiaries both inside and outside Europe.¹⁴⁶ The lack of an overall regulation of this issue does not mean that the subject of corporate liability has remained untouched by European case law and that it is impossible to identify some general principles from the Court’s practice.

There is no general definition in EU law on the concept of limited liability. In the case of *Idrima Tipou AE v. Ipourgos Tipou kai Meson Mazikis Enimerosis* the Court gave an interpretation of this notion in accordance with the First Company Law Di-

¹⁴⁵ Vandekerckove p. 547

¹⁴⁶ Report of the Reflection Group On the Future of EU Company Law (2011) p. 60

rective. The case concerned the legality of Greek law providing that shareholders with a holding of over 2.5 percent in national radio- and television companies could be fined together with the company.¹⁴⁷ The Court recalled that the Directive regulates certain types of companies identified by the European legislature as having limited liability, but did not prescribe what a company having limited liability must be.¹⁴⁸ The Court observed that the law of most Member States does not hold shareholders of companies mentioned in article 1 of the Directive personally responsible for the debts of a company enjoying limited liability. That did not mean that this was a general principle of company law given application under all circumstances and subject to no exceptions.¹⁴⁹ Thus, the Court confirmed that there is no general definition in EU law on the notion of “limited liability”. Furthermore, the decision affirms that the adoption of the doctrine “piercing of the corporate veil” is left to the competence of each Member State, seeing as this doctrine has evolved as an exception from the rules governing limited liability companies.¹⁵⁰

Even if a clear definition does not exist in EU law, it can be established that limited liability is an unwritten principle of EU company law¹⁵¹ and that potential deviation from this principle is left to the discretion of the Member States domestic law. If victims of environmental damage in the host country attempts to hold the parent company liable based on arguments under company law, they would have to come up with exceptions to this rule. Such exceptions would only apply in exceptional cases.¹⁵² The better option would be to evade this focus on the relationship between two separate legal entities in preference of a focus on the tortious action.

¹⁴⁷ C-81/09 paras. 8-9 and 28

¹⁴⁸ C-81/09 para 41

¹⁴⁹ C-81/09 para. 42

¹⁵⁰ Papadopoulos (2012) p. 408 *referring to* ECR 2010 p. I-10161 paras. 55-57

¹⁵¹ Grundmann p. 189

¹⁵² Vandekerckhove (2007) p. 9

Placing the event giving rise to damage with the parent company may give rise to a discussion on the notion of a shareholder's limited liability, which is traditionally considered to belong under the law of companies. It has been advocated that this discussion is therefore not subject to the rules in Rome II. Article 1 (2) (d) explicitly exempts issues regarding company law from its scope of application. Thus, when the event giving rise to the damage is argued to be actions or omissions by the parent company towards its subsidiary, the issue may fall outside the scope of Rome II in its entirety and will have to be decided based on domestic choice of law rules.¹⁵³ However, a distinction must be made between tort-based liability for the parent and the company law related doctrine "piercing of the corporate veil". The first concerns holding the parent company liable for the damage sustained based on its own actions (or omissions) towards the subsidiary. The latter refers to making an exception to the fundamental notion of the parent and subsidiary as two separate legal entities by holding the parent liable for the subsidiary's actions in exceptional cases.¹⁵⁴ Foreign direct liability cases are usually characterized by their tort-based liability approach.¹⁵⁵ Even though, there is not necessarily always a clearly defined line between these two grounds for liability,¹⁵⁶ the issue of placing the event giving rise to the damage with the parent company should therefore be considered a question of tort law in this context and not company law. Thus, this issue can be situated within the scope of the interpretation of article 7.

This does not mean, however, that the discussion on placing the event giving rise to the damage with the parent company does not raise issues that may run counter to these fundamental ideas in company law. Even though applying a tort-based ap-

¹⁵³ García-Castrillón (2011) p. 571-572

¹⁵⁴ Joseph (2004) p. 130

¹⁵⁵ Enneking (2012) p. 92

¹⁵⁶ Vandekerckhove p. 12

proach is designed to focus on the parent's control over the harmful events, the doctrine of limited liability may still impose difficulties for the claimants. Wherever liability of parent companies and their subsidiaries is involved in a case, the notions of the companies in a corporate group as being separate legal entities and the shareholders limited liability are likely to be discussed, or at least mentioned.¹⁵⁷ Domestic courts are likely to be hesitant towards creating precedents potentially leading to unlimited liability "by the back door". On the other hand, courts should also be careful putting decisive weight on the corporate form, when the issue at hand is liability. The answer should be based on whose actions gave rise to the damage within in the corporate group, and not on the form of the group's internal relationships.¹⁵⁸ Furthermore, even though these rules are important facts of EU law and domestic law, this does not mean that one should allow being seduced by the corporate veil even in situations where the veil serves merely as an illusion concealing the factual circumstances. This should, in my opinion, also be the case when placing the tortious event with the parent company is at issue.

3.2.2.2 Development in EU competition law

There is one interesting example from EU case law where liability has been established for the parent company for the operations of its subsidiary. Under EU competition law the parent company may be held liable for the unlawful conducts of a subsidiary without necessarily having had a direct involvement in this conduct. This is possible when the subsidiary's conduct on the market is not based on its own decisions, but regulated by the parent's instructions. In such situations the companies are considered to have formed a "single economic unit." When the parent is the single shareholder of the subsidiary accused of infringing the rules, this even leads to the presumption that the parent in fact exercises a "decisive influence" over the subsidiary. This approach is, however, restricted to issues concerning EU competition law.

¹⁵⁷ See both the Hempel case (3.2.2.3.1) and the Cape case (3.2.1.2.)

¹⁵⁸ Zerk (2006) pp. 234-236

¹⁵⁹ As long as the doctrine of the “single economic unit” has this limited application, it is unlikely to have relevance in the domestic proceedings of a foreign direct liability case. However, it does serve as an example of how focus on the factual circumstances of the relationship between two separate legal entities, as opposed to the formal relationship between them, can lead to a different result. In addition, the emergence of this form of practice might be taken as an indication of EU law being able to attribute more weight to realities rather than formalities in cases concerning corporate groups.

3.2.2.3 Environmental liability directive

It has been advocated that a link can be made between the parent company as the one giving rise to the damage under article 7 and the wide definition of the “operator” given in the Environmental liability directive. According to article 6 to 8 the “operator” is the one responsible for the damage. According to article 2(6) of the Directive an “operator” is defined as “any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated”. Such an interpretation is similar to the court’s reasoning in the previously mentioned case of *Lubbe and others v. Cape plc*. The question to be answered in this case was whether the court had jurisdiction. However, the court also mentioned that a discussion of the issue of the parent company’s responsibility towards an overseas subsidiary would include what part the parent company played in controlling the operations of the group.¹⁶⁰ This is also a similar to the court’s reasoning in the Cape case. This analogy between a parent company possessing control over its subsidiary and the definition of the operator also resembles the court’s reasoning in a Norwegian example of domestic case law, which will be presented in the following.

¹⁵⁹ Sahlin and Winckler (2012) p. 547; C-97/08

¹⁶⁰ García-Castrillón (2011) pp. 571-572; [2000] UKHL 41 para. 20

3.2.2.3.1 *The Hempel case*

The Hempel case is a decision from the Norwegian Supreme Court where the Danish company Hempel was held responsible for paying the cost for inspections in relation to its Norwegian subsidiary Hempel Coating's pollutive activity in Norway. During the period when the pollution occurred there was a series of mergers and demergers which eventually resulted in the establishment of the company Hempel Coatings, which was liquidated in 2001. The subsidiary company, Hempel Coatings was a result of a merger with a former subsidiary of Hempel and another Norwegian company. Hempel owned 100 % of the shares in Hempel Coatings.¹⁶¹ In 2004 Norwegian authorities ordered the parent company to pay the costs for inspection of the polluted area. The authorities claimed to have legal basis for holding both Hempel and Hempel Coatings responsible for carrying out the inspection in section 51 of the Norwegian Pollution Control Act.¹⁶² The requested inspections were carried out,¹⁶³ but Hempel sued the government claiming that article 51 did not provide a legal basis for holding the parent company responsible and sought reimbursement for its inspection costs.¹⁶⁴

The court concluded that section 51 did provide with a responsibility for the parent company to carry out inspections relating to pollution caused by its subsidiary. It based its conclusion on an interpretation of the relevant provision, but when doing so, it also reviewed the relevance of the principle of the shareholder's limited liability in such a context. Section 51 provided the authorities with the opportunity to order someone who is in possession of something which leads to, or might lead to, pollution to bear the costs of necessary inspections. In its argumentation the court relied on the on the provision's wording and purpose and the Pollution Act in general. The

¹⁶¹ Rt. 2010 s. 306 paras.1-6

¹⁶² Rt. 2010 s. 306 para. 11

¹⁶³ Rt. 2010 s. 306 para. 9

¹⁶⁴ Rt. 2010 s. 306 para.13

court referred to the “internationally acknowledged principle” of “the polluter pays” which provides that the person or entity drawing economic benefit from the polluting activity shall also bear the costs of that activity. Section 51 was considered to be a result of this principle.¹⁶⁵ On the other hand, the court also considered the shareholder’s limited liability to be a basic principle of corporate law. The interpretation of article 51, however, did not concern the question of the shareholders liability in general, but rather liability of a shareholder which has actual control over a subsidiary. In such cases it would be reasonable, in the courts view, to draw the conclusion that the parent company is in the possession of something (that “something” being the subsidiary) within the meaning of article 51. The court argued that this interpretation would also contribute to the realization of the “polluter pays” principle and noted that the subsidiary’s business will usually be of vital interest to the parent company. This interpretation would, according to the court, also be in line with the authorities need to be able to impose the costs for the pollution on the one who has the economical interest. Furthermore, interests of an efficient enforcement of the rules favored the conclusion that the relevant provision was not to be interpreted as to exclude the possibility of holding a parent company responsible.¹⁶⁶ Based on these arguments, the court found that section 51 could be applied as a legal basis for imposing an obligation towards the parent company to pay the costs of inspection. The decision was unanimous.¹⁶⁷

Although the Hempel case has an international aspect, it lacks the North-South constellation that would resemble a foreign direct liability case. The parties in this example are two neighboring industrialized countries with similar legal traditions. Another aspect that differentiates this case from the previous description of foreign direct liability cases is that this is a dispute between a public authority and a company

¹⁶⁵ Rt. 2010 s. 306 para.52

¹⁶⁶ Rt. 2010 s. 306 para.69

¹⁶⁷ Rt. 2010 s. 306 paras.79 and 91

instead of two private actors. Even though the basis for the lawsuit was that the company sought compensation, this claim was not based on tort, but on the authorities' allegedly wrongful interpretation of a public provision. These atypical characterizations set aside; the case has relevance as an example of domestic case law where public interests, in form of environmental protection, seems to have been given greater weight than the fundamental idea of the company as a separate legal entity.

There are several interesting issues in this case which distinguishes it clearly from the Cape case and other similar cases on direct parent liability. First of all, the court does not question whether the parent in fact had any possibility of preventing the environmental damage through controlling the subsidiary.¹⁶⁸ In this connection, it should also be noted that much of the pollution in the Hempel case was caused by the subsidiary's predecessor.¹⁶⁹ Furthermore, the court does not evaluate whether there was some sort of negligence from the parent and does not imply that fault is in any way a requirement for liability.¹⁷⁰ The court seems to base the conclusion merely on the actual control the parent company often has over a subsidiary, regardless of how this control materializes. The Cape case on the other hand required not just a degree of control from the parent, but also control resulting in a duty of care that has to be breached through the parent's negligence. Furthermore, the Cape case focused on the parent's control over the harmful operations rather than the control over the subsidiary. It should also be noted that the court does not discuss whether the mergers and demergers were carried out by the company in order to avoid responsibility for the damage, thus, implying that this is not necessary to examine in this case, or in future similar cases in order to establish liability.¹⁷¹ Based on the court's omission to exam-

¹⁶⁸ Sjøfjell (2010) p. 8

¹⁶⁹ Rt. 2010 s. 306 paras. 4-6

¹⁷⁰ Sjøfjell (2010) p. 8

¹⁷¹ Sjøfjell (2010) p. 8

ine these factors, holding the parent company responsible in this case, seems to have been a lot easier than it is in case law concerning direct parent liability.

The court defined “the polluter” as a person or entity drawing economic benefit from the pollutive activity. A parent company as a shareholder also draws economic benefit from such activity. Therefore, it may be argued that the court simply extended the “polluter pays” principle to apply not just to the actual polluter, but the person who, in the end, is the one best fit to carry the burden. This could make the case merely about how this principle is to be given effect through a specific provision given in domestic public environmental law. On the other hand, the extension of this principle could also be adapted further to encompass cases concerning pollution where the other party is a claimant seeking compensation from a company.

The Supreme Court in this case is not absolutely clear on whether the case strictly concerns the interpretation of an environmental provision or if the court in fact pierces the corporate veil. It has been pointed out that, regardless of the court’s own classification, it is difficult from a company law perspective to reckon it as merely an issue of environmental law.

It has been advocated that the case in fact is about whether the corporate veil may be pierced in order to place the responsibility, not on the polluter, but on the parent in its capacity as a shareholder.¹⁷² If it is considered to be an example of corporate veil piercing, it shows that there is a possibility for the veil to be lifted in favor of other pressing societal interests.¹⁷³ If it is not considered to be an example of corporate veil piercing, a similar line of argumentation when identifying the one responsible for the costs of the damage could still be significant to the establishment of foreign direct liability for environmental damage. This is mainly due to the court’s focus on the

¹⁷² Sjøfjell (2010) p. 7

¹⁷³ Sjøfjell (2010) p. 7

control the parent company is presumed to have over the activities of its subsidiary and how environmental concerns are given significant weight throughout the court's reasoning.

In a case subsequent to the Hempel case, the former employees of a bankrupt subsidiary sought to have their unpaid wage demand paid out by the parent company. The claimants argued that the Hempel case constituted a basis for piercing of the corporate veil for the benefit of other pressing social needs, in this case, for the benefit of the protection of the employee. They argued that considerations concerning employees' rights should not have a different position than environmental considerations in such situations. The Court of Appeal rejected this argument and held that the Hempel case could not serve as precedent for piercing of the corporate veil and also referred to the fact that the Supreme Court had found the interpretation of section 51 difficult despite the pressing social needs at stake.¹⁷⁴ The further appeal to the Supreme Court was rejected.¹⁷⁵

Thus, the lower court did not see the Hempel case as a matter of corporate veil piercing and it does not seem like the Supreme Court, through its rejection of the appeal, felt the need to clarify or correct this statement. Based on this decision, the Hempel case cannot be classified as corporate veil piercing. It also implies that pressing social needs, other than environmental, are not meant to be given the same status in Norwegian law.

Nevertheless, it is an example of a European domestic court placing environmental concerns before the shareholder's privilege of limited liability. It remains to be seen whether this case was just a peculiar single incident or whether it is the starting point of a durable trend in domestic environmental law. The way the court interprets the

¹⁷⁴ LH-2011-206280

¹⁷⁵ HR-2012-1732-U

provision in section 51 to be given a wide application has similarities to the fairly broad definition of the “operator” in The Environmental Liability Directive. The Directive does not apply to civil claims arising out of environmental damage¹⁷⁶ and the Hempel case concerned national authorities’ access to instruct a company to pay the costs of necessary inspection. However, the fact that these are initially matters of public law, does not necessarily mean that the definitions of the “operator” or “polluter” should be applied differently in a case of civil liability for environmental damage where locating the event of the tortious act is the issue.

When applying the tort-based approach applied in foreign direct liability cases it would however be necessary to establish a causal link as well, which means that the control over the subsidiary in itself is not sufficient. In addition, according to Rome II article 1(2)(d) the liability of “members as such for the obligation of the company” is exempted from its application.¹⁷⁷ It is therefore likely that when the liability is argued to be based solely in its capacity as a shareholder, this would be considered a question of company law, making Rome II inapplicable.

3.3 Conclusion

According to the main rule laid out in article 4(1) of the Regulation it is highly likely that the law of the host country will be chosen as the applicable law in a foreign direct liability case.¹⁷⁸

If the host country’s law is found applicable, there are still other provisions in the Regulation that may affect the outcome of the case. It is not likely that article 17 will have significant impact on a positive outcome for the claimant but it might be given application favorable to the defendant. The overriding mandatory rules in article 16

¹⁷⁶ Dir 2004/35/CE recital 14

¹⁷⁷ Bogdan (2009) p. 230

¹⁷⁸ Enneking (2012) p.164

and 26 can be used to offer the claimant protection under the home country's law. This is however difficult to foresee, as the application of these rules largely depends on the content of the legal system in the forum.

In foreign direct liability cases concerning environmental damage, the choice of law might be decided in favor of the home country's law under an interpretation of article 7. First of all, article 7's scope of application must not be limited to the classic forms of transboundary harm. Secondly, it is possible to identify the parent's operations as the events "giving rise" to the environmental damage.

This issue is closely related to the question of holding the parent company liable for the damage under the applicable substantive law. In order to have a chance of succeeding in this, the claimant could choose a tort-based approach with the aim of holding the parent company directly liable for the damage by arguing negligence of a duty of care towards the claimant.

Where it is possible to establish a link between the operations of the parent company and the damage sustained, it does not make sense to let legal principles governing companies stand in the way of this circumstantial fact.

Examples from EU law on environment and the domestic example of the Hempel case shows that the idea of the parent company as the "operator" or "polluter" may serve as a guideline in the interpretation. However, placing the event giving rise to the damage solely based on the parent company's control over the subsidiary is unlikely.

The question of whether article 7, and other provisions where the place of the tortious event is decisive, can be interpreted in this manner will ultimately have to be decided by the Court.

4 Foreign direct liability in the development of CSR

The concept of corporate social responsibility has been given numerous different contents and definitions. The Commission published a new policy on the subject in 2011, where the definition put forward was “the responsibility of enterprises for their impacts on society”.¹⁷⁹ Foreign direct liability is just one of many approaches towards holding multinational corporations accountable for their wrongful actions towards society. The focus of this thesis has mainly been whether the company is likely to be held accountable for such actions in a particular case. Another question is whether such cases in general are capable of molding multinational corporations’ behavior in society. This chapter will tentatively indicate what role foreign direct liability might play in the promotion of corporate social responsibility (CSR) and how this new form of litigation is perceived within the EU.

As foreign direct liability cases become more common in Europe, the threat of having to face litigation at home may become a more relevant factor for the parent company when involving themselves in its subsidiary’s conduct. This threat can be identified as a factor in the consideration of costs.¹⁸⁰ The costs of for example improving health and safety measures in the host country may well be exceeded by the litigation costs itself. The costs of compensation in the event that the claimants win the lawsuit must also be added to the bill. However, the case may also lead to a settlement, which is quite common.¹⁸¹ This threat can also be identified as factor concerning reputation. The Trafigura received extensive media attention which, regardless of whether the media coverage was fair or correct, put the company in a very bad light.¹⁸² Even if the case does not go further than a settlement, if the dispute gains

¹⁷⁹ COM/681/2011 p. 6

¹⁸⁰ Tzavara (2009) p. 7

¹⁸¹ Enneking (2012) p. 46

¹⁸² Trafigura (2013); Enneking (2012) p. 103

attention by the media, it might have an impact on the company's business. This is especially a likely scenario if the company is a producer of consumer merchandise.¹⁸³

In the Commission's new policy on CSR the concept is further described to consist of the company's actions "over and above their legal obligations" towards society and environment.¹⁸⁴ Foreign direct liability cases may narrow the gap between the social or moral expectations we have towards corporate actors and the legal obligations which can be imposed on them. Corporations' business in developing countries may be considered socially irresponsible by the home country, but within the legal system where they operate, the business is perfectly legal. What foreign direct liability cases have the ability to do is transforming these moral obligations into legal obligations. Legal obligations may be easier for companies to grasp, as the consequences of not acting in accordance with them are more immediate and tangible. This may also motivate the corporations to implement a responsible business practice throughout the organization which go beyond what is expected according to the current legislation in the host country.¹⁸⁵

Foreign direct liability might help the claimant in a particular case to obtain justice. But if the aim is to adopt an overreaching regulatory system for CSR, this form of legal strategy is destined to fail in pursuit of that aim due to its inherent nature. Foreign direct liability is not systematic¹⁸⁶ and the prospects of obtaining justice depend largely on the specific circumstances of the case.

How foreign direct liability can affect CSR in Europe also raises the question of the EU's attitude towards foreign direct liability. The European Commission's Enter-

¹⁸³ Enneking (2012) p. 35

¹⁸⁴ COM/681/2011 p. 3

¹⁸⁵ Enneking (2012) pp. 407-409

¹⁸⁶ Zerk (2006) p. 240

prise and Industry Directorate General commissioned a study which was completed in 2010 exploring the legal framework on human rights and the environment applicable to European enterprises operating outside the EU. This report shows that the EU is aware of issues concerning the operations of EU-based companies' subsidiaries abroad. The report does not discuss foreign direct liability specifically, but addresses relevant issues under European private international law. One of the concluding recommendations was to extend the application of the Brussels I Regulation to include third-country subsidiaries.¹⁸⁷ As provided in chapter 2, this recommendation was not followed in the final recast of Brussels I. In the Commission's new policy on CSR the Commission stated that it intended to publish a report on the implementation of UN Guiding Principles on Business and Human Rights where this report will also be considered.¹⁸⁸ However, such a report has not yet been published. The Commission has submitted an *amicus curiae* on behalf of the EU in two previous foreign direct liability cases brought before US courts on basis of the Alien Tort Claims Act.¹⁸⁹ However, the Commission did not address the issue of foreign direct liability cases within the EU in this connection.

Thus, it is not clear whether the EU is positive towards foreign direct liability or whether it sees this as a feasible tool for promoting CSR. This may be because, even though it is a much discussed topic, there are to my knowledge still just a handful of these cases that have been brought to Europe.¹⁹⁰

¹⁸⁷ Study on the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union (2010) paras. 235-236

¹⁸⁸ COM/681/2011 p. 14

¹⁸⁹ Enneking pp. 293-294; Amicus Brief of European Commission on *Sosa v. Alvarez-Machain*; Amicus brief of the European Commission on *Kiobel v. Royal Dutch Petroleum Co.*

¹⁹⁰ Enneking (2009) p. 904

5 Conclusion

This thesis was written with the ambition of exploring how legal obstacles in the claimant's pursuit of justice in a foreign direct liability case concerning environmental damage brought before European courts can be overcome. Foreign direct liability in the promotion of CSR in Europe was also to be tentatively indicated.

As regards to jurisdiction, the Brussels I Regulation assigns jurisdiction over cases against the EU-based parent company to the court of the company's home state and may under certain circumstances provide the claimant with a choice of different Member State forums. Jurisdiction over a third-country subsidiary will have to be decided by application of the home state's domestic rules of international law.

As regards to applicable law, the Rome II Regulation is likely to give application to the law of the host country with the exception of applicable overriding mandatory provisions and public policy exceptions. In certain circumstances, a broad interpretation of article 7 on environmental damage may provide applicability of the home state's law when the event giving rise to damage is placed with the parent company. This conclusion is supported by the wording of the provision, its purpose and the universal application of the Regulation together with rules of EU law and domestic law already opening up to the possibility of holding the parent company liable for the subsidiary's operations.

As regards to the long accepted ideas of corporate groups consisting of separate legal entities and the shareholder's limited liability, this does not have to stand in the way of placing the tortious event with the parent company.

As regards to foreign direct liability cases playing a role in the promotion of CSR, the reality of facing this form of litigation may be a factor in molding EU-based companies' involvement in the operations of its subsidiary. The EU is yet to give an explicit opinion on the union becoming a base for foreign direct liability cases and whether this can be a tool in the promotion of CSR.

In conclusion, concerning the overall possibility of establishing liability for an EU-based parent company in these cases, it should be noted that there are several other obstacles the claimant must overcome that have not been discussed here. These would be for example the geographical distance, the financial and psychological burden of initiating such a lawsuit and difficulties of obtaining necessary evidence.

Nevertheless, establishing foreign direct liability for environmental damage in Europe is legally possible. Whether this possibility will be present, or even improved, in the future will largely depend on the EU's willingness to facilitate the legal process by taking into account the comprehensive consequences of environmental damage, the complex reality of multinational corporations' activities and the possibility of applying foreign direct liability as a tool in the development of CSR.

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Dir 2004/35/CE	Directive 2004/35/CE of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage
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