jurisdiction to make a third-party debt order interfering with the rights in contract where that order would not be recognised according to the law which governs the debt (*Société Eram Shipping Co. Ltd. v Compagnie Internationale de Navigation* [2003] UKHL 30, [2004] 1 A.C. 260).

The contractual characterisation is more consistent with a practical, modern view of comity. Acting in accordance with the applicable law is internationally accepted. The applicable law has the advantage of being generally clear and predictable, unlike a decision based upon comity. It is consistent with a narrow view of the *lex fori*. A party such as Bank Mellat would request non-inspection of documentary evidence of contracts on the ground that the foreign law governing those contracts requires confidentiality. Expert evidence of the content of the applicable law would still have to be evaluated. In this case the expert himself confused breaches of contractual and criminal law in Iran, possibly as a result of the parties not being clear in the questions raised. That confusion facilitated the English court denying the effect of Iranian law. A clearer focus on what an expert is to opine would lead to better results.

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PARENT COMPANY DUTY OF CARE TO THIRD PARTIES HARMED BY OVERSEAS SUBSIDIARIES

IN *Vedanta Resources plc. v Lungowe* [2019] UKSC 20, the Supreme Court affirmed the decision of the Court of Appeal that a UK parent company may owe a duty of care in English law to third parties affected by the activities of an overseas subsidiary. The case arose from allegations that the Nchanga Copper Mine in the Republic of Zambia repeatedly discharged toxic chemicals into local watercourses, polluting the only source of water for drinking and crop irrigation. The Mine is operated by Konkola Copper Mines (KCM), a Zambian company whose ultimate parent is the UK-domiciled Vedanta Resources (Vedanta). A group of 1,826 Zambian citizens brought claims in English courts against both companies, claiming negligence and breach of statutory duty under Zambian law. For Vedanta, they relied on Article 4 of the Brussels 1 Recast Regulation and argued that the company exercised a high level of control over both the mining operations and KCM's compliance with health, safety and environmental standards. For KCM, they invoked the "necessary or proper party" gateway in paragraph 3.1(3) of Practice Direction 6B of the CPR to serve the claim form outside the jurisdiction. Among other things, the gateway requires (1) there to be a "real issue" between the claimant and the

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domiciled defendant, which it is reasonable for the court to try and to which the foreign defendant is a necessary and proper party; and (2) that England be the proper place for the litigation or for there to be a real risk that the clamant will not obtain substantive justice in the proper place. The appellant-defendants argued that the gateway requirements were not satisfied and that relying on Article 4 of the Regulation to bring a claim against a domiciled defendant in order to take advantage of the gateway was an abuse of EU law.

The Supreme Court dismissed the appeal. Lord Briggs, who gave the leading judgment, agreed that there was a real triable issue – namely, whether Vedanta's involvement in KCM's operations gave rise to a duty of care to the claimants. He rejected the argument that parent company liability was a novel extension to the law of negligence; rather, the "general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B" (at [54]) can be traced back to *Dorset Yacht Co. Ltd. v Home Office* [1970] A.C. 1004. Whether a parent company owes a duty of care to third parties for the activities of a subsidiary depends on "the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control supervise or advise the management of relevant operations (including land use) of the subsidiary" (at [49]). This may be where the parent has taken over management of the relevant activities or given advice on how to manage a risk these categories are not exhaustive: "there is no limit to the models of management and control" of transnational corporations (at [51]).

The appellant-defendants argued that a parent company could never incur a duty of care in respect of the activities of a subsidiary simply by promulgating group-wide policies and expecting the subsidiary to comply with them. They relied on *Okpabi v Royal Dutch Petroleum*, in which Simon L.J. stated that the adoption of mandatory group-wide polices "cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily every subsidiary) such as to give rise to a duty of care" ([2018] EWCA Civ 191, at [88]). In contrast, Lord Briggs held that such polices may give rise to a duty of care "if the parent does not merely proclaim them, *but takes active steps*, by training, supervision and enforcement, to see that they are implement by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, *even if it does not in fact do so*. In such circumstances *its very omission* may constitute the abdication of a responsibility which it has publicly undertaken" (at [53], emphasis added). The second part of this statement is striking in that it suggests that a duty of care may arise simply from the assumption of control without the need to demonstrate actual control. The Supreme Court may provide further clarity on this point, as it is recently agreed to hear the *Okpabi* case. As for

Vedanta, there were published materials in which the parent company "may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial" (at [61]).

The appellants' also argued that relying on Article 4 of the Recast Brussels Regulation to bring a claim against Vedanta in order to sue KCM under the "necessary or proper" party gateway was an abuse of EU law. Lord Briggs was not persuaded by this argument: the High Court had already established as a matter of fact that the claimants were suing Vedanta also because they have a *bona fide* claim against it, and because there was evidence that KCM "might prove of doubtful solvency" (at [24]). Moreover, the abuse of law doctrine "is limited to the collusive invocation of one EU principle so as improperly to subvert another" (at [36]) but the issue in the present case is that Article 4 appears to disable courts from applying the English *forum conveniens* jurisprudence. This is because when it is apparent to a court that the claim against the domiciled defendant will proceed in England regardless of whether permission is given to serve the foreign defendant, the risk of irreconcilable judgments makes it difficult to conclude that anywhere other than England is the proper place for *both* claims. According to Lord Briggs, this is not an abuse of EU law but the consequence of courts treating the possibility of irreconcilable judgments as a trump card. Instead, they should treat this possibility as one factor in determining the proper place. Adopting this approach, he concluded that Zambia was the proper place for the combined claims: the alleged unlawful acts and the relevant damage took place there; the Mine operated pursuant to a Zambian mining licence and in accordance with Zambian law; and the claimants would find it difficult to give evidence in the UK. However, the absence of adequate funding options (Conditional Fee Agreements are prohibited in Zambia) and legal resources meant that there was a real risk that substantial justice would not be obtainable. KCM could therefore be served under the "necessary or proper party" gateway. From an access to justice perspective, the final outcome is to be welcomed. However, there remain difficult normative questions about where transnational tort cases of this sort should be heard. Although it is important for victims and for corporation responsibility more broadly that UK courts remain open to hearing cases against foreign subsidiaries of UK parent companies, it is also hard to avoid the conclusion that these complex and heavily fact-dependent cases frequently end up in the courts of states with well-resourced and well-financed lawyers, far from the site of harm and at the expense of empowering the states in which the harm occurred.

Although only a pre-trial decision on jurisdiction based on assumed facts, *Vedanta* is hugely important for transnational corporate responsibility and will likely have an impact on the reasoning of courts worldwide. From an access to remedy perspective, it is particularly significant that the court accepted that a parent company may owe a duty of care to third parties when it promulgates a group-wide policy and takes active steps to enforce it, or the parent holds itself out as supervising implementation of the policy but then fails to do so. As the facts of *Vedanta* demonstrate, being able to rely on group-wide policies is crucial for claimants who have to demonstrate a good arguable case before disclosure of internal company documents. However, there is a risk that the Supreme Court's decision will result in a backlash as company lawyers to review group-wide guidelines to ensure that responsibility for their implementation lies with subsidiaries. However, this may not always be possible, particularly where domestic obligations and international guidelines require companies to have human rights due diligence policies for the entire transnational group and global supply chain.

Lord Briggs makes it clear that there is nothing "special or conclusive about the bare parent/subsidiary relationship" (at [54]): a duty of care does not follow from equity ownership but from control and assumption of responsibility. Does this suggest that a retail company could incur a duty of care if it holds itself out as supervising and enforcing corporate responsibility policies in its supply chain but then fails to do so? As in all duty of care cases, the outcome would depend on the precise facts, but it is plainly more difficult to prove that a company – even a dominant global brand – is in a position to exercise a sufficient level of control over a contractual partner than a majority owned subsidiary (see the decision of the Court of Appeal for Ontario in *Das v George Weston Limited* 2018 ONCA 1053, a case which arose out of the collapse of the Rana Plaza building in Bangladesh). Nevertheless, by emphasising that the parent/subsidiary relationship is not a conclusive factor, *Vedanta* arguably keeps the door open for supply-chain responsibility.

The emphasis on control and assumption of responsibility underscores the fact parent duty of care to third parties is an exceptional form of liability and that in many transnational tort cases, separate legal personality will continue to obstruct access to justice. This starting point stands in contrast to areas of corporate regulation like EU competition law, where the parent is presumed to have exercised decisive influence over wholly owned subsidiaries, save where it can show that the subsidiary acted autonomously. The "single economic undertaking" is held responsible for any infringement without the need to demonstrate the personal responsibility of the parent. The potential for a transnational duty of care is no doubt a significant step forward, but it remains striking that, absent control and intervention, a parent may reap the benefits of a subsidiary's risky activities while the

poorest and most disenfranchised bear the corresponding burdens and social costs.

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PRIVACY INTERNATIONAL IN THE SUPREME COURT: JURISDICTION, THE RULE OF LAW AND PARLIAMENTARY SOVEREIGNTY

ASK any UK lawyer to name a seminal constitutional law case and there is a fair chance that he or she will cite *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147, in which the House of Lords reconceived the notion of jurisdictional error, interpretively neutralised a statutory provision that appeared to displace judicial review, vindicated the rule of law, and, at least on one analysis, implicitly raised questions about the extent of Parliament's legislative capacity. If *Anisminic* – decided just over half a century ago – was one of the blockbuster constitutional judgments of the last century, then *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 W.L.R. 1219 is its early twenty-first-century counterpart.

The claimant sought judicial review, arguing that the Investigatory Powers Tribunal (IPT) had misinterpreted section 5 of the Intelligence Services Act 1994 (ISA), leading it erroneously to conclude that the Secretary of State could authorise computer hacking on a thematic basis (e.g. in respect of classes of people). Section 67(8) of the Regulation of Investigatory Powers Act 2000 (RIPA), however, appeared to stand in the way of such a claim. It provided that, except to such extent as the Secretary of State by order provided otherwise, "determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court". Since the discretion in section 67(8) to provide for appeals had not been exercised, relevant IPT decisions would be legally impregnable absent judicial review. The question in *Privacy International* was whether, properly construed, the legislation accorded that status to such decisions.

In the Divisional Court ([2017] EWHC 114 (Admin), [2017] 3 All E.R. 1127), Sir Brian Leveson P. considered (at [42]) that there was a "material difference" between the sort of decision-making body whose decision was impugned in *Anisminic* and the IPT, since the latter was itself "exercising a supervisory jurisdiction over the actions of public authorities". This led him to the conclusion that judicial review did not lie. Although he did not go as far as to dissent formally, Leggatt J. plainly had grave misgivings, arguing