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After Bhopal: Implications for Parent Company Liability

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The Bhopal tragedy has, of course, made an enormous impression on everyone. To corporate lawyers it represents precisely the kind of nightmare that we most fear and that we hope our wise counsel can help avoid. The recent fire and chemical spill at the warehouse of Sandoz AG in Basle, Switzerland, and the accident at the chemical plant of Hoffmann-LaRoche in Seveso, Italy, several years ago remind us that these types of hazards do not discriminate on the basis of nationality or geography.

On a more mundane level the litigation that has arisen from the Bhopal accident has several intriguing aspects and holds, I believe, some valuable lessons for all American multinational companies and the lawyers who counsel them. I do not hope to deal with all those lessons in this talk and must remind you that, since the matter remains on appeal before the Court of Appeals for the Second Circuit,[1] any conclusions we might reach must remain preliminary. I would, however, like to discuss some of the issues that seem to me to hold the greatest interest and then ask for your thoughts and comments. I hasten to add that I speak more as a *rapporteur* than as an expert and would welcome any clarifications, amplifications, or the like that any of you, having greater expertise, might like to make.

I propose to tackle this topic in the following way. I will first try to give you a short analysis of Judge Keenan's decision on the motion by Union Carbide to dismiss the case on the ground of forum non conveniens. I will then try to put Judge Keenan's decision in some kind of context, based on some other recent cases involving the same issues. Finally, I

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1. The appeal was decided subsequent to this talk.

will offer some thoughts on what lessons the Bhopal case holds for those of us who counsel major American multinational companies.

I. The *Bhopal* Decision

I would like to give you a quick synopsis of the facts of the Bhopal case as described in Judge Keenan's decision, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*.[2] Union Carbide India Limited (UCIL) operated a chemical plant in the city of Bhopal, State of Madhya Pradesh, in India in that it manufactured two pesticides, called SEVIN and TEMIK. UCIL was incorporated in India in 1934. Union Carbide Corporation (UCC or Carbide), a New York corporation, owned, at the time of the tragedy, 50.9 percent of UCIL's stock. The principal active ingredient in the two pesticides is methyl isocyanate, a highly toxic gas. On the night of December 2-3, 1984, this gas leaked from the plant in substantial quantities. The prevailing winds blew the gas over populated sections of the city adjacent to the plant. An estimated 2,100 people died and over 200,000 people suffered injuries.

On December 7, 1984, American lawyers filed suit against UCC on behalf of certain Indian claimants in a West Virginia federal court. Subsequently, 144 additional actions were commenced in other federal courts. The Judicial Panel on Multi-District Litigation consolidated these cases in the Southern District of New York in February 1985. These individual cases were superseded by a consolidated complaint filed on June 8, 1985.

The Indian government, on March 29, 1985, enacted a statute called the Bhopal Gas Leak Disaster (Processing of Claims) Act (21 of 1985) (Bhopal Act). The Bhopal Act gives the Government of India the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with these events. Pursuant to the Bhopal Act, the Union of India, on April 8, 1985, filed a complaint with the District Court for the Southern District of New York setting forth claims for relief similar to those contained in the consolidated complaint of the individual plaintiffs. The district court, by order of April 25, 1985, established a Plaintiffs' Executive Committee representing the individual plaintiffs and including an attorney representing the Government of India.

On September 25, 1985, pursuant to the Bhopal Act, the Government of India framed a "scheme" for registration and processing of claims, pursuant to that the government has received 487,000 claims.

2. *Bhopal I*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987).

As most of you know, the district court granted UCC's motion to dismiss on the ground of forum non conveniens. In granting the motion, however, the court imposed the following conditions:

(1) That UCC consent to submit to the jurisdiction of the courts of India and continue waiving defenses based upon the statute of limitations;
(2) That UCC agree to satisfy any judgment rendered by an Indian court (assuming conformity with minimal requirements of due process);
(3) That UCC accept discovery under the model of the U.S. Federal Rules of Civil Procedure.[3]

Before discussing Judge Keenan's decision it may help to provide some background on the law of forum non conveniens. The Supreme Court laid down the basic rules for considering such a motion in *Gulf Oil Corp. v. Gilbert*.[4] That case involved a claim arising from an explosion of gasoline during delivery to a warehouse in Lynchburg, Virginia, owned by the plaintiff. Mr. Gilbert sued Gulf Oil, a Pennsylvania corporation, in New York. Gulf sought dismissal of the case on the ground that Virginia would offer a more convenient forum. The district court granted the motion, the Second Circuit reversed, and the Supreme Court reversed again, agreeing with the district court's position. For this case and a companion case, *Koster v. (American) Lumbermens Mutual Casualty Co.*,[5] decided the same day, the following principles emerge:

(1) A decision to dismiss rests in the sound discretion of the trial court;
(2) The plaintiff's choice of forum will normally receive deference;
(3) In reaching its decision the trial court should consider various "private interests," such as relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of a view of the premises, if appropriate to the action; other practical problems that make trial of a case easy, expeditious, and inexpensive, including enforceability of a judgment, if obtained;
(4) The court should also consider certain "public interests," such as administrative difficulties in congested courts, the unfairness of imposing jury duty upon people in a community with no relation to the litigation; the interest of holding a trial in the view of the persons affected ("There is a local interest in having localized controversies decided at home."[6]).

3. 634 F. Supp. at 867.
4. 330 U.S. 501 (1947).
5. 330 U.S. 518 (1947).
6. *Gulf*, 330 U.S. at 509.

The Supreme Court considered the applicability of this doctrine to international cases in *Piper Aircraft Co. v. Reyno*.[7] In that case the Court upheld the dismissal on the ground of forum non conveniens of a suit brought on behalf of the estates of certain Scottish and English subjects who died in an airplane crash in Scotland. The administratrix, who happened to be the legal secretary of the plaintiffs' attorney, brought wrongful death actions against the builder of the aircraft, that was manufactured in Pennsylvania, and the maker of the engines, that were manufactured in Ohio. The aircraft had received registration in Great Britain and was owned and maintained by a British company. It was operated by Scottish Air Taxi Service, and the wreckage of the plane was in England.

The U.K. Department of Trade investigated the accident and issued a preliminary report suggesting a mechanical failure. A review board found no evidence of defective equipment and suggested the possibility of pilot error as a cause of the accident.

The Court took note of the usual deference to be accorded a plaintiff's choice of forum, but added that such presumption would apply with less force when the plaintiff was foreign.[8] The Court upheld the district court's finding that an adequate alternative forum existed in Scotland and held that a possible change in law unfavorable to the plaintiffs resulting from a dismissal could not justify denial of the motion. Only where the alternative forum was so clearly inadequate and unsatisfactory as to provide no remedy at all could this consideration receive substantial weight.[9] In addition, the Court recognized that moving the case to Scotland would involve some inconvenience to the plaintiffs, since the case involved possible liability for acts committed in the United States related to the design of the engine and aircraft. The Court concluded that, on balance, Great Britain had a greater interest in the outcome of this litigation than did Pennsylvania and so agreed with the dismissal.

Given this background Judge Keenan's decision appears for the most part as a classic exercise in forum non conveniens analysis. The most difficult issue related to the adequacy of the Indian courts as an alternative forum to the U.S. In arguing against India the plaintiffs contended that the Indian court system sometimes produced delays of twenty-five years or more, did not provide the type of discovery available in U.S. courts, and lacked, generally speaking, the capacity to handle complex, technical litigation. In addition, the plaintiffs expressed concern about the amenability of UCC to jurisdiction in India. UCC submitted affidavits of two members of the bar of India, each admitted to practice for over forty

7. 454 U.S. 235 (1981).
8. *Id.* at 255.
9. *Id.* at 254.

years and both Senior Advocates before the Supreme Court of India. One of them served as Indian Ambassador to the United States from 1977 to 1979.[10] The plaintiffs submitted an affidavit of a professor of law at the University of Wisconsin Law School.[11] In their affidavits the Indian experts emphasized the ability of the Indian legal system to adapt to novel circumstances and devise novel procedures for dealing with them. In this context the existence of the Bhopal Act and the procedures for processing claims thereunder became important. In answer to the plaintiffs' assertion that India lacked procedural devices needed for the adjudication of complex cases, the district court explicitly conditioned dismissal on UCC's willingness to submit to discovery based on the U.S. Federal Rules of Civil Procedure.[12] To answer the objection of possible nonenforcement of a foreign judgment, the court imposed the condition that Carbide agree to be bound by judgment in India and accept the jurisdiction of the Indian courts.[13]

The irony of this entire exercise, of course, was that Carbide found itself arguing the adequacy of the Indian legal system, whereas the plaintiffs, citizens of India, joined by the Indian Government, argued the reverse. This alignment of parties must have struck the court as slightly bizarre. The Indian Government reversed its position on appeal, to the chagrin of the attorneys for the individual plaintiffs.

The district court also engaged in an extended analysis of the private and public interest considerations set forth in *Gulf Oil*. This analysis holds some interesting lessons for people who counsel multinational corporations. Carbide presented proof that almost all records relating to liability existed in and around Bhopal. It argued strenuously that Indian nationals managed and operated the plant, that UCC corporate headquarters had only limited contact with UCIL's Bombay headquarters, and that UCC's only involvement with the construction of the Bhopal plant was to provide a process design package consisting of the basic plan for the factory and certain technical assistance. UCC pointed to the involvement of independent contractors in India, which did the detailing of the process design, and the involvement of local and national governmental authorities in the plant design and execution of construction.

10. *Bhopal I*, 634 F. Supp. at 847.

11. *Id.* This aspect of the case deserves attention on the part of practitioners who have occasion to litigate a similar issue. The importance of choosing as highly credentialed and impressive an expert as possible to argue your side of the "local forum" question (i.e., relative adequacy or inadequacy of the foreign country judicial system as an alternative to the U.S.) cannot be overemphasized. The tone of Judge Keenan's remarks in discussing this issue makes it clear that Carbide's experts made a much better impression on him than did the plaintiffs'.

12. *Id.* at 850.

13. *Id.* at 852.

The district court concluded, based on this evidence, that UCC had had very little involvement in the design and construction of the Bhopal plant. The court, considering access to sources of proof, also pointed to the practical difficulties of litigating the case in the United States, not the least of that related to language problems. The court pointed out that the Indian courts have the ability to understand and operate in English, whereas American courts could not work with Hindi, the language of certain documents and witnesses. The court went through a similar analysis on the issue of access to witnesses and possibility of viewing the site.

With respect to public interest concerns the court concluded that administrative difficulties of litigating such a case in the United States would be far greater than comparable difficulties that might be encountered in India. In this connection the court pointed to the involvement of the Indian Government through environmental laws and regulations, occupational safety and health regulations, as well as the involvement of the Indian Central Bureau of Investigation, which conducted an inquiry into the disaster and impounded a significant number of documents. The court concluded: "The Indian interest in creating standards of care, enforcing them or even extending them, and protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology."[14] The district court decided that India's interest in this litigation far outweighed that of the United States and, subject to the three conditions it imposed, dismissed the consolidated case on forum non conveniens grounds.

II. Analysis of the District Court Decision

Comparison of this decision with other cases involving similar issues may help to show just how this case fits into the evolving law on this question.

My industry has, unfortunatley, made a fairly significant contribution to the law on this subject. In *Harrison v. Wyeth Laboratories Division of American Home Products*[15] citizens of the United Kingdom sued a manufacturer of an oral contraceptive product. Plaintiffs argued that the defendant company caused the marketing, sales, and distribution of the product in the United Kingdom and either actually produced and manufactured the product in the United Kingdom, or did so through others. They alleged that the defendant was responsible for failing to give adequate or reasonable warnings concerning risks, of which it knew, associated with these products.

14. *Id.* at 865.
15. 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd per curiam*, 676 F.2d 685 (3d Cir. 1982).

The manufacturer answered that all activities concerning manufacture and sale of the product occurred in the United Kingdom, and that Pennsylvania had no legitimate interest in regulating the conduct of its citizens beyond its borders. The defendant also pointed out that marketing decisions were made in light of British regulations and law and should be judged according to British standards.

The court granted the manufacturer's motion to dismiss. The court pointed to the interest of the country where the product was sold in regulating the conditions of sale and disagreed that a foreign country, like the United States, should impose its own view on such a subject. Prophetically, it would seem, the court wrote: "The impropriety of such an approach would be even more clearly seen if the foreign country involved was, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own."[16]

The court, nevertheless, refused to "insulate" the defendant from possible liability for actions that had occurred in the United States. It adopted, therefore, a series of conditions similar to those imposed by Judge Keenan: the defendant would have to consent to suit in the U.K., would have to make available, at its own expense, any documents or witnesses within its control needed to decide the action, and would have to consent to pay any judgments rendered against it in the U.K. Interestingly, the court in *Harrison* did not require waiver of any applicable statute of limitations.

In *Dowling v. Richardson-Merrell, Inc.*[17] British plaintiffs sued an American pharmaceutical company, claiming that a drug manufactured by that company caused birth defects. The plaintiffs argued that the planning, manufacturing, animal testing, primary human studies, and monitoring of the product took place in the United States. The defendant provided evidence that the product had at all times been manufactured, sold, and distributed in the United Kingdom by British companies, and that promotion and sale of the product were carried out under product licenses issued by the U.K. Government. The defendant also provided expert opinion, through an affidavit, designed to show that the infant plaintiffs could state good causes of action under English law. The court, again following the criteria laid down by *Gulf Oil* and *Piper,* affirmed dismissal, noting, in passing, the Supreme Court's comment in *Piper* that the normal deference to be accorded to plaintiffs was not controlling in a case involving foreign citizens. It wrote: "When a regulated industry, such as pharmaceuticals in this case and passenger aircraft operations in

16. *Id.* at 4.
17. 727 F.2d 608 (6th Cir. 1984).

Piper Aircraft is involved, the country where the injury occurs has a particularly strong interest in product liability litigation."[18]

In this case, as in the previous cases, the court conditioned dismissal on defendant's acceptance of various conditions: consent to suit and acceptance of process in the U.K.; agreement to make available any documents or witnesses necessary for a fair adjudication of an action in the U.K.; and consent to pay a judgment that might be rendered in the U.K. In addition, however, the district court required, and the appeals court affirmed, defendant's agreement to waive any statute of limitations defense not existing prior to the commencement of the action. Finally, the Sixth Circuit noted that, if a British court held that certain plaintiffs had no cause of action for prenatal injuries, such plaintiffs would have the right to reinstate their action in the United States.

The Eighth Circuit, in *De Melo v. Lederle Laboratories, a Division of American Cynamid Corp.*[19] has also followed this approach. That case involved a products liability claim by a Brazilian citizen against a manufacturer of a drug used against tuberculosis. She alleged that, as a result of taking the drug, she had become permanently blind. The package insert for the product manufactured and distributed in Brazil, a Portuguese translation of an English language version prepared by Lederle for use in the U.S., contained a warning, but spoke of only temporary vision loss. The U.S. version had been amended to warn against permanent vision loss, but the Brazilian version was not amended until sometime later. Ms. De Melo brought her suit in Minnesota, the state of the American lawyer representing her. The district court dismissed the case on forum non conveniens grounds, again imposing the four familiar conditions.

The Eighth Circuit affirmed following, once again, the analysis laid out in *Gulf Oil* and *Piper*. For the Eighth Circuit, Lederle's consent to suit in Brazil and willingness to make documents available satisfied concerns relating to the adequacy of the alternative forum.[20] The court also cited affidavits from Brazilian attorneys stating that De Melo's claims could state a good cause of action under Brazilian law. The court concluded that the lack of punitive damages and damages for pain and suffering, while making Brazil a less favorable forum, would not make it inadequate. As in *Harrison* and *Dowling*, the court concluded that the availability of witnesses and evidence in Brazil and a lack of interest of a U.S. forum in regulating conduct that occurred abroad militated in favor of dismissal.

18. *Id.* at 616.
19. 801 F.2d 1058 (8th Cir. 1986).
20. *Id.* at 1061.

The decision, however, attracted a strong dissent, the tone of that, I believe, points up an issue that, with the passage of time, will become more hotly contested. Judge Swygert concluded his comments by saying:

> Finally, I cannot help observing that Lederle is a multinational corporation. It has chosen to do business in Brazil. When such companies do business in foreign countries they should not, by that fact, manage to evade the force of American law. De Melo ingested the drug in Brazil. But the decision to warn of only temporary blindness occurred in the United States, and was made by United States citizens in the employ of a United States corporation. These facts suggest that the United States is the most appropriate forum to hear Ms. De Melo's complaint.[21]

In light of these cases the *Bhopal* case would seem to present a particularly compelling set of facts favoring dismissal.[22] The court in *Piper* admitted, for example, that, on the question of ease of access to sources of proof, the private interests pointed "in both directions."[23] In *Dowling, Harrison,* and *De Melo* each of the defendants marketed its product through a wholly-owned subsidiary, rather than one in that it held barely a majority interest. In *Harrison,* moreover, the court explicitly assumed that all production and marketing decisions might have been made by the defendant in Pennsylvania. In addition the imposition of the three conditions mentioned at the beginning of this talk seems entirely consistent with the approach taken in court after court in similar cases. The one anomalous aspect of Judge Keenan's decision relates to the requirement that Carbide

21. *Id.* at 1065; *see also* Schertenleib v. Traum, 589 F.2d 1156 (2d Cir. 1978) (case dismissed in favor of Swiss court); Cheng v. The Boeing Co., 708 F.2d 1406 (9th Cir.), *cert. denied,* 464 U.S. 1017 (1983) (case dismissed in favor of Taiwanese court despite presence of American as well as foreign plaintiffs and argument that Taiwanese court might have to apply U.S. law); Abiaad v. General Motors Corp., 538 F. Supp. 537 (E.D. Pa.), *aff'd per curiam,* 696 F.2d 980 (3d Cir. 1982) (case dismissed in favor of United Arab Emirates); *In re* Disaster at Riyadh Airport, Saudi Arabia, 540 F. Supp. 1141 (D.D.C. 1982) (case dismissed in favor of Saudi Arabia); Manu Int'l v. Avon Prod., Inc., 641 F.2d 62 (2d Cir. 1981) (dismissal reversed in suit by a Belgian corporation against a U.S. company alleging existence of a fraud directed from New York, in seeking to deal directly with plaintiff's Taiwanese manufacturer of handbags, and holding that New York would provide a more convenient forum, with fewer practical problems, including translation; *cf.* comment in concurring opinion by Judge van Graafeiland: "Unless other courts follow this lead, forum non conveniens bids fair to become a procedural ploy designed to discomfit rather than an instrument for the furtherance of justice." *Id.* at 68); and Gates Learjet Corp. v. Jensen, 743 F.2d 1325 (9th Cir. 1984), *cert. denied,* 471 U.S. 1066 (1985) (reversing dismissal of an action by U.S. manufacturer against *nonresidents* claiming trademark and tradename infringement, abuse of process, interference with contract in Philippines).

22. Indeed the Second Circuit, in affirming, commented: "[W]e are satisfied that there was no abuse of discretion in his [the district court's] granting dismissal of the action. On the contrary, it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal." 809 F.2d at 202.

23. *Piper,* 454 U.S. at 257.

accept discovery under U.S. rules. Carbide has appealed this point. Other courts have insisted that defendants accept, as a condition of dismissal, the production of documents and witnesses under their control. Other courts have not, however, taken the additional step of specifying, as did Judge Keenan, the procedural basis for doing so. One can assume, therefore, that such production would only occur on the basis of procedural rules that applied in the foreign court.[24]

Before considering the implications of *Bhopal* and related cases for the operations of multinational companies I would like to suggest some practical lessons that result from these cases. Dismissal on forum non conveniens grounds involves a price for defendants. They will almost certainly have to consent to the jurisdiction of the foreign court, thereby sacrificing a major jurisdictional defense. The defendant will also have to agree to cooperate in producing proof and agree to pay any eventual judgments. These conditions have the unfortunate result of eroding the sanctity of the corporate form, a principle which most multinational companies rely on to help manage the risk of doing business abroad. This erosion takes place at a time when the principle of limited liability is already subject to question in the U.S. courts for a variety of other reasons.[25]

In addition both parties, but especially the defendant, will need to submit proof on whether the foreign jurisdiction will provide relief for the plaintiff's claim.

The *Bhopal* case has gone up to the Second Circuit for review. Oral argument occurred on November 24, 1986.[26]

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24. The Second Circuit, in an opinion published after delivery of this talk, modified this aspect of the district court's decision. The appeals court ordered deletion of this condition, without prejudice to the right of the parties to have reciprocal discovery on *equal* terms under the federal rules, subject to approval of the Indian court. In the absence of such court-sanctioned agreement the parties would have to rely on discovery available under applicable Indian rules. *Bhopal II*, 809 F.2d at 205-06. The court wrote: "Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Application of this fundamental principle in the present case is especially appropriate since [India] . . . is expected to be a party to the Indian litigation, possibly on both sides [!]." *Id.* at 205. This change would seem to bring the *Bhopal* case back more clearly into the mainstream of the forum non conveniens decisions discussed above.

25. *See, e.g.*, Note, *Liability of Parent Corporation for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986). Neither the district court nor the Second Circuit discussed this aspect of their decisions, undoubtedly because it had no direct bearing on the narrow issue before them. It should not escape attention, however, that foreign plaintiffs gain a major procedural advantage, given the present state of the law, simply by starting their case in a U.S. court against the U.S. parent company, even when they know the case may well go back to their home jurisdiction on forum grounds. They thus pierce a "procedural corporate veil" (though not, obviously, establishing parent company liability on the merits) and force the foreign parent to submit to the jurisdiction of a foreign court that could otherwise not reach it. In imposing this condition, I believe U.S. courts do a major disservice to American multinational companies.

26. As mentioned above, that appeal has now been decided and is reported at 809 F.2d

III. Conclusions for the Management of Multinationals

From the foregoing discussion it would appear that the doctrine of forum non conveniens remains alive and well in U.S. courts, and that American parent corporations with subsidiaries abroad have little to fear in the way of the demise or erosion of this doctrine. I would, however, like to inject a note of caution. Typically, counsel for the plaintiffs in these actions emphasize the role of the American corporate parent in setting policy and supervising operations of its subsidiaries. Counsel in the *Bhopal* case took precisely this line of argument.[27] In research-oriented companies in industries like pharmaceuticals, computers, and electronics, that depend on focused research and development and consistency and uniformity in manufacture and marketing, this argument may begin to become persuasive. The remarks of dissenting Judge Swygert in the *De Melo* case strike me as a straw in the wind. In *Bhopal* contacts with the locale of the disaster were far greater than seems typical in most cases.

If *Bhopal* becomes the standard for measuring the necessary degree of local contact, defendants may have a more difficult time in the future persuading U.S. courts to transfer litigation involving foreign plaintiffs back to the plaintiffs' jurisdiction. We must remember that, despite the existence of clear standards, the application of forum non conveniens remains discretionary with the trial court. In addition the cases cited above are federal cases and do not bind state courts.

Before discussing specific recommendations I should perhaps put some of my prejudices on the table. In my view U.S. multinational companies face unique problems when they do business internationally. I detect a tendency on the part of U.S. judges, legislators, and regulators to equate the U.S. with the world and to insist that operations conducted by U.S. corporations outside the U.S. adhere to U.S. standards whether or not, as a legal matter, they apply or whether other governments may be involved. This paternalistic attitude carries the inherent assumption that other countries do not have the ability adequately to protect their citizens against (presumably predatory) U.S. multinationals and must, therefore,

195 (2d Cir. 1987). The individual plaintiffs have requested a rehearing and suggested that it be held en banc.

27. The issue of parent company responsibility for the potential tort liability of a subsidiary, while not faced by the U.S. courts in *Bhopal*, remains in that case for eventual resolution. The individual plaintiffs advanced, in their U.S. complaint, the theory, that seems to be gaining increasing credence, of the "monolithic multinational." This issue has received much attention in recent years, particularly through the proposal and adoption of various codes of conduct for transnational corporations. For an interesting discussion of this point, see Kolvenbach, *European Reflections on Bhopal and the Consequences for Transnational Corporations*, 14 INT'L BUS. LAWYER 357 (1986).

receive help from U.S. law. Multinational companies from France, U.K., Switzerland, Italy, Germany, and Japan do not face this problem.

In addition our government, even during a supposedly conservative administration, remains enchanted by the idea of using economic pressures for political ends, even though experience demonstrates that boycotts and sanctions achieve their political goals only in the rarest of circumstances.[28] To my knowledge no other major industrialized country imposes on multinational companies incorporated under its laws the panoply of regulation represented by the Libyan Sanctions Regulations, the Comprehensive Anti-Apartheid Act, the Foreign Corrupt Practices Act, the Cuban Assets Control Regulations, miscellaneous provisions of the Export Administration Act and related regulations, the Nicaraguan Sanctions Regulations, to name only a few. I do not mean to suggest that these measures necessarily lack a valid policy basis. They presumably have one. They testify, however, to a certain attitude that seems to want to ignore the existence of different realities outside the U.S. and all the attendant complexities that go with them.

Considering this climate and bearing in mind our discussion of the law of forum non conveniens, I offer the following thoughts:

(1) If a U.S. company wishes to do business abroad, it will need, at the outset, to decide how much of a commitment it wishes to make to international business. The greater the degree of commitment and the greater the concentration of resources abroad, the greater the difficulty a U.S. court will have in justifying a retention of jurisdiction.

(2) Ironically the existence of pervasive and intrusive regulation by the foreign jurisdiction may have the effect of reinforcing a district court's willingness to dismiss a case brought by foreign plaintiffs. This type of regulation, while bothersome as a compliance matter, may have the unintended benefit of reinforcing the local interest in the controversy. Judge Keenan repeatedly pointed to Indian Government involvement both before and after the Bhopal accident. Similar considerations ran through the *Dowling, Harrison,* and *De Melo* cases, where the courts emphasized the concern of local regulators in the way that products were marketed and sold.

(3) Counsel should review carefully with management how they approach the conduct of international operations. The analysis followed by Judge Keenan suggests a need for a clear delineation

28. *See, e.g.*, Carswell, *Economic Sanctions and the Iran Experience*, 60 FOREIGN AFFAIRS 247 (1981/82).

of responsibility between headquarters management and subsidiary personnel, with delegation to subsidiary management of as much autonomy as possible concerning *operating* matters and restriction of headquarters management to *strategy* and *policy* issues.

(4) The greatest potential problem area relates to issues like quality control, manufacturing technology, and research and development. In highly sophisticated industries like pharmaceuticals, stringent quality control, adherence to good manufacturing practices, and a consistent approach in labeling and marketing become essential to protecting the company's image as a reliable producer of effective and safe products designed to help cure disease. As counsel for major multinational corporations, therefore, we have an extremely delicate task in counseling management on how to achieve their goals and meet company standards, while at the same time minimizing the litigation risks that might result.

As a closing footnote to this discussion it seems appropriate to mention that one should also remain aware of the hazards of litigating complicated cases abroad. The recent difficulties experienced by Union Carbide before the Indian courts, that have attempted to prevent certain transactions that management deems necessary for the corporation's future development, suggest that successfully transferring a case to another jurisdiction will not necessarily bring an end to one's problems.[29]

29. *See, e.g., India Court Bars Carbide Debt Buyback, Asset Sales and Payout Pending Hearing,* Wall St. J., Nov. 18, 1986, at 8, col. 2 (Midwest ed.); *Union Carbide Asks U.S. Appeals Court To Intervene in Case of Bhopal Incident,* Wall St. J., Nov. 25, 1986, at 5, col. 1 (Midwest ed.); *Bhopal Judge Taken Off Case,* N.Y. Times, Feb. 26, 1987, at D-1 (reporting removal of presiding Judge in India, because he had also secretly filed a claim of his own in the proceeding).