Contents

Foreword	v
List of Contributors	xvii
1 The Litigation Landson of Dusiness and Hu	man Diahta 1
1. The Litigation Landscape of Business and Hun	man Rights 1
Robert McCorquodale	
I. Introduction	1
II. Litigating in civil law and common law legal	, •
III. Litigating criminal claims and civil claims	5
A. Criminal claims	6
B. Civil claims	8
IV. Litigating across the intersection of laws	11
A. Corporate law	11
B. Private international law	13
C. Public international law	15 valorments 17
V. Litigating in the context of international devVI. Conclusion	velopments 17
vi. Conclusion	21
2. Perspectives on the Development and Signific	cance of Tort
Litigation against Multinational Parent Comp	panies 24
Richard Meeran	
I. Introduction	24
II. Genesis of the UK litigation	25
III. Connelly v. RTZ	26
IV. Thor Chemicals	29
V. Cape plc	31
VI. The wider significance of Connelly, Thor Che	emicals,
and Cape plc	37
A. A foundation for the development of a paren	nt company
duty of care	37
B. Some observations for strategic litigation	41
VII. Barriers to justice	44
A. Forum non conveniens	44
B. Discovery/disclosure	45
C. Class actions	46
D. Funding	46
E. Damages levels	48
F. Fear of reprisals	48
G. MNC financial rearrangements	48
H. MNC instituting legal action in the host Stat	te courts 49

7	VIII.	Multinational human rights litigation and Business and Human Rights (BHR)	50
	IY	Multinational human rights litigation in South African:	50
	171.	cross-border collaboration between lawyers	53
	X.	Conclusion	56
3.		nan Rights Litigation against Multinationals in	
		ctice—Lessons from the United Kingdom	58
	Dan	iel Leader	
	I.	Introduction	58
	II.	Understanding corporate impunity: the example of	
		the Niger Delta	59
	III.	Corporate accountability cases: the English case law	61
		A. Parent company liability	61
		B. Thor Chemicals, Connelly v. RTZ, and Lubbe v.	
		Cape Plc [1995–2003]	62
		C. Chandler v. Cape plc [2012]	64
		D. Thompson v. Renwick Group plc [2014]	66
		E. Developments in parent company liability since 2015	66
		F. Human rights and security cases	74
	***	G. Supply and value chain cases	77
	IV.	Factors relevant to the claims against multinationals	78
		A. Jurisdiction and forum non conveniens	78
		B. Discovery and group actions	80
		C. Practical challenges, security, and claimant/witness anonymity	81
	37	D. Costs and funding Conclusion	82 83
	v.	Conclusion	0.3
4.	Mu	ltinational Company Litigation—South Africa	85
	Jaso	n Brickhill and Zanele Mbuyisa	
	I.	Introduction	85
	II.	Jurisdiction and applicable law	88
		A. The hierarchy of the courts	88
		B. Jurisdiction	88
		C. Foreign peregrini and juristic persons	90
		D. Arbitration	91
	III.	Causes of action	92
		A. Constitutional claims	92
		B. The constitutional impact on the common law	94
		C. Common law claims: delict, contract, and unjustified enrichment	94
		D. Statutory claims	97
	IV	Access to justice and legal representation	97
		A. Availability of legal representation	97
		B. Right to civil legal aid and availability	98
	V.	Prescription and time bars	98
		A. Prescription	98
		B. The approach of the courts when there is a conflict of laws	99

VI	. Class actions	100
VII	. Discovery	104
	A. Ordinary discovery process	104
	B. E-discovery or Electronically Stored Information (ESI)	104
VIII	. Damages	106
	A. Patrimonial and non-patrimonial loss	106
	B. Forms of damages	106
	C. Transmissibility of damages	107
IX	. Funding and costs	107
	A. Litigation funding	108
	B. Legal costs	109
X	. Enforcement of judgments	109
XI	. Conclusion	111
5. Liał	oility of Multinational Corporations in Canada for	
Inte	rnational Human Rights Violations	113
Bru	ce W. Johnston	
I	. Introduction	113
II	. Canadian legal context	114
III	. Jurisdictional issues	115
	A. Subject matter jurisdiction in common law provinces	115
	B. Subject matter jurisdiction in Quebec civil law	117
	C. Forum non conveniens	119
	D. Forum of necessity	123
	E. Choice of law	126
IV	. Justiciability issues	127
	A. Sovereign immunity	127
	B. Act of State	128
V	. Causes of action	128
	A. Causes of action in common law provinces	128
* * * *	B. Causes of action in Quebec civil law	130
VI	. Corporate issues	13
	A. Piercing the corporate veil in common law provinces	137
	B. Piercing the corporate veil in Quebec civil law	133
	C. The direct liability of the parent company in common law	134
	provinces D. The direct liability of the parent company in Quebec civil law	135
VII	Financial issues	136
¥ 11	A. Costs regimes and security for costs	136
	B. Legal fees	137
	C. Litigation funding	137
	D. Availability of damages	137
VIII	. Procedural issues	138
	A. Discovery	138
	B. Availability of class proceedings	138
IX	. Conclusion	138

6.	Civil Liability in Australia for International Human Rights	
	Violations	140
	Peter Cashman	
	I. Introduction	140
	II. Developments in English law	144
	III. Developments in Australian law	147
	IV. Discovery and preliminary discovery of documents	149
	V. The involvement of Australian companies in human rights	
	abuses and environmental damage in other jurisdictions	150
	VI. Procedural mechanisms for obtaining redress in Australia	157
	VII. Legal costs	159
	VIII. Adverse costs, security for costs, and litigation funding	159
	IX. Confidentiality constraints	161
	X. Non-litigious strategies	162
	XI. Conclusion	163
7.	International Human Rights Litigation in the United States	168
	Paul Hoffman	
	I. Introduction	168
	II. Alien Tort Statute (ATS)	169
	A. Possible ATS claims	170
	B. Theories of liability	171
	C. Presumption against extraterritoriality	173
	D. Corporate liability	174
	E. Doe v. Nestle and the Trump Administration position	175
	III. Torture Victims Protection Act (TVPA)	176
	A. Exhaustion of remedies	177
	B. Statute of Limitations	178
	IV. Trafficking Victims Protection Act (TVPRA)	178
	V. Foreign Sovereign Immunities Act (FSIA)	180
	VI. Anti-Terrorism Act (ATA)	182
	VII. RICO	184
	VIII. Environmental statutes	185
	IX. Common law claims	185
	X. State statutory claims	188
	XI. Defences to corporate accountability claims	188
	A. Personal jurisdiction	189
	B. Forum non conveniens	189
	C. Political question doctrine	191
	D. International comity	192
	E. Act of State doctrine	193
	XII. Access to justice in US courts	194
	A. Class actions	195
	B. Discovery	196

	CONTENTS	xiii
	C. Enforcement of US judgments	197
	D. Settlement	198
	XIII. Conclusion	199
8.	Foreign Direct Liability of Multinational Corporations in	
	the Dutch Legal Order	201
	Channa Samkalden	
	I. Introduction	201
	II. Corporate criminal liability	203
	A. Jurisdiction	204
	B. Boundaries of criminal liability of corporations	205
	III. Civil liability	207
	A. Applicable law	207
	B. Jurisdiction	208
	C. Article 6:162 DCC	209
	D. (Child Labour) Due Diligence Law	212
	E. Alternative legal grounds	213
	F. Direct reliance on the ECHR	214
	IV. Collective action	214
	A. Admissibility in the Milieudefensie and Trafigura cases	215 217
	B. The new Act on collective damages in class actions V. Limitation	220
	VI. Damages	221
	VII. Evidence	223
	A. Rules on disclosure	224
	B. Witnesses and witness protection mechanisms	225
	VIII. Legal costs and funding	227
	A. Legal costs	227
	B. Funding	228
	IX. Conclusion	229
^	IV Distant like a lateration and the Malking at language and Communication	
9.	Human Rights Litigation against Multinational Companies	220
	in France	230
	Sandra Cossart and Lucie Chatelain	
	I. Introduction	230
	II. Overview of some existing legal avenues under French law	231
	A. Criminal law	231
	B. Consumer law	236
	C. Tort law	238 240
	D. Labour law E. Sastian II conclusion	241
	E. Section II conclusion	241
	III. The duty of vigilance: a new legal basis in civil liability cases	242
	A. The creation of a corporate duty of vigilanceB. Judicial enforcement mechanisms	243
		245
	C. Some unresolved legal issues	_ 13

xiv CONTENTS

	V. Procedural barriers	248
	A. Access to evidence	248
	B. Legal standing of NGOs	250
	C. Collective actions	251
	D. Rules on costs	252
	V. Conclusion	253
10.	Iuman Rights Litigation against Multinational Companies	
	n Germany	254
	Airiam Saage-Maaβ	
	I. Introduction	254
	II. Jurisdiction	255
	II. Applicable law	256
	V. Substantive legal basis in the German law of delict	258
	A. Section 823(I) BGB	258
	B. Section 823(II) BGB	261
	C. Section 1004 BGB and Lliaya v. RWE	262
	D. Corporate liability and its relevance in transborder human	
	rights	263
	V. Practical and procedural factors	268
	A. Discovery and burden of proof	268
	B. Collective actions	272
	C. Limitation periods	272
	D. The damages awarded to the victims and the costs of civil	
	proceedings	273
	I. Conclusion	277
11.	Multinational Human Rights Litigation from the Perspective	
	of Business	278
	Rae Lindsay '	
	I. Introduction	278
	II. What is 'multinational human rights litigation'?	279
	II. Multinational human rights litigation—what are its	
	particular challenges?	288
	V. The UN Guiding Principles on Business and Human	
	Rights (UNGP)	297
	V. Implications of the UNGP for multinational human	
	rights litigation	300
	A. State regulatory intervention	300
	B. Publicly stated commitments by business and their	
	implementation	301
	C. 'Legalisation' of the responsibility to respect	303
	D. Grievance mechanisms	309
	F. Conduct of litigation	311

VI. The future: regulation, legal liability models, and
multinational human rights litigation 314
VII. Conclusion 318
12. Litigation Funding: Practical Aspects 320
Susan Dunn and Felix Curtis
I. Introduction 320
II. Legality of third party funding arrangements 321
A. The doctrines of maintenance and champerty 321
B. The importance of control 322
III. Which cases will a litigation funder fund? 322
A. The ability of the defendant to pay the amount being claimed 322
B. The realistic minimum value of the claim 325
C. Amount of funding required 326
D. Strengths and weaknesses of the legal claim 327
IV. Particular considerations in claims against multinationals 327
A. Provision for the likelihood of the defendant's vigorous defence
of the claims 327
B. Jurisdiction, applicable law, and the effect of those on the
recoverability of funder's fees 328
C. Recovery of the funder's fee more generally 328
V. Overall commercial viability assessment of a case from the
funder's perspective and typical pricing terms for funding 329
A. Book building 329
B. Adverse costs 331
VI. What to look for in a funder 331
VII. Options for lawyers to risk share—legal frameworks in
various jurisdictions 332
A. England and Wales 332
B. Canada 333
C. The United States
D. Australia 336
E. Germany 336
F. France
G. Netherlands
H. South Africa 337
VIII. Case studies 338
A. Indonesian seaweed farmers v. PTTEP Australasia 338
B. Children and Women of the Kabwe District of Zambia v. Anglo
American South Africa Ltd 339
IX. Conclusion 340
Index 341