



Bhopal 20 years on: *forum non conveniens* and corporate responsibility

3 December 2004 was the 20th anniversary of the world's worst modern industrial accident—the Bhopal gas disaster in India. Leakage of toxic gas from a pesticide plant run by a local subsidiary of US firm Union Carbide killed at least 3800 people and injured many thousands more.¹

The Bhopal disaster led to a classic international legal case in which Union Carbide used the '*forum non conveniens*' doctrine to avoid being sued in the United States. Under this doctrine, courts can dismiss or 'stay' a case if the location is inappropriate or inconvenient for the defendant. *Forum non conveniens* has been routinely used by US corporations over the last two decades to block cases involving personal injury and/or environmental damage suffered overseas. UK companies have used the doctrine in a similar way. In Australia, however, the High Court has insisted on a more 'globally responsible' *forum non conveniens* approach, enabling Australian companies to be sued here if something goes wrong abroad.

Forum non conveniens only exists in common law countries. In civil law nations it is unknown. The European Union's 1986 Brussels Convention, for example, provides an automatic right to sue a multinational corporation in its home country.

Old rule

The traditional *forum non conveniens* rule in common law countries—from the 1936 *St. Pierre case* in the UK—was that a court could not refuse to consider a case

within its jurisdiction unless the plaintiff's choice of forum was:

... oppressive or vexatious to the defendant or would be an abuse of process in some other way.²

The rationale of the old rule was to stop a vindictive plaintiff deliberately harassing a defendant through legal action in a remote and inconvenient location. Since taking a company to court in its own country could not amount to harassment, local corporations had no escape from their home courts under the traditional rule.

New US and UK rule

In the 1980s both the US (*Piper Aircraft* 1981)³ and the UK (*Spiliada* 1987)⁴ abandoned the traditional *forum non conveniens* rule, primarily due to an overload of commercial litigation in their courts entirely involving foreign parties. Instead they adopted a 'most suitable' or 'more appropriate' forum approach, balancing foreign and local factors to decide the most 'natural' country to host the litigation. This imposed an immediate handicap on foreign plaintiffs, especially in human rights cases, where the event causing the injury or damage, the witnesses and much of the evidence would invariably be located in the plaintiff's own country—key factors suggesting a *forum non conveniens* dismissal under the new doctrine.

In the *Piper Aircraft* case, the US Supreme Court endorsed formal discrimination against foreign claimants, stating that a foreign plaintiff's choice of the US for legal action 'deserves less deference'.⁵

The Bhopal Case

In 1986 the Bhopal survivors and relatives of the dead sought compensation in the United States from the parent Union Carbide corporation. They were represented by the Indian Government which had declared itself the sole litigant in relation to the disaster.

Before the US case began, the Chief Justice of the Supreme Court of India said:

It is my opinion that these cases must be pursued in the United States ... It is the only hope these unfortunate people have.⁶

According to Judge Keenan of the New York District Court, however, the Indian connection with the case far outweighed the interests of citizens of the United States in the matter:

The presence in India of the overwhelming majority of the witnesses and evidence ... would by itself suggest that India is the most convenient forum for this ... case.⁷

Judge Keenan said that to retain the case in the United States would be a form of 'imperialism', imposing US rules, standards and values on a developing nation:

To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged.⁸

When the case returned to India, the Indian Government lodged a \$US3.3 billion claim against Union Carbide in the Bhopal District Court. In 1989, however, it agreed to a \$470 million settlement

discharging the company from all future claims over the disaster. The bulk of this money remained in the Bank of India until 2004 when the Indian Supreme Court ordered that it be distributed to 566 000 claimants, who were to receive several hundred dollars each.⁹

Other cases

Apart from the Bhopal case, US courts have cited the *Piper Aircraft* decision to dismiss many other foreign claims for *forum non conveniens*. According to the *International Business Law Review*, 470 lawsuits have been filed against US companies over the last 20 years for injuries allegedly caused by use of the pesticide DBCP on banana plantations in developing countries. Largely because of the US *forum non conveniens* doctrine, however:

... no US court has yet heard a case on its merits, even though the first DBCP case was filed in 1984.¹⁰

Effect of dismissal

When such cases are dismissed from the United States, in theory they are re-tried in a foreign country. But in practice they are normally never heard of again. As academic David Robertson says:

Rather than embarking on an arduous journey through one or more foreign legal systems, many a plaintiff will simply surrender ... [M]any plaintiffs ... run out of money, lawyers, stamina, courage, or lifespan before completing the foreign voyage.¹¹

US corporations and global responsibility

The US *forum non conveniens* doctrine means Union Carbide and other US multinationals are not held to account in the United States when things go wrong overseas. Under the US approach it is difficult for the liability of such companies to be tested in US courts. As (then) Justice Deane of the Australian High Court pointed out, the US approach meant, for example, that in the *Piper Aircraft* case:

Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.¹²

The difficulty of suing US companies in their home jurisdiction makes it hard to obtain enforceable judgments allowing access to the assets of such firms. In addition, allowing foreign cases to be readily dismissed for *forum non conveniens* helps US corporations escape domestic standards in their overseas operations (although other factors are also relevant). As Professor Joel Paul said in the *Harvard International Law Journal*:

By allowing transnational business to choose legal systems imposing a lower regulatory burden than the United States, US courts have effectively lowered regulatory standards. By refusing to exercise jurisdiction in a case like *In re Union Carbide*, a court effectively allows a US manufacturer to avoid US tort liability and encourages other manufacturers to locate plants abroad.¹³

The Australian approach

In *Oceanic Sun Line* (1988)¹⁴ and *Voth* (1990)¹⁵ Australia's High Court refused to adopt the 'most suitable forum' approach in *forum non conveniens* matters, instead devising its own 'clearly inappropriate forum' test. As with the US/UK approach, Australian courts will balance the foreign and local factors in a case. But a dismissal will only be granted if the defendant can show that it is 'oppressed' or 'harassed' by the plaintiff's choice of Australia for legal action. This retains the rationale of the traditional doctrine, making it impossible for Australian companies to obtain a dismissal from their own courts on *forum non conveniens* grounds.

The High Court's refusal to follow the US/UK approach attracted strong criticism. It was accused of 'judicial imperialism' for not

allowing international cases to be heard in the country where they had the 'greatest connection'. As one critic said of the Australian approach, 'no policy, other than that of naked and open chauvinism, supports it'.¹⁶

In *Renault v Zhang* (2002),¹⁷ however, the High Court affirmed the 'clearly inappropriate forum' test as Australian law. And it stated that even where the law of a foreign country had to be applied to decide a case, Australia would not be a 'clearly inappropriate' forum for hearing the matter.

The Ok Tedi case

The *Ok Tedi case* (1995)¹⁸ showed the benefits of the Australian approach. The case concerned pollution of river systems and adjoining land in Papua New Guinea from the Ok Tedi copper mine owned by Australian corporate giant BHP. The Ok Tedi landowners sued BHP in the Victorian Supreme Court for environmental damage. In the US a *forum non conveniens* dismissal would have been expected where, as in the Ok Tedi case, all the plaintiffs resided in a foreign country, the damage occurred entirely within that country, and much of the necessary evidence was located in the foreign land. But there was no point in BHP seeking a *forum non conveniens* dismissal. Under the Australian test it would have to show that it was being 'harassed' by the choice of Melbourne—its corporate headquarters—for court action.

The *Ok Tedi case* occurred as the rebellion on the PNG island of Bougainville was coming to a head. The spark for the Bougainville rebellion was local landowner dissatisfaction with the operation of the RTZ-CRA Panguna copper mine. As the lawyer for the Ok Tedi people said:

The only difference in Bougainville's case was that the rebellion occurred because the

people had no access to legal recourse, but with Ok Tedi the people were able to put their faith in the legal system ... If there hadn't been that option via the law courts, then I think there is a real prospect it would have developed into violence also.¹⁹

The fact that legal proceedings could occur in Australia encouraged a settlement in 1996 under which BHP agreed to pay compensation and construct a waste containment system for the Ok Tedi mine.

Role of foreign governments

Forum non conveniens, however, is only one hurdle in obtaining legal compensation from multinational corporations. Another obstacle is the role of foreign governments in preventing legal action.

It is not surprising that national governments often have a direct stake in major industrial projects. But when accidents occur, governments face conflicting pressures: on the one hand to obtain appropriate compensation for the people affected, and on the other to avoid scaring away foreign investment.

In the case of Bhopal, the Indian Government owned 22 per cent of the local Union Carbide subsidiary which ran the Bhopal plant. Similarly the PNG Government owned 30 per cent of the Ok Tedi mining enterprise. Another example is Romania's Baia Mare gold mining project—a joint venture between the Romanian Government and Australian company Esmeralda—where an accident in January 2000 released cyanide into major river systems in Hungary.²⁰

In all three cases laws were enacted restricting litigation:

- in 1985 the Indian Government enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act making itself the sole litigant in relation to the disaster, preventing any legal action against the government

itself and stopping a later class action in the US

- after a dispute over implementation of the 1996 settlement, the PNG Government enacted the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001 indemnifying BHP from damages and preventing any future legal action,²¹ and
- in 2003 the Romanian Government issued a 'force majeure' certificate for the Baia Mare accident, declaring that it was caused by extreme weather and exonerating the joint venture parties from any liability.²²

Effect in Australia

In the *Renault case* (2002), Australia's High Court said that where an incident causing injury or damage occurs overseas, the law of the foreign country is likely to apply even if a case is heard here. Despite Australia's stricter *forum non conveniens* doctrine, therefore, laws such as those enacted by the PNG and Romanian governments could prevent legal action in Australia.

The High Court suggested that whether it would in fact apply such laws, or might refuse to on public policy grounds, would be decided at a preliminary stage—that is, at the same time as determining whether Australia was a convenient forum for the case. The implication is that if some of the foreign law needed to decide a case offends Australian standards of justice, then this country may be a 'clearly inappropriate' forum for hearing the matter. In other words, Australian courts may not be able to pick and choose which bits of foreign law to apply and still hear the case.

After the Baia Mare accident, there were reports that the Hungarian Government would commence legal action in Australia, with the *Ok Tedi*

case cited as a precedent.²³ But this has not occurred, perhaps because the *Renault* decision makes the Romanian 'force majeure' certificate effective under Australian law.

The European Union and *forum non conveniens*

In a draft ruling in December 2004, the European Court of Justice (ECJ) said that the UK *forum non conveniens* doctrine was incompatible with the United Kingdom's obligations under the European Union's Brussels Convention.²⁴ The ECJ said that *forum non conveniens* detracted from the legal protections the Convention sought to promote. Plaintiffs wasted time and money when cases were removed to another country; if a just outcome proved unachievable in the other country it was difficult to restart the case in the UK; and if a fair result could be obtained in foreign proceedings, this would require further expense and probably involve considerable delay. In the latter respect, the UK *forum non conveniens* doctrine:

... could be regarded as incompatible with Article 6 of the European Convention on the protection of human rights and fundamental freedoms.²⁵

If confirmed, the ECJ's decision will mean the death of the *forum non conveniens* doctrine in the United Kingdom. British corporations will no longer be able to use it to have cases removed from UK courts. As a recent article in a British industry journal said:

A resolution of this issue bringing it in line with other European countries will make it impossible to stay claims on the grounds of 'forum non conveniens' in England. This is a scary possibility for multinational companies.²⁶

Conclusion

Compared to the United States, Australia has a more 'globally responsible' *forum non conveniens*

doctrine which acts as a barrier against local multinationals seeking to escape the application of Australian jurisdiction and legal standards in their overseas operations. Despite strident criticism of Australia's failure to adopt the US/UK doctrine, it appears the UK approach will now be brought into line with Australia's.

However, notwithstanding the refusal of US courts to accept responsibility for cases such as the Bhopal litigation, the balance in ensuring corporate accountability is not necessarily in Australia's favour. The US offers avenues for legal action not available in other countries. As Monash University's Professor Sarah Joseph explains, US laws such as the Aliens Torts Claims Act (ATCA), the Torture Victims Protection Act (TVPA) and the Racketeer Influenced and Corrupt Organisations statute:

... provide plaintiffs with unique substantive causes of action against [US and other multinational corporations] that have breached their human rights.²⁷

Taking action under these laws, however, involves other hurdles. For example, foreign claimants can normally only sue under ATCA or TVPA where a national government is involved. Moreover, US defendants can still have such actions dismissed on *forum non conveniens* grounds. As Professor Joseph points out, *forum non conveniens* remains a 'daunting impediment to transnational human rights litigation in the US'.²⁸

In Australia's case, its tough line on *forum non conveniens* is not enough to ensure a 'just' or 'fair' result where injuries or damage involving Australian corporations occur overseas. The High Court's *Renault* decision appears to have increased the potential for overseas laws to prevent foreign claimants obtaining compensation in Australia.

Legislation is another option for this country. In response to the Baia Mare accident, the Australian Democrats introduced a Corporate Code of Conduct Bill in 2000 requiring Australian companies to adhere to environmental, human rights and labour standards when operating overseas. However the Bill was not supported by the major Australian political parties.

Further reading

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3. 454 US 235.
4. [1987] AC 460.
5. 454 US 235 at 256.
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23. Alexander Szakats, 'Cross Border Pollution—Private International Law Problems in Claiming Compensation', (2001) 32 VUWLR, 609 at 619; Bernard Lane, 'Neighbours have legal recourse', *The Australian*, 15 February 2000.
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25. *ibid.*, at [270]. Article 6 states that everyone is entitled to a fair determination of their civil rights 'within a reasonable time'.
26. Y. Belgore, 'Forum non conveniens in England and USA for litigation against oil multinationals', *Oil, Gas & Energy Law Intelligence*, v. 1, Issue 1, Jan 2003.
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