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Models of Corporate Supply Chain Liability

Supervisor: Drs. Caro VAN DEN BROECK

Promotor: Prof. Matthias Edward STORME

Master thesis, submitted by

Penelope A. BERGKAMP

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Summary

This thesis examines the exposure of EU-based multinational corporations to supply chain liability (SCL) under extra-contractual, civil liability or tort law. The theoretical models and case law are analysed.

The analysis shows that common law jurisdictions dominate the development of SCL, with the civil law jurisdictions likely to follow along. It also demonstrates that the courts so far have been reluctant to entertain the grand new theories of SCL – the concept of corporate social responsibility, supply chain responsibility, and the related company law, stakeholder, and public trust models have not (yet) been accepted as potential legal bases for SCL.

Instead, courts have reinterpreted existing tort law concepts to fit the case of SCL. The English courts have led the way in exploring this area of potential corporate liability. If English law is illustrative of the future development, SCL will center on control of a business partner's activity by the EU-based multinational corporation. Such control can be *de facto* or, maybe, presumed based on a duty to control. The core concept of control is supplemented by the familiar concept of knowledge, actual or presumed – knowledge of risks may trigger a duty to intervene.

Although the more radical SCL models have been relegated to back stage, they may revive if legislatures or possibly courts cross the 'bridges' between the existing law and the new models. This thesis identifies these bridges: in first instance, the promise to control, the duty to control and the duty to know, and, subsequently, once these bridges have been crossed, the concept of enterprise liability (economic unity), the duty to meet expectations, and the duty to pursue the public good.

Considering the similarities between civil liability in common law and civil law, the developments in UK will likely become relevant to the prospects of Belgian supply chain liability cases.

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Preface

Supply chain liability of multinational corporations is a fascinating topic. It raises the question of corporate (social) responsibility, and tests the limits of both the law and judicial law making.

My interest is the subject of this thesis is long-standing. Over the last couple of years, I have researched this issue and written about it in several blog posts and articles. Footnote 34 provides references to this work.

I would like to thank prof. dr. Matthias Edward Storme and drs. Caro Van den Broeck for their inspiring encouragement, enlightened guidance and insightful comments. Through their teachings, I discovered that wisdom begins where knowledge ends. They also impressed upon me that to become a master, I must continue to be a student.

Penelope Aurelia Bergkamp

Leuven, 2 May 2019

List of abbreviations

ATS	Alien Tort Statute (US)
CC	Civil Code
CSR	Corporate Social Responsibility
EU	European Union
EWCA	England and Wales Court of Appeal
ICC	International Chamber of Commerce
ILO	International Labour Organisation
ISO	International Standardisation Organisation
MNE	Multinational Enterprise
NGO	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
ONCA	Ontario Court of Appeal
ONSC	Ontario Superior Court
SCL	Supply Chain Liability
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UN	United Nations
US	United States

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1 Introduction

A novel legal theory,[1] supply chain liability holds that in certain circumstances a company can be held liable for damage-causing events in its supply chain. In broad terms, a company may be exposed to supply chain liability, if it causes or fails to prevent damage in violation of a duty not to cause harm or to prevent harm at its suppliers' sites. By and large non-existent no more than a decade ago, this new legal theory may become a major avenue for law suits against multinational corporations.

Two recent court cases that gained much media attention raised the question as to whether and, if so, under which conditions, a corporation is responsible for damage-causing events in its supply chain. The cases illustrate the importance of understanding the legal bases of supply chain liability and its boundaries.

1.1 Rana Plaza factory collapse

In 2013, the Rana Plaza building, a Bangladeshi garment factory, collapsed. More than 1,100 factory workers died and 2,000 were injured. A class action lawsuit filed in Canada in 2015 against a major Canadian retailer floated the theory that the retailer was responsible for the abominable circumstances because a very substantial part of the plant's output (ca. 50%) was produced for the retailer.[2] In first instance and on appeal, the case was dismissed, *inter alia*, on the grounds that "the exceptional circumstances" in which a company can be vicariously liable for the misdeeds of independent contractors were not present in this case: the retailer did not "control" the risk of harm to the claimant.[3] The judge struggled with the prospect of "indeterminate liability": who would owe a duty of care to whom, and who would not. Indeed, this is a legitimate concern –

[1] It could be argued that SCL is not so novel. In 1984, Indian victims of the Bhopal disaster sued Union Carbide in the United States under US tort law invoking an early version of a SCL theory. The Court of Appeal dismissed the case on the basis of *forum non conveniens*, which suppressed the rise of SCL for decades. The case was then brought before the Indian courts, resulting in a settlement. *In re Union Carbide Corp. Gas Plant Disaster* [1987] 634 F. Supp. 842, 844 (S.D.N.Y. 1986), 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).
[2] *Das v George Weston Limited* [2018] ONCA 1053, at 7.
[3] *Das v George Weston Limited* [2017] ONSC 4129, at 469.

supply chain liability imposed on corporations needs careful definition and clear boundaries.

1.2 Oil pollution in Nigeria

Royal Dutch Shell ('Shell') has been a target of legal claims with respect to operations abroad. Court cases have been filed in the UK and The Netherlands against Shell for environmental damage and related economic harm caused by its Nigerian subsidiary. Oil that escaped from pipelines operated by Shell's Nigerian subsidiary had allegedly polluted lands and waters in the Niger Delta. Farmers and fishers consequently lost their livelihood.

In February 2018, the England and Wales Court of Appeal (EWCA) ruled that Shell has no legal responsibility under English law for the pollution caused by its Nigerian subsidiary, and dismissed the case.[4] Shell does not operate the Nigerian pipelines and thus did not exercise sufficient control for English law to impose a duty of care on Shell *vis-à-vis* the Nigerian farmers. In the Dutch case, however, the court found that Shell may be liable for the damage, even if sabotage is found to have caused the oil spills.[5] Thus, this case centers on a parent company's duties to monitor the activities of its subsidiaries, to intervene, as necessary, and to monitor its pipelines and prevent sabotage. The Dutch case is currently pending before the Court of Appeal of The Hague.

The Rana Plaza and Shell cases are two examples of a growing list of cases. It certainly looks like 'supply chain liability' litigation is on the rise. Before examining the philosophical and legal foundations of supply chain liability, however, the concept as such needs to be defined carefully.

[4] *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191.
[5] *Eric Dooh & Ors v Royal Dutch Shell & Ors* [2015] The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:2015:3586.

2 Definition

The legal theory of corporate supply chain liability holds that a company may be held liable for damage-causing events in its supply chain if it failed to prevent the damage in violation of a relevant duty to refrain from causing harm or a duty to prevent harm.[6]

A corporation's supply chain often involves many contractual relationships (such as those relating to suppliers and employees) and non-contractual relationships (such as the impact of a company's operations on the local community, its influence on the environment). The figure below presents a schematic overview of a corporation's (CO in Figure 1) supply chain. CO has a simple supply chain, with only one subsidiary which supplies to it – the subsidiary, in turn, has its own raw material suppliers. CO may issue guidelines or impose policies on its subsidiary and may provide (supervisory) staff. CO's customers buy the end products and dispose of it after use. The subsidiary may be an unrelated supplier. Of course, in the real world, supply chains can much more complicated and involve many hundreds or even thousands of subsidiaries, direct and indirect suppliers, business partners, etc.

All these relationships can inspire claims: employees claiming their wages, suppliers claiming payment for goods delivered, etc. These natural and legal persons are the *voluntary* creditors of the corporations – contracts and contract law ground their legal entitlements. However, a corporation can also have involuntary creditors – they do no have a contract with the corporation, but may have claims against it based on laws such as civil liability (tort) law.

Supply chain liability may involve both voluntary and involuntary creditors – and one and the same person may be both. It builds on the theories of supply chain responsibility and corporate social responsibility, and ties these to contractual and extra-contractual obligations.

[6] The definition of supply chain liability is derived *mutatis mutandis* from the definitions of *supply chain responsibility* and *corporate social responsibility,* which have been previously defined by international organisations, for example the International Chamber of Commerce and the European Commission. *See* Section 3.2 and 3.3.

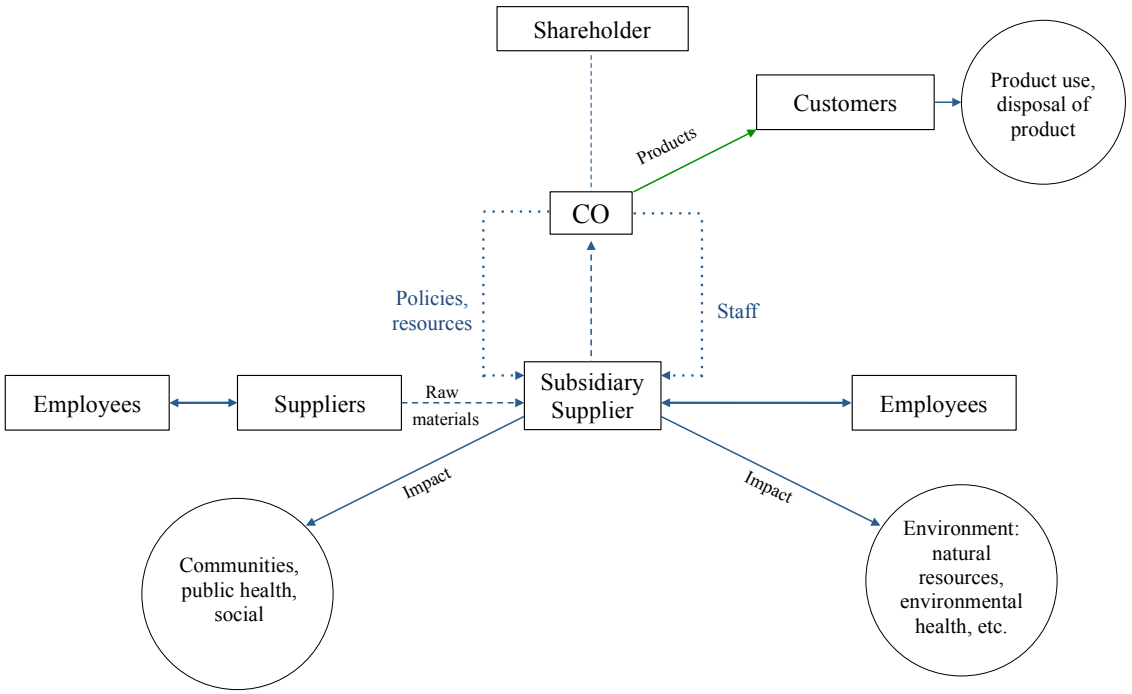

Figure 1: Schematic overview of the supply chain of a Corporation (CO), including stakeholders (employees, shareholders and customers).

3 Foundations

This chapter analyses the philosophical foundations of supply chain liability, since they provide clues as to the possible legal theories. The focus is on corporate social responsibility (CSR) and supply chain responsibility (SCR). To encourage companies to comply with CSR and SCR norms, international organizations, such as the UN, OECD, ILO, and EU, have issued soft law instruments. Although hard laws implementing some form of SCL exist, their scope is narrow. General theories of supply chain responsibility, however, may begin to influence the judicial interpretation of open norms of civil liability, such as negligence; in that manner, generalized supply chain liability may come into existence without legislation.

3.1 Corporate social responsibility

For a long time, the dominant view has been that corporations do *not* have social responsibility,[7] but the tide appears to have changed. Over the last several decades, the thinking about the corporation's role in society has changed. This is true in particular in relation to the large multinational enterprise, which may have annual turnovers that exceed the gross domestic products of some countries.

[7] M. Friedman, 'The Social Responsibility of Business is to Increase its Profits', *The New York Times Magazine*, September 13, 1970; M. Friedman, & R. D. Friedman, *Capitalism and freedom*, Chicago: *University of Chicago Press*, 1962, 133. A case-in-point is the landmark ruling in *Walkovszky v Carlton* [1966] 223 N.E.2d 6 (N.Y.). The plaintiff, who sustained severe injuries after being struck by a taxicab, sued the individual who "organized, managed, and controlled" the taxicab company. Namely, the taxicab company was organised as follows: each taxicab formed a different corporation and each corporation carried the minimum insurance coverage required by law. Thus, in order to obtain full compensation, the plaintiff argued that the "corporate veil should be pierced". The Court of Appeals, however, held that "[t]he corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought." In other words, the corporation is not responsible for the protection of the public, the legislature is.
A dissenting view was articulated by Justice Keating: "The issue presented by this action is whether the policy of this State, which affords those desiring to engage in a business enterprise the privilege of limited liability through the use of the corporate device, is so strong that it will permit that privilege to continue no matter how much it is abused, no matter how irresponsibly the corporation is operated, no matter what the cost to the public. I do not believe that it is."

There is a growing realization that government cannot solve society's biggest problems, such as pollution and poverty.[8] Corporations, on the other hand, have been very successful in addressing some societal needs. Through technological innovation, economies of scale, and other strategies, their efficiency and productivity gains have been impressive. Hence, the idea emerged that the corporate problem-solving capability should be harnessed to solve social problems.[9]

Moreover, it has been argued that corporations, in particular multinational enterprises (MNEs), pursue private gains at the expense of the public interest.[10] Globalization, with its perceived adverse effects on the environment, workers, and communities, repeated financial crises, human rights violations, non-compliance with law, and scandals involving corporate greed and excessive executive compensation, are invoked to support this proposition.[11] "Corporate social responsibility" would be necessary to address these deficiencies, and instil a sense of accountability to the public for all of a corporation's effects.

Under the modern theory of corporate social responsibility, corporations may not pursue solely their shareholders' interests, but they have a social responsibility to society "within its sphere of influence".[12] Corporations should change the way they do business to reflect broader, societal interests.[13] Fundamental economic and social transformation, and long-

[8] Y. Miwa, 'Corporate Social Responsibility: Dangerous and Harmful Though Maybe Not Irrelevant', 84 *Cornell L. Rev.* 1999, 1227 – 1254.
[9] Committee for Economic Development, 'Social responsibilities of business corporations', New York, 1971. Available at *https://www.ced.org/reports/single/social-responsibilities-of-business-corporations* (last access on 2 May 2019).
[10] L. A. Stout, *The Shareholder Value Myth*, San Francisco: *Berrett-Koehler Publishers*, 2012.
[11] R. L. Grossman, F. T. Adams, and C. Levenstein (ed.), 'Taking Care of Business: Citizenship and the Charter of Incorporation', *New Solutions: A Journal of Environmental and Occupational Health Policy*, vol. 3, issue 3, 1993, p. 7–18. Available at *https://doi.org/10.2190/NS3.3.c*.
[12] S. Wood, 'Four Varieties of Social Responsibility: Making Sense of the 'Sphere of Influence' and 'Leverage' Debate Via the Case of ISO 26000', Osgoode CLPE Research Paper No. 14, 2011.
[13] Symbolic hereof is the European Commission's alteration of its definition of CSR: from "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" to "the responsibility of enterprises for their impacts on society". This change reflect the alleged need for businesses to take into account "the interests of society as a whole" and to "maximize the creation of shared value for their owners/shareholders and for their other stakeholders and society at large". European Commission, 'Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final, 3 and 6 – 7. Available at:

term corporate thinking would be required. For corporations, this is believed to translate into the 'triple bottom line' of 'people, planet, profit.'[14]

3.2 Supply chain responsibility

Corporate social responsibility provided fertile soil for the development of supply chain responsibility, which, at bottom, is no more than a specific version of social responsibility. There is no 'official' or legal definition of 'supply chain responsibility;' in CSR doctrine, the terms 'responsible supply chain management' and 'responsible sourcing' are often used as synonyms.[15] Clearly, the concept includes an element of 'Be Thy Brother's Keeper.'[16] The International Chamber of Commerce has defined supply chain responsibility broadly as a voluntary commitment by companies to manage their relationships with suppliers in a responsible way (ICC, 2007)[17]. Although this definition appears to limit the concept to the supply side, it might also be applied to the demand side, i.e. to customers.

Under the theory of supply chain responsibility, companies should accept responsibility for their products after they have left their sites, and for their supplies before they arrive at their gates. It attempts to address the problem that not all companies have the same level of information, expertise, and resources when it comes to managing environmental and social issues. Thus, if the stronger companies in the supply chain take the lead and assist, they can help all entities in the chain improve.

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http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf (last access 2 May 2019).

[14] J. Elkington, 'Enter the Triple Bottom Line' in *The Triple Bottom Line: Does It All Add Up?*, edited by A. Henriques and J. Richardson, *Taylor & Francis*, 2004.

[15] A. H. Porteous, S. V. Rammohan, S. Cohen and H. L. Lee, 'Maturity in Responsible Supply Chain Management', White Paper for the Stanford Global Supply Chain Management Forum, 4 December 2014. Available at *https://www.gsb.stanford.edu/faculty-research/publications/maturity-responsible-supply-chain-management* (last access 2 May 2019); R. Guo, H. L. Lee and R. Swinney, 'Responsible Sourcing in Supply Chains', *Management Science*, vol. 62, issue 9, 2016, 2722 – 2744. Available at: *https://www.gsb.stanford.edu/faculty-research/publications/responsible-sourcing-supply-chains* (last access 2 May 2019).

[16] Derived from Genesis 4: 8 – 10: "Then the Lord said to Cain, 'Where is Abel your brother?' He said, 'I do not know; am I my brother's keeper?'". Holy Bible, *New International Version*, 2011.

[17] ICC Commission on Business in Society, *ICC Guide to Responsible Sourcing*, *International Chamber of Commerce*, 2008. Available at: *https://cdn.iccwbo.org/content/uploads/sites/3/2008/10/ICC-guide-to-responsible-sourcing.pdf* (last access 2 May 2019).

Supply chain responsibility, thus, is a company's responsibility across its entire supply chain, for the social, ecological and economic consequences of the company's activities (*see* Figure 1 above). To enable others to monitor and verify how a company meets its duties, supply chain responsibility requires reporting on the consequences of its operations and its efforts to mitigate problems. To ensure 'democratic' and informed corporate decision-making, a company should also constructively engage with stakeholders, including business partners and non-governmental organizations, through information sessions, consultation and the like.

3.3 Soft law and hard law

A number of hard and soft law instruments impose supply chain responsibility. Soft law instruments include the OECD Guidelines for Multinational Enterprises[18], the UN Guiding Principles on Business and Human Rights (the 'Protect, Respect and Remedy' Framework) which oblige companies to ensure respect of human rights "within their sphere of influence"[19], and an international standard on corporate social responsibility (ISO 26000)[20]. Legal instruments include the EU Directives on non-financial reporting[21], and the supply chain management regimes imposed by the forthcoming EU conflicts minerals regulation[22], as well as environmental and health safety legislation, such as the REACH Regulation[23] for chemical substances, which focuses on the dissemination of chemical risk management information and practices throughout a chemical company's supply chain.

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[18] OECD, *OECD Guidelines for Multinational Enterprises*, *OECD Publishing*, 2011. Available at: *http://dx.doi.org/10.1787/9789264115415-en* (last access 2 May 2019).

[19] United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, 2011. Originally drafted by J. Ruggie and endorsed by UN Human Rights Council Resolution 17/4. Available at: *http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf* (last access 2 May 2019) (Hereafter "UN Guiding Principles").

[20] ISO 26000:2010. Available at: *https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en* (last access 2 May 2019).

[21] For an overview of EU law on company reporting, *see http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#legal-framework* (last access 2 May 2019).

[22] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[23] Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

There is a trend towards the "hardening" of soft law supply chain responsibility instruments in various forms in countries such as the UK, the US, France, and Switzerland. Laws such as the UK Modern Slavery Act[24], the Dutch Child Labour Due Diligence Bill[25], the French *Loi Sapin II* on anticorruption[26] and the EU Directive on Non-Financial Reporting[27] build on principles of vicarious liability to impose targeted forms of supply chain liability for specific practices. Novel theories of supply chain liability, however, aim to hold companies liable for a much larger scope of environmental harms and human rights violations.[28]

3.4 From responsibility to liability?

In recent scandals, EU and US companies were slammed for failing to prevent environmental harm and human rights infringements by their suppliers in foreign (often developing) countries, where regulations and standards may be lax.[29] Recent court cases, legislative developments, and academic writing suggest that in the future, corporations may be exposed to liability if their suppliers cause environmental harm or violate human rights. In some cases, plaintiffs seeking compensation for their harms do not pursue claims against the local entities, which may be undercapitalized and are subject to 'plaintiff-unfriendly' compensation rules. Instead, claimants, assisted by US or European attorneys, prefer to assert claims against parent companies or business partners based in jurisdictions with more attractive compensation regimes. In doing so, they may invoke the novel theories of 'supply chain liability'.

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[24] Modern Slavery Act 2015. Available at http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (last access 2 May 2019).

[25] Child Labour Due Diligence Bill ('Wet Zorgplicht Kinderarbeid'), 2017. Available in Dutch at: *https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet* (last access 2 May 2019).

[26] *Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* ('Loi Sapin II 2016'). Available in French at: *https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id* (last access 2 May 2019).

[27] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[28] S. L. Leader and A. Yilmaz Vastardis, *Improving Paths to Business Accountability for Human Rights Abuses: A Legal Guide*, University of Essex Business and Human Rights Project (2018). Available at: *http://repository.essex.ac.uk/21636/* (last access 2 May 2019).

[29] J. Hartmann and S. Moeller, 'Chain liability in multitier supply chains? Responsibility attributions for unsustainable supplier behavior', *Journal of Operations Management*, vol. 32, issue 5 (2014), p. 281—294.

From the perspective of judicial progressivism, it may be a small, logical step from supply chain responsibility to supply chain liability. While the legal principle of sustainable development requires economic development consistent with environmental and social needs, the precautionary principle requires action in the face of uncertain risk, including preventive action. The rise of the 'risk society'[30] has made the identification and distribution of risks a central theme in politics, and intensified calls for adequate loss prevention and compensation. This development may also influence judges who are confronted with claims based on SCL.

As noted above, supply chain responsibility has already been laid down in legislation and 'soft law' (self-regulatory codes). There is much literature promoting expanded application of the concept.[31] If the right case presents itself, courts have the substance they need to find that a corporation owed a duty of care to victims or the state to prevent harm caused by its suppliers, customers, or other business partners in the supply chain (e.g. distributors). Indeed, courts do not need to look long to find specific duties in duty of care articulated in soft law,[32] legal literature and scholarly opinions. Failure to meet the demands of supply chain responsibility can thus result in a finding of fault. Under the doctrine of supply chain liability, the bottom line is that a corporation can be held liable for damage caused by its business partners on the ground that it failed to prevent damage caused by others where it had a duty to do so. The key question then becomes in what situations corporations have a duty to prevent damage in their supply chains. Courts are in charge of drawing the lines in this area.

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[30] U. Beck and M. Ritter, *Risk Society: Towards a New Modernity,* London: *Sage Publications*, 1992.

[31] M. Gjølberg, 'Explaining Regulatory Preferences: CSR, Soft Law, or Hard Law? Insights from a Survey of Nordic Pioneers in CSR', *Business and Politics*, vol. 13, issue 2 (2011), 1 – 31. Available at: *https://doi.org/10.2202/1469-3569.1351* (last access 2 May 2019).

[32] "The corporate responsibility to respect human rights means acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur. The term "responsibility" rather than "duty" is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself." United Nations Special Representative J. Ruggie, *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*, September 2010. Available at: *https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf* (last access 2 May 2019).

In its extreme forms, supply chain liability could render the concepts of legal personality and limited liability moot. It may not be fair, equitable, or reasonable, however, to hold a corporation liable for damage caused by another corporation merely based on an existing business relationship. As supply chain liability involves a form of vicarious (or joint and several) liability, existing legal regimes tend to view it as an exception to the general rule that a person should not be liable for another person's acts or omissions. Law and legal theory therefore exercise forces on SCL in opposite directions.

In other words, supply chain liability acutely raises the question where the lines should be drawn. The contours of supply chain liability are beginning to become visible, and suggest that corporate liability for human rights and environmental law violations committed by both subsidiaries and unaffiliated business partners is no longer mere theory.

4 Research methodology

4.1 Research question

As illustrated above, the concept of supply chain liability is novel and it is still unclear what its legal bases and boundaries are. Supply chain liability may be legally grounded in three ways: by statute, by contract or by extra-contractual legal concepts. These grounds of SCL, of course, overlap and interact in often complex ways – Figure 2 illustrates some of the main intersections and interactions (*see* Figure 2).

This paper analyses on which legal bases corporations can be exposed to potential liability under tort law[33] for damage-causing events in their supply chains (Figure 2, under 3).[34] It does not discuss potential contractual liability or statutory liability (Figure

[33] The term 'tort law', when used in relation to all jurisdictions discussed in this thesis includes tort law (common law jurisdictions) as well as extra-contractual civil liability (civil law jurisdictions).

[34] The author has previously analysed topics relevant to supply chain liability in a series of blog posts for *Corporate Finance Lab*, a blog administered by prof. dr. Joeri Vananroye, KU Leuven Institute for Commercial and Insolvency Law. This paper integrates parts of and builds on the following blog posts: P. A. Bergkamp, 'UK Supreme Court Enables Expansive Supply Chain Liability', *Corporate Finance Lab*, 30 April 2019. Available at: *https://corporatefinancelab.org/2019/04/30/uk-supreme-court-enables-expansive-supply-chain-liability/* (last access 2 May 2019); P. A. Bergkamp, 'European Company Law Journal: 'Parent Company Liability After Okpabi v Shell'', *Corporate Finance Lab*, 30 July 2018. Available at: *https://corporatefinancelab.org/2018/07/30/european-company-law-journal-parent-company-liability-after-okpabi-v-shell/* (last access 2 May 2019); P. A. Bergkamp, 'Parent Companies Are Not Parents, Subsidiaries Are Not Children', Corporate Finance Lab, 6 March 2018. Available at: *https://corporatefinancelab.org/2018/03/06/okpabi/* (last access 2 May 2019); P. A. Bergkamp, 'Swiss Referendum on Implementing Supply Chain Liability', *Corporate Finance Lab*, 13 February 2018. Available at: *https://corporatefinancelab.org/2018/02/13/swiss-referendum-on-implementing-supply-chain-liability/* (last access 2 May 2019); P. A. Bergkamp, 'The EU Conflict Minerals Regulation: The Uncertain Effects of Supply Chain Due Diligence', *Corporate Finance Lab*, 10 July 2017. Available at: *https://corporatefinancelab.org/2017/07/10/the-eu-conflict-minerals-regulation-the-uncertain-effects-of-supply-chain-due-diligence/* (last access 2 May 2019); P. A. Bergkamp, 'French Constitutional Council Permits Civil, But Not Criminal, Enforcement of Corporate Duty of Vigilance Law', *Corporate Finance Lab*, 29 March 2017. Available at: *https://corporatefinancelab.org/2017/03/29/a-post-by-guest-blogger-penelope-bergkamp/* (last access 2 May 2019); P. A. Bergkamp, 'French Constitutional Council Permits Civil, But Not Criminal, Enforcement of Corporate Duty of Vigilance Law', *Corporate Finance Lab*, 29 March 2017. Available at: *https://corporatefinancelab.org/2017/03/29/a-post-by-guest-blogger-penelope-bergkamp/* (last access 2 May 2019); P. A. Bergkamp, 'Supply Chain Liability: The French Model', Corporate Finance Lab, 11 March 2017. Available at: *https://corporatefinancelab.org/2017/03/11/supply-chain-liability-the-french-model/* (last access 2 May 2019); P. A. Bergkamp, 'The Mystery of Corporate Social Responsibility In A Market Economy', *Corporate Finance Lab*, 30 January 2017. Available at: *https://corporatefinancelab.org/2017/01/30/the-mystery-of-corporate-social-responsibility-in-a-market-economy/* (last access 2 May 2019); P. A. Bergkamp, 'Supply Chain Liability: A Primer', *Corporate Finance Lab*, 1 December 2016. Available at: *https://corporatefinancelab.org/2016/12/01/supply-chain-liability-a-primer/* (last access 2 May 2019).

2, under 1 and 10). Independent of statutory liability and contractual liability, fault, negligence or breach of a duty of care may result in tort liability (Figure 2, under 3). In addition, a statute may impose obligations that increase potential liability exposure under contract law (Figure 2, under 6) or tort law (Figure 2, under 2) – for instance, a statute may require that a company gather and analyse information which may indicate the presence of a risk of harm. Since breach of a statute is regarded as an actionable fault in many jurisdictions, statutory liability may result in extra-contractual liability as well. To enforce these obligations, a statute may also set forth specific remedies in lieu of, or in addition to, tort or extra-contractual liability, such as administrative fines (Figure 2, under 1). The effects of specific statutes and the remedies set forth therein fall outside the scope of this research.

Likewise, a contract may affect tort liability. It may overlap with tort liability (and/or statutory liability, Figure 2, under 4, 6 and 8). Further, through contracts, a company may exonerate itself from potential extra-contractual (or possibly statutory) liability *vis-à-vis* its business partners (Figure 2, under 5, 7 and 9). These interactions between contractual liability and tort liability are likewise not discussed in this thesis.

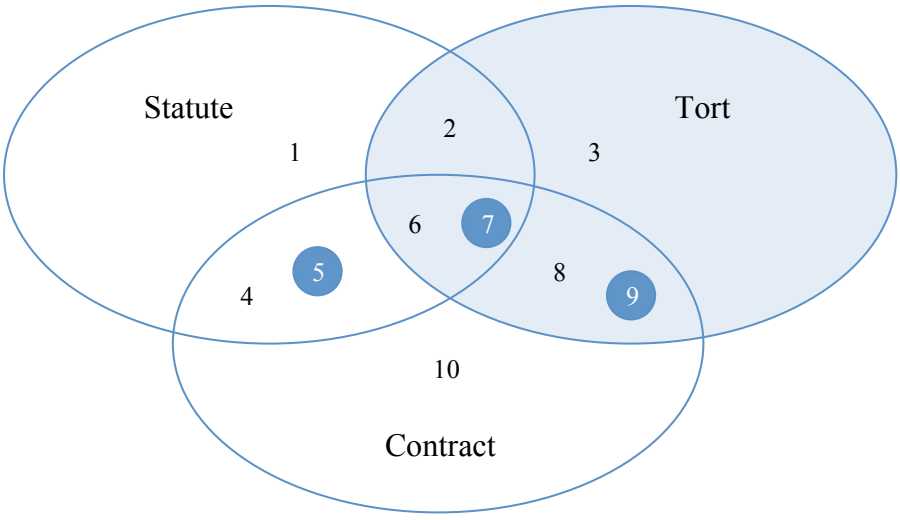

Figure 2: The interplay between the grounds of SCL

While the researches touches on all of these grounds of liability, the following question is at the centre of the analysis:

> "On which extra-contractual legal bases can EU-based companies be held liable for environmental damage and human rights violations caused by subsidiaries or business partners in their supply chains?"[35]

The main research question can be divided into a number of sub-questions:

> (1) On which general and specific legal theories and grounds can extra-contractual supply chain liability in theory be based?
>
> (2) Have these theories/grounds been invoked to support claims brought before the courts?
>
> (3) In the light of the case law and existing legal doctrines, what are the key issues associated with the theories?

Given that the research focuses on the legal theories behind SCL, it does not go into generic issues associated with tort law liability, such as causation.[36]

4.2 Methodology

The analysis will be informed by comparative legal doctrinal research. Specifically, the analysis and comparison of legal doctrines and concepts relevant to SCL laid down in statutes and case law in both EU and non-EU jurisdictions and both civil law jurisdictions and common law jurisdictions. The differences between the two systems that have implications for potential SCL will be highlighted, insofar as they relate to legal bases and conditions.

To conduct this doctrinal research, the focus lies on reviewing statutes, case law and soft law instruments, and the interactions between them. In addition, the literature on the relevant fundamentals of company law, CSR, and contractual and extra-contractual liability.

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[35] A company's supply chain may comprise subsidiaries, other suppliers (downstream), and customers (upstream), *see* Figure 1. Supply chain liability, as the term is used in this paper, comprises both parent company liability as well as supply chain liability for 'business partners'.

[36] Issues relevant to causation are discussed, however, where concepts such as foreseeability come into play.

4.3 Scope of research

The countries that are researched have not been randomly picked. Below, a brief summary is provided of the criteria used to select the jurisdictions. Thereafter, a short overview of statutes and court cases illustrative of the SCL trend is provided, and a more detailed discussion of these developments per jurisdiction will follow.

4.3.1 Jurisdictions covered

Since this paper examines a trend in the law, the relevant jurisdictions are those in which either (a) the legislature has imposed supply chain liability by statute or, (b) the courts addressed the question as to whether companies can be found liable for damage-causing events in their supply chain. On this basis, 7 relevant jurisdictions were identified: France, the Netherlands, the United Kingdom (England and Wales), the European Union (EU), the United States and Canada.[37]

The European countries may not be representative for the EU as a whole, as they appear to be frontrunners in the area of SCL, which is the reason they have been selected for further research and analysis.

As the United States has been a leader in corporate transparency and put CSR on the map, my research will also cover the evolution and current state of SCL in the US, which will serve as a point of comparison for the situation in Europe. Of course, the US litigation system differs substantially from European litigation, so any comparison needs to be informed by an adequate understanding of the similarities and differences between the two blocks.

Other jurisdictions are excluded from this research because either they do not meet the above criteria, or in case they do, due to practical reasons (language, lack of searchability or lack of reliable English sources) they could not be included.

4.3.2 Limitations

[37] Excluding Québec.

There is potential issue of 'reporting bias' in my research. NGO's often are a catalyser of CSR law initiatives and CSR litigation. They make sure to highlight their successes (*i.e.* 'positive reporting')[38], for example through press releases and publications. The media tends to pick up their success stories. On the other hand, NGO's remain silent about their defeats, since they do not want to weaken their reputation.

In other words, NGO's try to avoid 'negative reporting' of SCL claims that have been rejected by courts (*i.e.* "reporting bias"). In addition, the companies involved in these cases are not inclined to publicize their wins in court, since they have little to gain from such publicity – to the contrary, it might upset their relations with the NGO community and prompt others to try similar cases. Thus, there likely are failed SCL initiatives and lost court cases that are not included in this research, since the author is not aware of their existence (*i.e*. the "false negatives" of this project). This means that the conclusions of this paper may not be generalizable to all of the EU.

In addition, jurisdictions lacking information or reliable information on SCL have been excluded from this research as well.

[38] A. Ebrahim, *NGOs and Organizational Change: Discourse, Reporting, and Learning*, Cambridge: *Cambridge University Press*, 2003, 80.

5 Structure

The following chapter presents a substantive discussion of the legal bases of SCL. As noted above, the focus is on the extra-contractual liability models. There are 7 such models: the civil liability model, the operator model, the legitimate expectations model, the agency model, the company law model, the stakeholder model, and the public trust model.[39]

Based on the preceding analysis, Chapter 6 discusses these SCL models. As will be seen, most of the action has been around the civil liability open norms model. Attention is paid to Belgian and French tort law and to SCL cases brought under UK, Canadian and US tort law. In Chapter 7, the court rulings are boiled down to a set of determinants of supply chain liability. Chapter 8 adopts an *ex ante* perspective on supply chain liability. In Chapter 9, the conclusions of the research and analysis are presented, as well as some thoughts on the future of supply chain liability.

The models discussed in this chapter vary along two axes – they may be more incidental (case by case, depending on the facts) or structural (SCL is the default position), and they may be based more on private law or more on public law. At the same time, they are not completely independent and separate from each other. To the contrary, they overlap to a significant extent. Figure 5 shows how the models overlap and which concepts provide a 'bridge' from one model to another. It is to be expected that a novel model will only be entertained once courts have endorsed the corresponding bridging concepts.

[39] The *human rights model* is not included in the research. Note that this model may get more traction following the The Hague Court of Appeals' judgment in the *Urgenda* Climate Change litigation. *De Staat der Nederlanden v Stichting Urgenda* [2018] The Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2591 (often referred to in The Netherlands as 'De Klimaatzaak').

6 Legal bases of supply chain liability

6.1 Introduction

Companies can be held liable for damage caused by their subsidiaries or business partners in their supply chains on three possible grounds: a contract, a statute or other causes of extra-contractual liability. The research for this thesis analyses the extra-contractual grounds and its models in more detail and assesses their compatibility with the laws of the relevant jurisdictions. By analysing the statutes and court judgments of each jurisdiction, it is possible to define legal models that can effectively enforce supply chain liability.

A third party affected by a company's operations will probably sue on the basis of extra-contractual, tort or civil liability theories. Where contractual and statutory grounds are lacking, these theories may provide the desired European forum of jurisdiction[40] so that plaintiffs can tap into the often large resources ('deep-pockets') of the European company. There are multiple legal models on the basis of which plaintiffs could sue an EU corporation extra-contractually. This paper analyses the conditions and boundaries of each legal model, how they may vary across jurisdictions, and whether a pattern can be discerned in the evolution of this new area of liability exposure.

6.2 Statutory due diligence requirements

While courts are still wading through the uncharted waters of the open norms model, the legislature has begun to define some supply chain responsibility and liability concepts more precisely. A few specific statutes adopted by progressive legislatures have

[40] E.g. through article 4 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32 ("Brussels I Recast"); for a full analysis of the gateways to jurisdiction in the EU, *see*: G. Van Calster, *European Private International Law*, 2nd edition, Oxford: *Hart Publishing*, 2016, 357 – 358.

implemented supply chain liability, usually in the form of due diligence and disclosure obligations.[41]

6.2.1 Overview of SCL statutes

Jurisdiction	*Statutory law*
EU	Directive on Non-Financial Reporting (2014)[42] Conflict Minerals Regulation (2017)[43]
France	Sapin II Law on anticorruption (2017) Duty of Vigilance Law (2017)
Switzerland	The Responsible Business Initiative (2015, subject to referendum in 2019)[44]

[41] Fresh legislative proposals to implement SCL have emerged. *See* for example the three scenarios for legislative reform proposed by C. van Dam and F. Gregor, 'Corporate responsibility to respect human rights vis-à-vis legal duty of care', in: J. J. Álvarez Rubio and K. Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, London: *Routledge*, 2017, 119 – 138. *Scenario I* entails a reform of civil procedural law: it proposed to adopt *disclosure* from common law systems. *Scenario II* imposes a 'rebuttable presumption of control' over subsidiaries and business partners, lowering the plaintiff's burden of proof to attach tort liability. *Scenario III* comes closest to the existing regulations and proposals, as it proposes to implement a statutory duty on companies to conduct due diligence in their supply chains – *see* for example the proposal by German NGO's: R. Klinger *et al*., 'Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht', Berlin: *Amnesty International et al.*, 2016. Available at: *https://germanwatch.org/de/11970* (last access 2 May 2019).

[42] The EU Non-Financial Reporting Directive requires European companies with more than 500 employees to publish sustainability reports in each EU member country and specifies that the reports must include information relating to "environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors". Directive 2014/95/EU; European Commission, *Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information)*, C/2017/4234, *OJ* C 215, 5.7.2017, p. 1–20.

[43] The Regulation will enter into force on 1 January 2021. Regulation (EU) 2017/821; European Commission, *The regulation explained* (FAQs), 13 December 2017. Available at: *http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/* (last access 2 May 2019); OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, Paris: *OECD Publishing*, 2016. Available at: *http://dx.doi.org/10.1787/9789264252479-en* (last access 2 May 2019).

[44] Following a clear trend, Switzerland is now also considering proposals to implement SCL. Possibly inspired by the French Corporate Duty of Vigilance Law, the Swiss Coalition for Corporate Justice launched a 'Responsible Business Initiative' ("RBI") in 2015. The RBI involves a citizens' petition to amend the Swiss Federal Constitution to impose "appropriate due diligence" obligations on Swiss companies in accordance with their responsibilities under the UN Guiding Principles, along with liability for breaches by their subsidiaries or business partners under their control. To escape liability, Swiss

The Netherlands	Dutch Child Labour Due Diligence Bill (2017)
UK	Modern Slavery Act (2015)[45]
US	Alien Tort Statute (1789) Dodd-Frank Act (2010)[46]

Figure 3: Overview of SCL statutes

companies will have to prove that they took all due care or that the damage would have occurred anyway. The Federal Council recommended that the RBI be rejected, but the Council of States adopted a Counter-Proposal to the initiative. The Counter-Proposal aims primarily to limit and clarify the scope of the RBI. Pursuant to Article 139 of the Federal Constitution, the Swiss people will be asked to vote on the RBI in a popular referendum in 2019. Swiss Coalition for Corporate Justice, *Responsible Business Initiative* (2015). Unofficial translation available at: *http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf* (last access 2 May 2019); The Swiss National Council (*Conseil fédéral suisse*), 'Message relatif à l'initiative populaire «Entreprises responsables – pour protéger l'être humain et l'environnement» du 15 septembre 2017', *Federal Gazette*, *no.* 17.060, 2017. Available online in French at: *https://www.admin.ch/opc/fr/federal-gazette/2017/5999.pdf* (last access 2 May 2019); The Legal Affairs Committee of the Swiss National Council, 'Zusatzbericht der Kommission für Rechtsfragen vom 18 Mai 2018 zu den Anträgen der Kommission für einen indirekten Gegenvorschlag zur Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt" im Rahmen der Revision des Aktienrechts', 2018. Available at: *https://www.parlament.ch/centers/kb/Documents/2016/Kommissionsbericht_RK-N_16.077_2018-05-18.pdf* (last access 2 May 2019).

[45] The UK adopted the Modern Slavery Act in 2015. Initially, the draft bill did not prohibit the use of slave labour abroad – asking businesses to audit and report on modern slavery in their supply chains was considered to be too big of an additional burden. However, ferocious campaigning by NGOs resulted in a 'Transparency in Supply Chains' clause (TISC) being added to the bill. Under this clause, "big business will be forced to make public its efforts to stop the use of slave labour by its suppliers". Section 54, Part 6 of the UK Modern Slavery Act of 2015; Anti-Slavery International campaigned for the inclusion of the TISC, *see https://www.antislavery.org/what-we-do/work-supply-chains/* (last access 2 May 2019).

[46] Even prior to recent SCL trends, the US has had a strong tradition of promoting transparency, for example through disclosure obligations imposed by the United States Securities and Exchange Commission ("SEC"). In 2012, in fulfilment of Section 1502 of the Dodd Frank Wall Street Reform and Customer Protection Act ("DFA"), the SEC issued the 'Conflict Minerals Rule'. This rule requires companies to disclose information on the source of 3TG used in their products. The EU Conflict Minerals Regulation discussed above is modelled after the DFA. Furthermore, in 2016, the SEC issued a 'Concept Release', seeking public comments on topics relating to business and financial disclosure requirements for publicly traded companies. Several topics addressed the disclosure of company information relating to sustainability and public policy issues. The issues on which disclosure requirements were being considered included climate change, resource scarcity, corporate social responsibility, and good corporate citizenship. The key question was whether CSR reporting should become mandatory for publicly traded US corporations. *See https://www.sec.gov/rules/concept/2016/33-10064.pdf* (last access 2 May 2019).

6.2.2 Impact of due diligence requirements on SCL

By requiring EU companies to exercise due diligence in their supply chains and to make their efforts and the results public, lawmakers hope that companies will ensure CSR norms are respected throughout their supply chains. Authorities can sanction, usually in the form of a fine, companies that fail to comply with these regulations.[47]

These statutory requirements may increase a company's exposure to supply chain liability in three ways. First, by conducting the required investigations, the company's knowledge about problems, challenges, risks, and threats in a subsidiary or business partner's operations increases.[48] This kind of knowledge may trigger a duty of care under tort law to act to remedy the situation.[49] Secondly, the required disclosure of the results of the due diligence investigations inform potential plaintiffs and facilitate potential liability

[47] For example, in February 2017, the French Parliament adopted a law, known as the 'Corporate Duty of Vigilance Law' that imposes a duty of vigilance on large companies to prevent serious violations of human rights and serious environmental damage in their supply chains. The Corporate Duty of Vigilance Law imposes an obligation on large corporations to set up, implement and publish a "vigilance plan". However, as the terms used are rather generic and largely left undefined, the scope of the various obligations imposed on companies is vague. Important questions such as what risks should be covered, whether sub-suppliers should be included, what action to prevent or mitigate risk is deemed "appropriate", what "reasonable measures" entail, what constitute "serious" violations of human rights, and so on, are left unanswered. Despite the vagueness of the terms employed in the legislation, the Constitutional Council sanctioned the obligation to establish a vigilance plan. While the court ruled out criminal sanctions for breaches, it left the door wide open to civil litigation. Thus, the civil courts will have to sort out what the obligations imposed by the Corporate Duty of Vigilance Law entail, and how far liability law may be stretched to provide remedies for non-compliance. Companies will likely have to cope with the resulting uncertainties for some time. *See* Assemblée Nationale, Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, n° 924, 21 February 2017. Available in French at: *http://www.assemblee-nationale.fr/14/ta/ta0924.asp* (last access 2 May 2019).

[48] Under the recently adopted EU Conflict Minerals Regulation, EU importers of tantalum, tin, gold, and tungsten ("3TG") must establish a supply chain due diligence program. They are required to keep documentation demonstrating compliance with the obligations imposed by the regulation, which include mandatory independent third-party audits. According to the Commission's FAQs, companies that practice due diligence, "first check how risky it is to source raw materials from a certain region afflicted by conflict. They assess the likelihood that those raw materials could be financing conflict or mined using forced labour. By checking the source, they can then make sure that they do not help fund that conflict." The system required to make these kinds of determinations is worked out in detail. In short, there is much data to be obtained, verified, and recorded.

[49] For example, the EU Conflict Minerals Regulation focuses explicitly on risk, and requires that importers follow the OECD's Due Diligence Guidance, which sets forth five steps: (i) establish a strong company management system; (ii) identify and assess risk in the supply chain; (iii) design and implement a strategy to respond to identified risks; (iv) carry out an independent third-party audit of supply chain due diligence; and (v) report annually on supply chain due diligence. Failure to properly identify risks and implement a response strategy can be regarded as a fault or even negligence *per se*.

proceedings against the EU company.[50] Thirdly, in some cases, a failure to comply with due diligence obligations could directly support a finding of fault or negligence and a claim for compensation of damages, subject to the requirements of causal link. As a general rule, no compensation can be awarded under tort law merely because a damage-causing event has taken place in a company's supply chain, but if such an event has occurred in the presence of breaches of due diligence obligations, the company involved is vulnerable.

6.3 Overview of SCL case law

Jurisdiction	*Case law*	*Status*
UK	Adams v Cape Industries plc (1990)[51]	
	Chandler v Cape (2012)[52]	
	Thompson v Renwick (2014)[53]	
	Lungowe v Vedanta (2017)[54]	Pending (trial)
	AAA v Unilever (2018)[55]	Dismissed
	Okpabi v Shell (2018)[56]	Dismissed
	Vedanta v Lungowe (2019)[57]	
US	Kiobel v Royal Dutch Petroleum (2015)	Dismissed
	Daimler v Bauman (2014)	

[50] The "management system" required by the EU Conflict Minerals Regulation, for instance, must include a "grievance mechanism," which is defined as "an early-warning risk awareness mechanism allowing any interested party, including whistle-blowers, to voice concerns regarding the circumstances of extraction, trade and handling of minerals in and export of minerals from conflict-affected and high-risk areas."
[51] *Adams v Cape Industries plc* [1990] Ch 433.
[52] *Chandler v Cape plc* [2012] EWCA Civ 525.
[53] *Thompson v The Renwick Group plc* [2014] EWCA Civ 635.
[54] *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2018] 1 W.L.R. 3575.
[55] *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532.
[56] *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191.
[57] *Vedanta Resources plc v Lungowe* [2019] UKSC 20.

	Jesner v Arab Bank (2018)	
Canada	Choc v Hudbay Minerals Inc. (2013) ONSC 1414[58]	Pending (trial: discovery)
	Das v George Weston Limited (2017)[59]	Dismissed
The Netherlands	Milieudefensie et al. v Shell[60]	Pending (trial)
Germany	Jabir v KiK (2019)[61]	Dismissed

Figure 4: Overview of SCL case law

6.4 Civil liability: open norms model

Through the open norms of tort law – "negligence", "fault", "breach of a duty of care" – a corporation can be held liable for not exercising sufficient care or supervision in its supply chain or not doing enough to prevent harm from arising. These open concepts are construed by courts on case-by-case basis. As the duty of care in a particular case is influenced by legal, ethical and societal principles and norms about harm prevention and compensation,[62] it allows for a large scope for argument and can accommodate new legal theories. Hence, plaintiffs often choose to sue on basis of this model.

A duty of care can involve a series of more specific duties. The specific norms likely to be invoked typically involve putative duties aimed at preventing harm, such the duty to seek information, investigate, monitor or control, the duty to audit, verify, or supervise, and the duty to prevent. The duties to seek information, investigate, monitor, control,

[58] *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414.
[59] *Das v George Weston Limited*, 2017 ONSC 4129.
[60] Joined cases of *Dooh v Shell* [2015] Court of Appeal of The Hague, ECLI:NL:GHDHA:2015:3586, *Shell v Akpan* [2015] Court of Appeal of The Hague, ECLI:NL:GHDHA:2015:3587 and *Oguru-Efanga v Shell* [2015] Court of Appeal of The Hague, ECLI:NL:GHDHA:2015:3588 ("*Milieudefensie v Shell*").
[61] *Jabir and others v KiK Textilien und Non-Food GmbH* [2019] Case No. 7 O 95/15. Press release in German available at: *http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-Urteil-KIK.pdf.*
[62] P. Keeton and W. L. Prosser, *Prosser and Keeton on the Law of Torts*, St. Paul, Minn: *West Pub. Co*, 1984; P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law (Law in Context)*, Cambridge: *Cambridge University Press*, 2018; M.S. Shapo, *Principles of Tort Law (Concise Hornbook Series)*, *Thomson/West*, 2003, 12 at 1.06; W. Van Gerven, *Het beleid van de rechter*, Antwerpen: *Standaard Wetenschappelijke Uitgeverij*, 1974, 93 at 24, 147.

audit, verify, and supervise are closely related and, arguably, are specific applications of the overarching duty of care and the concept of fault liability inherent in negligence – they constitute 'best efforts' or means (as opposed to result) obligations – even if these obligations are met, it is conceivable that harm ensues. The duty to prevent, on the other hand, looks at the result, *i.e.* the absence of harm, and, thus, tends to turn negligence into strict liability; this, of course would be inconsistent with the legal concept of negligence as 'fault-based' liability, because the 'duty to prevent' basically imposes no-fault liability.[63]

It explains also why courts generally do not go so far to find a duty to prevent. Nevertheless, if relevant duties of care are construed ever more stringently, the bright line between fault and strict liability disappears. In hindsight, it is often possible to point to specific interventions that could have prevented the harm – additional monitoring, more close supervision, extra checks, extra preventive measures. If courts are inclined to add to the duty of care and make it more and more onerous, it will become harder and harder to meet the relevant duty of care, up to the point where it is practically impossible to meet it. At that point, fault liability has turned into *quasi-strict* liability.

6.4.1 Principles of tort liability

6.4.1.1 Belgian and French tort law

So far, all court judgments in cases relating to supply chain liability have been decided under common law.[64] Of course, in future cases yet to be initiated, the law of a civil law

[63] This corresponds to the distinction between "schuldaansprakelijkheid" or "responsabilité pour faute" and "risico-aansprakelijkheid" or "responsabilité de risque" under Dutch, French and Belgian law. *See* for *The Netherlands*: T. Hartlief, 'De zogenaamde risicoaansprakelijkheid van art. 6:174 en de klassieke schuldaansprakelijkheid van art. 6:162 zijn eigenlijk één pot nat!', *NJB* 2011/227, afl. 5, 285; J. M. van Dunné, *Verbintenissenrecht Deel 2*, Rotterdam: *Kluwer*, 1997, 123 – 125; *France*: P. Malaurie, L. Aynès and P. Stoffel-Munck, *Droit des obligations*, Mayenne: *La collection de Droit civil, éditions LGDJ*, 2018, 41 – 52 (France); *Belgium*: H. Bocken, 'Van fout naar risico. Een overzicht van de objectieve aansprakelijkheidsregelingen naar Belgisch recht', *TPR* 1984, 373 – 376.

[64] Pursuant to Article 4 of the Rome II Regulation in each of these cases, the law of a country with a common law tradition had to be applied. Article 4 Rome II stipulates that "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur" (*i.e.* the principle of *lex loci*

country may have to be applied.[65] Moreover, there are noteworthy similarities and differences between civil and common tort law.[66] This section briefly examines issues that will arise under the tort laws of France and Belgium, which bear a close resemblance to each other.[67]As set out below, the finding of fault in civil law is influenced by the same factors that are taken into account in finding a breach of a duty of care under common law.

Article 1382 to 1386 of the Belgian Civil Code[68] ("CC") and article 1240 to 1244 of the French CC lay out the rules of Belgian and French tort law. Article 1382 and 1240 state: "*Any act of man, which causes damage to another, shall oblige the person by whose fault it occurred to repair it*".[69] Article 1383 and 1241 add that one is liable for the damage he causes "not only by reason of one's acts, but also by reason of one's imprudence or negligence."[70] To incur liability, there must be: (1) fault, (2) damage, and (3) a causal link between the fault and the resulting damage. Note that the conditions for liability to arise in common law are almost identical to the civil law conditions;[71] that being the case, and given that SCL claims under common law have proven to be viable, it is to be expected that SCL claims under civil law will also be feasible, and even facilitated by successful claims in common law jurisdictions.

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damni). Thus, in *Das v George Weston*, the court had to apply Bangladeshi law; in *Okpabi v Shell* and *Milieudefensie v Shell* the courts applied Nigerian law; in *Vedanta v Lungowe*, the court applied Zambian law; in *Jabir v Kik*, Pakistani law was applicable, etc.

[65] According to the general principle of *lex loci damni*, if harm occurred in, for instance, the Republic of Congo, the laws of Congo apply – which inherited a civil law tradition and therefore may look at the civil liability law practice of Belgium.

[66] Prior to the UKSC's decision in *Vedanta*, supply chain liability claims were considered more difficult to realise under common law, as the hurdle of the establishment of a novel duty of care had to be passed. In that sense, the closed nature of the common law tort system was the most important difference between the two systems. However, the UKSC's decision in *Vedanta* appears to have eliminated that hurdle since, as discussed in Section 6.4.1.2, *B*, the duty of care of an entity in control of another entity is not a novel category.

[67] Both countries adopted the Code Napoléon. R. Piret, 'Le Code Napoléon en Belgique de 1804 à 1954', *Revue internationale de droit compare*, vol. 6 no. 4, 1954, 774.

[68] *Burgerlijk Wetboek* (Dutch) or *Code Civil* (French).

[69] Article 1382 and 1240 CC: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrive, à le réparer."

[70] Article 1383 CC: "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence."

[71] Under common law, liability arises if there is (1) a duty of care, (2) a breach of said duty, and (3) a causal link between the breach of the duty and the harm that occurred. C. Witting, *Street on Torts, 15th Edition*, Oxford: *Oxford University Press*, 2018, 26; A. M. Linden, B. Feldthusen, M. I. Hall, E. S. Knutsen and H. A. N. Young, *Canadian Tort Law*, *11th edition*, Toronto: *LexisNexis*, 2018, 124 – 125, at 4.3 – 4.9; P. Giliker, *Tort, 6th edition*, London: *Sweet & Maxwell*, 2017, at 2-002.

A. Standard of care

To determine whether there was a "fault", the alleged wrongdoer's behaviour will be compared to the behaviour of a "reasonably careful and forward-looking person under the same circumstances" (the so-called *bonus pater familias*).[72] Where a *bonus pater familias* can foresee damage resulting from his behaviour,[73] he takes the necessary precautionary measures to prevent it.[74] An act or omission that falls short of this standard constitutes a fault. Thus, with respect to SCL claims two questions arise: (1) when is a prudent and forward-looking EU corporation able to foresee damage resulting from its act or omission; and, if it is able to foresee such damage, (2) what measures should it take to prevent this damage? In short, when ought a company to foresee harm and what does it have to do to prevent harm? As the standard is open to interpretation by the courts, it is prone to potential expansion,[75] In particular in areas, such as SCL, where ethical norms emerge and human rights apply.[76]

Multiple factors may play a role in this assessment.[77] Recurring damage may increase foreseeability. If, for example, a pipeline used by a Congolese company to transport oil is

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[72] T. Vansweevelt & B. Weyts, *Handboek aansprakelijkheidsrecht*, Antwerpen: *Intersentia*, 2009, 127; L. Cornelis, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht. Deel I, De onrechtmatige daad*, Antwerpen : *Maklu*, 1989, 37; H. De Page, *Traité élémentaire de droit civile belge*, II, *Bruylant*, 1964, nr. 942.

[73] The foreseeability requirement is established case law by the Belgian Supreme Court ('Court de Cassation', or Cass.): *see* for example, Cass. 5 May 1971, *JT* 1971, 662; Cass. 12 November 1951, *Pas*. 1952, I, 118 – 120.

[74] An equivalent standard of care was developed by common law to determine whether the alleged wrongdoer has breached its duty. In the English landmark ruling of *Blyth v Birmingham Waterworks Co.*, the EWHC held that "[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Blyth v Birmingham Waterworks Company* [1856] EWHC Exch J65. *See* for the *US*: *United States v Carroll Towing Company* [1947] 159 F.2d 169 (2d Cir.); S. G. Gilles, 'The Invisible Hand Formula', *Virginia L. Rev.*, vol. 80, no. 5, 1994, pp. 1015–1054. *JSTOR*, *www.jstor.org/stable/1073624* (last access 2 May 2019).

[75] H. Vandenberghe, 'Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad 2000-2008. Foutvereiste. Algemene kenmerken,' *TPR* 2010, 1862; B. Dubuisson, 'De la légèreté de la faute au poids du hasard. Réflexions sur l'évolution du droit de la responsabilité civile', *RGAR* 2005, nr. 14.009.

[76] This thesis does not discuss the applicability of human rights to EU-based companies with operations in developing economies, except insofar as they play a role in actual SCL litigation. For a general overview, *see* J. J. Álvarez Rubio and K. Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, London: *Routledge*, 2017; *UN Guiding Principles*, *see* fn. 17.

[77] Originally formulated as an objective test, in both civil law and common law, the test of the 'reasonable man' was adapted to consider subjective elements. In a leading negligence case, the House of Lords described the point of the test as follows: "The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the

badly maintained and has already leaked once, a new oil spill was probably foreseeable. Would a reasonably careful EU parent or non-parent business partner, in that case, have undertaken specific measures to prevent such damage? Proximity between the EU company and the Congolese company as a result of the EU company's involvement with the operations in Congo may increase the likelihood of triggering a duty of care of the EU company *vis-à-vis* the people affected by the Congolese company's operations; a reasonably careful parent company, active in the oil industry and capable of exercising control over the operations of it subsidiary, may well instruct her subsidiary to maintain the pipeline, or may do so herself. However, a reasonably careful parent or non-parent business partner would not necessarily intervene to prevent an oil spill in all cases. As under common law,[78] prior knowledge of risks, expertise in risk prevention, and representations are likely to play a role in this assessment. If a parent or non-parent business partner makes public statements to consumers about its 'green' supply chain, for instance, one may expect the company to deploy significant efforts to ensure its supply chain is environment friendly. This expectation may, in turn, be reflected in the standard of care applied by the court.[79]

Under Belgian and French civil liability law, as a general principle, a person is not liable for the harm caused by another person. As under common law, however, there are

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particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable." *Muir v Glasgow Corporation* [1943] UKHL 2. Case law of the Belgian Supreme Court ("Cass.") produced the same outcome. The Court refers to the comprehensive standard as a reasonable man "placed in the same circumstances". Cass., 14 April 1969, *Arr. Cass*., 1969, 757. To determine the standard of care, the courts may chose which circumstances (such as superior knowledge or skill, prior knowledge, etc.) they include in their assessment. H. Vandenberghe, 'Aansprakelijkheid uit onrechtmatige daad (2000-2008). Overzicht van de rechtspraak (2000-2008),' *TPR* 2010, (1749) 1925–1926 (*Overview of Belgian jurisprudence*); H. Vandenberghe, M. Van Quickenborne and P. Hamelink, 'Aansprakelijkheid uit onrechtmatige daad (1964-1978). Overzicht van rechtspraak,' *TPR* 1980, (1139) 1165–1166 (*Overview of Belgian jurisprudence*).

[78] *See* Section 6.4.1.2.

[79] Y. Queinnec & M.C. Caillet, 'Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?' in *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh, Brussels: *Bruylant*, 2010, 654 – 655.

exceptions to this principle, some of which have been made by the legislature and some by the courts.[80] A duty of care *vis-à-vis* persons affected by another person's actions may effectively create such a court-made exception. An evolving moral conviction that parent companies and purchasers of products are subject to moral obligations to take effective action to prevent violations of human rights by their subsidiaries and suppliers, and to protect the environment against the adverse impacts of their activities, increases the likelihood that courts will find a corresponding legal duty.[81] This is even more likely where there are 'soft law' instruments, such as codes of conduct, to which courts can refer.[82]

Until the French or Belgian courts squarely address supply chain liability, however, one can only speculate as to how easily they will be swayed. The next chapter examines whether, under common law, a duty of care exists relevant to SCL. As the Belgian and French standard of care involves a similar assessment, the civil law courts may take the same elements into account.[83] The common law developments are therefore likely indicative of what civil law courts will rule in future cases.

B. Causation

As noted above, this thesis does not separately discuss causation. The question arises, however, whether civil law might be more favourable to SCL claims as a result of differences in causal requirements. Under Belgian law, as discussed above, foreseeability

[80] For example, Article 1384 Belgian CC and Article 1242 French CC; P. Brun, *Responsabilité civile extracontractuelle*, *5ième édition*, Paris: *LexisNexis*, 2018, 197 – 198 at 288 – 289.
[81] E. Dirix, 'De maat van de Maatman', *RW* 2014–15, issue 23, 882. To make his point, the Belgian author refers to a judgment of the German *Bundesgerichtshof* (the German Supreme Court, "BGH"), in which the BGH overturned the appellate court's decision to hold the victim jointly liable for her injuries caused by a traffic accident because she was not wearing a helmet. The BGH relied on statistics indicating only 11% of bikers wears a helmet, which shows the BGH aims to reflect societal norms – in this case the norm of not wearing a helmet when riding a bike; K. Oliphant, 'Culture of Tort Law in Europe', 3 *J. Eur. Tort. L*., 2012, (147) 147 – 157; D. M. Engel and M. McCann (eds.), *Fault Lines, Tort Law as Cultural Practice,* Stanford: *Stanford University Press*, 2009.
[82] A. Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law*, Oxford: *Hart Publishing*, 2018, 177 – 182; C. Glinski, 'The Ruggie Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards through Mutual Impact and Learning', *Nord. J. Hum. Rights*, vol. 35, issue 1, 2017, 15 – 34.
[83] L. Niglia, 'A 'European' Tort Law? Comparative Thoughts On An 'Essentially Contestes' Private Law Institution', in: *Research Handbook on EU Tort Law*, P. Giliker (ed.), Cheltenham, UK: *Edward Elgar Publishing*, 2017, 376.

of damage is a necessary condition for finding "fault". Foreseeability plays no role at the level of causation, however – the requisite causal link is present if a fault constitutes a *conditio sine qua non* of the damage for which compensation is claimed. Pursuant to the 'doctrine of equivalence', [84] any fault anywhere in the chain of causal events, is considered the cause of the damage as it occurred.[85] Common law causation requirements tend to be less relaxed and focus on concepts such as 'proximate cause' – only an event that is sufficiently related to the damage is deemed to be the cause of thereof,[86] "remote" damage does not engage liability, and "intervening acts" of another person (*novus actus interveniens*) may break the chain of causation between the defendants' carelessness and the damage.[87] This raises a question as to whether Belgian law therefore would be more favourable to SCL claimants.[88] The answer to this question will have to come from the Belgian courts.

6.4.1.2 Common law

Where a parent company was required to exercise care, for example, supervision, in its supply chain but failed to do so and thereby caused harm to people or the environment, it

[84] The equivalence doctrine, however, is not applicable in all civil law jurisdictions. Dutch law, for instance, requires the damage to be reasonably attributable to the fault, taking into account factors such as proximity, probability and culpability. Articles 6:162 and 6:98 Dutch CC; J. Spier, T. Hartlief, G.E. Van Maanen, and R. D. Vriesendorp, *Verbintenissen uit de wet en schadevergoeding*, Deventer, *Kluwer*, 2006, 236 – 243; J. M. van Dunné, *Verbintenissenrecht. Deel 2.*, Rotterdam: *Kluwer*, 1997, 309 – 312. The French courts are reportedly shifting away from the Dutch approach to the Belgian approach. Y. Queinnec & M.C. Caillet, o.c., 655; P. Brun, *Responsabilité civile extracontractuelle, 5ième édition*, Paris: *LexisNexis*, 2018, 161 – 170.

[85] M. E. Storme, 'Quelques aspects de la causalité en droit des obligations et des assurances', *De Verz.* 1990, 444 – 445.

[86] H. L. A. Hart and A. M. Honoré, *Causation in The Law*, *2nd edition*, Oxford: *The Clarendon Press*, 1985.

[87] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2, 3 – 4; W. M. Landes and R. A. Posner, *The Economic Structure of Tort Law*, Cambridge, MA: *Harvard University Press*, 1987, 228 – 255.

[88] Under the doctrine of equivalence, the victim can address any wrongdoer for the full compensation of the damage occurred. *See* for example, Cass. 12 November 2015, *Vlaamse Milieumaatschappij v P.W.D. et al.*, AR C.14.0468.N and C.14.0469.N, *Pas.* 2015, issue 11, 2579; Cass. 4 December 1950, *Pas.* 1951, I, 201. However, the Belgian Supreme Court itself does not always adhere to the doctrine of equivalence. E.g. in the '*Poncin*' case, the Belgian Supreme Court refused to find a causal link between a *conditio sine qua non* (breach of a statute) and the damage, as the damage could not possibly have been foreseen. Cass. 11 October 1989, *Revue générale des assurances et des responsabilités (RGAR),* 1992, no. 12007, 1-2; H. Bocken, I. Boone & M. Kruithof, *Inleiding tot het schadevergoedingsrecht: Buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Brugge: *Die Keure*, 2014, 65 and 78 – 83; T. Vansweevelt en B. Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, Antwerpen: *Intersentia*, 2009, 766 – 767.

may be found liable in tort of negligence.[89] The question whether, and, if so, under which conditions, a parent company owes such a duty of care, has been entertained several times by courts in the UK, Canada, the US, the Netherlands and Germany.[90] Canadian and UK tort law, both being common law jurisdictions, is very similar and build on the same precedents and legal principles.[91]

A. Pre-trial stage

The English, American and Canadian jurisdictional and civil procedural rules provide tools to dismiss claims before allowing the case to go to trial.[92] In the cases concerning supply chain liability, the use of these tools has often resulted in the dismissal of the claims.

In determining whether there is jurisdiction and a triable issue, the courts have to examine substantive law questions. Pursuant to the UK Civil Procedure Rules,[93] for the case to go to trial, there must be 'a real issue' between the claimant and the defendant that is 'reasonable for the court to try'.[94] The existence of 'a real issue' is construed as a

[89] P. Giliker and S. Beckwith, *Tort,* 4th Edition, London: *Sweet & Maxwell*, 2011, at 1-002; J. A. Zerk, *Multinationals and Corporate Social Responsibility, Limitations and Opportunities in International Law*, New York: *Cambridge University Press*, 2006, p. 201; V. Harpwood, *Modern Tort Law*, 6th Edition, London: *Cavendish Publishing*, 2005, at 1-1.
[90] *See* fn. 59.
[91] A. M. Linden *et al*., *Canadian Tort Law*, *11th edition*, Toronto: *LexisNexis*, 2018, 256 – 257.
[92] The jurisdictional, civil procedure and substantive law issues may be closely linked, which can be illustrated with reference to the UK. Pursuant to Article 4 Brussels I Recast, the UK courts have jurisdiction over Vedanta plc, which is a UK entity. However, the plaintiffs sued both Vedanta plc and KCM, a Zambian entity, which renders Brussels I Recast inapplicable. The jurisdiction of the UK courts in the *Vedanta* case is therefore governed by UK national law on adjudicatory jurisdiction. Although suing both the UK and Zambian entities raises jurisdictional complications, there are strategic reasons as to why the plaintiffs have chosen to do so. Litigation against Vedanta's Zambian subsidiary might be problematic due to the lack of an independent and competent judiciary and possible procedural issues. Further, if they assert jurisdiction, the UK courts can judge all acts and omissions of both the Zambian entity and the UK entity, issue orders to the Zambian entity (e.g. to produce documents), etc. In these proceedings, Vedanta plc cannot hide behind KCM. This strategy has also been deployed in the cases against Shell, and it appears to work. On 1 May 2019, the District Court of The Hague ordered Shell and its Nigerian subsidiary to produce documents relating to Shell's possible involvement in the murdering of people in Nigeria in the 1990s. See, *Kiobel v Shell* [2019] The Hague District Court, 1 May 2019, ECLI:NL:RBDHA:2019:4233, at 5.
[93] Article 3.1 (3) of Practice Direction 6B and Part 11 of the Civil Procedure Rules.
[94] Article 3.1 (3) of Practice Direction 6B; T. C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, Cambridge: *Cambridge University Press,* 2015, p. 124.

'realistic prospect of succeeding on the merits' of the claim.[95] The judgments of the UK courts have interpreted these concepts in the context of supply chain-related claims, which has provided insights into their views on substantive SCL.

On the basis of Rule 21.01(1)(b) of the Rules of Civil Procedure[96], an Ontario court may, on request of the defendant, strike out the claim if it 'discloses no reasonable cause of action'. The test is interpreted strictly; only if the action is "certain to fail", it can be struck.[97]

Under the procedural rules of the Delaware Superior Court,[98] the plaintiff alleging negligence must "specify a duty, a breach of the duty, who breached the duty, what act or failure to act caused the breach, and the party who acted".[99] Further, a motion to dismiss for the 'failure to state a claim' is available.[100] A failure to state a claim is understood as the inability of the plaintiff to recover "under any reasonably conceivable set of circumstances susceptible of proof."[101]

On these grounds, defendants may counter-argue that they do not owe a duty of care *vis-à-vis* the plaintiff or the plaintiff fails to provide sufficient evidence. Thus, to allow a lawsuit to proceed, the courts have to determine whether a duty is likely to exist.

B. Novelty

Through case law, the common law defines the circumstances in which a duty of care is owed by one person *vis-à-vis* another person.[102] In doing so, the common law has created recognised categories of duties of care. To establish a novel duty of care category, the

[95] See *Lungowe* [2017] EWCA Civ 1528, at 63; *Okpabi* [2018] EWCA Civ 191, at 33, 132, 141, 199, 207; *Unilever* [2018] EWCA Civ 1532, at 1.
[96] R.R.O. 1990, Reg. 194.
[97] *Choc v Hudbay*, at 41.
[98] The law of the state of Delaware serves as an example here, as it was the law of the forum in the leading American supply chain liability case *Rahaman v JC Penney*, discussed in detail below.
[99] Superior Court Civil Rule 9 (b). Available at: *https://courts.delaware.gov/rules/pdf/superior_civil_rules_2016.pdf* (last access 2 May 2019); *Ramahan v JC Penney*, p. 5.
[100] Superior Court Civil Rule 12(b), (6).
[101] *Ramahan v JC Penney*, p. 4 – 5.
[102] The starting point is that one can only be held responsible for his or her negligence if the law imposes a duty to exercise caution. Or, in the words of Lord Esher: "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." *Le Lievre v Gould* [1893] 1 QB 491, at 497 (UK).

court has to apply a three-prong test, as laid down in the landmark ruling in *Caparo Industries Plc v Dickman*: (1) the duty of care must relate to a harm that is reasonably capable of being foreseen; (2) it must concern a 'relationship of proximity'[103] or 'neighbourhood' between the plaintiff and defendant; and (3) the attachment of liability for harm occurred must be 'fair, just and reasonable'.[104]

The English and Canadian courts of first instance and court of appeals have applied the *Caparo*-test in supply chain liability cases,[105] treating the duty of care potentially owed by the EU company towards the plaintiff as a *novel* category.[106] As discussed below, in only one case, *Lungowe v Vedanta*, a SCL claim managed to pass the *Caparo*-test, but in

[103] According to the UK House of Lords proximity is 'not susceptible of any precise definition'. *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 574.
Canadian courts have determined the parameters of proximity: in assessing proximity, 'the expectations of the parties, representations, reliance and the nature of the property or interest involved' are to be taken into account. *Odhavji Estate v Woodhouse* [2003] S.C.J. No. 74, at 50.

[104] This test, which the UK courts still apply today, builds on a previous two-step test defined by the House of Lords in the 1977 landmark ruling in *Anns v Mertons*. *Anns* is considered a controversial ruling, as the court created the possibility to establish a duty of care, not on the basis of a duty of care previously held to exist, but as the result of a test later called the *Anns* test. The *Anns* test (1) examines whether a 'sufficient relationship of proximity based upon foreseeability' exists between the alleged wrongdoer and the person who has suffered the damage and (2) takes into accounts 'any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.' Because the House of Lords in *Anns* define 'proximity' uniquely in terms of reasonable foresight. Therefore, both English and Canadian courts have altered the *Anns* test. *Anns v Merton London Borough Council* [1977] UKHL 4; S. G .A. Pitel, 'Negligence: Canada Remakes the Anns Test', *The Cambridge Law Journal*, vol. 61, issue 2, 2002, 252–254. Available at *JSTOR*, *www.jstor.org/stable/4508879* (last access 2 May 2019).

[105] Being a common law jurisdiction, Canada borrowed the duty of care concept from the UK. Canadian courts refer to the *Anns/Cooper* test. In *Cooper v Hobart* the Supreme Court of Canada refined the *Anns* test as follows: "In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? And, (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed." Thus, although, like *Anns*, the *Anns/Cooper* test is made up of two stages, the first stage actually consists of two parts: (1) foreseeability and (2) proximity. The Canadian *Anns/Cooper* test thus closely resembles the English *Caparo* test. *Cooper v Hobart* [2001] SCC 79; *Kamploops (City) v Nielsen* [1984] S.C.J. No. 29, at 10; A. M. Linden *et al.*, *Canadian Tort Law*, *11th edition*, Toronto: *LexisNexis*, 2018, 256 – 257 and 263 at 6.43.

[106] The English, American and Canadian procedural rules accommodate novel claims – the novelty of the cause of action is not a reason to dismiss the claim. *See* for example *Choc v Hudbay*, at 42.

an April 2019 judgment the UKSC has held that at least in the context of the parent-subsidiary relationship *Caparo* is not applicable.[107]

In *Vedanta*, the UKSC addressed the qualification as 'novel' of the duty of care on the part of Vedanta, an English holding company, *vis-à-vis* the neighbours of the copper mine operated by its Zambian subsidiary. Vedanta argued that this type of duty of care goes "beyond any established category" and thus is a novel category subject to the *Caparo*-test.[108] Accordingly, Vedanta asserted, the Court of Appeal should have adopted a more "cautious incremental approach by analogy with established categories" and carried out a more "detailed investigation of the claimant's case".[109] Contrary to Vedanta's argument, however, the Supreme Court held that this category of duty of care is not novel.

The relationship between a parent company and its subsidiary,[110] it ruled, does not give rise to a new category of duty of care.[111] Shareholdership as such is not the key factor,[112] control is. Shareholdership merely provides an opportunity to exercise control.[113] The UKSC appears to entertain the possibility that control be created in other ways, for example by contract or directorship. While it states that the opportunity to control in itself does not create a duty to control, it leaves open the possibility that in some cases such an opportunity may ground a duty to control.[114] To support its ruling, the UKSC refers to a

[107] "[The judge] accepted the invitation of counsel on both sides to treat *Caparo Industries plc v Dickman*, and its three ingredients of foreseeability, proximity and reasonableness, as the starting point. This assumed, contrary to my view, that he was dealing with a novel category of common law negligence liability, but he can hardly be criticised for having done so in the light of the parties' joint invitation." *Vedanta Resources plc v Lungowe* [2019] UKSC 20 ("*Vedanta*"), at 56.
[108] *Vedanta*, at 46.
[109] *Ibid.*
[110] Note that the UKSC does not refer to the relationship between the parent company and the neighbours of its subsidiary operations – it implicitly assumes that the relevant legal relationship is that between the parent and its subsidiary. It seems to treat the subsidiary as the instrument through which the parent may have caused harm to the neighbours.
[111] *Vedanta*, at 54.
[112] The UKSC's ruling raises a question as to whether ownership as such could never give rise to duties of care; in some cases, the law imposes liability on owners for damage caused by their property. For example, in the landmark ruling in *Wringe v Cohen* [1940] KB 229, the Court of Appeal held that the owner of the house that partly collapsed can be held liable for the damage caused, unless he can prove the collapse occurred through the act of a trespasser or force majeure. Under *Rylands v Fletcher*, however, the liability rests on the operator, not the owner. *Rylands v Fletcher* [1868] UKHL 1.
[113] *Vedanta*, at 49.
[114] The circumstances under which the parent company (or non-parent business partner) owes a duty of care thus is a function of the degree of control that the parent in fact exercised or, maybe, ought to have been

line of cases dealing with 'control'.[115] As Vedanta is to be viewed through the lens of control, there is no novelty, and in this regard there is not necessarily a difference between SCL claims against parents and those against non-parent business partners.

C. Threshold to proceed to trial

By putting an end to the application of the strict *Caparo*-test,[116] the UKSC has lowered the threshold for supply chain liability cases to proceed to trial. However, at trial, the plaintiffs will need to prove: (1) the existence of a duty of care, (2) breach of said duty and (3) a causal link between the two. Assessments of proximity and foreseeability, as under the *Caparo-test*, will continue to be relevant at this stage.

In the assessment of 'control' at a preliminary stage, proximity will continue to be relevant, as it was under the *Home Office* case to which the UKSC refers.

6.4.2 United Kingdom

6.4.2.1 Chandler v Cape

In *Chandler*, the appellate court held that Cape plc. was liable for the harm Mr. Chandler, an employee of Cape's subsidiary in the UK, had suffered due to exposure to asbestos while working for Cape's subsidiary. Cape plc. employed a medical officer to oversee the health and safety of the employees of its subsidiary, who were exposed to asbestos. By employing a medical officer responsible for monitoring the subsidiary's employees, the

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exercised. This would appear to leave open the possibility that corporate social responsibility obligations give rise to duties of care under the law of negligence.

[115] The Court specifically refers to the case *Home Office v Dorset Yacht Co*, in which a group of delinquent boys, who had been working in the harbour of Brownsea Island under the supervision of Home Office officers, stole a yacht, which collided with another yacht. According to the House of Lords, the Home Office owed a duty of care to the owners of the nearby yachts so as to prevent damage to their yachts. The court reasoned that the boys were under the Home Office officers' control and the damage that occurred was foreseeable. *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

[116] *Vedanta*, at 60.

court found, the parent company assumed responsibility for the health of the employees of its subsidiary.[117]

On appeal, the EWCA confirmed the decision in first instance, and specified that it is not always necessary to show that the parent intervened in the specific aspect of the subsidiary's operation – such as managing employee health and safety, as in this case – instead, "the court will look at the relationship between the companies more widely."[118] A practice of intervening in the subsidiary's trading operations, for instance, may be sufficient, provided that the parent company has superior knowledge on the topic concerned.[119] Specifically, the court identified four factors which may indicate the existence of a duty of care owed by the parent company *vis-à-vis* its subsidiary's employees: (1) the two companies' businesses are the same in a relevant respect; (2) the parent company has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe – as the parent company knew or ought to have known; and, (4) the parent company knew, or ought to have foreseen, that the subsidiary would rely on its superior knowledge." These indicia are known and referred to in later judgments as the "Chandler indicia". The UKSC has emphasised, however, that "the *Chandler* indicia are no more than particular examples of circumstances in which a duty of care may affect a parent."[120] Proximity in this case was straightforward, and, accordingly, the court found a duty of care.

6.4.2.2 Thompson v Renwick plc

In *Thompson v Renwick plc*, the Court of Appeal found that a parent cannot be held to have assumed a duty of care to employees of its subsidiary in health and safety matters 'by virtue of that parent company having appointed an individual as director of its subsidiary company with responsibility for health and safety matters'.[121] The reason was

[117] *Chandler v Cape plc* [2012] EWCA Civ 525, at 80; *Chandler v Cape plc* [2011] EWHC 951 (QB), at 75.
[118] *Chandler* [2012], at 80.
[119] *Ibid*.
[120] *Vedanta*, at 56.
[121] *Chandler* [2012], at 24.

that the defendant parent company was a holding company and did not at any time carry on any business at all apart from that of holding shares in other companies.

6.4.2.3 Okpabi v Shell

On 14 February 2018, the EWCA issued its ruling in Okpabi et al. versus Royal Dutch Shell (RDS) and Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC).[122] RDS is the ultimate holding company of the international Shell Group, which comprises petroleum products companies around the world. SPDC is responsible for Shell's oil production operations in Nigeria. Mr. Okpabi et al. – a total of about 42,500 claimants – sought damages from Shell for environmental damage caused by leaks of oil from pipelines operated by SPDC in the Niger Delta. Allegedly, the oil pollution has affected areas of land across the Niger Delta, the waters of the Delta itself, activities on both land and water and, thus, people's livelihoods. In *Okpabi*, these people are seeking compensation for the losses they suffered.

In first instance and on appeal, the English courts dismissed the case based on lack of jurisdiction. On appeal, the English appellate court addressed important jurisdictional questions in relation to a parent company's liability for damages caused by its subsidiaries. Since the claims against RDS were based on negligence, and negligence implies breach of a duty of care, the key question for the court's jurisdictional analysis was whether RDS had an arguable, relevant duty of care – in other words, there should be a colourable argument to the effect that RDS breached its duty of care *vis-à-vis* the claimants.[123]

The first prong was met: since oil spills had occurred regularly in the past, the damage resulting from these spills was found to be foreseeable – this was not contested by RDS. While the court in first instance paid considerable attention to the third prong, the court discussed it only briefly, finding the claimants' arguments unpersuasive (see below). The appellate court's focus came to lie on the second requirement of 'proximity'.

[122] *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191 ("*Okpabi*").
[123] Pursuant to Article 3.1 (3) of Practice Direction 6B of the Civil Procedure Rules, if a duty of care on the part of RDS exists, the Court finds, the next step would be to determine whether the claims against SPDC are admissible.

A. Proximity is a matter of de facto, not de jure control

To determine whether there was a relation of proximity between RDS and the claimants, the appellate court in *Okpabi* relied chiefly on 'common sense and practicality'.[124] In contrast, the court in first instance had focused heavily on formalities of corporate law to reject the necessary 'proximity'. It noted, first, that RDS 'was not a direct parent of SPDC, in the sense that it did not hold shares in SPDC; and nor did it conduct operations itself, in contrast to the position of the defendant in *Chandler v Cape Plc*.' As Justice Simon writing the majority opinion for the Court of Appeal stresses, this point seems relevant only in terms of differentiating the present case from precedent case law – Justice Simon 'would accept the facts of the Chandler case with the parent directly engaging someone to address the relevant risk strongly favoured a relationship of proximity in contrast with the present case'. According to Simon, holding shares is not of importance to establishing proximity; rather, one must look at the day-to-day operations.

The second formal consideration of the court of first instance centered on the directors: 'the executive officers of RDS (the CEO and CFO) who sat on Executive Committee ("ExCo") were in a minority'. Justice Simon discounts this point as well, since 'ExCo carried out functions on behalf of RDS', meaning ExCo functions under RDS's control regardless of the composition of its board. Once again, according to the Court of Appeal, the corporate formality is not necessarily related to the reality.[125]

A third factor to which the court of first instance gave weight, related to authority to conduct operations. As this court observed accurately, RDS was not itself permitted to carry out operations in Nigeria, and was not a party to the joint venture agreement, pursuant to which the operations were carried out. Again, the Court of Appeal was unimpressed and notes that the fact that RDS was not authorized to operate pipelines on Nigerian soil does not mean it did in fact refrain from doing so.

With the fourth factor the court of first instance considered the policy implications of finding a duty of care. Specifically, the court considered that imposing a duty of care on

[124] The courts noted that there is little precedent from which guidance could be gained. The only tort case they cited, in which a parent company was found liable, is *Chandler v Cape*.
[125] *Okpabi*, at 129.

RDS would potentially impose 'liability in an indeterminate amount, for an indeterminate time, to an indeterminate class', citing Cardozo CJ in *Ultramares Corporation v. Touche*.[126] This argument received favourable reception by the Court of Appeal. The court reasoned that a parent company would become liable for damage unlawfully caused by its subsidiaries around the world, since 'much of the claimants' argument was designed to show that the Shell Group imposed a wide-ranging degree of direction from the centre'. As Justice Simon put it, this argument 'proved too much, in the sense that what it in fact showed was standardisation of policies and practices across all the operations and in all the countries in which the Shell Group operated.' As discussed below, such standardisation does not establish control over subsidiaries' operations.

Thus, the Court of Appeal did not endorse a formal approach to determining 'proximity', incidentally leaving the door open for claims against a company for harm caused by its business partners' activities. Rather, the appellate court opined that as a prerequisite to establishing the necessary level of 'proximity', RDS must be shown to have either (1) assumed responsibility for the relevant aspect of the business of their subsidiary (*i.e.* the operation of oil pipelines), or (2) exercised a sufficient degree of control over the operations of the subsidiary.

With respect to the first test, according to the claimants, the imposition by RDS of mandatory policies, standards and manuals regarding the safe operation of pipelines on its subsidiaries established the requisite proximity. To the extent these requirements were mandatory, Justice Simon argued, they were mandatory across all Shell subsidiaries – there was no indication of specific control of or responsibility for the Nigerian subsidiary. In emphasizing the uniform application of these policies, the court of appeal thus suggested that a showing of a particular divergence or discrepancy from the safety requirements in relation to the Nigerian subsidiary would have had more relevance.

With respect to the second test, the claimants' argued that the systems of supervision and guidance in implementing RDS's standards testify to RDS' control over the subsidiaries' operations. The appellate court rejected this reasoning since it found that 'the concern

[126] *Ultramares Corporation v Touche* [1932] 174 N.E. 441.

was to ensure that there were proper controls and not to exercise control'. In other words, RDS' policies did not result in RDS taking over the operation of its subsidiaries' operations; they merely ensured that the subsidiaries exercised control in accordance with the policies. Furthermore, the appellate court reasoned, insofar as RDS' policies were mandatory for its subsidiaries, 'this is hardly surprising since it affected Shell's general reputation'. It is only fair to expect a company to care about its reputation abroad and thus to make sure its guidelines are followed.

Dissenting from the majority, Justice Sales took a different approach to establish a duty of care of a parent company. First, he determined that RDS' subsidiary had a duty of care *vis-à-vis* the claimants according to the *Caparo*-test under English law. He then argued that because of the likely proximity due to practical control of management or generalized joint control, this duty of care may be imputed to RDS as the parent company. The majority rejected Justice Sales' analysis, however, because no sufficient degree of control had been established, as discussed above.

B. Fair, just and reasonable

Since the Court of Appeal had already concluded that the proximity test was not met, it quickly disposed of the claimants' reasoning regarding the 'fair and reasonable' requirement. The claimants argued that it is fair, just and reasonable to impose a duty of care on RDS in the present circumstances on several grounds.

First, they asserted it is important to make sure multinational enterprises comply with international standards such as CSR. As the appellate judge Simons points out, however, this is true as an 'abstract principle', but a 'doubtful' basis for imposing a duty of care. Indeed, subject to a few exceptions, international CSR standards are set out in non-binding soft law instruments.

Further, they argued that it would be fair, as there is 'only limited enforcement of environmental regulations in Nigeria'. Justice Simon does not engage this point specifically, but finds the argument as a whole unpersuasive.

Lastly, the claimants contended that because RDS makes 'billions of pounds of profit' from its subsidiary's operations, it is neither unreasonable nor unfair to impose a duty of care on RDS. Justice Simons characterizes this reasoning as assuming that which must be proven.

Since neither proximity nor reasonableness was found, the majority deemed any further analysis unnecessary.

The UK Supreme Court will now have to decide whether to grant Okpabi's request for appeal; its application was deferred until after the the Court had ruled on *Vedanta*.[127] Given the Court's ruling in Vedanta, chances are that the Court will grant Okpabi's request. The Court's forthcoming ruling in *Okpabi* could be another seminal case in the evolving English law on supply chain liability.

6.4.2.4 AAA v Unilever

In *AAA & Others v Unilever plc. and Unilever Tea Kenya Limited (2018)*,[128] the EWCA held that the evidence relied upon by the claimants failed to disclose a level of control by the parent company (Unilever) over the subsidiary's (Unilever Kenya) operations that was sufficient to warrant the imposition of a duty of care. The facts were unique, however, as it concerned politically motivated violence after the Kenyan presidential elections. Violent protesters intruded on Unilever Kenya's tea plantation where they committed murder, rape and damaged property. Both employees of Unilever Kenya as well as neighbouring citizens filed suit against Unilever and its subsidiary in the UK.

The EWCA also identified two broad scenarios, which might give rise to parent company liability:

"*(i) [W]here the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary's own management;*

[127] The Supreme Court of The United Kingdom, Letter to the solicitors of the parties in *Okpabi*, 9 July 2018. Available at: *https://www.business-humanrights.org/sites/default/files/documents/okpabi supreme court answer.pdf* (last access 2 May 2019).
[128] *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 ("*Unilever*").

or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk."[129]

Under each of the tests, the Court could not find the requisite level of involvement. Thus, proximity between Unilever and the workers and neighbours in Kenya could not be established and the claim was dismissed.

6.4.2.5 Lungowe v Vedanta

Lungowe marks the first time the EWCA found that a duty of care *vis-à-vis* parties other than the subsidiary's employees may be owed by the parent company.[130] Vedanta Resources Plc ("Vedanta") is an English holding company for a group of metal and mining companies, including a Zambian company, Konkola Copper Mines Plc ("KCM"). The plaintiffs, Zambian citizens, brought proceedings against Vedanta and KCM because KCM's copper mining operations in Zambia allegedly polluted Zambian rivers, which caused them harm. The water from the rivers served the plaintiffs in many ways: as drinking water, for washing, irrigation and food supply. The EWCA allowed the case to proceed to trial.

The UKSC granted Vedanta's appeal for the case to be dismissed on the ground of non-jurisdiction. On 10 April 2019, the UKSC confirmed the EWCA's decision. The UKSC found that Vedanta's published materials state that Vedanta had laid down standards of environmental control over the activities of KCM, and implemented those standards by "training, monitoring and enforcement".[131] Therefore, the Court reasoned, it is arguable that a "sufficiently high level of supervision and control over the activities at the mine" may be demonstrated at trial, which means that the claim cannot be dismissed by summary judgment.[132] Importantly, as the Court treated actual control, not shareholding as such or the mere opportunity to control, as the key factor triggering a duty of care, it opened the door to SCL claims against non-parent corporations that exercise control over

[129] *Unilever*, at 37.
[130] *Vedanta*, at 88; *Das v George Weston Limited* [2018], at 155.
[131] *Vedanta*, at 61.
[132] *Ibid.,* at 42 and 61.

the activities of a business partner through means other than shareholding, such as contractual arrangements or directorship.

Furthermore, the UKSC addressed some of the circumstances in which control may lead to the imposition of liability on a parent company or, by extension, a non-parent business partner. As *Vedanta* is to be viewed through the lens of control, there is not necessarily a difference between supply chain liability claims against parents and those against non-parent business partners. The same principles apply to both scenarios.

With respect to the adoption of group-wide policies, the Court rejected "a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them."[133] As the Court noted, in *Chandler*, the group-wide policies contained errors, which in turn caused harm when implemented by the subsidiary; a parent that prescribes such erroneous policies breaches its duty of care.

With respect to implementation of group-wide policies, the Court observed that "[e]ven where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries."[134] Thus, a parent company's involvement with the application or implementation of policies may trigger a duty of care.

On public statements by the parent about supervision and control of the subsidiary, the Court noted "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances, its very omission may constitute the abdication of a responsibility which it has publicly undertaken." It is the raising of expectations that triggers a duty of care in this case.

[133] *Ibid*., at 52.
[134] *Ibid*., at 53.

The Court explicitly refused to limit the categories of possible duties of care of parent companies, as the EWCA had done in *Unilever* (see above):

> "There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking".[135]

While the passive investors does not have a duty of care towards the tort victims of the company they own, the parent that operates its subsidiaries as part of a single undertaking does have a duty of care towards the victims of the subsidiary's activities.

Due to this ruling, to avoid liability, parent companies or non-parent business partners might become wary not to prescribe and implement policies to subsidiaries and business partners.[136] There is a question, however, whether this strategy will work, given that omission may also be a ground for liability, as discussed in Chapter 6.

6.4.2.6 Conclusions on UK supply chain liability case law

The current state of the UK law on SCL can be neatly summarized based on the only UK Supreme Court SCL ruling thus far. In *Vedanta*, the Supreme Court enabled expansive supply chain liability. Control over the subsidiary's or supplier's operations is now the linchpin of supply chain liability. The Court contemplates that control over a company's activities can be established in several ways other than ownership or shareholding, such as through contract or directorship. While it states that the opportunity to control in itself does not create a duty to control, it leaves open the possibility that in some cases such an opportunity may ground a duty to control.

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[135] *Ibid.*, at 51.

[136] For an interesting parallel concerning the doctrine of general contractor's liability in Delaware, please refer to the Superior Court of Delaware's policy consideration in fn. 68 in *Ramahan v JC Penney*.

In *dicta*, the Court makes further statements that address key issues in connection with supply chain liability. To a substantial degree, its judgment sets out the contours of supply chain liability of both parent companies and non-parent business partners. As such, it provides much guidance for international corporate groups. Internally, their policies and guidelines, and the implementation thereof, as well as group-wide due diligence and compliance programs, are relevant to the SCL exposure of multinational corporate groups. Externally, public statements about their policies will have implications for their liability exposure, as such statements create expectations. Where parents or other business partners have actual knowledge of problems or risks, or possess superior operational expertise, they may incur an increased duty of care and be exposed to incremental liability.

Given the emphasis on control, the level of economic integration of international corporate groups will be an important determinant of supply chain liability. If corporate groups operate as one economic unit, the parent of the group may well be deemed to be in operational control of its subsidiaries and thus have duties of care to prevent harm. Economic integration therefore is also likely to increase a parent's or other business partner's responsibility for subsidiaries' operations in terms of safety, environmental impact and human rights compliance.

6.4.3 Canada

6.4.3.1 Choc v Hudbay

In *Choc v Hudbay Minerals Inc,*[137] the Ontario Superior Court of Justice[138] entertained direct supply chain liability claims. The plaintiffs in this case are indigenous Mayan Q'eqchi' from Guatemala; the defendant, Hudbay, is an international mining company with subsidiaries in Guatemala. The Mayan claim that Hudbay's Guatemalan subsidiaries committed human rights abuses, including murder and gang rape. They sued both the Guatemalan subsidiaries and the Canadian parent. As to the parent, they allege that it

[137] *Choc v Hudbay* [2013] ONSC 1414 ("*Choc v Hudbay*").
[138] The Superior Courts are provincial courts of first instance for *inter alia* civil claims greater than 'small claims'.

failed to exercise adequate control and supervision. By dismissing the defendant's motion to strike the plaintiff's action, the court allowed the case to proceed to trial. The court found – contrary to what the defendant argued – that there may be "a reasonable cause of action in negligence."[139] The court came to this conclusion after it applied the English '*Anns* test' and found that a *prima facie* duty of care exists as (1) Hudbay could have foreseen the damage caused by its subsidiary's operations, because Hudbay was aware of the risk of violence, and (2) Hudbay had made public representations concerning its relationship with local communities and its commitment to respecting human rights, and thereby, brought itself in proximity of the indigenous Mayan people. According to the Court, Hudbay's public statements about its respect for human rights raised expectations on the part of the plaintiffs. Thus, Hudbay's public statements are "indicative of a relationship of proximity between the defendants and plaintiffs."[140]

According to the court, the competing policy considerations in recognizing a duty of care should be assessed at a later stage, when the facts of the case are fully developed.[141] Although there is no final ruling on the substance of the case yet – the case is currently in discovery[142] – the preliminary decision is noteworthy. First of all, it is a first of its kind. Until *Choc*, Canadian courts had declined jurisdiction over these types of claims on the grounds of *forum non conveniens* or simply a lack of jurisdiction.[143] Secondly, the court's reasoning opens a door to a whole new category of cases in which parent companies could have prevented harms caused by their subsidiaries by exercising effective supervision and control.

6.4.3.2 Das v George Weston Limited

As illustrated in the introduction, the collapse of the Rana Plaza in Bangladesh was the reason for a class action lawsuit filed against Loblaws, a Canadian retailer.

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[139] *Choc v Hudbay*, at 75.
[140] *Ibid.*, at 68.
[141] *Ibid*., at 74.
[142] Superior Court of Justice Ontario, Endorsement of Plaintiff's Motion to settle discovery plans, 29 June 2015. Available at: *http://www.chocversushudbay.com/wp-content/uploads/2010/11/Judgment-requiring-HudBay-to-disclose-extensive-internal-corporate-documentation.pdf* (last access 2 May 2019).
[143] *See Bil'in (Village Council) v Green Park International Ltd* [2009] QCCS 4151, para. 338; *Association canadienne contre l'impunité v Anvil Mining Ltd* [2011] QCCS 1966, para. 30.

The plaintiffs argued that Loblaws owed a duty of care to the workers at Rana Plaza because: (1) Loblaws knew that garment manufacturing often took place in unsafe conditions in Bangladesh, (2) Loblaws adopted 'CSR Standards', (3) Loblaws ordered limited audits to implement the CSR Standards, and (4) Loblaws had control over its suppliers because it could refuse to accept goods if the suppliers did not comply with Loblaws CSR Standards or local laws were disobeyed.

In first instance, the case was dismissed, as the court did not find the retailer controlled the risk of harm to the claimant.[144] The court held that while Loblaw may have a moral or ethical duty of care, "it certainly is not plain and obvious that a purchaser of goods does or should have a legal duty of care to the employees of a manufacturer of those goods."[145] Namely, the appellate court disputed the application of *Chandler v Cape*, the English precedent concerning parent company liability, because Loblaws is not a parent of its sub-supplier.[146] Therefore, "the nature of their proximity is completely different: [the sub-supplier] could contract with any number of purchasers, none of which could have the kind of control present in a parent/subsidiary relationship." The UK Supreme Court's ruling in *Vedanta*, however, does not support this reasoning, since the relevant criterion now is actual control, not ownership. Thus, in hindsight, the Ontario court might have ruled differently after *Vedanta*.

6.4.4 United States

As the US is home to many large companies with global supply chains, there have been many attempts to hold them liable under US law for harmful conduct of their subsidiaries or suppliers abroad. As the case law illustrates, plaintiffs have found creative ways to argue for corporate SCL. One of those gateways is no longer available – the Supreme Court recently shut down the "Alien Tort Statute gateway"[147] in *Jesner v Arab Bank.*[148]

[144] *Das v George Weston* [2017], at 469 and 483. Justice Perell refers to the recent EWCA rulings in *Lungowe*, *Okpabi* and *Unilever* at 153 – 174.
[145] *Ibid*, at 524.
[146] *Das v George Weston,* at 177.
[147] The Alien Tort Statute (ATS) gives the federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law. It is part of the United States Code (§1350, 28 U.S.C.) first adopted in 1789. When the ATS was drafted in the 18th century, international law dealt primarily with regulating diplomatic relations between States and outlawing crimes such as piracy.

However, the court did not rule out that US companies could be held liable for actions by their foreign subsidiaries under US law.

Another class action lawsuit arose out of the Rana Plaza factory collapse, this time against US retailers JC Penney, The Children's Place and Wal-Mart. Similar to the Canadian lawsuit, the plaintiffs in *Ramahan v JC Penney* argued that the US retailers breached their duty of care to ensure the Rana Plaza was a safe place to work. As is required by the law of the state of Delaware, one party owes a general duty of care to another party if there is a "special relationship" between them.[149] However, plaintiffs did not argue the existence of a special relationship.

Instead, they claimed that, due to the known safety risks at the Rana Plaza, the works the contractor supplier was hired to do posed a "peculiar risk". In that case, the employer of the independent contractor owes a duty of care to take special precautions to mitigate this "peculiar risk".[150]

International law expanded in the 21st century to include the protection of human rights. Consequently, the ATS gives survivors of egregious human rights abuses, wherever committed, the right to sue the perpetrators in the United States.
The first case brought under the ATS for human rights abuses was *Filartiga v. Peña-Irala*. In 1976, family members of a man who had been tortured and killed by police in Paraguay brought a case under the ATS against a Paraguayan officer apprehended in the US. A U.S. federal court in New York upheld their claims, opening the door for future claims under the ATS. *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
Beginning in the mid-1990s, a new class of ATS suits emerged that aim to hold multinational corporations accountable for complicity in human rights abuses. However, to date, no contested corporate ATS cases have resulted in judgments in favour of the plaintiffs. Two corporate accountability cases, *Doe v Unocal* and *Wiwa v Shell*, have resulted in settlements. *Doe v Unocal* 395 F.3d 932 (9th Cir. 2002) and *Wiwa v Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).
Moreover, the Supreme Court narrowed the scope of application of the ATS. In *Kiobel v Shell*, the Supreme Court ruled unanimously that the ATS does not apply to events occurred abroad. More precisely, the ATS does not rebut the "presumption against extraterritoriality".

[148] In *Jesner v Arab Bank*, the Supreme Court held that the ATS does not apply to foreign corporations either. [2018], No. 16-499, 584 U.S. Thus, the options for foreigners to sue under the ATS are limited. In his concurring opinion in *Kiobel v Shell*, Justice Breyer summarized the entire test when the ATS would establish jurisdiction, as follows if "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbour (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Thus, the human rights movement is looking in different directions. S. Moyn, "Time To Pivot? Thoughts on Jesner v Arab Bank", *Lawfare Blog*, 25 April 2018. Available at *https://www.lawfareblog.com/time-pivot-thoughts-jesner-v-arab-bank* (last access 2 May 2019).

[149] Comparable to the 'proximity'-prong of the *Caparo*-test.

[150] E.S. Pryor, "Peculiar Risk in American Tort Law", 38 *Pepp. L. Rev*. 2 (2011), p. 395.

The first question the court posed is whether the conditions present in the garment factories from which the US based retailers sourced clothing presented a 'peculiar risk'. Under established case law, a peculiar risk is "a special risk peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions."[151] The plaintiffs claimed that the US retailers "ignored warning signs (including publicly available information regarding the safety of the Rana Plaza building and previous incidents at other Bangladesh garment factories) of the imminent dangers facing workers in Rana Plaza."[152] However, the court held that the inadequacies in the construction of the Rana Plaza are not peculiar to the garment industry. Thus, "defendants cannot be reasonably expected to take precautions against a building collapse when deciding to source garments from factories in Bangladesh." It seems only logical that the Bangladeshi contractors are responsible to take these precautions.

Indeed, the scope of application of the peculiar risk doctrine is limited. First, the doctrine intends to protect only third-party bystanders. Employees of the contractor are excluded from the protected class.[153] Second, the standard of a "peculiar risk" is high: proof that the risk was uncommon, in addition to being peculiar to the activity, is required.[154] Thus, the peculiar risk doctrine, as currently construed, would not appear to present a feasible conduit for pursuing supply chain liability claims.

6.4.5 The application of common law in the Netherlands and Germany

6.4.5.1 The Netherlands: Milieudefensie v Shell

Similar proceedings to the UK case of *Okpabi* against Shell are pending in The Netherlands. A group of Nigerian farmers and a Dutch environmental association ("*Vereniging Milieudefensie*") brought a series of claims against Shell in 2009, seeking

[151] *Bryant v Delmarva Power & Light Co.*, 1995 WL 653987, at 6.
[152] Class Action Complaint, at 94. Available at *https://www.plainsite.org/dockets/2l74auzyq/district-of-columbia-district-court/rahaman-et-al-v-jc-penney-company-inc-et-al/* (last access 2 May 2019).
[153] *In re Asbestos Litig.*, 2002, WL 31007993, at 2; *Monk v Virgin Islands Water & Power Authority*, 53 F.3d 1381 (3d. Cir. 1995), at 1394; *Bryant v Delmarva Power & Light Co.*, 1995 WL 653987, at 6; Section 409 and 413 Restatement (Second) Of Torts, Am. Law Inst. 1965.
[154] E.S. Pryor, "Peculiar Risk in American Tort Law", 38 *Pepp. L. Rev*. 2 (2011), p. 407 – 408.

compensation for environmental damage resulting from oil spills in Bayelsa State in Nigeria. Farmland and fishing ponds adjacent to Shell's operations were allegedly affected by oil spills, which substantially reduced the Nigerian farmers' income.

In a brief judgment, the District Court of The Hague ruled in 2009 that it had jurisdiction to hear the cases against RDS and SPDC, based on Article 2 (1) of the Brussels I Regulation[155] and Dutch national civil procedure rules, respectively. In 2015, the Court of Appeal of The Hague rendered more substantial interim judgments concerning its jurisdiction to hear the cases.[156]

To determine jurisdiction, the Court of Appeal of The Hague applied a more lenient test than its English counterpart. Pursuant to Article 7.1 of the Dutch Code of Civil Procedure, claims against Shell's Nigerian subsidiary, SPDC, are admissible provided that the claims against RDS and SPDC are "connected with each other in such a way that a joint consideration is justified for reasons of efficiency." As SPDC argued, this condition is not met in case the claims against RDS are "*obviously bound to fail*". In other words, according to the defendants, there would be no arguable duty of care on the part of RDS to prevent damage caused by oil spillage by one of its subsidiaries in Nigeria. To determine whether RDS has a relevant duty of care, however, the Dutch court did not go into much detail. Rather, it dismissed the defendant's argument stating that, "it cannot be ruled out in advance that a parent company, in certain circumstances, may be liable for damage resulting from acts or omissions of a (sub) subsidiary." Although SPDC did argue that these circumstances do not present themselves here, the Court ruled that this factual assessment should be made in the second phase of the proceedings. Thus, whether or not RDS owed a relevant duty of care is not an issue that should be considered in the context of jurisdiction.

[155] Article 2 (1) Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2001 L 12/1-23; now Article 4 of the Brussels I Recast Regulation, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ EU L 351/1-32.

[156] C. De Groot, 'The 'Shell Nigeria Issue': Judgments by the Court of Appeal of The Hague, The Netherlands', 13 *European Company Law*, Issue 3, 2016, 98-104.

The English threshold to establish jurisdiction over a parent company for unlawful acts of its subsidiary is substantially higher than the Dutch threshold. Under English law, to establish jurisdiction, a plaintiff must furnish some factual evidence that the circumstances that give rise to a parent company's duty of care, are present. In other words, they must demonstrate a *reasonably arguable* duty of care on the part of the parent company *vis-à-vis* the claimants. As a key condition to a parent company's duty of care to a subsidiary's employees or parties directly affected by its operations, it must be shown that the parent company exercised 'control'. On the basis of this criterion, an arguable duty of care was deemed to exist in the case of *Vedanta*,[157] because some actual evidence relevant to the parent company's responsibility for the subsidiary's health and safety policies, and control over its operations, had been proffered. The Dutch courts, on the other hand, appear to content with the mere possibility of a parent company's duty of care, and do not require actual evidence of the existence of such a duty.

However, the Dutch Court of Appeals' ruling may turn out to be a Pyrrhic victory.[158] If Okpabi's appeal to the UKSC is not granted or, subsequently, the UKSC does not overturn the EWCA's judgment ruling out a duty of care on the part of RDS *vis-à-vis* the claimants, it will be harder for the Dutch courts to rule in favour of the plaintiffs on the merits. If RDS does not owe a duty of care to this class of claimants under English law, the Dutch courts are less likely to impose such a duty.[159]

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[157] *Lungowe v Vedanta* [2017] EWCA Civ 1528.

[158] P.A. Bergkamp, 'Parent Company Liability After Okpabi v. Shell', 2018, 15 *European Company Law*, Issue 4, p. 112–117.

[159] Before the UK ruling in *Okpabi* could serve as guidance, the District Court of The Hague had to apply common law principles in a case relating to supply chain liability. The court ruled that pursuant to article 3 of the Dutch Conflict of Laws Torts Act, Nigerian law, being the law of the state where the spill and the ensuing damage occurred, is applicable. As the alleged torts were committed before 11 January 2009, the Rome II Regulation on the law applicable to non-contractual obligations is not applicable. Since Nigerian common law is substantially similar to English common law, Nigerian courts would apply the principles established by the English common law for establishing a duty of care.
The Court concluded that RDS did not owe the plaintiffs a duty of care, as the *Caparo*-test was not met. Focusing on proximity, the Court dismissed the analogous application of *Chandler v Cape* on the grounds that the relationship between a parent company and the employees of its subsidiary, operating in the same country, is not comparable to the relationship of a parent company of an international oil group and the villagers living nearby oil pipelines or oil facilities operated by its subsidiaries in other countries. Finding no other special circumstances justifying a duty of care on the part of RDS, the court ruled it would not be fair or reasonable to impose such a duty of care on RDS, and rejected the claims. In hindsight, the District Court's argument relating to the application of *Chandler* is not in line with the UKSC's findings in *Vedanta*. Thus, when ruling on the merits, the Hague Court of Appeal will have to analyse RDS' factual

6.4.5.2 Germany: Jabir v KiK

On 10 January 2019, the Regional Court (*Landgericht*) of Dortmund dismissed the first case concerning supply chain liability brought before German courts, *Jabir et al. v KiK Textilien und Non-Food GmbH*,[160] based on a Pakistani statute of limitations.[161] Three years prior to the opening of proceedings against KiK, a fire occurred at the factory of Ali Enterprises, one of KiK's suppliers, which resulted in the death of 260 workers and injured another 32 workers. The plaintiffs argued that KiK breached its duty of care to procure safe working conditions for its business partner's employees in Pakistan by failing to take adequate action to prevent the fire.[162] As KiK representatives visited the factory, KiK was aware of its defects, plaintiffs argue. Therefore, KiK could have foreseen the damage caused to the plaintiffs by the fire. Regarding the issue of proximity, plaintiffs argue that KiK assumed the responsibility to ensure the safety of the workers by publicly proclaiming to implement CSR standards in its supply chain.[163] In addition, KiK exercised control over Ali Enterprises by: integrating its Code of Conduct in every contract of sale with Ali Enterprises, by stipulating the right to perform audits without prior notice, by visiting the factory, and by reserving the right to terminate the business

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control over SPDC. However, the EWCA previously analysed RDS' factual control in the 2017 *Okpabi* ruling, which – if not overturned by the UKSC – the Dutch appellate court will have to apply. *Milieudefensie & Ors v Shell & Ors* [2013] District Court of The Hague, 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 at 4.26 – 4.34 and ECLI:NL:RBDHA:2013:BY9845 and ECLI:NL:RBDHA:2013: BY9854.

[160] *Jabir and others v. KiK Textilien und Non-Food GmbH* [2019] Regional Court of Dortmund, 10 January 2019 (Case No. 7 O 95/15). Press release available in German, at: *http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-Urteil-KIK.pdf* (last access 2 May 2019).

[161] Under EU Regulation No 864/2007 on the law applicable to non-contractual obligations ("the Rome II Regulation") Pakistani law applies to the case. Because Pakistani tort law is based on English common law, so are the plaintiffs' arguments.

[162] The European Center for Constitutional and Human Rights (ECCHR) represented the plaintiffs. It submitted a "Legal Opinion on English Common Law Principles on Tort: Jabir and Others v Textilien und Non-Food GmbH" (hereafter "Legal Opinion") on 7 December 2015. Available at: *https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf* (last access 2 May 2019).

[163] The submitted KiK Sustainability Report states: "We are responsible for more than 20,000 employees in Europe, people who we employ directly, as well as those workers involved in producing goods ordered by us in their respective countries. (...) It is therefore logical and economically prudent for us to design processes that make the best possible use of resources, to define social and ecological standards, and adhere to them, and also to assume social responsibility above and beyond our core business activities". KiK Sustainability Report 2010, p. 13. As the UKSC held in *Vedanta*, it is irrelevant whether KiK actually did what it claimed to do.

relationship in case of non-compliance with KiK's Code of Conduct.[164] Moreover, because 75% of the factory's output was destined for KiK, plaintiffs argue that the "intensity of [KiK's] demand" might itself have been the cause of the lack of safety.

By dismissing the case on procedural grounds, the German court did not rule on the merits of the case. However, for the reasons set out above, it is unlikely it would deviate from English case law when applying English law. In this respect, it is interesting to look at the tort laws of other European countries, whose courts may be called upon in future supply chain liability cases.

6.4.6 'Control' is becoming the linchpin of supply chain liability

With supply chain liability still evolving, courts struggle to shape the applicability of the civil liability model. The analysis of the case law presented above, however, reveals a possible focal point of the analysis by courts of SCL claims: the exercise of control by the EU or US company over the operations of its subsidiary or business partner.

There is much less clarity around the question as to whether and, if so, under which conditions, parent companies or non-parent business partners have a duty to exercise control over their subsidiaries or business partners' potentially harmful activities. The general principles of negligence liability suggest that knowledge of unacceptable risks could be a triggering event; if the parent or business partner knew or should have known that its subsidiary or business partner conducted its operations in a dangerous manner, it may incur a duty to monitor, supervise, and/or correct. Without actual knowledge of any unacceptable risks, it will be much harder to assert a SCL claim – a claimant will have to argue that the parent or non-parent business partner should have investigated and, if necessary, attempted to correct its business partner's practices, or, if no remediation was possible, not to do business with that company. Once courts cross that bridge, corporate social responsibility may begin to shape SCL.

[164] Legal Opinion, at 18.

6.5 Legitimate expectations model

The legitimate expectations model holds that CSR obligations can arise out of the assumption of responsibility by a private promise of public declaration of compliance with CSR norms.[165] A company that claims to implement CSR norms in its supply chain creates "legitimate expectations" among its business partners.[166] Such representations (or promises) may be publically or privately made – through the publication of corporate reports, such as sustainability reports, advertising, labelling or packaging, or otherwise, or through private, non-public contractual clauses;[167] they can even be implicit, for instance, if a parent or business partner otherwise takes care of a subsidiary's or supplier's operations. The potential plaintiffs vary depending on the public or private nature of the representations or promises.

In an international context, it would appear that the most likely plaintiffs in these cases are injured workers of the supplier, other persons in the supplier's vicinity that suffer harm, and customers of consumer goods companies in the West.[168] A worker has an

[165] The legitimate expectations model can give rise to supply chain liability on both extra-contractual and contractual grounds. The contractual grounds fall outside of the scope of research for this paper.

[166] For example, Nike heavily promotes and markets its commitment to CSR norms in its supply chain. Nike issued a "Code of Conduct", which lays out required minimum standards each supplier factory or facility has to meet in order to produce products for Nike. Nike also dedicated a separate website to its commitment to improving "sustainability" in its supply chain: *www.sustainability.nike.com*, including improving worker's conditions. To make its claims stick, Nike releases yearly "supply chain disclosure" statements, reporting on the actual conditions.

[167] CSR norms can be included in a supply contract between the EU company and its local subsidiary or business partner. Although it is counter-intuitive to agree to expanded exposure to liability, supply contracts imposing CSR norms are becoming more common, because larger multinationals increasingly require such commitments from their suppliers. They tend to do so due to the pressure they feel from non-governmental organizations and sometimes governments, which police their activities abroad. It might even be financially more attractive for EU corporations to make sure business partners in their supply chains respect CSR norms – the 'doing well by doing good' theory. Indeed, there is some empirical evidence to the effect that improved environmental and social performance will lead to higher levels of financial performance. One reason may be because consumers are willing to pay more for ethically produced goods. Based on a contract including a CSR or SCL clause, a company that supplies to another company could be held liable for breach of contract in case of human rights violations or environmental damage caused by its foreign operations. M. Miremadi, C. Musso, and U. Weihe, 'How much will consumers pay to go green?' *McKinsey Quarterly*, October 2012. Available at *https://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-much-will-consumers-pay-to-go-green* (last access 2 May 2019).

[168] Customers of consumer goods may assert claims on the basis of a contract with the manufacturer, on the basis of a contract with a retailer by which the manufacturer is bound as a third party obligor, or as a third party beneficiary of a contract to which the manufacturer is a party. In cases of direct sales, customers of consumer goods contract directly with the manufacturer – on the basis of that contract, they may be able to

employment contract with the supplier, but not necessarily with the parent or the supplier's customer.[169] In some cases, an injured worker might be able to argue that there is a contract with the parent or the supplier's customer in relation to issues such as management of working conditions – in those cases, the worker could claim directly against the parent or supplier's customer based on a contract.[170] If there is only a contract with the supplier, the issue will be whether an injured worker can claim against the parent or supplier's customer.[171] The legitimate expectations model suggests that the EU parent

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assert CSR-related claims against that manufacturer. If they purchase from a retailer, the contract with their retailer may provide grounds for claiming against the manufacturer – for instance, the manufacturer may be deemed to be a party to that contract (for example, because the retailer served as the manufacturer's agent in the relevant respect) or a third party obligor under it. For example, when Nike makes representations about its strong commitments to preventing child labour, Nike raises an expectation among its customers that its suppliers do not employ children in producing the materials for Nike products.
Based on Nike's own statements, its customers may be entitled to assume that suppliers' workers enjoy "minimum working conditions." Nike's statements about its insistence that its business partners apply CSR standards may induce "reasonable expectations" on the basis of which consumers can claim damages for breach of contract if the standards are violated. Whether their claims are asserted under a contract with the manufacturer, the contract with the retailer to which the manufacturer is a third party obligor, or possibly some other contract to which the manufacturer is a party or under which it is a third party obligor, depends on the specific circumstances of each case. C. M. A. McCauliff, 'A Historical Approach to the Contractual Ties that Bind Parties Together', 71 *Fordham Law Review* 841—867, 2002. Available at: *http://ir.lawnet.fordham.edu/flr/vol71/iss3/9* (last access 2 May 2019).

[169] [xxx]

[170] The question arises whether a public statement regarding the conditions in the supply chain of the purchased good, for instance on the merchant's website or in an advertisement, is part of the contract (as a condition or a warranty)?

[171] Where the contract between the supplier and the supplier's customer includes CSR-related requirements, for example, in relation to occupational health and safety, an injured worker might be able to argue that he is a third party beneficiary of that commitment of the supplier's customer. Persons in the vicinity of the supplier will typically not be able to base their claims on a contract with the parent or the supplier's customer, but they might be able to assert claims as third party beneficiaries of a contract between the supplier and the parent or supplier's customer in relation to relevant CSR-related obligation, for example regarding environmental management. In 2009, the US Court of Appeals for the Ninth Circuit considered these questions in *Doe I v Wal-Mart*. Wal-Mart, a US retailer, incorporated a code of conduct for its suppliers into its supply contracts with foreign suppliers. These "Standards for Suppliers" require Wal-Mart's foreign suppliers to comply with local laws and local industry standards.
In addition, Wal-Mart reserved the right to cancel orders and terminate the supply contract in case the supplier fails or refuses to comply with these standards or does not allow inspection of the production facilities. Employees of Wal-Mart's foreign suppliers brought a class action against Wal-Mart in the US for a failure to adequately monitor its suppliers. Plaintiffs allege that Wal-Mart is aware of the recurring violations of the Standards by its suppliers. That is why, Wal-Mart barely inspects the production facilities without announcing the inspection and the inspectors are pressured to produce positive results. Moreover, in order to comply with the short deadlines imposed by the supply contracts and the small pay, the suppliers are forced to violate the Standards. According to these foreign workers, the Standards and California common law provide substantive obligations that can be enforced by the foreign workers against Wal-Mart because they are: (1) third party beneficiaries of the Standards contained in the supply contracts, or (2) jointly employed by Wal-Mart.
The same claims were presented by the plaintiffs in *KiK v Jabir*. In accordance with article §328 of the German Civil Code (*Bürgerliches Gesetzbuch* or "BGB") a third party, benefited by a contract to which it

or non-parent business partner assumes responsibility if it raised expectations by making representations about compliance with CSR norms in its supply chain. A person affected by the operations of a subsidiary or supplier can, on this ground, seek compensation from the EU parent or non-parent business partner for breach of its voluntarily assumed duty of care.

6.5.1 Canada

The plaintiffs in *Das v George Weston*[172] relied on the legitimate expectation model: because the workers at Rana Plaza saw the personnel of a company instructed by Loblaws conducting social audits, they expected Loblaws to ensure their safety. According to the plaintiffs, Loblaws thereby assumed responsibility for the safety of the workers at the Rana Plaza and breached its duty of care.

However, the Ontario Court of Appeal remarked that the limited social audits "did not and were not intended to cover any structural issues" of Rana Plaza. Therefore, the court held, there is "no basis for any reliance on Loblaws or Bureau Veritas with respect to the structure of the Rana Plaza premises."[173] However, the court did not do away with the legitimate expectations model, as it mentioned "had the appellants suffered damage as a result of one of the deficiencies that had been identified by Bureau Veritas in its reports, that could well have affected the analysis of whether a duty was owed."[174]

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is not a party, "acquires the right to demand the performance directly." If the contract does not explicitly state so, the right of the third party beneficiary is "to be inferred from the circumstances, in particular from the purpose of the contract." For instance, if KiK's Code of Conduct forms part of KiK's supply contracts, the workers employed by KiK's supplier could be considered third party beneficiaries of KiK's Code of Conduct, incorporated in KiK's supply contracts ('*Vertrag zugunsten Dritter*'). As a result, these workers would have contractual claims against KiK. I. Heinlein, 'Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben ihrer Lieferanten', *NZA* 2018, (276), 279.

[172] For the facts of the case, *see* Section 6.4.3.2.

[173] *Das v George Weston* [2018] ONCA 1053, at 178.

[174] *Ibid*., at 182.

6.5.2 United States

In *Ramahan v JC Penney*[175], the US counter-part of the previously discussed Canadian *Das*-case, plaintiffs argued that because JC Penney, Children's Place and Wal-Mart publicly announced their policies to ensure safe working environments in their supply chains, and claimed they met the standards of safe working conditions set forth in their policies, they owe a duty of care to their business partner's workers.[176] "These statements, however, do not by themselves create a duty to employees of independent contractors where a duty does not otherwise exists," the Court held.[177]

6.6 Agency model

Under the agency model, a subsidiary or business partner may, under certain conditions, be deemed to act as an agent of the parent company or customer. The subsidiary's or supplier's authority to act for its parent or customer may be express[178] or apparent.[179] If the law of agency is construed to apply to both contractual and extra-contractual obligations,[180] the principal, the EU company, would be liable for harmful acts (or, maybe, omissions) of the agent under the applicable law. For example, if a subsidiary or supplier causes environmental pollution or worker injuries, the EU company, as the principal, may be liable for such harms. Whether any such theory would be viable and which requirements will have to be met (e.g. which requirements that agent's apparent authority have to meet, or whether the agent acted within the scope of its authority), is a function of the specific rules applicable in any given jurisdiction.

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[175] For the facts of the case, *see* Section 6.4.4.
[176] Complaint, at 66 and 71.
[177] *Ramahan*, at 25.
[178] Express authority includes "usual authority", *i.e.* authority an agent has by virtue of being reasonably necessary to carry out his express authority. *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549.
[179] Restatement of Agency (Second)§ 27: "Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."
[180] *See Watteau v Fenwick* [1893] 1 QB 346: "the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority."

6.6.1 Does agency theory require piercing the corporate veil?

In the Canadian case *Choc v Hudbay*,[181] the plaintiffs claim that HudBay's Guatamalan subsidiary CGN acted as an agent of HudBay.[182] In the preliminary ruling, the court held that "if the plaintiffs can prove at trial that CGN was Hudbay's agent, at the relevant time, they may be able to lift the corporate veil and hold Hudbay liable." The reference to veil lifting is a bit puzzling, since the finding of agency does not require the lifting of the corporate veil. In much of UK, US and Canadian case law, liability attaches to a parent company or upstream company (the principal) for harmful acts or omissions of its subsidiary or business partner (agent) based on some form of "piercing the corporate veil".[183] As explained under the *company law model* below, courts are generally reluctant to 'pierce the veil', which requires proof of fraud or *mala fides* and injustice.[184] In any event, under the law of agency, it is not necessary to pierce the corporate veil, because the agent binds the principal directly.

According to the Canadian Court, however, there is no distinction between a principal's vicarious liability and piercing the corporate veil. Although the plaintiffs allege Hudbay is liable as the principal, the Court finds that "this line of argument is, in essence, the same as the attempt to pierce the corporate veil."[185] The Court dismisses the plaintiff's alter ego claim (*see* below) because the plaintiffs did not plead Hudbay acted *mala fide,* but it did not require this pleading for the agency claim.[186] Thus, it appears the court is using the term 'piercing the corporate veil' in a relaxed sense, as an exception to the principle that a legal person does not incur obligations due to the actions of another person. Clearly, agency theory imposes direct liability on the principal for tortious acts of its agent based on the agency contract (within the scope of authority), and to that extent is

[181] For an overview of the facts, please refer to Section 6.4.3.1.
[182] Statement of Claim, at 114.
Available at: *http://www.chocversushudbay.com/wp-content/uploads/2010/11/Choc-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf* (last access 2 May 2019).
[183] *Choc v Hudbay*, at 43 – 49.
[184] *See* under Section 6.7 (the so-called instrumentality-test or 'alter ego'-test); e.g. *Adams v Cape Industries plc* [1990] Ch 433.
[185] *Choc v Hudbay*, at 43.
[186] *Ibid*., at 48.

an exception to this principle.[187] Thus, at trial, the court will most likely not hold the plaintiff to the higher standard for corporate veil piercing (*see* below), but, instead, apply the principles of agency. The boundaries of the principal's liability for unlawful acts committed by the agent has been a topic of intense debate in UK, US and Canadian case law.

6.6.2 Indicia of a principal-agent relationship

This form of liability is an application of the legal principle of *respondeat superior* or "let the master answer".[188] Pursuant to this principle the actions of the subsidiary or supplier (agent) are imputed to the parent or purchaser (principal).[189] Already in 1926, the New York Court of Appeal held that in a parent – subsidiary relationship "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."[190] Thus, for liability for obligations of the subsidiary or supplier to attach to the parent or customer, a plaintiff needs to show that the parent or customer exercised dominion and obtrusive control over the subsidiary or supplier. The question arises what 'dominion and obtrusive control' entails? While the separate entity doctrine adopted in cases such as *Salomon v Salomon* prevents an extensive application of agency theory, [191] the case law does allow agency to be invoked in some cases.

In the landmark ruling of *Smith, Stone and Knight Ltd. v Birmingham,*[192] the English court formulated the following indicia to conclude there is an agency relationship between a parent and its affiliate: (1) the affiliate company's profits are the parent's profits; (2) the parent company selected/appointed the affiliate company's management; (3) the parent company is the 'head and brain' of the profitable business; (4) the parent

[187] *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
[188] *Walkovszky v Carlton* [1966] 223 N.E.2d 6 (N.Y. 1966), at 7 – 8.
[189] A. O. Sykes, 'The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines', *Harvard Law Review*, vol. 101, no. 3, 1988, 563 and 582. Available at: *JSTOR*, *www.jstor.org/stable/1341141* (last access 2 May 2019).
[190] Justice Cardozo in *Berkey v Third Ave. Ry. Co.* [1926], 155 N.E. 58, 61.
[191] J. Harris, 'Lifting the corporate veil on the basis of an implied agency: A re-evaluation of Smith, Stone and Knight,' *Company and Securities Law Journal* 23 (1), 2005, 7–27.
[192] *Smith, Stone and Knight Ltd. v Birmingham* [1939] 4 All ER 116.

company 'dominates' the affiliate's business activity; (5) the parent's skill and decisions led to the affiliate making profit; (6) the parent was incessantly in control of the affiliate.[193] The court made it clear that mere shareholding (and reaping the benefits of the separate legal entity) and managerial control are not sufficient to establish an agency relationship.[194]

Thus, if the evidence shows that there is high degree of economic and management integration between the parent and its subsidiary, and the parent controlled the subsidiary's activities, their relationship may be qualified as a principal-agent relationship. If that is the case, the parent may be liable for the subsidiary's unlawful acts. The same reasoning would apply to the relationship between a customer and its supplier.

6.7 Company law model

Under the rule of limited liability, the liability of the shareholders of a company is limited to their contribution to the company's share capital (*i.e.* the capital which they have contributed or agreed to contribute).[195] The concept of limited liability applies also to a company that holds (all of) the shares of another company.[196] Limited liability is a "fundamental principle of corporate law"[197] and is generally deemed to be necessary to create incentives for investments in corporations.[198] Limited liability does not create any particular problems as far as voluntary creditors of the corporation are concerned – they are able to protect themselves against the corporation's potential insolvency before the fact, for instance, by requiring security or advance payment.

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[193] *Re FG Films Ltd* [1953] 1 WLR 483 (Eng. Ch. Div.)
[194] S. H. Lo, 'Piercing of the corporate veil for evasion of tort obligations,' 46 *Common Law World Review*, 2017, (42) 46 – 47.
[195] F. H. Easterbrook and D. R. Fischel, 'Limited Liability and the Corporation', *52 University of Chicago Law Review*, 1985, 89 – 117. Available at:
https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2165&context=journal_articles
(last access 2 May 2019).
[196] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1; *Gregorio v Intrans-Corp*. [1994] CanLII 2241 (ON CA), at 24.
[197] F. H. Easterbrook and D. R. Fischel, o.c., 89.
[198] H. Hansmann and R. Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts', *Faculty Scholarship Series,* 1991, 5035. Available at: *http://digitalcommons.law.yale.edu/fss_papers/5035* (last access 2 May 2019); S. M. Bainbridge and M. T. Henderson, *Limited Liability, A Legal and Economic Analysis*, London: *Edward Elgar Publishing*, 2016.

There are exceptions to the rule of limited liability, however. Shareholders can be jointly or severally liable – with all of their assets – for a company's debts, if they engage in wrongdoing or fraud that results in the company causing damage or avoiding payments, or if they abuse the company's limited liability for private gain. The question arises as to whether supply chain liability could also be considered as one of the exceptions to the limited liability rule. Where shareholders become liable for a company's debts, this is generally referred to as '*piercing the corporate veil*'.[199] Veil piercing involves a court-made doctrine attributing the harmful act or omission of a company (subsidiary) to its shareholders (its parent company). Common law courts, for instance, have pierced the corporate veil in cases of fraud,[200] which gave rise to the '*alter ego*' doctrine.[201] An exception to the limited liability principle of the corporation, the *alter ego*-test is strict.[202] Under which conditions veil piercing could create supply chain liability has not been addressed by the case law.

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[199] K. A. Strasser, 'Piercing the veil in corporate groups', *Connecticut L. Rev.*, vol. 37, issue 3, 2005, 637 – 666.

[200] *See*, for example, *Antonio Gramsci Shipping Corp & Ors v Aivars Lembergs* [2013] EWCA Civ 730; *Trustor AB v Smallbone* (No 2) [2001] EWHC 703 (Ch); *Jones v Lipman* [1962] 1 WLR 832; *Gilford Motor Co Ltd v Horne* [1933] Ch 935.

[201] The alter ego doctrine holds shareholders, directors and officers liable for the debts of the corporation when it is used fraudulently. *Canada*: *642947 Ontario Ltd. v Fleischer* [2001] CanLII 8623 (ON CA), at 68: "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct"; in *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* [1996] ONSC 7979, at 22 – 23, the Ontario Superior Court specified that "complete control" requires more than ownership: "It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently" and secondly, there must be "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"; *Gregorio v Intrans-Corp.* [1994] ONCA 2241, at 24. *United States*: in case there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist" and the limited liability would lead to "injustice". *Automotriz Del Golfo de California v Resnick* [1957] (Cal. 1957) 306 P. (2d) 1, at 4; X., 'Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common Law', *Harvard L. Rev.,* 1982, *95*(4), 854; L. L. Clum, 'Corporations: Liabilities: Inadequate Capitalization as Ground for Disregarding Corporate Entity,' *Michigan L. Rev.,* 1957, *56*(2), 299-301. *United Kingdom*: e.g. *Gencor ACP v Dalby* [2000] EWHC 1560 (Ch).

[202] Relevant factors the courts take into account to conclude the subsidiary is an alter ego are the commingling of assets and operations, the failure to maintain adequate corporate records, the same individuals serving as directors and officers of the two corporations, the use of the same office or business location, the employment of the same employees, the failure to adequately capitalize a corporation, etc. *Associated Vendors, Inc. v Oakland Meat Co* [1962] 210 Cal.App.2d 825, at 838 – 840. As the doctrine is concerned with fraud, it is only applicable in very limited circumstances and thus not a gateway for supply chain liability litigation. In *Choc v Hudbay*, the court dismissed the plaintiff's claim that Hudbay's Guatamalan subsidiary, CGN, formed Hudbay's 'alter ego': "The fact that Hudbay allegedly engaged in wrongdoing through its subsidiary is not enough to pierce the corporate veil. The plaintiffs would have to allege that Hudbay had used CGN 'as a shield for fraudulent or improper conduct', that the very use of CGN was to avoid liability for wrongful conduct that it carried out through CGN." *Choc v Hudbay Minerals Inc.* [2013] ONSC 1414, at 48.

More radically, abolishing limited liability altogether would hold parent companies liable for all acts or omissions of their subsidiaries solely on the basis of being the sole or main shareholder ('shareholder liability').[203] Another approach would be to regard the corporate group as an economic unity[204], whereby the parent company is liable for the subsidiary, since it exercises complete control over the subsidiary and the two entities are part of a shared enterprise ('enterprise liability').[205] If the UKSC judgment in *Vedanta* is indicative, however, enterprise liability will be a function of *de facto* control, rather than *de jure* control or opportunity to control.

So far, courts have not endorsed this theory and are unlikely to go down this road in the absence of legislative developments.[206] Unless properly limited, enterprise liability and shareholder liability are general and broad theories that are diametrically opposed to established concepts of separate legal personality and limited liability; it would appear to be up to the legislature to introduce such liability rules. Indeed, shareholder and enterprise liability have been imposed by statute in some countries. General parent company liability has been implemented in Albania through article 208 of the Law on Entrepreneurs and Companies.[207] Reflecting the concept of 'enterprise liability,' this law stipulates that a "parent company" stands surety for both the contractual and extra-contractual claims of the creditors of its "subsidiaries," if the parent has the right to

[203] Shareholder liability offers an advantage from a policy perspective: as opposed to operator liability, it does not give the shareholder an incentive to refrain from exercising to control to minimise risk. To the contrary, it encourages efficient management.

[204] In *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, the Court of Appeal held that the plaintiff holding company and its two subsidiaries should be treated as a 'single economic entity'. The holding company was seeking compensation for the forced transfer of title to land owned by its subsidiary to the Council. The case did not concern the group's liability, however. Subsequent case law, in any case, traded Lord Denning's pragmatic approach to legal personality for the principled approach as per *Salomon v Salomon*. *Trustor AB v Smallbone and Others (No 2)* [2002] BCC 795; *Adams v Cape Industries plc* [1990] Ch 433; *Woolfson v Strathclyde Regional Council* [1978] SLT 159, HC.

[205] L. M. LoPucki, 'The Death of Liability', 106 *Yale L.J.*, 1996, 67 – 69.

[206] As the EWCA reiterated in the landmark case of *Adams v Cape*: "[W]e do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law." *Adams v Cape Industries plc* [1990] Ch 433.

[207] Republic of Albania, Law No. 9901 On Entrepreneurs and Companies, 14 April 2008. English translation available at: *http://images.mofcom.gov.cn/al/201401/20140106173806 94.pdf* (last access 2 May 2019).

appoint at least 30 per cent of one of the subsidiary's governing bodies or has at least 30 per cent of votes at the General Meeting. This statute goes way beyond the possibility for a parent company to voluntarily declare itself liable for the debts of its subsidiary, which is known in The Netherlands as a "403-declaration"[208].

Veil piercing or other theories lifting limited liability should be distinguished from direct liability[209] of the parent company, which is extra-contractual liability, as discussed above. Under direct liability, a parent is liable due to its failure to properly control the subsidiary's conduct so as to avoid the damage. In other words, under this theory, the focus is on the parent company's obligations in relation to the creditors of its subsidiary. Irrespective of the subsidiary's liability, direct liability of the parent company entails an independent duty of care of the parent company – no 'veil piercing' is necessary.[210]

It is clear that these generalized exceptions to limited liability go beyond the traditional grounds for veil piercing. As they are broad and general, they tend to be less suitable for courts to entertain, and will likely not shape the supply chain liability landscape any time soon.

6.8 Operator model

A parent company can be the 'operator' of its subsidiary and be exposed to liability in that capacity. This 'operator liability' is akin to the liability of a director or officer in control of managing the activities of the corporation. The scope and conditions of this model, of course, depend on the definition of the term 'operator'. Definitions set forth in

[208] Article 403 Dutch Civil Code ('Burgerlijk Wetboek') Book 2. Available in Dutch at: *http://wetten.overheid.nl/BWBR0003045/2015-01-01#Boek2_Titeldeel9_Afdeling12_Artikel403* (last access 2 May 2019).

[209] L. F. H. Enneking, *Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability*, *Eleven International Publishing* (2012). Available at: *https://ssrn.com/abstract=2206836* (last access 2 May 2019).

[210] Therefore, for instance, the EWCA explicitly rejected the application of piercing the corporate veil in *Cape v Chandler*. As Arden L.J. puts forth at 69: "I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company."

civil liability instruments diverge, from simple definitions focused entirely on 'control'[211] to convoluted definitions such as the one set out in the EU Environmental Liability Directive.[212]

If a parent company exercises a sufficient degree of managerial control over its subsidiary, it could be deemed to have assumed the capacity of operator. Thus, the operator model expands the quality of operator to parent companies in control of the activities of their subsidiaries. Once a parent is deemed an operator, the legal regimes that impose liability on operators become applicable to that company.[213] This could also be the case where a customer exercises control over its supplier.

The operator model raises similar issues about the requisite level of control as discussed under 5.2.1, above, in relation to the existence of a duty of care owed by the EU company *vis-à-vis* persons affected by the operations of its subsidiary. If the operator model is framed in the right manner, it might even come close to the current case law under negligence liability, which focusses on 'control.' Thus, the operator model may well be suitable for pursuing SCL claims.

[211] "'Operator' means the person who exercises the control of a dangerous activity." Article 2 (5) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 1993, 21.VI.1993. Council of Europe: European Treaty Series, nr. 150.

[212] Under this directive, the term 'operator' means "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 authorisation for such an activity or the person registering or notifying such an activity." Article 2 (6) Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ* L 143, 30.4.2004, p. 56–75.

[213] Some statutes impose operator liability only in specific instances. For example, in the US, operators of waste disposal sites are liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for the cost of remediation. US courts have often found a parent company directly liable for its subsidiary's on-site disposal practices, typically because the parent company had authority to control, and/or exercised actual or substantial control over the subsidiary's operations. *See* for example, *Union Pac. R.R. Co. v Oglebay Norton Minerals, Inc.* [2018] No. EP-17-CV-47-PRM (W.D. Tex.); *Trinity Indus., Inc. v Greenlease Holding Co.* [2018] 903 F.3d 333 (3d Cir.); *Schiavone v Pearce* [1996] 79 F.3d 248 (2d Cir.); *United States v TIC Inv. Corp*. [1995] 68 F.3d 1082 (8th Cir.) and *Jacksonville Elec. Authority v Bernuth Corp.* [1993] 996 F.2d 1107 (11th Cir.).

6.9 Stakeholder model

Opposed to the shareholder model, the stakeholder model dictates that corporate decision-making should take into account the interests of stakeholders and include them in the decision-making process ('inclusive' decision-making). Stakeholders include employees, suppliers, customers, neighbours, regulatory and government authorities. As such, this is chiefly a procedural, formal model.[214]

A parent company might be exposed to liability for damage in its supply chain if it can be said that the parent failed to manage in accordance with the stakeholder model, and, as a result thereof, disregarded the interests of stakeholders and caused them harm. Conceptually, there are two main issues associated with this approach. First, the relevant stakeholders can be narrowly or broadly defined – only if the stakeholders include the employees, neighbours, and others affected by the subsidiary's or supplier's activities, will the parent corporation or upstream business partner have to take their interests into account. Second, in these kinds of cases, a causal link between the failure to properly involve stakeholders and the damage that has arisen may be hard to establish, because the requirement to involve them is procedural, not substantive – in other words, the adverse outcome has not been affected by the breach of the obligation.

Compared to the models discussed above, this model is quite a radical departure from the existing law. The law does not generally recognize that a corporation should take the interests of its stakeholders into account – rather, it only does so selectively as to some interests of some stakeholders. Courts therefore are less likely to rule favourably on SCL claims invoking this model.

[214] M. Magill, M. Quinzii and J.–C. Rochet, 'A Theory of the Stakeholder Corporation', *Econometrica*, vol. 83, issue 5, 2015, 1685 – 1725. Available at: *https://doi.org/10.3982/ECTA11455* (last access 2 May 2019); T. Clarke, 'The stakeholder corporation: A business philosophy for the information age', *Long Range Planning*, vol. 31, issue 2, 1998, 182 – 194. Available at: *https://doi.org/10.1016/S0024-6301(98)00002-8* (last access 2 May 2019).

6.10 Public trust model

This model suggests that natural, material and human resources have been given *in trust* to a corporation to manage for the benefit of the public good, not only the shareholders. The corporation's decision-making must meet this public good purpose. This model is an extension of the thinking reflected in the stakeholder model, but it is even more radical because it completely redefines the purpose of corporation. Under this model, corporate social responsibility is no longer one of many obligations of the corporation; CSR is its purpose.

Because this model reconceives the purpose of the corporation, it is inconsistent with the corporate laws of the jurisdictions discussed in this dissertation. This model therefore requires legislative reform of the company code in every one of these jurisdictions. For example, article 1:1 of the recently updated Belgian Company Code states: "One of its [the corporation's] purposes is to provide a direct or indirect capital gain to its shareholders."[215] The words "one of its purposes" have been added to accommodate social undertakings, *i.e.* companies primarily aimed to produce benefits for third parties.[216] It cannot be excluded that this provision will be interpreted to mean that a commercial company could have a social purpose, in addition to the purpose of pursuing the distribution of capital gains to their shareholders, but it is unlikely that it will be interpreted to mean that a company must have a social purpose.

The plaintiffs in *Das v George Weston,* which centers on claims arising out of the *Rana Plaza* collapse, invoked a version of the public trust model based on the corporation's fiduciary duty to the victims of its supplier's activities. They argued that "Loblaws violated the trust reposed in it by the garment workers by exercising its discretion to [their] detriment".[217] Because "Loblaws was in a position of power and had the means and authority to unilaterally determine the scope of the audits and inspections

[215] Article 1:1 draft bill of 8 March 2019 of the Belgian Company Code. Available in Dutch at: *http://www.dekamer.be/FLWB/PDF/54/3119/54K3119022.pdf*.
[216] Belgian House of Representatives, *Report of the first reading of the draft bill introducing the Company Code of 14 November 2018*, DOC 54 3119/011.
Available in Dutch at: *http://www.dekamer.be/FLWB/PDF/54/3119/54K3119011.pdf*, p. 154.
[217] Statement of Claim, at 230: *see Das v George Weston* [2017], at 127.

performed", plaintiffs argue, Loblaws owed the garment workers a fiduciary duty to exercise its power in the workers' best interest. However, the Court of first instance held there was neither a recognised,[218] nor an *ad hoc* fiduciary relationship between Loblaws and the plaintiffs.[219] Fiduciary relationships "involve confidentiality, trust, and loyalty so that the fiduciary is bound to act altruistically for the beneficiary."[220] In commercial relationships, however, parties typically act in self-interest. An *ad hoc* fiduciary duty, however, can be imposed, when the defendant relinquished its self-interest, and expressly or impliedly undertook to be loyal to the plaintiff.[221] According to the plaintiffs, Loblaws' assumed a fiduciary duty by commissioning 'comprehensive' social audits at Rana Plaza and by adopting and implementing 'CSR Standards'[222]. The Court rejected their plea, finding that the facts did not show that Loblaws performed these audits to protect the workers and the CSR standards' language and wording did not specify any fiduciary duty – which should be clearly stated.[223] Knowledge of poor regulation or enforcement of regulation regarding the safety of workplaces in Bangladesh and other third world countries does not establish a fiduciary duty.[224] The plaintiffs appealed the court's dismissal of a duty of care, but not the court's ruling on the lack of a fiduciary relationship, indicating that they do not feel strongly about the public trust theory in this case.

Thus, it does not seem that the public trust model can count on a friendly reception by the judiciary. It requires a re-interpretation of existing legal concepts that is not only radical,

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[218] *Das v George Weston* [2017], at 562; at 578 the Court noted, "there is no case law in Bangladesh, England, Canada, common law countries, or the United States, that has recognized a fiduciary duty by a purchaser to a sub-supplier's employees."; at 580.

[219] Under both English and Canadian law certain relationships are "categorically fiduciary" (for example the relationship between a lawyer and his or her client). If a particular relationship does not fall under one of the recognised categories, a fiduciary obligation may arise on an *ad hoc* basis as well, namely when the relationship displays the "indicia of a fiduciary relationship". The Supreme Court of Canada set forth the following indicia: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. *Elder Advocates of Alberta Society v Alberta* [2011] SCC 24, at 36.

[220] *Das v George Weston* [2017], at 581.

[221] *Ibid*., at 588.

[222] Loblaws' CSR standards set general standards and mandated that the suppliers comply with national and local laws and adhere to best practices for their industry. *Ibid*., at 40.

[223] *Ibid* , at 582.

[224] *Ibid.,* at 573, 588 – 589.

but also not sufficiently definable and therefore uncontrollable. It would revolutionize both company and liability law.

6.11 Summary of SCL models

SCL models include models that are extensions of existing law and radical models that would create new law. Thus far, the more radical SCL models have not been entertained by courts, although they are in some cases invoked by plaintiffs to support their SCL claims. While these models are currently figuring on the back stage, they may revive if legislatures or possibly courts cross the 'bridges' between the existing law and the new models.

Figure 5 shows these bridges:

- The promise to control is the bridge between the open norms (fault, negligence) and legitimate expectations model;
- The duty to control and the duty to know are the bridge between the open norms (fault, negligence) model and the operator model;
- The concept of enterprise liability (economic unity) is the bridge between the operator and company law model;
- The duty to meet expectation is the bridge between the legitimate expectations and stakeholder model; and
- The duty to pursue the public good is the bridge between the company law model and the public trust model.

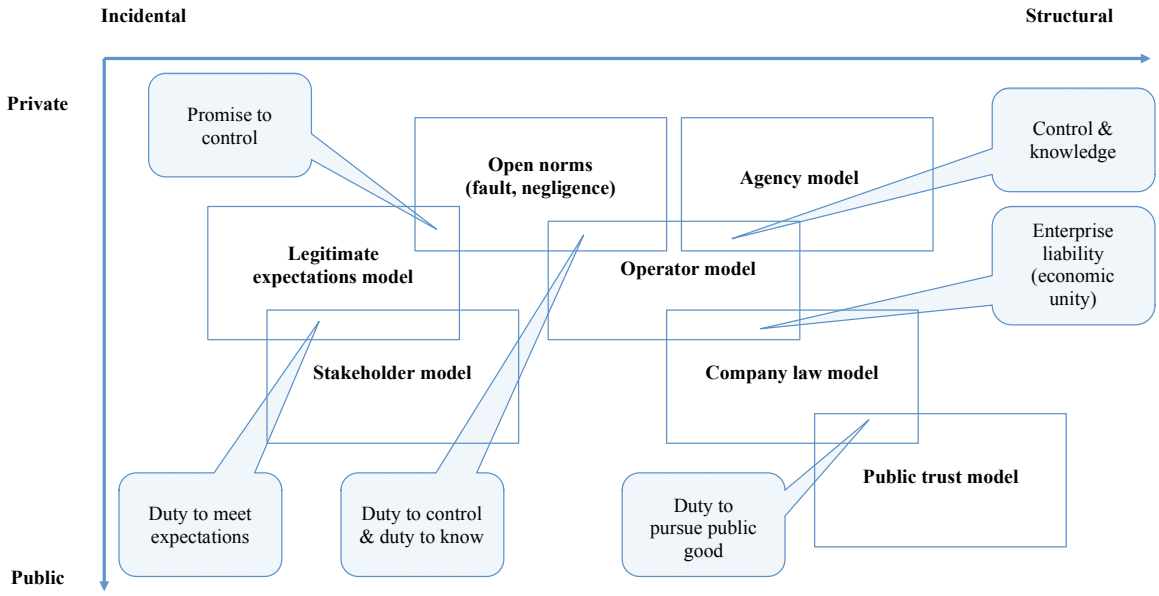

Figure 5: Summary of SCL models in function of incidental versus structural and private versus public

7 Determinants of supply chain liability

In this chapter, the determinants of supply chain liability are discussed. Based on the analysis of the case law set forth in the previous chapters, this chapter adopts a pragmatic perspective, and attempts to identify those factors that may trigger supply chain liability.

The UK case law, in particular the Supreme Court's judgment in *Vedanta*, provides a good roadmap for identifying the determinants of SCL. As discussed in Section 6.4.2.5, under the *Vedanta* ruling, the circumstances under which a parent company or a non-parent business partner owes a duty of care to potential victims is primarily (albeit not exclusively) a function of the degree of control that the parent or non-parent business partner in fact exercised over its subsidiary or supplier.[225] In addition, in *dicta*, the case law deals with several important questions that define the scope of and the factors potentially relevant to supply chain liability.

The SCL case law has also identified some factors that do not affect a corporation's exposure to SCL. As discussed above, the mere holding of shares does not trigger liability.[226] Further, the profits struck up by the parent company from its subsidiary do not affect the parent company's exposure.[227] Conduct "consistent with international standards, including those relating to corporate social responsibility" is a "doubtful foundation for the imposition of a duty of care".[228]

7.1 Corporate policies

Corporate policies and guidelines may trigger SCL in at least two ways. First, such policies may be deficient and, as a result thereof, cause damage. An example based on the *Chandler c*ase is an inadequate policy concerning the manufacture of asbestos in open-sided factories that allows asbestos dust to escape. Second, a corporation may take active steps to implement such policies at a subsidiary or business partner. Such steps may

[225] Or customer. Although the case law centers on downstream SCL, conceptually, there is also scope for upstream SCL.
[226] *Vedanta*, at 49.
[227] *Okpabi*, at 130.
[228] *Ibid.*, at 130 – 131.

include training, supervision and enforcement. Thus, whether a policy is mandatory or merely advisory, is not decisive; SCL exposure depends on the corporation's actual involvement with the implementation.

Conversely, if policies or guidelines are not deficient, and the corporation does not take active steps to implement or enforce them, it would seem that the corporation is not exposed to supply chain liability on this ground. This would be different where a corporation has an affirmative obligation to ensure that its policies and guidelines are implemented. It is conceivable that such an obligation is found to exist where, for instance, the activities involved pose high risk or require a high level of expertise. The courts have not yet adopted rulings to this effect, however.

Where a corporate group has implemented a group-wide policy, but such policy is not applied to a particular subsidiary's operations without an objective justification, this decision may trigger SCL exposure. For example, if Royal Dutch Shell had a corporate policy that all pipelines must be protected by fences, and decided that this policy should not be applied by its Nigerian subsidiary, this would be an issue.

There is an issue, however, as to whether corporate policies create duties of care vis-à-vis third parties, such as the employees or neighbours of a subsidiary or supplier. Such duties could arise in at least two ways. First, if the implementation of corporate policies is effectively conducted by a parent or non-parent business partner, there may well be operational control of the kind that triggers relevant duties of care. Second, a corporation may trigger such duties by making representations *vis-à-vis* third parties or publishing statements on which third parties can rely.[229] Absent operational control and such representations and statements, however, the legal basis for extending a corporation's duties of care in relation to corporate policies to the third parties concerned is unclear.

[229] M. Conway, M., 'A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains', *Queen's Law Journal*, Vol. 40, issue 2, 2015, 741 – 786.

7.2 Ad hoc advice

Instead of enacting general policies or guidelines, a corporation can also provide ad hoc advice to a subsidiary or business partner. If such advice is incorrect, SCL may ensue. As discussed above with respect to policies, there is an issue as to whether advice creates duties vis-à-vis third parties. The analysis set forth in Section 7.1. applies.

7.3 Knowledge

In *Vedanta*, the UK Supreme Court also alluded to knowledge and the consequences thereof. It references, in apparent agreement, the plaintiffs' claim of Vedanta's "sufficient knowledge of the propensity of [its subsidiary's] activities to cause toxic escapes into surrounding watercourses," as well as the fact that a report published by Vedanta "made particular reference to problems with discharges into water and to the particular problems arising at the Mine."[230] Thus, although the Court did not deal extensively with the consequences, knowledge clearly plays a role in the Court's conception of SCL.

There are at least two ways knowledge can come into play. First, a corporation may know (or should have known) of problems, risks or threats at a subsidiary's or supplier's site. Not all risks are relevant; knowledge of unacceptable risks, however, may trigger a duty of care. Second, a corporation may possess knowledge, know-how and expertise in relation to managing and reducing the risks associated with the activities conducted by its subsidiary or supplier; in that case, the company may incur a duty of care that goes beyond the standard duty of care, and may thus be exposed to supply chain liability if it does not deploy that knowledge to remedy problems that may be present, in particular where the activities involved require special expertise and know-how.

7.3.1 Actual or imputed knowledge

Under the *Caparo*-test, the foreseeability of damage is a key criterion to determine whether a duty of care exists. Knowledge, thus, is relevant to the duty of care analysis. As

[230] *Vedanta*, at 58.

the test turns on foreseeability, not on what was actually foreseen by the defendant, knowledge is to be determined objectively – did the defendant know, or should it have known, that damage would ensue? This is similar to the propensity of an activity to cause damage to which the UK Supreme Court refers.[231] In other words, a parent company or non-parent business partner will be deemed to know about the foreseeable risks associated with the activities of its subsidiary or supplier. Put differently, ignorance does not preclude finding a duty of care – a parent or non-parent business partner may have an obligation to determine what risks its subsidiary's or supplier's activities pose, and take appropriate action.

Other cases confirm that actual knowledge is a strong basis for asserting SCL claims. In *Choc v Hudbay Minerals Inc,* for instance, the Ontario Superior Court ruled that a parent company had foreseen the damage caused by its subsidiary's operations, because Hudbay was aware of the risk of violence. The plaintiffs claimed that security personnel of Hudbay's Guatemalan subsidiaries committed human rights abuses, including murder and gang rape, while forcibly evicting them to start a new mining project, and sued both the Guatemalan subsidiaries and the Canadian parent.

7.3.2 Superior knowledge

In the UK case of *Chandler v Cape*, the Court of Appeal held that Cape plc. was liable for the harm Mr. Chandler, an employee of Cape's subsidiary in the UK, had suffered due to exposure to asbestos while working for Cape's subsidiary. The court identified four factors which may indicate the existence of a duty of care owed by the parent company *vis-à-vis* its subsidiary's employees: (1) the two companies' businesses are the same in a relevant respect; (2) the parent company has, or ought to have, superior knowledge on relevant aspects of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe – as the parent company knew or ought to have known; and, (4) the parent company knew, or ought to have foreseen, that the subsidiary would rely on its

[231] *Vedanta*, at 55: "The essence of the claimants' case against Vedanta is that it exercised a sufficiently high level of supervision and control of the activities at the Mine, with sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses, as to incur a duty of care to the claimants."

superior knowledge. It is not required that the parent is in the practice of intervening in its subsidiary's environmental, health and safety or human rights compliance management or policies – involvement with economic, financial or trading operations may be sufficient if the subsidiary or supplier has let the parent or business partner call the shots.[232]

These criteria are referred to in later judgments as the "*Chandler indicia*". The UK Supreme Court has emphasised in *Vedanta*, however, that "the *Chandler* indicia are no more than particular examples of circumstances in which a duty of care may affect a parent."[233] Stated in general terms, companies with superior knowledge may have a duty to monitor and assist, as necessary, their business partners with inferior knowledge, either if they control or intervene in a business partner's operations, or if the risks associated with the activities are such that intervention is required.

7.4 Public statements

While knowledge is key to foreseeability and, thus, to the existence of a duty of care, public statements may result in a finding of proximity of the plaintiffs to the defendant and, thus, in the relevant duty of care being applicable *vis-à-vis* the plaintiffs. As discussed above, *Vedanta*'s public statements were deemed to cause Vedanta to incur responsibility to third parties for meeting the promises so made. Even if the law would not otherwise impose this responsibility, companies that voluntarily assume it but do not execute, are exposed to liability if third parties who relied on their promises, suffer harm as a result.[234]

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[232] *Chandler v Cape*, at 78: "Given Cape's state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. The scope of the duty can be defined in either way. Whichever way it is formulated, the injury to Mr Chandler was the result. As the judge held, working on past performance and viewing the matter realistically, Cape could, and did on other matters, give Cape Products instructions as to how it was to operate with which, so far as we know, it duly complied."

[233] *Vedanta*, at 56.

[234] *Vedanta*, at 58: "[The judge] then identified (…) the particular material which supported his view that the claimants' case was arguable. They included part of the published material, namely a report entitled 'Embedding Sustainability' which, he said, stressed that the oversight of all Vedanta's subsidiaries rested

As confirmed by *Choc v Hudbay*, public statements are an important factor for third parties such as neighbours. They are generally less relevant to workers employed by the subsidiary or supplier, however, since they tend to have access to documents and other information that are not available to other third parties; in *Das v George Weston*, for example, the employees relied on the social audits conducted by the non-parent business parent, which had not been published.

7.5 Forms of corporate control

In *Vedanta*, the UK Supreme Court rejected the proposition that the parent-subsidiary relationship is special from the liability perspective – what counts is *de facto* control. *De facto* control can be established where a parent company serves as its subsidiary's director,[235] which also triggers exposure to directors' and officers' liability. Likewise, other formal indicators, such as a parent company holding all shares, if it behaves like a shareholder rather than a director of officer, will not have significant impact on the risk of liability for its subsidiary's torts.

A parent's respect for its subsidiary's separate personhood, and the subsidiary's compliance with corporate formalities, helps to avoid *an impression* of the parent company assuming actual operational control over the subsidiary. However, the reality of actual operational control prevails over mere formalities.

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with the board of Vedanta itself". The UKSC confirms the judge of first instance and the appellate judge's decision that Vedanta's published statements are "indicative at least of an arguable case for having undertaken a sufficiently close intervention into the operation of the Mine to attract the requisite duty of care." *Vedanta*, at 58 – 60.

[235] This is to be distinguished from overlap in membership of the respective boards, however, which will have little, if any, weight in analysing the liability exposure.

7.6 Summary

The case law can be summarized in a set of relatively straightforward rules. Figure 6 represents an attempt to capture the relevant court rulings in a schematic.

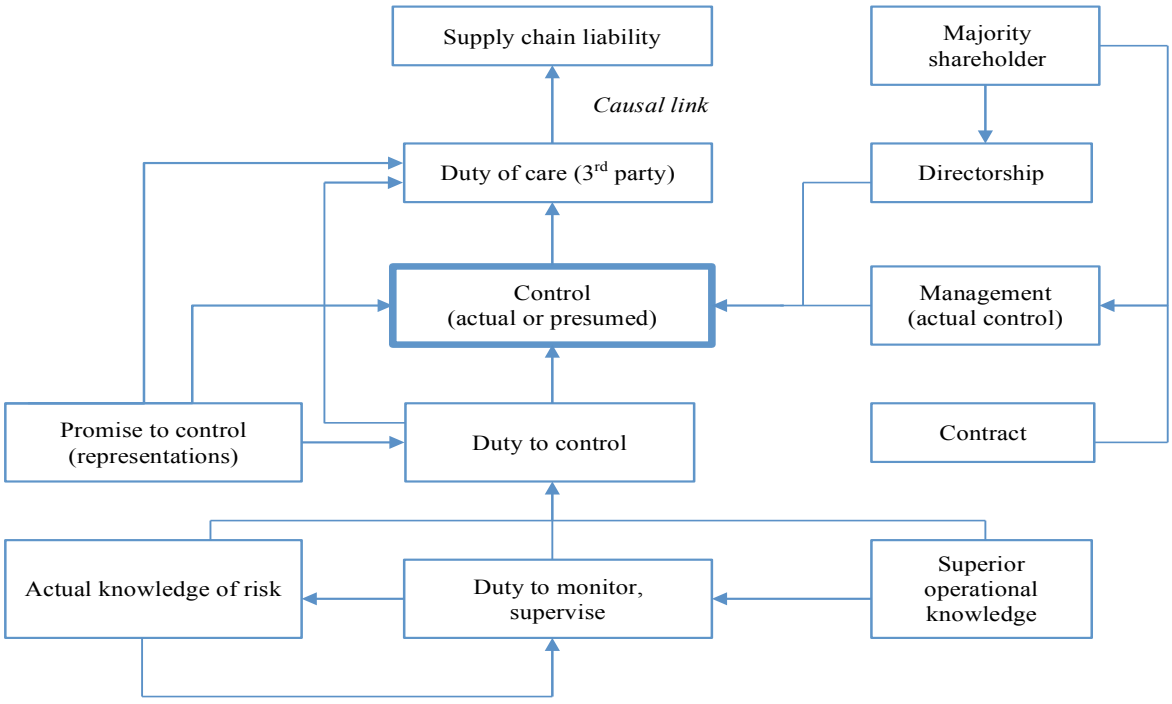

Figure 6: Conditions of supply chain liability

The core concept is control, which can be actual control or presumed control based on a duty to control. Knowledge of a risk or superior operational expertise can result in a duty to control. Once there is actual or presumed control, it becomes the legal basis for SCL.

8 An ex ante perspective on supply chain liability

The case law may show a relatively clear picture of the exposure to supply chain liability in the specific situations at issue. Viewed from an *ex ante* perspective, however, there is a large grey area, where the law is unclear and evolving, and where exposure to SCL is uncertain and a matter of legal risk management.

As the analysis above suggests, there is balancing involved and both commission and omission may give rise to SCL exposure. A corporation that takes control of its subsidiaries' and business partners' operations may incur liability exposure, and so may a corporation that is not in any way involved with such operations (if responsible management of supply chains requires some involvement). Figure 7, below, depicts a corporation's exposure to SCL as a function of three main variables: (1) the degree of economic integration between the parent/business partner and subsidiary/supplier (ranging from a passive investor/business partner to an actual or claimed single commercial undertaking); (2) the level of the company's operational control over environmental, health and safety, and human rights compliance;[236] and (3) the risks associated with commission (acting) and omission (not acting). Knowledge and duty to monitor[237] are additional, secondary variables.

In Figure 7, SCL for commission is exposure to liability for deficient CSR policies or deficient implementation thereof. SCL for omission is exposure to liability for the lack of CSR policies (including environment, health and safety and human rights compliance), if there is an obligation to implement such policies.

As this figure suggests, the SCL risk for omission is high if there is a high level of economic integration, but a low level of CSR involvement, and the SCL risk for commission is high if there is a high level of CSR involvement, irrespective of the level of economic integration. Knowledge and duty to monitor impact SCL exposure if the

[236] Of course, how well the corporation manages the subsidiary's or supplier's environmental, health and safety and human rights compliance, will determine the actual damage that arises from its operations, and, thus, the scope of liability exposure.

[237] The duty to monitor is short-hand for affirmative obligations to monitor, control or supervise the environmental, health and safety, and human rights compliance management of subsidiaries' or business partners' operations, and assist them in preventing harm and respecting other people's rights.

level of CSR management is low; in this case, a company's level of knowledge of the relevant risks may well fall below the level required by the applicable standard.

	Low economic integration		High economic integration	
Low level of operational control over CSR compliance	**Low liability risk based on omission & commission**	Knowledge: ↑ Duty to monitor: ↑	**High liability risk based on omission; low on commission**	Knowledge: ↑ Duty to monitor: ↑
High level of operational control over CSR compliance	**High liability risk based on commission; low on omission**	Knowledge: 0 Duty to monitor: 0	**High liability risk based on commission; low on omission**	Knowledge: 0 Duty to monitor: 0

Figure 7: Schematic overview of the degree of exposure to SCL (high or low) in function of the degree of economic integration and the degree of intervention in CSR compliance.

The impact of 'knowledge' and of a 'duty to monitor' on SCL exposure are indicated by 0 = neutral, ↑ = increase and, ↓ = decrease. Note that this figure assumes that there is an incident that has caused harm. Thus, it does not reflect the actual, physical risk, which, in turn, is a function of the level of CSR management.

9 Conclusions and the future of supply chain liability

While SCL theories are wide-ranging and, in some cases, radical, favourable court judgments on supply chain liability concentrate around fault liability. Viewed from this angle, supply chain liability tests an revered and old principle of civil liability – subject to limited exceptions, a person is not liable for damages caused by the act of a third party. It tests this principle in several ways. Corporate social responsibility challenges the principle directly, and suggests that multinational corporations, with their vast resources and expertise, should assume responsibility for the damages caused by their subsidiaries and business partners. Building on theories of 'agency', 'control' and 'alter ego', less confrontational approaches attempt to redefine the term 'act of a third party' by proposing that the damage-causing act is not the 'act of a third party' but the act of the corporation itself.

Most of the activity centers on the exceptions to the principle, however. The principle and its exceptions have been rephrased by SCL proponents as follows: a person is not liable for damages caused by the act of a third party, unless there is a recognised relationship between that person and the third party and, on the basis of the relationship, that person should have taken action to try prevent the damage (and, if the third party was found to be uncooperative, it should have terminated the relationship). The relationships between a parent company and a subsidiary and between a non-parent business partner and a supplier have been proposed as being the kinds of relationships that fall under the exception. Courts have been reluctant to go all the way, however, and have refocused on operational control over the third party, and involvement with or knowledge or foreseeability of the risks posed by the third party's activities.

Operational control is not the opportunity to control, which any controlling shareholder has, but requires actual control. Involvement with the risks arising from the third party's activities concerns the situation in which a corporation intervenes in the operations of a business partner in a way that foreseeably results in unacceptable risks. Knowledge of or foreseeability of the risks arising from a third party's act is at issue where a corporation knew or should have known of the risks arising from its business partner's activities and

should have taken action to reduce such risks. These concepts fit into existing tort law categories, even though they may have to be stretched, and are therefore easier to accept for judges. Their broad application would expand SCL to a significant degree, and if the English law is indicative, this is where SCL is heading.

More expansive supply chain liability, however, requires the recognition of a new principle – the idea that multinational corporations are responsible (and liable) for the activities of their business partners, and have affirmative obligations to monitor, control or supervise them and assist them in preventing harm and respecting other people's rights. This, of course, is the driver behind corporate social responsibility. To adopt such a far-reaching novel principle without legislative mandate, courts would probably have to create a new category of duty of care. This duty of care would be built on the traditional concepts of foreseeability, proximity, and, maybe, human rights, and be informed by overarching theories of fairness, efficiency, and, of course, corporate social responsibility. Whether courts can be persuaded to go this route, is hard to predict. As demonstrated by the climate change litigation against the state of The Netherlands,[238] against all odds, courts sometimes endorse novel theories based on open norms.

It should be asked, however, whether expansive SCL would be a good thing. Like similar ambitious concepts, SCL has to find its proper place in the collision of realism and idealism. EU companies' global supply chains often include third world or developing countries. These countries have less evolved economies, like most EU member states no more than 50 or 60 years ago; demanding that they accept and respect CSR norms, a product of highly developed countries in the West, will put them in a tough spot. Take the example of child labour. In many developing countries, child labour is allowed and constitutes an important source of income for families. With the imposition of CSR norms prohibiting child labour, these children will lose their jobs. As these countries do not have adequate resources to provide education or other alternatives, children might end up in the 'informal economy' (bars, prostitution, etc.) or human trafficking. Realists acknowledge and appreciate the discrepancy between the state of economic development and aspirational social norms; countries with lower economic development have to make

[238] *Urgenda* Climate Change litigation: *De Staat der Nederlanden v Stichting Urgenda* [2018].

trade-offs, and cannot always afford to comply with Western demands not to make children work. In the eyes of idealists, however, child labour is always wrong and should not be tolerated under any circumstance. But they are unable to compensate for the loss of income associated with this norm, and cannot prevent the kind of secondary order effects referenced above.

This dichotomy between idealism and realism is likely to also influence judges who are to decide SCL claims. The tension between progressive and conservative adjudication is at the heart of the debate on judicial activism.[239] The future of SCL will in no small part be a function of whether the idealist/progressive forces or the realist/conservative forces in the judiciary will prevail.

Supply chain liability is still in its infancy. Whether it will grow up and prosper or dwindle, depends on how the opposing forces will play out. To SCL opponents, it is clear that the judiciary should not enact novel liability rules. To SCL proponents, it is a matter of enabling liability law to evolve with the rise of new social norms. Like Odysseus,[240] judges will have to navigate carefully between the Scylla of 'liability in an indeterminate amount, for an indeterminate time, to an indeterminate class', and the Charybdis of legislating from the bench.

[239] The European Court of Justice has been called an "activist court". Dawson and B. de Witte, *Judicial Activism at the European Court of Justice,* London: *Edward Elgar Publishing*, 2013. *See* also M. Bossuyt, 'Judicial Activism in Europe: the Case of the European Court of Human Rights', *Open Europe*, September 16, 2013. Available at:
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[240] The antagonist in Homer's *Odyssey*; a tale of the Greek king of *Ithaka* who, after winning the war against Troy thanks to his idea of the "Trojan Horse", was lost at sea for ten years before returning home to rejoin his wife Penelope. R. Fitzgerald. *Homer: The Odyssey.* Garden City, NY: *Anchor Books*, 1963.

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