***AASA:* Locating the Central Administration of a Subsidiary Company which is part of a Corporate Group under Article 60 of Brussels I Regulation**

Chukwuma Samuel Adesina Okoli\*

1. **INTRODUCTION**

The place where a company has its statutory seat, central administration, or principal place of business is of considerable significance to the legal and commercial life of a company. One of the significant contributions of Brussels I Regulation (“Brussels I”)[[1]](#footnote-1) to the legal and commercial life of companies domiciled in Member States of Brussels I is the ability of these companies to reasonably predict and foresee that if they are domiciled within such Member States, a plaintiff has the right to sue them in such jurisdiction(s).[[2]](#footnote-2) This is irrespective of whether the forum of a non-Member State has a stronger connection to the dispute, or the non-Member State forum is a much more convenient forum to resolve the dispute.[[3]](#footnote-3) In order to make the concept of domicile clearer and predictable in the allocation of jurisdiction against a company domiciled in Member States, Article 60(1) of Brussels I provides that a company is deemed to be domiciled in a Member State where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business. However, Article 60 of Brussels I leaves at least two gaps: first, it does not provide any definition or guidance on the meaning of central administration (and principal place of business), and second, it does not make specific provisions on how it applies to corporate groups.

Prior to the recent English case of *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* (“*Anglo American South Africa Limited*”) decided at the English High Court(s) by Sibler J,[[4]](#footnote-4) and (next) Andrew Smith J[[5]](#footnote-5), and then (on appeal from the decision of Andrew Smith J) by the Court of Appeal,[[6]](#footnote-6) English courts have had the opportunity to interpret or define what “central administration” means under Article 60 of Brussels I.[[7]](#footnote-7) The decision in *Anglo American South Africa Limited* is worthy of attention for at least two reasons. First, English judges for the first time were faced with the determination of locating the central administration of a subsidiary company, (which is part of a corporate group) where it was alleged and established that the ultimate English parent company arguably exerted powerful influence over the South African subsidiary company so that it was argued by the claimants (for the purpose of establishing English jurisdiction) that the central administration of the subsidiary company was located in the jurisdiction of the parent company. Second, English judges embarked on a re-evaluation of the correctness of previous English decisions that defined what “central administration” means under Article 60 of Brussels I.

The focus of this article is to critically analyse the decision of English judges taken on these two principal issues. In doing so, the second part of this article states the facts and decision(s) in *Anglo American South Africa Limited*; the third part of this article discusses how English judges reached their decision(s) in some depth; the fourth part of this article contains some remarks; and the fifth part of this article contains the conclusion.

1. **The facts and decision(s) in *Anglo American South Africa Limited***

The case was first instituted before Sibler J[[8]](#footnote-8) based on what is called a “good arguable case”[[9]](#footnote-9) that the English court had jurisdiction. The case involved two separate actions against the defendant company called *Anglo American South Africa Limited* (“AASA”) and other defendants. In the first action, *Vava* and other claimants allege that they contracted silicosis while working as mine workers in AASA’s goldmines in SA, and this was caused by the negligence or breach of duty of AASA. In the second action, *Young* and other claimants (her father and litigation friend) allege that Young suffers from disabilities resulting from late diagnosis of phenylketonuria by reason of the negligence of doctors for whom AASA is alleged to be vicariously liable. AASA is incorporated in South Africa, but belongs to a group of companies (or corporate group) called Anglo American Group (“AA Group”). AASA is an indirectly owned subsidiary of Anglo American plc (“AA plc”), the ultimate parent company whose central administration is in England, and the South African assets of AASA constitute approximately 40% of the worldwide assets of the AA group. One of AASA’s principal function was to own shares in the Group’s South African companies, and AASA was the vehicle through which the group and AA plc implemented its strategy in South Africa. AA plc arguably exercised considerable influence over the affairs of AA. One of such influence was that directors in AASA had to make recourse to the managing staff of AA plc in making some significant decisions. Although the vast majority of the directors of AASA where resident in SA, it was established that they had infrequent Board of Directors (“BOD”) meetings. In short, AASA had regard to the policy and strategy of AA plc in making its own decisions. The claimants in both actions, based on these facts argued that at the material time the damage allegedly occurred, AASA was controlled and advised by AA plc so that the central administration of AASA was in England, not South Africa. AASA and other defendants on the contrary contended that the English court had no jurisdiction based on Article 60(1)(b) as the defendant company’s central administration was in England, and it was immaterial that it was the subsidiary of an ultimate parent company whose central administration is in England.

The claimants’ case before Silber J was also to seek the permission of the court for specific disclosures to establish the amount of influence or control AA plc exerted over AASA. The claimant also tentatively advanced the view before Silber J that AASA’s principal place of business was in England, but Silber J without much ado rejected the argument as simply untenable.[[10]](#footnote-10) Silber J ruled in favour of the claimants at the preliminary stage by holding that the claimant had at least a good arguable case that AASA’s central administration was in England, and granted the order for specific disclosure. Silber J emphasised that his ruling on Article 60(1)(b) was simply a preliminary one, which will not necessarily be same decision taken by another judge after disclosures have been made and arguments fully taken on the Article 60(1)(b) issue.[[11]](#footnote-11)

When the case came before Andrew Smith J,[[12]](#footnote-12) after disclosures had been made, the claimant abandoned the argument that the AASA’s principal place of business was in England, but maintained the position that AASA’s central administration was in England. The claimants in the alternative submitted that in this case the concept of central administration is so unclear that a reference should be made to the Court of Justice of the European Union (“CJEU”).[[13]](#footnote-13) Andrew Smith J in a considered ruling, after a detailed consideration of the facts, reached the decision that the claimants had not made out an arguable case that AASA’s central administration was in England in order to institute their claims in the English court under Article 60(1)(b). Andrew Smith J also declined to make a reference to the CJEU. On appeal, the Court of Appeal sustained the decision of Andrew Smith J and dismissed the appeal.[[14]](#footnote-14)

1. ***Anglo American South Africa Limited*: How the decision(s) was reached**

There was some notable common ground between the parties and the judges on the position of the law under Article 60(1)(b) in relation to the case. First, the only way the claimants can invoke the jurisdiction of the English courts as a matter of right in this case was through the provisions of Article 60(1)(b).[[15]](#footnote-15) Second, Article 60 is to be given an autonomous interpretation as a matter of European law in order to achieve uniformity and predictability among Member State courts;[[16]](#footnote-16) and previous English authorities on the subject on the subject of central administration under Article 60(1)(b) of Brussels I did not have the benefit of other language versions of the Article 60 of Brussels I,[[17]](#footnote-17) previous related European jurisprudence,[[18]](#footnote-18) authoritative academic commentaries (principally from civil law jurisdictions),[[19]](#footnote-19) and authoritative German judicial decisions[[20]](#footnote-20) in order to give Article 60 an autonomous meaning.[[21]](#footnote-21) Third, AASA cannot have its central administration in South Africa and England at the same time.[[22]](#footnote-22) Fourth, it is not correct to state that the central administration of a wholly owned subsidiary is always located with its parent company or shareholder;[[23]](#footnote-23) and although the claimants did not advance the position that the functions of AASA had been usurped or taken over by AA plc, if this were the case, the English judges would have been inclined to hold that there was an arguable case that AASA’s central administration was in England to give English court(s) jurisdiction.[[24]](#footnote-24)

In deciding the case, the English judges first had to define and determine what central administration means under Article 60(1)(b) of Brussels I. Silber J after a consideration of the authorities on the subject defined central administration as “where management decisions are taken and where entrepreneurial decisions take place irrespective of where its economic activities occur.”[[25]](#footnote-25) Although, this definition was also in line with the German Supreme Court decisions and civil law academic commentaries on the subject, Silber J appeared to have been influenced by the English decisions of HH Judge Chambers QC in *King v Crown Energy Trading AG*[[26]](#footnote-26) and Tomlinson J in *King v Crown Energy Trading AG,*[[27]](#footnote-27) in giving little or no significance to the place where the Board of Directors (“BOD”) and Annual General Meetings (“AGMS”) meet for the purpose of determining where the central administration of a company is.[[28]](#footnote-28) Andrew Smith J did not adopt the same approach. Andrew Smith J on the contrary held that where the BOD meets is a significant part of the administration of a company, and could be a critical determinant of the place where a company has its central administration.[[29]](#footnote-29)

Another area where previous English decisions on the subject of Article 60(1)(b) were questioned and doubted was the position taken by HH Judge Chambers QC in *King v Crown Energy Trading AG*[[30]](#footnote-30) that administration implies “back office” functions;[[31]](#footnote-31) and secondly, the acceptance by English judges of the position advanced by Professor Briggs in an academic commentary,[[32]](#footnote-32) that in determining what constitutes central administration, a helpful approach is to examine the place where those who have serious responsibilities have their place of work.[[33]](#footnote-33) Andrew Smith J qualified his acceptance of the concept of “back office” functions to mean that central administration under Article 60(1)(b) means important administration and not the bulk of administration - which possibly indicates the difference between principal place of business and central administration.[[34]](#footnote-34) Secondly, Andrew Smith J expressed the view that although a listing of those with important responsibilities in a company can be helpful in indicating the central administration of company under Article 60(1)(b), it was not a decisive factor.[[35]](#footnote-35) Aikens L.J (with whom other Justices of the Court of Appeal agreed with) on the contrary held that the utilisation of the suggestion of “back office” and “a simple listing of those with important responsibilities in a company” by previous English authorities to interpreting Article 60(1)(b) was unhelpful and should be disregarded.[[36]](#footnote-36)

In giving Article 60 a “European” autonomous meaning, Andrew Smith J and Aikens L.J adopted an approach similar to that of Silber J, who had benefitted from the extensive research of counsel to the parties in the case, and central administration was defined to mean the place where the company concerned through its constitutional organs, takes decisions that are essential for the company, which is the place where the company takes its entrepreneurial decisions.[[37]](#footnote-37)

Based on the above autonomous definition (which parties in the case did not dispute), the claimants` counsel advanced three principal arguments before Andrew Smith J, and (on appeal) the Court of Appeal, which was vigorously contested by the defendants. The first argument was that the place where a company has its central administration does not necessarily depend on anything done by the company or its constitutional organ, but the question is where the main entrepreneurial decisions which determine the activity of the company are taken, irrespective of whether they are taken by the company, its parent or any other company in the group. The second argument was that: in the alternative if the first argument fails, the subsidiary of a parent company should be regarded as having its central administration where the parent company has its central administration if it is established that the parent company was in such a position that it *could* usurp or take over the functions of the subsidiary company. The third argument was that the concept of central administration is so unclear as to warrant the CJEU`s interpretation.

On the first argument, Andrew Smith J (with whom the Court of Appeal agreed with) in rejecting the claimants’ argument, held that it was not supported by other language versions of Article 60(1)(b), as Article 60(1)(b) is concerned with a company *having* its central administration in a jurisdiction; not simply where the company`s central administration is. In other words, the focus of Article 60(1)(b) is on where AASA *itself* has its central administration, and not the activities of other companies in the group that affect it such as AA plc.[[38]](#footnote-38) Also, the claimants’ argument was not supported by any authority on the subject; it was actually inconsistent with the position taken by Professor Pocar (at para 28 of his report) that Article 60(1)(b) could be justified on the basis that a company may be sued in the forum where it has its central administration so that the company exposes itself if it chooses to keep its central administration and principal place of business in different forums of Member States.[[39]](#footnote-39) Lastly, the claimants` position was a difficult one to apply in other variety of cases.[[40]](#footnote-40)

On the second argument, Andrew Smith J and the Court of Appeal in rejecting the argument of the claimants took the position that Article 60(1)(b) is concerned with a company *actually* having its central administration in a company; not the possibility of such occurrence. A contrary position will defeat the aim of predictability and uniformity in Brussels I, where the court will have to make inquiries into the law governing a parent company and subsidiary company, which will in turn require consideration of different domestic company laws of Member State for an inquiry that was intended to be solely factual, and not legal.[[41]](#footnote-41)

The third argument was rejected by Andrew Smith J and the Court of Appeal on the basis that central administration under Article 60(1)(b) was clear enough, and did not warrant the interpretation of the CJEU; and the reason why controversy was generated on the definition of central administration under Article 60(1)(b) was that previous English decisions did not benefit from the thorough researches of counsel in this case with the aim of giving Article 60 a “European” autonomous meaning.[[42]](#footnote-42)

1. **Some Remarks**

First, it is observed that the Court of Appeal in adopting an autonomous definition of “central administration” in a bid to honour recital 11 to Brussels I,[[43]](#footnote-43) refrained from providing any further criteria (as English Judges at the High Court did) such as suggesting that: “[T]he location of the company secretary’s office in a major organisation might provide a clue”,[[44]](#footnote-44) or “a simple listing of where those with important responsibilities in the company have their office,”[[45]](#footnote-45) or the “place where the BODs meet could be a critical determinant”.[[46]](#footnote-46) The approach taken by Aikens L.J could rightly be applauded for being a cautious one – a desire to ensure that English judges only resort to the autonomous definition and apply it to individual cases without fettering their discretion.

Second, although the decision(s) of Andrew Smith J and the Court of Appeal in relation to locating the central administration of AASA (within the AA Group) claim to do so through an autonomous “European” interpretation of Article 60(1)(b),[[47]](#footnote-47) the truth is that these judges were also probably influenced by both the English domestic company law concept of corporate legal personality of a company within a group of other companies,[[48]](#footnote-48) and central management and control.[[49]](#footnote-49) This is what led these judges to hold that even if AA plc exerted *powerful influence* over AASA, they would not hold that AASA’s central administration was (by that fact) in England;[[50]](#footnote-50) and express the view that they may only hold to the contrary if it was at least established by the claimants that AA plc *usurped* or *took over* the powers or functions of the constitutional organs of AASA.[[51]](#footnote-51)

The principal reason for the above stated is that, at the moment, it is doubted if there can be a uniform application of the concept of central administration to corporate groups under Article 60(1)(b) of Brussels I in order to honour the requirements of recital 11. English judges overlooked the recent CJEU decision in *Impacto Azul Lda v BPS* [[52]](#footnote-52)which was not brought to their attention. In *Impacto Azul Lda v BPSA,* the question referred to the CJEU was whether Portuguese law which provides for joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries only in respect of parent companies having their seat in Portugal was a violation of Article 49 TFEU that requires the abolition of restrictions of the freedom of establishment (such as discrimination on grounds of nationality) in the European Community. The CJEU in holding in the negative pointed out that “*the rules concerning corporate groups are not harmonised at the European Union level*, the Member States remain, in principle, competent to determine the law applicable to a debt of a related company”.[[53]](#footnote-53) The significance of the CJEU’s decision (and the analogy that could be drawn from it) is that there is no guarantee that other Member State courts of Brussels I that have laws that do not recognise the separate legal personality of companies within the group on grounds such as abuse of rights or the need to ensure greater transparency of the corporate group not being used an instrument of commercial fraud will follow the English approach that is very reluctant (except in truly exceptional cases) to “pierce the corporate veil”[[54]](#footnote-54) of a company within a group.[[55]](#footnote-55) If there is indeed a uniform application of the concept of central administration to corporate groups in determining the domicile of a company under Article 60(1)(b), it is the CJEU that would have been in a best position to fill the gap and provide authoritative guidance to other Member State courts.

Notwithstanding the above stated, the author supports the approach of Andrew Smith J and the Court of Appeal on the basis that it honours the requirement of Recitals 11 to Brussels I which gives the defendant domiciled in the EU the ability to reasonably foresee or predict where it can be sued. If a contrary interpretation was taken to the effect that AASA’s central administration was in England on the ground that the essential entrepreneurial management decisions of AASA was carried out by AA plc, or that AA plc as an ultimate parent company *could* usurp the functions of AASA, the effect of that decision would cause considerable problem(s). It would be a strong attraction to forum shopping – a situation where claimants would easily find a way to sue companies that are part of a group (probably domiciled outside Member State jurisdictions) in a favourable Member State court simply to gain jurisdictional advantage, by arguing that the central administration is located there. Thus, in this case, where AASA should simply have been sued in South Africa, (which had a real and manifestly close connection to the dispute)[[56]](#footnote-56) based on the private international law principle of proximity and sufficient connection,[[57]](#footnote-57) the claimants by avoiding the application of English domestic private international law rules through Article 60(1)(b) of Brussels I, sought to sue in the English forum that had very little or no connection with the dispute in order to gain jurisdictional advantage.

1. **Conclusion**

The English Court of Appeal (in agreement with Andrew Smith J) after a re-evaluation of previous English decisions and a consideration of other authorities on the subject provided a “European” autonomous definition of “central administration” under Article 60(1)(b) of Brussels I. However, it is open to doubt at the moment if Article 60(1)(b) can be applied uniformly among court of Member States to corporate groups. The judges should have referred the question to the CJEU to resolve. The CJEU would have been in a better position to fill the gap and provide guidance to other Member State courts in relation to how Article 60(1)(b) applies to corporate groups. The refusal of the English judges refer this question to the CJEU is a missed opportunity.

1. \*Barrister and Solicitor of the Supreme Court of Nigeria, LLM *Distinction* (International Commercial Law) University of Aberdeen, Phd candidate, tutor and employee of the University of Luxembourg, and recipient of the *Fonds National de la Recherche* Grant, Luxembourg. I can be contacted at chukwuma.okoli@uni.lu.

Council Regulation (EC) 1215/2012 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1 (“Brussels I Regulation”). [↑](#footnote-ref-1)
2. Article 2 and Article 60 of Brussels I. See recital 11 to Brussels I which provides that “The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.” [↑](#footnote-ref-2)
3. *Owusu* ***v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281-02)[2005] ECR I-1383.** [↑](#footnote-ref-3)
4. [2012] EWHC 1969 (QB). [↑](#footnote-ref-4)
5. [2013] EWHC 2131 (QB). [↑](#footnote-ref-5)
6. [2014] EWCA Civ 1130. [↑](#footnote-ref-6)
7. *King v Crown Energy Trading AG* [2003] EWHC 163 (Comm) (HH Judge Chambers QC); *Ministry of Defence and Support of the Armed Forces for Iran v Faz Aviation and another* [2007] ILpr 42 (Langley J); *Alberta Inc v Katanga Mining Limited* [2008] EWHC 2679 (Comm) (Tomlinson J). [↑](#footnote-ref-7)
8. [2012] EWHC 1969 (QB). [↑](#footnote-ref-8)
9. “Good arguable case” in English proceedings generally means that at the preliminary stage “one side has a much better argument on the material available” – *Canada Trust Company v Stolzenberg* (No 2) [1998] 1 WLR 547. [↑](#footnote-ref-9)
10. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2012] EWHC 1969 (QB) [62]. [↑](#footnote-ref-10)
11. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2012] EWHC 1969 (QB) [91]. [↑](#footnote-ref-11)
12. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [66]. [↑](#footnote-ref-12)
13. Article 267 of the Treaty on the Functioning of the European Union. [↑](#footnote-ref-13)
14. *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130. It should be noted that *Vava* and other claimants did not challenge the decision of Andrew Smith J. [↑](#footnote-ref-14)
15. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2012] EWHC 1969 (QB) [8] (Silber J). In other words, if AASA had been sued on the basis that it neither had its place of incorporation, central administration nor principal place of business in any of the Member States of Brussels I, the English courts by resorting to its traditional private international law rules would not have granted the claimants leave to bring AASA and other defendants before the English forum with regard to a case that was manifestly connected with the South African forum and could be conveniently tried there. [↑](#footnote-ref-15)
16. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [7], [17] (Andrew Smith J). [↑](#footnote-ref-16)
17. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [7] (Andrew Smith J). [↑](#footnote-ref-17)
18. Article 48(1) of the Treaty establishing the European Community which governs the right of establishment of companies. See Advocate General Darmon in *R v HM Treasury ex p. Daily Mail and General Trust Plc* (Case 81/87) [1988] ECR 5483. [↑](#footnote-ref-18)
19. U Everling, *The Right of Establishment in the Common Market* (Commerce Clearing House, 1964) 75; Official explanatory report on the Lugano Convention by Professor Fausto Pocar (OJ 2009 C 319/1) (“Professor Pocar’s report”) para 27 and 28. [↑](#footnote-ref-19)
20. German Federal Supreme Court (*Bundesgerichtshof*) of 27 June 2007, XII ZB 114/06 [2008] NJW-RR 208; German Federal Labour Court (*Bundesarbeitsgericht*) of 23 January 2008, 5 AZR 60/07, [2008] NJW 2797; German District Court for Frankfurt (Landgericht Frankfurt am Main), decision 2-08 S 25/09 of 3 March 2010. [↑](#footnote-ref-20)
21. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) (Andrew Smith J) [75]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [46] (Aikens L.J). [↑](#footnote-ref-21)
22. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [57] (Andrew Smith J). [↑](#footnote-ref-22)
23. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [66] (Andrew Smith J). [↑](#footnote-ref-23)
24. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [66] – [70]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [38] (Aikens L.J). [↑](#footnote-ref-24)
25. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2012] EWHC 1969 (QB) [43]. [↑](#footnote-ref-25)
26. [2003] EWHC 163 (Comm) [12] – [13]. [↑](#footnote-ref-26)
27. [2008] EWHC 2679 . [↑](#footnote-ref-27)
28. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2012] EWHC 1969 (QB) [43]. [↑](#footnote-ref-28)
29. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [22], [24]. [↑](#footnote-ref-29)
30. [2003] EWHC 163 (Comm) [12] – [13]. [↑](#footnote-ref-30)
31. “Administration is clearly an aspect of the conduct of business. That aspect has something of the ‘back office’ about it. Boards decide upon policy and important aspects of its implementation. Employees sell, supply and produce. Administration ensures that all runs smoothly: money is got in, debts are paid, leases and transport are arranged, personnel are looked after.” *Ibid.* See also *Ministry of Defence and Support of the Armed Forces for Iran v Faz Aviation and another* [2007] ILpr 42 (Langley J); *Alberta Inc v Katanga Mining Limited* [2008] EWHC 2679 (Comm) [23] (Tomlinson J). [↑](#footnote-ref-31)
32. A Briggs and P Rees (P Rees as editor with no authorial role), *Civil Jurisdiction and Judgments* (4th edition, Informa/Lloyds of London Press, 2005) para 2.115; A Briggs and P Rees, *Civil Jurisdiction and Judgments* (5th edition, Informa, 2009) para 2.138. [↑](#footnote-ref-32)
33. *King v Crown Energy Trading AG* [2003] EWHC 163 (Comm) (HH Judge Chambers QC) [13]; *Alberta Inc v Katanga Mining Limited* [2008] EWHC 2679 (Comm) [23] (Tomlinson J). [↑](#footnote-ref-33)
34. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [23]. [↑](#footnote-ref-34)
35. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [20]. [↑](#footnote-ref-35)
36. *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [43] – [44]. [↑](#footnote-ref-36)
37. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [23], [71]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130. [↑](#footnote-ref-37)
38. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [71]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [48]. [↑](#footnote-ref-38)
39. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [71]. [↑](#footnote-ref-39)
40. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [71]. [↑](#footnote-ref-40)
41. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [74]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [48]. Andrew Smith J and Aikens L.J both placed reliance on Professor Pocar’s Report. [↑](#footnote-ref-41)
42. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) (Andrew Smith J) [75]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [46]. [↑](#footnote-ref-42)
43. “The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction”.  [↑](#footnote-ref-43)
44. *King v Crown Energy Trading AG* [2003] EWHC 163 (Comm) (HH Judge Chambers QC) [13]. [↑](#footnote-ref-44)
45. *King v Crown Energy Trading AG* [2003] EWHC 163 (Comm) (HH Judge Chambers QC) [12] - [13]; *Alberta Inc v Katanga Mining Limited* [2008] EWHC 2679 (Comm) [23] (Tomlinson J). [↑](#footnote-ref-45)
46. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [22], [24] (Andrew Smith J). *Cf Alberta Inc v Katanga Mining Limited* [2008] EWHC 2679 (Comm) [23] (Tomlinson J); *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2012] EWHC 1969 (QB) [43] (Silber J). [↑](#footnote-ref-46)
47. The English judges were persuaded by Dr. U Everling’s submission in *The Right of Establishment in the Common Market* (Commerce Clearing House, 1964) 75, para 214 to the effect that “[T]he central administration is located where the company organs take the decisions that are essential for the company’s operations. In this connection only the organs of the company itself count; *it is irrelevant whether the company depends on the decision of a parent company which has its domicile outside the community*” [Emphasis is mine]. [↑](#footnote-ref-47)
48. The “Albazero”, [1977] AC 777, 807 “Each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure to the same person or corporate body irrespective of the person or body in whom those rights are vested in law.” See also *Holden v Wood* [2005] EWHC 547 (Ch), [2006] EWCA Civ 26 (CA). [↑](#footnote-ref-48)
49. *United Construction v Bullock* [1960] AC 351; *Holden v Wood* [2005] EWHC 547 (Ch), [2006] 1 WLR. 1393(CA). [↑](#footnote-ref-49)
50. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [72] (Andrew Smith J); *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [48] Aikens L.J. [↑](#footnote-ref-50)
51. *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [66] – [70]; *Young* *v* *Anglo American South Africa Limited* [2014] EWCA Civ 1130 [38]. Andrew Smith J (*Ibid*) also suggested at para 71 a specific situation of the subsidiary properly acting as an agent or subsidiary for the parent company as an exception to the rule in this case. [↑](#footnote-ref-51)
52. 20th June 2013 (Case C-186/12) [2013] ECR 0. [↑](#footnote-ref-52)
53. *Ibid* at paragraph 35[Emphasis is mine]. [↑](#footnote-ref-53)
54. *Prested v Petrodel Resources Ltd and Others* [2013] UKSC 34; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5 .For a recent commentary see also C.S.A. Okoli, “English Courts Address the Potential Convergence between the Doctrines of Piercing the Corporate Veil, Party Autonomy in Jurisdiction Agreements and Privity of Contract” (2014) 3 *Journal of Business Law* 252-261. [↑](#footnote-ref-54)
55. See generally S Rammeloo, “The judgment in CJEU C-186/12 (*Impacto Azul*): Company law, Parental Liability and Article 49 TfEU – A plea for a `Soft Law` Oriented EU Law Approach on Company Groups” (2014) *European Company Law* 20. [↑](#footnote-ref-55)
56. See also *Vava & Ors v Anglo American South Africa Limited; Young* *v* *Anglo American South Africa Limited* [2013] EWHC 2131(QB) [76] (Andrew Smith J). [↑](#footnote-ref-56)
57. See Recital 12 to Brussels I which provides that “In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice”. This principle of proximity contained in recital 12 only concerns Member State courts to Brussels I such that it does not matter if a non-Member State court such as South Africa in this case has a manifestly or obviously close connection to the dispute- *Owusu* ***v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281-02)[2005] ECR I-1383.** [↑](#footnote-ref-57)