Foreign Direct Liability Claims in Sweden:  
Learning from Arica Victims KB v. Boliden Mineral AB?  

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Abstract

On 12 September 2013 what may be the first foreign direct liability claim in Sweden was filed in the County Court of Skellefteå. This court action is reflective of a growing wave of civil liability suits in European jurisdictions to hold transnational corporations accountable for human rights violations and environmental damages. This article examines the feasibility of foreign direct liability claims in Sweden, focusing on enabling conditions with regards to jurisdiction, collision rules and applicable law, substantial legal basis, procedural and practical circumstances, and the theories by which parent companies can be held liable for negligence in supervising acts of subsidiaries and contractors. It is demonstrated that foreign direct liability claims on environmental damage indeed are possible in Sweden albeit with considerable constraints, primarily of procedural and financial character. The conclusion provides some cautious remarks on the merits of the claim against Boliden and the reform options available to a Swedish government committed to improving the access to justice for victims of violations perpetuated by Swedish companies, their subsidiaries and contractors.

Keywords


1 Introduction

On 12 September 2013 what may be the first Swedish (and to wit also Scandinavian) foreign direct liability claim against a corporation concerning environmental damage abroad was filed in the County Court of Skellefteå. The plaintiff is the association Arica Victims KB, representing 707 people in the Chilean town of Arica. The defendant is the Swedish company Boliden Mineral AB, one of the largest Swedish mining corporations, which during 1984–85 exported 20,000 tons of mining waste (sludge) from its facility in Skellefteå to an area known as Polygono in Arica. The sludge, containing high levels of arsenic, mercury, lead and cadmium, was handled by the Chilean company Promel S.A and was dumped in Polygono, used as a playground for children and where social housing was subsequently constructed.

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From the late 1990s, a wave of serious diseases were observed in the community, including cancer, impaired breathing, skin diseases, physical and mental disorders and an increased rate of miscarriages. In 2009–2012, the first medical tests of the inhabitants were made, which demonstrated excessive levels of, among other, arsenic in the blood stream. After having been unable to reach an out-of-court settlement with Boliden, the plaintiffs now claim close to 91 million SEK from Boliden in compensation for the damages.\(^1\)

In the claim, the plaintiffs aim to show Boliden’s negligence in its involvement in the act that led to the damages suffered by the plaintiffs, i.e. that Boliden owed a duty of care directly to the victims despite the fact that the actual depositing of the sludge was undertaken by a Chilean contractor. The actions, it is argued, were contravening Swedish law and purposefully aimed at circumventing forthcoming changes in the Swedish regulation on the export of toxic waste. While Boliden was licensed to undertake the industrial activity in question, major decisions on handling of the mineral waste were expected to be made in a coordinating group involving government authorities, established under Swedish law. The export to Chile, it is argued, took place without the consent of this group. Furthermore, in this view, Boliden was prior to the waste dumping clearly cognizant of the health risks associated with the act. In an application for a patent for a new technology to remove arsenic from its mining waste, Boliden stated that – at the time – no other technology existed anywhere in the world that could render such sludge safe.

This court action in Skellefteå is reflective of a growing wave of civil liability suits in European jurisdictions, wherein plaintiffs, civil society activists and lawyers are seeking to hold transnational corporations (TNCs) to account for violations of human rights violations and environmental damages abroad.\(^2\) While these transnational cases are few-and-far between and fraught with considerable legal and practical obstacles, they have nonetheless, as noted by Richard Meeran, who has led a number of cases from the UK based law firm Leigh Day and Co., provided a “salutary warning to TNCs which have depended, in the past, on applying double standards overseas and escaping liability by hiding behind their local subsidiaries”.\(^3\) The recent high-profile court cases against the Shell Group in the Den Haag District Court in the Netherlands have shown the possibility to hold corporations accountable for human rights abuses abroad under the Dutch Civil Code.\(^4\) These cases involved both Royal Dutch Shell, domiciled in Den Haag, and its Nigerian subsidiary. It was the first transnational litigation against a Dutch company, and the Court upheld its view that it had jurisdiction to summon both the Nigerian subsidiary and the Dutch parent company in a joint hearing, with Friends of

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1 Skellefteå Tingsrätt, T. 1021-13 Arica Victims KB v. Boliden Mineral AB.


the Earth Netherlands granted *locus standi* to litigate the case as a public interest suit. The substantive assessment of the Court dismissed the liability of Royal Dutch Shell since the parent was not found to have supervisory responsibility under Nigerian tort law (which was applied to the case). Yet, the Nigerian plaintiff, Akpan (a farmer from the Niger delta), was awarded compensation from the Nigerian subsidiary, which was found liable for mismanagement of its operations leading to oil spills and contamination. The cases were subsequently appealed to the Dutch Supreme Court.

Cases such as these have stimulated interest among lawyers, law scholars and civil society activists in Sweden, who have been prompted to ask: What are the legal underpinnings of the claim against Boliden? To what extent are court actions as seen in the UK and the Netherlands legally and practically feasible? This article aims to make a contribution towards answering these questions, providing an analysis of the legal liability of parent companies in Sweden for environmental damages abroad and possible avenues for transnational tort litigation in Swedish courts.

2 Background

The human rights and environmental dilemmas provoked by experiences of global corporate impunity have stimulated growing interest in the ability to apply domestic legal systems to hold TNCs to account for violations abroad. It is well recognised that TNCs continue to operate in regulatory vacuums created between disaggregated structures with opposing rationales, principally the market-driven opportunism of global corporate networks and the classical democratic territorialism of nation states. In other words, there is a persistent tension between private international law delimiting and distributing jurisdictions and the aspiration of universal application of international human rights and environmental protection norms. The privileges afforded to transnational corporations through private law are also well known: separate legal personality (allowing *de facto* control over subsidiaries despite the lack of such control being recognised *de jure*), limited liability (protecting shareholders from financial risks beyond their initial investment) and full legal capacity (companies’ entitlement to own shares in other companies).

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8 See F. Gregor, *Principles and pathways: Legal opportunities to improve Europe’s corporate accountability framework* (European Coalition for Corporate Justice, Brussels, 2010).
As argued by Nicola Jägers, among others, these privileges largely comprise ‘legal fictions’, inherited from an era when societal and corporate conditions were rather different. As a case in point, the principle of limited liability has its roots in the early times of the British industrial revolution when corporations were not permitted to hold shares and corporate groups were thus unknown. In their current form, these privileges serve to undermine the objectives of international human rights and environmental law as well as the preventive and deterring functions of both criminal and tort law in domestic regimes. Furthermore, the lack of transparency in corporate governance and opaque decision making processes make it often impossible to identify who is responsible within corporate networks, thus preventing the location of legal liabilities.

It is partly due to these limitations that some scholars have argued that the characteristics of international law are symbolic of the emergence of an ‘imperial global state’ serving the interests of a transnational corporate capitalist class while undermining substantive democracy at intra- and inter-state level. In this vein, Anderson highlights the “acute need to develop legal devices that can represent legitimate interests across national boundaries”. To be sure, it is increasingly recognised that non-state actors hold responsibility also under international law. However, while international human rights law and environmental conventions places obligations on states to protect their citizens and environment, they do not provide international enforcement mechanisms to hold TNCs to account. For instance, under the European Convention on Human Rights (ECHR) states are not under an obligation to control their nationals outside the national territory. Similarly, existing environmental conventions and European Union (EU) directives do not provide legal remedies for plaintiffs outside the EU. For instance, the Aarhus Convention on the access to justice in environmental matters does not consider the potential for non-nationals to file claims in the EU and the EU Environmental Liability Directive specifies the liability of public authorities and not corporations.

Because of the lack of implementing mechanisms for international human rights and environmental norms attention has been directed to the feasibility of applying national courts and domestic tort law. In European foreign direct liability claims, as will be detailed below, cases that may otherwise represent human rights violations linked to natural resource exploitation are framed under domestic tort law as personal injury cases associated with environmental damages. For this reason, the article does not make a detailed treatment of the

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12 Anderson, supra note 2.
distinction between human rights and environmental damage cases. The special characteristics of foreign direct liability claims are appraised in the following section and some comments on the implications from a transnational justice perspective are provided in the conclusion of this article.

2.1 Foreign Direct Liability Claims

Transnational human rights litigation has predominantly arisen in common law countries, where courts may exercise jurisdiction over foreign companies regarding extra-territorial actions. In civil law countries the tortfeasor must be domiciled within the jurisdiction.\(^{15}\) In Europe, criminal prosecution has thus far been most prevalent, with cases focusing on the cooperation of corporations with military regimes and dictatorships and/or the involvement in (civil) war and other armed conflicts.\(^{16}\) While the development of criminal accountability is urgent, non-criminal accountability mechanisms are equally important, and may even be more effective in some instances.\(^{17}\)

The US has seen the majority of transnational litigation on corporate violations, with more than 150 cases brought against TNCs in US federal courts since the mid-1990s. The 2004 \textit{Sosa v. Alvarez-Machain} case set a precedent that human rights abuses under international law could be tried in US courts. The 2005 \textit{Doe v. Unocal} case was the one of the first court cases involving corporate human rights and resulted in confidential but substantial compensation through settlement.\(^{18}\) These cases have generally been filed as human rights cases under the Alien Tort Statute, granting universal jurisdiction. However, with the recent US Supreme Court ruling in \textit{Kiobel v. Royal Dutch Petroleum Co.}, the judiciary has taken a less plaintiff-friendly position and the window seems to be somewhat closing.\(^{19}\) Combined with the obstacles presented by the \textit{forum non conveniens} doctrine (enabling the court to dismiss the claim if it believes a more appropriate forum exists elsewhere), this prompts examination of other legal avenues and other jurisdictions. Here, the possibilities within European jurisdictions to file civil claims under ordinary tort law gain increasing interest.

European tort cases against TNCs generally comprise of negligence claims, alleging that the parent company itself has breached a duty of care owed directly to the victims of harm arising from the operations of one of the parent’s subsidiaries.\(^{20}\) This means that the claims centre on 1) an alleged violation of (written or unwritten) norms pertaining to proper societal conduct as reflected in the duty of care; 2) that the parent was directly involved in the violation and thus

\(^{15}\) Joseph, \textit{supra} note 10.

\(^{16}\) \textit{For instance} the criminal complaint filed to the Swiss public prosecutor against a senior manager in Nestlé for negligence contributing to the death of a Colombian trade unionist and the complaint. See European Center for Constitutional and Human Rights, ‘Criminal Complaint against Nestlé Switzerland concerning murder of Colombian trade unionist Luciano Romero’, <www.ecchr.de/index.php/nestle-518.html>, visited 30 June 2014.


\(^{19}\) Jägers \textit{et al.}, \textit{supra} note 4.

has a degree of control over the acts of the subsidiary, which justifies liability. In this way, foreign direct liability claims seek to mobilise domestic tort law to overcome the barriers presented by the lack of enforcement mechanisms for international human rights law, complex corporate structures and the legal privileges afforded by company law, including that of separate legal identities.

Scandinavian countries have seen little if any court action testing the legal liability of companies for human rights abuses and environmental damages abroad. In a 2004 review of jurisprudence in Norway of companies having been found liable for grave violations of international law, Fafo did not find any past or pending cases. Close to ten years later, Sjåfjell similarly concluded that Norway has seen no transnational civil liability cases and that the only cases have related to alleged corruption abroad. Similarly, Sweden had, until the 2013 claim against Boliden AB, seen no civil cases. This review identified only one criminal court case in Sweden, namely against Lundin Oil for negligence and complicity in gross human rights violations in its oil operations in Sudan. No criminal or civil cases involving transnational business operations were identified in Denmark.

Since many of the legal questions associated with foreign direct liability claims are novel and penetrate traditional legal boundaries, courts will often lack clear legal statutes or prior court praxis as reference and will need to innovate. Legal doctrine thus plays a potentially considerably role. Till now, research in transnational litigation has tended to focus on the US and UK jurisdictions. More recently, research has focused also on civil law jurisdictions in the EU, such as the Netherlands. To wit, the only explicit treatment in the Swedish doctrine of the feasibility of foreign direct liability claims associated with environmental damages is found in an analysis by Jonas Ebbesson. This study was conducted prior to the entry into force of the Rome II Convention and focused on the considerations when host country tort law is applied. The present article builds on Ebbesson’s analysis (in Swedish) and makes many of its considerations available to foreign observers. It extends the analysis into the possible use of Swedish tort law and also provides a more detailed treatment of practical and financial considerations connected to a foreign direct liability claim in Swedish courts.

2.2 Objective and Method

21 Enneking, supra note 2, p. 175.
23 B. Sjåfjell, ‘Sustainable Companies: Possibilities and Barriers in Norwegian Company Law’, 2013-20 Legal Studies Research Paper Series (University of Oslo Faculty of Law, Oslo, 2013). One criminal complaint has been filed by Amnesty Norway against Aker Kvæener ASA for its role in building and servicing Camp Xray at Guantanamo Bay; however, the state prosecutor decided not to proceed. See Amnesty International Norway, ‘Kritiske kommentarer til statsadvokatens begrunnelse for å henlegge anmeldelsen av Kværner ASA’, <www.amnesty.no/aktuelt/fere-nyheter/arkiv-lobby/kritiske-kommentarer-til-statsadvokatens-begrunnelse-%C3%A5-henlegge-an>, visited 30 June 2014.
25 Jägers and van der Heijden, supra note 7, Enneking, supra note 2.
This article aims to contribute to the body of work on foreign direct liability of European corporations, covering a jurisdiction that so far has received limited attention. The analysis is hoped to support increased awareness among Swedish actors of the avenues for foreign direct liability claims and to inform legal scholars and practitioners outside Sweden about the Swedish legal regime, its opportunities and weaknesses. As such, the paper asks the following main question: What is the feasibility of foreign direct liability claims in Sweden?

The structure of the analysis is inspired by the findings of Liesbeth Enneking in her study of foreign direct liability claims and the experiences in the Dutch Shell cases in the Den Haag District Court. Enneking distinguished four areas where enabling conditions must be present for a claim to be feasible: jurisdiction (the rules of civil jurisdiction determining if the court has jurisdiction to adjudicate on the claim), collision rules and applicable law (how the choice is made in conflict-of-law situations between different possibly applicable laws, partly depending on the framing of the claim), substantial legal basis (whether there is a legal basis for the claim in the applicable tort law regime, and other applicable sources of law), and procedural and practical circumstances (including financial costs, evidential rules, possibilities of collective action claims, etc.). In addition, some attention is given to the theories by which the parent company can be held liable for its negligence in supervising the acts of its subsidiaries. A brief introduction to the Swedish legal regime, Swedish company law and the tradition of rights based litigation is provided as a background to the analysis.

The analysis relies on a synthesis of statutory law, travaux préperatoires and previous work in the Swedish doctrine and scholarly work, including on jurisdiction, collision rules and international private law, tort law and procedural rules. In some cases, given the possibility that a Swedish court may refer to court praxis in countries with related legal regimes, references are also made to court praxis in other Nordic jurisdictions. The study has only in a few instances included direct assessment of court praxis beyond what is already available in scholarly works. This decision was made since detailed analyses of case law to large extent already are available and since more specific readings of praxis would be relevant only for the analysis of the feasibility of specific claims.

3 The Swedish Legal Regime

Sweden is a constitutional monarchy with executive power vested in the government (Regeringen) and legislative power in the legislature (Riksdag). The judicial system is comprised of 55 district courts, six courts of appeal and the Supreme Court, all handling both criminal and civil cases. Specialised courts and administrative courts (concerning consumer rights, the labour market, and the environment) do not process transnational claims. The legal systems of the Nordic, and especially Scandinavian, countries have been influenced by both Anglo-Saxon common law and continental Europe’s civil law system. Regional cooperation

27 Enneking, supra note 2.
28 Rooted in a relatively common societal heritage, Scandinavian legal institutions and concepts derive from more or less the same basis. Law was originally based on regional codes from the Middle Ages. The law of torts was previously not codified. See J. Hellner, ‘Unification of Law in Scandinavia’, 16 American Journal of Comparative Law (1968) pp. 88–98.
in private law was substantial until the 1970s, but has reduced in recent decades.29 One example of legal cooperation concerns the Nordic Convention on Environmental Protection (Miljöskydskonvention), which provides all citizens in the Nordic countries (except Iceland) with equal access to national courts. Still, while statutes may be similar, the praxis of the courts may vary considerable between the countries.

The Swedish legal tradition is dualist in nature, with international rules treated separately from national law and only obtaining value through the latter. The primary mode of implementation of international law has been through transformation into national law, but recent years have seen an increase in direct incorporation.30 Like other Scandinavian countries the Swedish domestic penal law has integrated a number of provisions of international human rights law, which can be enforced with universal jurisdiction.31

The most important sources of law in Swedish courts are, in order of descending importance: 1) statutory acts/legislation, 2) court praxis, 3) travaux préparatoires and 4) doctrines (expert statements). The considerable reliance on preparatory works to inform the court on how to interpret statutes based on their originally intended function is rather unique in the EU.

Scandinavian countries also tend to borrow case law and praxis from one another to a greater extent than from other EU member states. Supreme Court rulings may thus be influenced by precedence of other country courts despite having no direct binding effect. Furthermore, recently, the guidance from the Swedish Supreme Court decisions have increased, with rulings laying out more detailed general principles as a basis for decisions, which can serve as precedence in subsequent cases.32

3.1 Rights-based Court Litigation

The role of the Swedish judiciary in shaping social change has historically been limited. Until recently, the judiciary was not expected to have any political function in interpreting legal statutes or providing checks on the powers of the executive or legislative branches. As expressed by Professor Lindblom in the late 1980s, “it appears that the state consciously or unconsciously seeks to keep away disputes from the courts”.33 Instead, dispute resolution and legal debate has primarily been centred on the state institutions as the loci of supervision and control, and alternative dispute resolution procedures have often replaced court actions. If not prevented by the executive itself, courts have often actively decided against performing judicial reviews of executive actions.

Sweden, like other EU countries, never saw the revolutions of for instance Germany and France in the 18th and 19th centuries that paved the way for the elaboration of citizens’ rights

29 In the area of company law, this may be partly influenced by the increased competition to secure company registrations and the fact that harmonisation proceeds through the EU.
31 E.g. Hillblom, supra note 22, Amnesty International Sweden, supra note 30.
and a stronger rights-based approach in the court system.\textsuperscript{34} Other possible reasons for the limited use of the courts commonly suggested are a relatively low degree of polarisation between government and civil society or within society, a preference for consensus decision making, and a relatively high degree of trust in government. Evidently, social change has historically largely happened via social movements and political executive reform, not through civil rights movements with litigation as a central strategy.\textsuperscript{35}

More recently, however, a shift has taken place towards a wider role of the Swedish courts, including in prevention, reparation, control and judicial law-making. This shift appears partly contingent on the so-called ‘move towards Europe’ and the incorporation of the ECHR into Swedish law.\textsuperscript{36} An important influence has been exerted by the rulings of the European Court of Human Rights at Strasbourg on Swedish violations of the ECHR.\textsuperscript{37} It is partly for these reasons that Lindvall and Rotstein refer to the fall of the ‘strong state’ approach to social steering in Sweden.\textsuperscript{38}

Other developments may have been equally important, including rapid technological and economic change spurring law reforms and need for interpretation of new legal principles, which to a greater extent are laid out in framework legislation with generic clauses. Altogether, these developments have resulted in a shifted balance of power between the judiciary and law making.\textsuperscript{39} The use of the ECHR has led to the increased possibility to have public agencies’ decisions tried in court, and has contributed to a move away from the assumption of ‘all-mighty’ public authorities. The strength of judicial review of authorities’ decisions on environmental matters appears to have improved since the accession to the EU.\textsuperscript{40}

Still, Swedish courts show resistance to apply case law of the European Court of Justice (ECJ) as precedence when the cases concern other EU countries. Furthermore, Sweden continues to receive criticism from the United Nations (UN) and the EU that while access to rights in general are high, specific groups remain marginalised and have their basic human rights


\textsuperscript{35} However, apparently the first New York legal aid clinic was in fact inspired by lessons in Copenhagen with providing legal aid to the urban poor; see E. Rekosh, ‘Constructing public interest law: Transnational collaboration and exchange in Central and Eastern Europe’, 13:1 UCLA Journal of International Law and Foreign Affairs (2008) pp. 56–96.


infringed. This includes stigmatisation of Romas and discrimination against indigenous Sami people.41

3.2 Company Law

Sweden, like other Nordic countries, adopted with their accession to the EU the distinction between private and public limited companies, which originated in German law and was later inserted into European Community law.42 Public limited companies can raise capital from the general public, typically through trades in shares, and thus qualify for listing on the stock exchange. They are hence subject to stricter regulation to protect shareholder and stakeholder interests. The Nordic company law regime favours shareholder supremacy, while seeking to afford greater protection of other stakeholders than is the case in common law, such as minority shareholders, creditors and employees.43

The Swedish Companies Law (Aktiebolagslagen 2005:551) applies the principle of incorporation, i.e. a corporation is considered Swedish when registered with the state authority Bolagsverket.44 Thus, while EU company law is increasingly harmonised through EU Company Directives, Swedish corporate law retains, so far, the ‘incorporation theory’ and companies are governed by the law in accordance with which they are duly established.45 However, with recent case law, the ECJ has contributed to a de facto dismantling of the alternative ‘seat principle’ and promotes a competition between EU member states in providing the most attractive company law for registration.46

When the Swedish Companies Act was first developed in 1848 the emphasis was on restricting the power of the companies and the risk that they would inflict damage on the public interest. In the 1910 reform, focus was on protecting the concerns of creditors and third party interests in general. With the 1944 reform, the protection of shareholders and creditors was stressed even further, as was the need for companies to contribute to Swedish welfare. The subsequent 1975 reform emerged from a coordinated Nordic legislative collaboration and – reflective of the social democrat rule – emphasised the interests of workers/employees and regulation to protect minority shareholders and company capital. The 2005 reform, which yielded the current act, presented some liberalisation. It also included what is known as a

41 See The Committee on the Elimination of Racial Discrimination (CERD), ‘Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12–30 August 2013)’, CERD/C/SWE/CO/19-21, 30 August 2013.
42 The full list of legal entities permitted under Swedish private law are the so-called aktiebolag, handelsbolag, kommanditbolag, enkeltbolag, ekonomisk föreningar and ideella föreningar. See T. Sandström, Svensk aktiebolagsrätt (Nordstedts Juridik, Vällingby, 2012).
44 Sandström, supra note 42.
‘managerial revolution’, i.e. that directors were given more freedom to maximise shareholder value.47

In Sweden, the principle of limited liability was originally justified based on an argument for the public good; in that it would enable large industrial enterprises to contribute to the development of the welfare state and provide conditions for employment, including large infra-structural projects such as the railroads.48 Compared to the UK, the industrial revolution took place only from the second half of 1880s, and the first limited liability companies tended to be in the forest industries, namely saw mills and pulp industry. The establishment of limited liability companies was strongly tied to large business banks, especially during the early 1900s with mergers into groups of companies and trade in shares. Despite some growth also in Small and Medium Enterprises, the developments were thus often led by a few wealthy families in alliances with large banks – several of these families retain a considerable dominance in the Swedish business sectors up till today. In contrast, risk capital is now predominantly generated from large institutional owners, such as insurance companies, pension funds and shareholding funds.49 This appears to parallel developments in the Nordic region at large.50 Harmonisation within EU company law has played a considerable role. As in the general European company law regime, the ‘purpose’ of corporations is largely unregulated in company law, and most regulation is directed at protecting shareholders (thus relying on ‘shareholder primacy’ as an ideological basis).

There are only a few reporting requirements for Swedish companies, besides those found in the EU directives on non-financial reporting.51 The Swedish Companies Act contains no provisions requiring corporations to safeguard or otherwise promote sustainable development. Whereas no specific requirements are placed on private companies, public limited companies are governed by the Swedish Corporate Governance Code of February 2010, which adopts the ‘comply or explain’ principle in that companies are expected to (voluntarily) report on their compliance with the code or explain in cases of deviation.52 Under the Swedish Environmental Code, companies that have been issued an environmental permit shall also report on conditions in the operations of their subsidiaries. Moreover, special reporting requirements are in place for state-owned companies.53 The Swedish finance minister decided in 2012 that boards of state-owned corporations shall be responsible for sustainability policies

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49 Sandström, supra note 42.
50 Sjärfell, supra note 23.
and that guidelines for reporting of state-owned companies follow the Global Reporting Initiative (GRI) standard.

4 Conditions for Foreign Direct Liability Claims in Sweden

Following this introduction to the Swedish legal regime the following sections provide a synthesis of the enabling conditions for foreign direct liability claims, focusing on jurisdiction, applicable law, substantive legal basis, and procedural and practical circumstances.

4.1 Jurisdiction

Sweden adheres closely to the EU jurisdictional rules. The Brussels I Regime and the Brussels/Lugano conventions are considered by the Supreme Court to express generally accepted international jurisdiction principles to influence national interpretation.54 The Brussels I Regulation (44/2001) stipulates the competence of national courts and their jurisdiction in questions pertaining to international private law. The general rule is that a court case shall be filed at the place where the defendant corporation/person is domiciled (Article 60). According to Article 59 of the Regulation, the definition of the defendant’s domicile shall be answered by Swedish law, typically the Code of Judicial Procedure (Rättsbalken 1942:740, Chapter 10, §1).55 According to Article 5(5), a corporation can also be sued if the tort refers to activities of the branch of a corporation based in Sweden despite the parent company being incorporated elsewhere.

The ECJ has clarified that forum non conveniens is not permitted under the Brussels I regime and these rules shall also be applied in international disputes involving non-member states.56 Furthermore, no general rule exists in Sweden to allow courts to decline jurisdiction based on forum non conveniens. However, it has been suggested in the doctrine that courts may decline jurisdiction based on the perceived ‘inappropriateness’ of hearing the claim in Sweden.57 There is currently no statutory basis, nor case law, supporting the existence of forum necessitatis in Sweden. However, it appears that the courts tend to interpret extensively the ordinary jurisdictional rules when no other foreign court has jurisdiction. Swedish courts thus may feel obliged to provide a forum and an extensive interpretation of the national forum rules if no foreign court exercises jurisdiction.58 There is no express authorising of Swedish courts to exercise universal jurisdiction in civil proceedings.

56 ECJ C-281/02, Owusu v. Jackson et al.
57 Wikholm and Hamzeh, supra note 54. In contrast, in Norway, the Civil Disputes Act (act no. 90 of 17 June 2005) states (Section 4-3) that disputes in ‘international matters’ may only be brought before Norwegian courts when there is a “sufficiently strong connection to Norway”. According to some scholars, this principle was applied in some cases even before the act was modified to its current form.
58 NJA 1971, cited from Wikholm and Hamzeh, supra note 54. See also M. Bogdan, ‘The treatment of environmental damage in Regulation Rome I’, in J. Ahern and W. Binchy (eds.), The Rome II Regulation on the
In situations not listed in the Brussels I Regulation, then the ordinary (so-called exorbitant) national jurisdictional rules apply, principally the provisions in Chapter 10 on domestic disputes in the Swedish Code of Judicial Procedure. However, jurisdictional rules for Swedish courts (domsrättsregler) may derive from both procedural law as well as rules inserted into substantive law. The Swedish Code of Judicial Procedure contains no general provisions on international claims and extends its general principles to cross-border cases. Domestic forum rules are here applied to transnational cases by means of analogy.

The general exorbitant rule of jurisdiction is that the district court in the place of residence of the defendant will have jurisdiction (section 1). A corporation is considered to reside where the board has its seat or, if it has no permanent seat, where administration is carried out. For a person, residence is defined based on civil registration in Sweden, i.e. the place where he/she was registered on the 1st of November of the preceding year shall be considered to be his/her residence. The provision also provides for suing in a district court where the defendant is sojourning.

Specific provisions (section 3) allow district courts where property or an asset is located to exercise jurisdiction, irrespective of the defendant’s residence. This provision (the ‘asset rule’) is specifically aimed at international cases which will have jurisdictional problems. It allows bringing proceedings for any claim against the defendant, even if unrelated to the asset or for a value going beyond such asset. A line of case law has demonstrated the possibility to provide jurisdiction despite a weak link to Sweden, but that the asset must have some value. Furthermore, the ‘delict forum rule’ (section 8) states that tort claims can be filed in a Swedish court if either the tortuous act was committed or the harm was incurred in this place.

Claims against multiple defendants can be consolidated when claims are based on essentially the same grounds or if all interested persons will be bound by the same judgment (section 14). They can be brought in a court in which any defendant is required to respond. However, case law suggests that joining claims with non-EU co-defendants can only be allowed in exceptional cases. The general rule is that the jurisdiction rules must directly grant jurisdiction to the claim on the co-defendant. The Supreme Court has stated that a minor connection to Sweden can be sufficient to allow for jurisdiction.

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60 Bogdan, supra note 55. It is common in Scandinavia to rely on analogies from existing legislation if no specific rules apply to a claim. See also Hellner, supra note 28.


62 See also NJA 1932, p. 267 and Bogdan, supra note 55. See also L. Pålsson, Svensk rättspraxis i internationell processrätt (Nordstedts Juridik, Uppsala, 1989).

63 In its decision NJA 1986, p. 729 a Swedish citizen domiciled in England became co-defendant with two other Swedish defendants on the basis of a connection between the claims and a minor relation to Sweden. See Wikholm and Hamzeh, supra note 54.
Some of the exorbitant forum rules have been deactivated in the Brussels I Regulation’s Annex 1, which lists the rules which cannot be used to sue a person domiciled in a member state. For Sweden this includes the ‘asset rule’. However, for defendants who are not domiciled in an EU member state all national rules apply. Note however that Annex 1 of the Brussels Regulation is not exhaustive so other provisions in the Procedural Code may be exempted.

4.2 Collision Rules and Applicable Law

The general choice-of-law rules derive from the EU’s Rome II Regulation on the Law Applicable to Non-contractual Obligations (EC/864/2007), which has direct effect for disputes concerning events taken place after its entry into force 11 January 2009. While originating in the need for coordination among member states, it applies to all transnational conflict-of-law concerns, also with non-member states. For tort claims, the general rule of lex loci damni applies (Article 4), unless the claim is covered by special rules in other articles. This means that the law of the place where the injury was suffered shall apply. For environmental damage (Article 7), plaintiffs may choose between lex loci damni and lex loci delicti (also known as lex loci actus), i.e. the law of the place where the tortuous act took place.

The possibility to choose applicable law for environmental damage claims, known as the principle of ubiquity, is aimed to provide greater protection in transnational cases involving weak law regimes prone to exploitation. The special rules for environmental damage in the Rome II Regulation refer to the Treaty of the EU (Article 174), which states the need for a high level of protection based on the precautionary principle, the principle of prevention and the principle of interventions at the source. The principle of ubiquity will normally lead to favor laesi, i.e. application of the law most advantageous to the plaintiffs, at least when the plaintiff has access to juridical expertise to make this judgment. While the provisions in the Rome II Regulation do not specifically mention injunctions, the objectives and underlying principles of the Regulation (e.g. recital 25) suggest that injunctions could also be covered.

The Rome II Regulation speaks vaguely of the ‘place where the harmful event occurred’ because the drafters left it open to the court to decide how to interpret the harmful event. These ambiguities were dispelled in the landmark case Handelskwekerij GJ Brier BV v. Mines des Potass d’Alsace, namely that victims of environmental degradation can sue the polluter in the home court, place of pollution and the place where the injury was caused. The argument was based on the teleological principle of the Brussels Convention, aiming to protect the weakest party and strengthening access to justice by favouring the use of the strictest law.

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64 The ECJ has not yet ruled on the application of the Rome II Regulation
65 Bogdan, supra note 58.
67 Bier v. Mines de potassse d’Alsace, ECJ 21/76.
68 See also J. Lookofsky and K. Hertz, Transnational litigation and commercial arbitration. An analysis of American, European and International law, 2nd edition (Juris Publishing and DJÖF Publications, Copenhagen, 2004). Overall, the ECJ has over the years expanded the reach of jurisdiction to favour plaintiffs in
For tortuous acts or omissions prior to the entry into force of the Rome II Regulation in 2009, applicable law is determined by the international private law in Sweden at the time. This question has been examined by scholars in relation to the recent Boliden case, where the harmful events took place in the 1970s. Plaintiffs here argue that the case must be judged according to the tort law of Chile. In Swedish international private law praxis there has been no distinction between *lex loci delicti* and *lex loci damni*, and the general principle of *lex loci delicti* in Rome II is considered to be the generally applicable principle. 69 This is not a unanimous view, however. A Supreme Court decision from 1969 adopted the principle *lex loci damni*. Also, prior to the Rome II regulation, the so-called ubiquity principle has been applied in Sweden, permitting the plaintiff to decide on applicable law. Still, according to the majority view in the Swedish doctrine, for environmental damages incurred prior to 11 January 2009, the principle of *lex loci deliciti* appears to be applicable.

Other special rules may determine the law applied to the claim. According to Article 17 of the Rome II Regulation, appropriate account must be taken of the codes of conduct in force in the place of damage. However, it is unlikely that the defendant will be exempted of liabilities despite complying with all rules of conduct in the place of damage, if it was known that they were insufficient. 70 Furthermore, according to Article 16 of the Brussels Regulation, Swedish courts may also apply the principle of ‘overriding mandatory provisions’ in national law instead of host country law. 71 Swedish courts may also apply the rule of *ordre publique*; that is, when the court finds that the consequences produced by the foreign law are incompatible with Swedish public policy. The application of this rule is, however, prevented in some cases under the Brussels I Regulation (Article 35(3)). Furthermore, in Sweden, there are very few examples of cases where the *ordre publique* rule has been evoked openly; often collision rules are instead re-interpreted. 72 This may owe to concerns that openly ignoring foreign law may lead foreign governments to retaliate by disregarding Swedish law. 73 Moreover, it has been argued that if the host country would lack rules establishing liability for ‘obvious’ damages, then Swedish courts could construct their own rules for the specific case by analogous use of the Environmental Code. 74

4.3 Substantive Legal Basis

If it is established that a Swedish court has jurisdiction over the claim and that Swedish law will apply, then the court will assess the substantial legal basis for the claim by means of the Swedish Tort Liability Act (*Skadeståndslagen* 1972:207). The Act is the first tort law, prior to which the penal code (in its Chapter 6) of 1864 was applied. While the penal code formally only covered criminal torts, in practice it was extended to most tort claims. Swedish tort law environmental cases, see F. K. Juenger, ‘Environmental damage’, in C. McLachan and P. Nygh (eds.), *Transnational tort litigation* (Clarendon Press, Oxford, 1996) pp. 201–215.


70 Bogdan, supra note 58.


73 Bogdan, supra note 55.

74 Ebbesson, supra note 26.
underwent significant reforms in the decades after the Second World War as part of a Scandinavian reform process. This included, notably, strengthening the liability of the state and public authorities and the principle of vicarious liability of employers for tortuous acts of their employees. The 1972 Act also codified a long-established praxis in Swedish law, namely that financial loss are only amenable to damages if the acts committed are simultaneously criminal. Some exemptions have however emerged from court praxis in later years. In contrast, tortfeasors will be liable for damages arising from loss of life, personal injury or damages to property irrespective of the criminality.75

The Swedish Tort Liability Act is a framework law with generally formulated provisions. Its Chapter 2, §1 states that: “He/she who intentionally or negligently causes a personal injury or damage on a property must compensate for the damage.” The Act specifies three types of liability: 1) personal liability, 2) vicarious/principal liability, and 3) liability of the state and public authorities. In this section, the emphasis will be on personal and vicarious liability since these principles are most relevant to corporate accountability.76 Tortfeasance (vällande), generally accepted in Swedish praxis despite not being defined in the statutes, is a common term covering both intent (mens rea) and negligence. While torts can thus be awarded based on negligence in the act of corporate staff, the Swedish tort law does not penalise omissions or passivity.77 The notions of intent and negligence are not defined in the statutes.

The definition of culpa arising from negligence relies on a composite assessment of the conditions of the act (the so-called subjective element). The court will define a standard for the act and, second, assess if any circumstances exempt the person/legal entity from following this standard. The standard is normally defined from specific norms in legislation or in guidelines from public authorities that are aimed explicitly at the acts in question. The standard can also rely on customary norms, but there is yet little praxis in Sweden in this regard, including the use of Corporate Social Responsibility (CSR) or branch specific standards. If the court is unable to derive a sufficient standard, then the court makes an independent assessment. Established principles derived from praxis show that the likelihood of culpability from negligence generally depends on 1) the risk that the damage would occur, 2) the magnitude or severity of the potential damage, 3) the defendant’s costs in avoiding the

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76 Public authorities can be liable for errors in their control and environmental monitoring, if deviating from expected standards. However, authorities generally have much freedom to exercise discretion in their judgments. Liability will be transferred to private entities that undertake a function delegated from a public authority, carrying out functions of the state or municipalities. Moreover, foreign nationals may also file requests for injunctions or judicial review of agency decisions under the Environmental Code and the Administrative Procedures Act and the Act of Administrative Court Procedures; however, the jurisdiction is limited to the Swedish territory. Discussion on Swedish compliance with the Aarhus Convention is ongoing, including whether the rules on standing of environmental NGOs are too strict (including criteria of a 2000 member minimum and three year establishment period). E.g. H. B. Jensen, ‘Measures on access to justice in environmental matter (Article 9(3) – Country report for Sweden’, Inventory of EU Member States’ Measures on Access to Justice in Environmental Matters (Milieu Ltd., Brussels, 2007), P. H. Lindblom, Miljöprocess – del I + II (Iustus Förlag, Uppsala, 2001).
risk, and 4) the extent to which the damage was foreseeable to the tortfeasor. If the plaintiff has given implicit consent then this can to some degree exempt the defendant from liability.\(^78\)

Above and beyond the negligence test, the claimant must demonstrate a causal relationship between the tortuous act and the damage. The Swedish Tort Liability Act does not define how causality shall be determined. Court praxis has established that the act must have been a ‘necessary condition’ for the damage (\textit{condition sine qua non}), and often must have been the decisive factor causing the damage. However, the act does not necessarily need to be the only or dominant cause. The court applies a so-called ‘adequacy assessment’ (\textit{adekvansbedömning}) to determine if the act has been an adequate cause. According to praxis, the plaintiff will be expected to show that it is ‘considerably more likely’ that the causal relations claimed by plaintiff are true than those of defendant.\(^79\)

\subsection*{4.4 Parent Company Liability}

Foreign direct liability claims, per definition, targets the parent company for its own acts and not those of its subsidiary. Meanwhile, several liability theories may potentially interact during court assessments. Therefore, in addition to the principle of duty of care in Swedish tort law discussed above, this section briefly treats three specific liability theories that may potentially enable plaintiffs to hold the parent company accountable for acts of its subsidiaries. These include 1) the theory of principal/vicarious liability, included in the Swedish Tort Liability Act, 2) the theory of operator liability in Swedish environmental law, and 3) one or several theories of ‘veil piercing’ associated with Swedish company law. The theories of the liability of a principal and an operator both respect the principles in corporate law of limited liability and separate legal entities of parent and subsidiary. In contrast, veil piercing dismantles these corporate privileges and treats the parent and subsidiary as one and the same legal entity. While it is very rare that the theory of veil piercing is applied, and so far only to domestic cases within the Swedish national territory, court praxis and the doctrine suggest that it may, potentially, interact with the theories of principal and operator liability during concrete court rulings.

The notion of principal or vicarious liability is rather strong in the Swedish Tort Liability Act (Chapter 3, §1). An employer has principal liability, irrespective of whether she/he has been directly implicated in the employee’s acts. Furthermore, if a principal decides how a task shall be enacted and exercises some degree of control over the tortfeasor then the principal will be liable irrespective of whether a formal contractual relationship exists.\(^80\) The notion of ‘employee’ is extended to include everyone who undertakes actions for another person under conditions that are similar to those in an employer-employee relationship; however, the act must have taken place within what can reasonable be considered the ‘service’ (Chapter 6, §5). The statutes contain little clarification on the definition of employee, but the \textit{travaux}

\(^78\) Hellner and Radetzki, \textit{supra} note 77.

\(^79\) In Swedish the formulation is “\textit{Klart mera sannolikt}”. \textit{See NJA 1993}, p. 764, cited from Hellner and Radetzki, \textit{supra} note 77.

préparatoires details that a wide interpretation shall apply. Overall, the same assessment of causation is made for physical as for legal persons – but company organs also account for anonymous and accumulated acts and omissions of several staff. The Tort Liability Act also clarifies that all employees, not only those with superior responsibilities, are liable. The law also applies the concept of ‘non-delegable duties’, i.e. the company will be responsible for acts despite having delegated these to another person.

In contrast to the wide definition of principal liability, the Swedish Tort Liability Act does not contain provisions on the liability of contractors; corporations, thus, cannot be liable for acts or omissions of independent actors that they contract. In addition to the theory of the liability of principals the Swedish Tort Liability Act also applies the ‘organ theory’; that is, that the company’s governing ‘organ’ (typically the board or executive committee) becomes liable for the acts of staff. In practice, while these so-called dogmatic underpinnings differ, the result is the same irrespective of which theory is applied, namely that the legal person becomes liable while the physical person is exonerated (notwithstanding whether the person is a regular employee or board member/director). Rulings thus tend to simply refer to the culpability of ‘the company’. However, in general, the managing director has supervisory duty and will be primarily liable for damages caused by the behaviour of one of her/his employees, and only in extreme circumstances can the board of directors be held liable. No exact scope of supervisory responsibilities is defined but depends on the organisation and type of business activity. Swedish case law recognises the existence of de facto ‘shadow directors’ and a parent company Chief Executive Office that overrules the organs of the subsidiary will be liable as a normal employee of the subsidiary.

The Swedish Companies Act (Chapter 1, §5) defines a ‘group of companies’ as a parent company and its subsidiaries if it owns more than 50 per cent of the shares. Like most other EU jurisdictions, Swedish company law provides no legal definition of the distribution of responsibilities in groups, with each company assumed to be a distinct legal entity. Instructions provided from the parent company will thus generally be considered as decisions exerted by the shareholders at the general meeting. Shareholders may be liable for torts only when they breach the statutes of the Swedish Companies Act or instructs the directors in breach of the articles of association (Swedish Companies Act, Chapter 15, §3).

In the analysis of corporate accountability and transnational litigation in other jurisdictions much attention has been devoted to different theories of ‘veil piercing’

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81 Hellner, supra note 75.
82 Bengtsson and Strömback, supra note 80. See also NJA 1953, p. 144, cited from Hellner and Radetzki, supra note 77.
83 The Nordic corporate governance model implements a so-called ‘dual executive system’ in which both the board of directors and an executive committee are jointly liable as formal company organs; see Lau Hansen, supra note 43.
85 Moberg, supra note 48.
86 In fact, individual members on the board of directors can be liable for promoting any unwarranted considerations for environmental sustainability that can result in financial loss or otherwise have negative effects.
In the doctrine, there is disagreement if there is evidence that one or several veil piercing theories exist in Swedish courts. The same ambiguity exists in other Nordic countries. The instances that are generally considered to include examples of veil piercing have been based on cases in which shareholders have been held responsible for corporate debts of a subsidiary. This principle is codified in the Swedish Companies Act (Chapter 13, §2) in the rule of capital deficiency (kapitalbrist). The doctrine has identified the following preconditions for veil piercing from court praxis: 1) lack of independence of the subsidiary from the parent company, 2) the subsidiary was undercapitalised, 3) some additional implicating factor, such as purposefully seeking to circumvent liability. A Government Inquiry from 2008 confirms this reading. Moberg has suggested that an additional criterion is that the company has not been loyal to the company form as regulated in the Swedish Companies Act; however the criterion is found only in rulings from the Courts of Appeal and not in rulings of the Supreme Court.

The perhaps most cited example of veil piercing took place when a limited liability company (Nyköpingsåns kraftverks interessenter) was established by a number of private parties to build a dam and regulate the watercourse in the river Nyköpingsån. Flooding caused by the dam led to damages on the property of a downstream occupant. This person sued the company, which however lacked capital and was declared bankrupt. The Supreme Court found that the case fulfilled the conditions for holding the shareholders liable. A main reason was that the limited liability company managing the dam was not seen to carry out independent activity but was established and controlled by its owners solely for the dam construction project.

In 1987 a government inquiry put forward a proposal for codification of a legal principle of veil piercing, but this did not win approval. In particular, the proposal considered to include the principle of ‘undue influence’ (otillbörlighet) as exerted by the parent, but concerns were raised regarding the ‘vagueness’ of this criterion. The government rejected the incorporation

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88 For instance, within Danish company law, there is no regulation of group of companies and rules on corporate entity responsibility are few, e.g. in the Danish Company Act. The veil has only been lifted in few cases, where the financial capital has been mixed. The general requirements for accessing the assets of shareholders have been that shareholders 1) assume actual leadership roles in the subsidiary and thus become liable as directors, and/or 2) abuse their position, e.g. that the independence of the subsidiary was not respected. See Erhvervs- og Selskabsstyrelsen, Modernisering af selskabsretten - betænkning 1498 (Schultz distribution, Copenhagen, 2008). In Finland, while there have been no cases of veil piercing, a test was constructed by the Finish Supreme Court in the case KKO 1997:17, wherein the justifiability of veil piercing is seen to depend on 1) the extent of ownership of the parent in the subsidiary, 2) the independence of the subsidiary, and 3) whether there is an intention to violate the rights of subsidiary’s creditors.
92 NJA 1947, p. 647, see analysis in Andersson, supra note 89. Moberg, supra note 38, also identifies this case as the first clear-cut example of veil piercing.
93 Government of Sweden, Ansvarsgenombrott m.m. Betänkande av betalningsansvarsanskommittén med förslag till ändringar i aktiebolagslagen (SOU 1987:59).
of this principle since it was seen to undermine the limited liability of shareholders and that there was no urgent need to legislate. Legal scholars have observed that because of the lack of statutory definition on the matter, Swedish courts may still refer to parts of the 1987 proposal when adjudicating on parent company liability.

The third theory of parent company liability to be treated here is based on the principle in Swedish environmental law of the liability of ‘operators’ (verksamhetsutövare). In the Swedish Environmental Code (Miljöbalken 1998:808, Chapter 10, §2), the operator is the person or legal entity that legally as well as de facto has exerted a decisive influence on the activity in question. This principle is derived from EU environmental law, notably in the Environmental Liability Directive (EC/2004/35), which has developed the notion of operator liability independent of company law. This provides a broader theory of liability than is found in veil piercing, with the possibility to influence the interpretation of parent company liability. Several examples of travaux préparatoires have discussed how the theory of operator liability complements veil piercing and that it could be developed further, without undermining company law principles, to include actors with vested interests who knowingly permit the activities. Meanwhile, strong reasons are needed for a Swedish court to disregard an environmental permit in the host country, such as proof of corruption or if the company activities blatantly disregard fundamental human rights.

The most recent Swedish case law applying the theory of operator liability is from a ruling by the Svea Court of Appeal, in its capacity as Environmental Supreme Court, wherein a parent company was held jointly liable with its subsidiary for the environmental clean-up of toxic waste. The Court relied on several principles in determining the liability of the parent company, including that the subsidiary was wholly owned by the parent and that the subsidiary had only been able to continue operations, despite annual deficit over a longer period, because of the financial support from the parent. This is seen to suggest that the parent company had both complete legal control over the subsidiary and had a decisive influence in letting the subsidiary continue its operations. In Norway, a related case attracted attention in

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94 Government of Sweden, supra note 90.
95 See Ebbesson, supra note 26, citing decisions from Koncessionsnämnden för miljöskydd KN 126/91 and 190/92; and RÅ 1997 ref. 12.
96 The Environmental Liability Directive (2004/35/CE, Art. 6) defines ‘operator’ 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, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity”.
97 See review in Sections 4–5 of Government of Sweden, Miljöansvarsutredning: Ett utvidgat miljöansvar (SOU 2006:39). Similar debate has taken place in Norway on the possibility to develop the theory of operator liability further concerning specifically tort claims on environmental damages. The Norwegian government has, so far, concluded that it would not be appropriate because of concerns with the economic impacts and reduction in risk taking in the private sector. Norwegian Foreign Ministry, Næringslivets samfunnsansvar i en global økonomi (St.meld. nr. 10, 2008–2009).
98 Ebbesson, supra note 26.
99 M 11429-12, see also T. Sandström, Ansvarsgenombrott mot ett aktiebolags ägare (InfoTorg Juridik Index, 2013).
2010 when a parent company, Hempel, was held liable under the Norwegian Pollution Control Act (Section 51) for the costs in a clean-up after an under-capitalised subsidiary. \\(^{100}\)

While tort law does not apply rules of strict liability, the Swedish Environmental Code (Chapter 32) defines several instances of strict liability for specific activities, which bears high levels of intrinsic risk. \\(^{101}\) These rules were incorporated, in unchanged form, from the former Law on Environmental Damages (*Miljöskadelagen*; 1986:55). \\(^{102}\) Under the rules of strict liability, the liability is stronger than in the general tort law based on culpa. As part of the environmental public administrative law regime, these strict liability rules cannot be applied to transnational tort claims and they do not fall under the Rome II regulation’s definition of tort law. Still, it has been suggested that future court praxis may find more cases of inherently dangerous activity that can motivate strict liability, beyond what is based on statutes. \\(^{103}\)

### 4.5 Procedural and Practical Circumstances

While Swedish private law, including tort law, is considered a variant of civil law, procedural law adopts more common law principles, notably in the 1948 Code of Judicial Procedure. This includes the use of the adversary rather than the inquisitorial principle in court hearings and a very concentrated trial with all evidence taken during the main hearing. \\(^{104}\) Evidential rules are based on the principles of morality, immediacy and concentration, where no types of evidence are barred. However, compared to the common law system of for instance the UK, Sweden lacks disclosure provisions in procedural law, which otherwise may contribute to levelling the playing field with regards to the access to evidence.

Following Chapter 35 of the Code of Judicial Procedure it is the responsibility of each party to provide the evidence used as grounds for the claim. The burden of proof to demonstrate grounds for jurisdiction lies with the plaintiff. \\(^{105}\) Another principle from praxis is that the person with the best opportunity to access the required evidence shall have the burden. Similarly, a party that claims something different from what is ‘commonly held to be true’ will be expected to provide the relevant evidence. Judges may also, in some cases, apply the principle of placing the burden of proof with the stronger part. \\(^{106}\) Furthermore, a part that bases a claim on foreign law will be expected to provide the required documentation for the legal content. \\(^{107}\) Judges are entitled to exercise process facilitation, including helping a party represent their case adequately; however, they are very careful not to be seen as taking sides.

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\\(^{101}\) Strict liability has gained a firmer foothold in continental Europe during the 20th century, see van Dam, *supra* note 34.

\\(^{102}\) See B. Bengtsson, *Skadestånd för miljöskada* (Norstedts Juridik AB, Stockholm, 2011). In Sweden, strict liability is written into the Environmental Code, while in Denmark and Finland, specific acts on environmental damage apply. However, as other environmental legislation, these acts apply only to the national territory.

\\(^{103}\) Hellner and Radetzki, *supra* note 77.

\\(^{104}\) Lindblom, *supra* note 36.

\\(^{105}\) Pålsson, *supra* note 62.


\\(^{107}\) Code of Judicial Procedure Chapter 35, §2; see also Bogdan, *supra* note 55.
Civil claims generally have a barring after 10 years; however, for compensation connected to criminal claims the barring depends on the nature of the criminal act.¹⁰⁸

The core rule on financing of litigation costs is found in Chapter 18, §1 of the Code of Judicial Procedure, applying the English rule of cost (loser pays). The requirement to reimburse the opposing party for the litigation costs includes attorney fees, and time and activity costs associated with preparation for the trial and its procedure. Some provisions exist to protect a losing party, if the winning party is seen to have abused the litigation system, i.e. the costs must have been ‘reasonably incurred’. For foreign plaintiffs, the principle of cautio judicatum solvi is applied (Law 1980:307) in that the ability to cover court litigation costs must be demonstrated in advance.¹⁰⁹

The Law on Legal Aid (Rättshjälpslagen 1996:1619, §6) allows for legal aid to plaintiffs with an annual income of less than 260,000 SEK. Legal persons are not entitled to public legal aid but can pursue private fundraising. Foreign plaintiffs, who are not Swedish citizens, may receive legal aid only under specific conditions (§12). For instance, case law suggests that legal aid may be provided if the case exhibits strong humanitarian reasons.¹¹⁰ The travaux préparatoires also suggest that legal aid to foreign nationals depends on the existence of particularly strong reasons – court praxis has been very restrictive in the interpretation. Praxis suggests that legal aid cannot cover evidence generation or other preparations outside of Sweden.¹¹¹ Yet, the Code of Judicial Procedure (Chapter 36, §24) allows the state to cover part of the evidence cost in certain cases where plaintiffs are not eligible for legal aid for representation. All EU citizens are treated on equal terms with Swedish nationals. Sweden has made some adjustments in response to the Council Directive 2003/8/EC that aims to implement common minimum standards for legal aid in cross-border disputes within private law, i.e. including tort law, within the EU.¹¹²

Overall, legal aid has been drastically cut during the 2000s and has been replaced by private litigation insurance. Most company staff and private citizens will thus have their litigation costs covered via private insurances (rättsskyddsförsäkring). In other Scandinavian countries, an increased use of board liability insurance schemes also serves to enable board members to take additional risks in their efforts to maximise shareholder value.¹¹³ In Sweden, most damages are, in fact, paid through out-of-court settlements with levels defined by the largest insurance companies.¹¹⁴

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¹⁰⁸ Amnesty International Sweden, supra note 30.
¹⁰⁹ Pålsson, supra note 62; furthermore, according to RB 18:2-3, so-called ‘kvittning’, that each party covers own costs, is applicable in a limited number of situations.
¹¹¹ Pålsson, supra note 62.
¹¹³ Sjäfjell, supra note 23.
The cost risk and absence of state funds, including a perceived conservatism among insurance companies, are seen as key obstacles from an access to justice perspective. Furthermore, the lack of pre-trial discovery and post-trial standardised damage calculations act to the detriment of plaintiffs. Non-financial damages depend on subjective assessments and will typically be associated with much ambiguity. The lack of standard calculation procedures for damages on environmental goods and services especially act to the detriment of claimants reliant on, for instance, subsistence farming or other non-cash economies. Furthermore, Swedish courts can only provide compensation, not other forms of redress such as punitive damages.

A national access to justice reform took place in 2002 with the enactment of the Swedish Group Claims Act, adjunct to the Code of Judicial Procedure’s provisions on civil non-contractual claims (§2). The Environmental Code (1998:808) was also modified to permit group claims in environmental cases for compensation as well as requests for injunctions; however, only for claims concerning the Swedish territory. The general rules of procedure apply to group claims, and the Group Claims Act only provides specific adjustments for these cases. As such, the Group Claims Act is applicable to all cases brought to general courts of first instance (the principle of pluralism); it can be applied when it is superior to individual claims (the principle of pragmatism) and does not affect the content of the law (the procedural principle).

The proposal for the Group Claims Act came at a junction where diversification of dispute resolution had peaked and Sweden saw a move towards coordination with the general courts assuming more responsibility. During the drafting process, the commission received widespread criticism, including claims of the proposals being unconstitutional. However, as reviewed by the governmental commission, the criticisms were ill-founded and did not reflect experiences with group claims in other European countries, nor the US or Canada. The institution of the Swedish class action can also be seen as part of the trend towards expanding the possibilities for collective redress in the EU. European interest in collective redress has specifically focused on protection of consumer interests. The Scandinavian countries all adopted legislation allowing class actions during the early 2000s (Sweden in 2002, Norway in 2005, and Denmark in 2006). Also Finland enacted the Finish Group Action Act in 2007.

In all three Scandinavian countries, private, group and public actions are permitted. All three countries rely on ‘opt-in’ as the main principle (i.e. that litigants actively must join the group);

115 Strömbäck, supra note 114.
116 See also Andersson, supra note 89.
117 See also Amnesty International Sweden, supra note 30.
118 Lindblom, supra note 36.
120 European Commission, Green paper on consumer collective redress (COM(2008) 794 final). EU attitudes have also changed as part of the harmonising of process law, especially with regard to consumer and competition law.
121 Retsplejeraadet, Reform af den civile retspleje IV. Gruppesøgsmål mv. (Betænkning nr. 1468, 2005).
however, Denmark and Norway also allow opt-out in mass actions. In Sweden, only the group representative is financially liable for loss of the case, while in Denmark and Norway also members can be liable.\textsuperscript{123} In Sweden, private group actions can be initiated by a natural or legal person with standing to the proceedings. There are no rules on the organisation’s lifetime – it can be set up one day and sue the next. Members who have opted in are not parties and not liable for costs of proceedings, but are covered by the ruling (\textit{res judicata}).\textsuperscript{124}

The Swedish Group Claims Act also introduced the opportunity to employ ‘risk agreements’ (§ 38–41), \textit{i.e.} agreements between plaintiffs and attorney concerning reduced compensation if the case is lost and an increased fee if it is won (using a customary hour rate). However, risk agreements cover only one’s own costs and do not remove the risk of shouldering the opponent’s costs. Hence, this measure does not match the contingency fee system of common law countries. The aversive stance of Swedish insurance companies, exempting class actions from litigation insurance, also remains a main obstacle.\textsuperscript{125}

A 2008 governmental evaluation of the impact of the Group Claims Act found that 11 cases had been filed under the Act, four of which were dismissed by the courts and seven which continued to settlement. None had resulted in judgment.\textsuperscript{126} Only one of the cases had a trans-border element, concerning a dispute between the Swedish state and a private company (regarding the importation of alcoholic beverages to Sweden).\textsuperscript{127} Lindblom’s assessment in 2007 found nine cases, eight private actions and one public action, with the defendant companies having been among the largest in Sweden (\textit{e.g.} Skandia, Telia). Only one case led to a settlement favouring the plaintiff. A common strategy has been for defendant corporations to submit procedural pleas to seek to disqualify the claim as a group action.\textsuperscript{128}

5 Conclusions

Foreign direct liability claims on human rights violations and environmental damage are possible in Sweden, albeit with considerable constraints. As Ebbesson previously concluded “the door is open but the threshold is high”.\textsuperscript{129} Yet, despite what at first sight may appear to comprise insurmountable barriers in international, European and Swedish private law, there may, in fact, be important legal avenues to explore in Sweden to establish corporate liability.

The general European regime on jurisdiction and collision rules, as codified in the Brussels I Regulation and the Rome II Regulation, offers the same general playing field as for other

\textsuperscript{123} In Finland, group claims are limited to consumer cases and must be represented by the Consumer Ombudsman. In Norway, a special group claims act was passed in 2008 and in Denmark the Code of Judicial Procedure (\textit{Retsplejeloven}) was expanded with a Chapter 23a; both have provisions that similar to the Swedish act allows for class actions in all cases. \textit{See} P. H. Lindblom, \textit{Grupptalan i Sverige} (Nordstedts Juridik AB, Stockholm, 2008).

\textsuperscript{124} Nordh, \textit{supra} note 119.

\textsuperscript{125} Lindblom, \textit{supra} note 123.

\textsuperscript{126} Swedish Ministry of Justice, \textit{Utvärdering av lagen om grupprättegång} (Ds 2008:74, Government Inquiry led by Ms. Marianne Wastesson).


\textsuperscript{128} Lindblom, \textit{supra} note 36.

\textsuperscript{129} Ebbesson, \textit{supra} note 26, p. 309.
member states. Still, compared to other European regimes, there may be specific advantages for plaintiffs pursuing a claim in Sweden. As regards jurisdiction, the exorbitant forum rules may have relevance, for instance enabling claims against a non-European defendant based on the presence of assets in Sweden. Moreover, it is also possible to summon a parent and subsidiary in a joint claim, although very specific conditions will be required. In terms of substantial legal basis, the Swedish Tort Liability Act may offer a somewhat more flexible view on negligence and causation than do some other tort statutes in continental Europe, such as Germany.130 The broad view on principal liability may also help overcome the challenges otherwise faced in pinning the liability for the act to the parent company, including identifying the individual tortfeasor in the company. The Group Claims Act may also, in principle, offer possibilities for class actions, which are otherwise rarely accessible to claimants in continental European civil law jurisdictions.

Obstacles appear, as elsewhere in the EU, to be primarily practical and financial in character, for instance associated with the burden of proof placed on the plaintiffs combined with the absence of disclosure requirements, and the prohibition of contingency fees in procedural law. Previous work has highlighted how cost risks and the uneven ability to access litigation insurance undermine access to justice, especially when cases are uncertain and thus have great precedent setting potential.131 This is, partly, why proposals have been made, in accordance with the view of the Ethics Committee of the Swedish Solicitors Society, to allow contingency fees for lawyers (provisionsavtal) under certain conditions.132 Furthermore, given the lack of case law, it is unclear what role customary and unwritten norms, including CSR and branch specific standards, may have in influencing a Swedish court’s definition of a standard of duty of care. The potential for defining a standard duty of care based on branch specific sustainability standards appears a particularly important area of further research.

Foreign direct liability claims are possible in Sweden, but are they also desirable? As previously observed, the potentially undesirable consequences of foreign direct claims are many. Notably, the dispute resolution process is largely removed from the local context in which the alleged violations took place, which may undermine the legitimacy and capacity of the national justice system and prevent the trial’s contribution to conflict resolution. Tort law is no panacea and there is a continuous need to improve legal regimes to enable victims of corporate abuse to draw on multiple remedies.133 As Enneking has previously asked, given the obvious limitations to such claims, are courts – at all – equipped and democratically legitimised to serve as arbiter in private interest conflicts of such transnational nature?134 The judicialisation of the moral questions addressed in a foreign direct liability claim may be undesirable if they remain unconnected from rigorous political decision making. Lindblom has earlier reminded of Wilhelmson’s comment that “[t]he judgment of the morality of decisions… is naturally primarily a political issue. Accordingly, one should not necessarily consider it a good thing that this discourse is judicialized … this is a crisis of legitimacy for

130 Saage-Mass, supra note 71.
131 E.g. Lindblom, supra note 123; Nordh, supra note 119.
132 Swedish Ministry of Justice, supra note 126.
133 Anderson, supra note 89.
134 Enneking, supra note 2.
politics that, for good or ill, is broadening the scope of the law; politics can hardly increase its legitimacy unless politicians once again begin discussing relevant social and moral questions.” Irrespective of these concerns, ultimately, the purpose and desirability of bringing a specific case will depend on the interests of the plaintiffs and their view on how to obtain redress and access to justice. As noted above, owing to the weaknesses in the current international and domestic justice regimes, in many cases foreign direct liability claims will be their only means of redress.

Meanwhile, as reviewed by Enneking, tort law is well suited to interfere in the relationships between private parties under conditions of changing societal norms and circumstances because of its ‘open standard based nature’, whereby courts can select societal practices and customs for their legal interpretation. While Sweden in many areas is at the forefront in the promotion of the international environmental and human rights norms, there is a need to clarify in concrete terms how these espoused norms shall be implemented, in particular with regards to Swedish actors’ own detrimental impact abroad. The effect of strategic litigation may here be potentially high in the Swedish business environment, which is characterised by relatively small communities and tight networks, where trust and reputation are important informal governance mechanisms.

The above highlighted challenges to foreign direct liability claims could be addressed through reforms by a Swedish government committed to improving the access to justice for victims affected by transnational violations of human rights and environmental damage. Indeed, strategically litigated cases, it is commonly hoped, may serve to stimulate parliamentary action and compel governments to codify improved enforcement of environmental and human rights norms in transnational contexts. They may serve to call attention to reform proposals offered to address the lacunas in transnational corporate accountability. To be sure, the perceived risks of deterring domestic investment and reducing corporate risk taking are often holding governments back from undertaking such reforms. In this regard, the experiences from the implementation of the Group Claims Act may be informative. The evaluation of the impact of this access to justice reform, which beforehand faced extensive resistance from insurance companies and corporate interest groups, did not find any impacts on investment interest in the Swedish private sector.

A number of specific proposals have emerged from the work of the United Nations Special Representative on Business and Human Rights, Professor John Ruggie, seeking to stimulate international efforts to clarify transnational corporate accountability. For instance, the

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135 T. Wilhelmsson, Senmodern ansvarsrätt cited from Lindblom, supra note 36.
136 Enneking, supra note 2.
139 Government of Sweden, supra note 126.
140 J. Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and
detailing of due diligence requirements, including human rights due diligence, has been suggested to help clarify the expected standard for corporate duty of care and thus reduce legal uncertainty.\textsuperscript{141} The United Nations Human Rights Council recently adopted a resolution on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. It is in this vein that the national proposal for the implementation of the UN Guiding Principles on Business and Human Rights in Denmark has suggested expanding the statutory framework for prosecuting TNCs for violations abroad.\textsuperscript{142} Moreover, proposals are also emerging for elaboration and implementation of the so-called Extra-Territorial Obligations (ETOs) of states to regulate corporations outside their national territories.\textsuperscript{143} Inspiration could also be taken from the EU Action Plan on Company Law, which highlights the possibility to clarify the notion of ‘group of companies’, which could lead to stronger liability for parent companies.\textsuperscript{144} Similarly, as Ebbesson has pointed out, the theory of operator liability in Swedish environmental law may be a particularly promising area for innovation, especially while theories of veil piercing are not developed further.\textsuperscript{145}

Returning to the case against Boliden, does the review in this study provide any leads as to the manner in which the County Court in Skellefteå may rule? Precise answers to this question will depend on a study of Chilean tort law (which will most likely be applied to the case), with its rules on prescription and culpability through negligence, aspects not covered in this article. Hence, only some general and cautious remarks can be offered. First, the Skellefteå Court clearly has jurisdiction to adjudicate on the case. Second, as argued by the plaintiffs, applicable law should be determined by international private law in Sweden at the time of the tortuous act, which means that \textit{lex loci delicti} should be applicable, \textit{i.e.} Chilean law. Moreover, if the Court was to apply the now widely adopted principle of ubiquity in European law, then the plaintiffs should still be allowed to choose the applicable law based on their preference as to which regime would offer the most favourable treatment of their claim. Third, the most contentious point is likely to be the definition of negligence and thus whether the tortuous act(s) can be imputed to Boliden. To the extent that the court will find some inspiration in the Swedish praxis to date, all four criteria for culpability appear – at a face 

\textsuperscript{141} O. De Schutter \textit{et al.}, \textit{Human Rights Due Diligence – the Role of States} (European Coalition for Corporate Justice, International Corporate Accountability Roundtable, Canadian Network on Corporate Accountability, 2012).
\textsuperscript{145} Ebbesson, \textit{supra} note 26.
reading of the complaint – to be fulfilled, *i.e.* that the risk of the damage was high, the magnitude of damage considerable, that Boliden was previously prepared (in its patent application) to invest to avoid such damages, and (also evident in the patent application) that the consequences were foreseeable. However, Boliden has not yet provided counter evidence and the evidential requirements and burden of proof, entirely placed on the plaintiffs, will likely be very high and may represent a considerable barrier.

Irrespective of the outcome, the claim against Boliden has great precedent-setting potential and will provide a welcome first concrete indication as to the feasibility of foreign direct liability claims in Sweden – as well as the need for legal and institutional reforms to enhance the access to justice for people harmed by the transnational operations of Swedish business enterprises.