Liability of Multinational Companies for Harm Occasioned by Their Affiliates: Control and Corporate Social Responsibility

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ABSTRACT (in Finnish)

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Turun yliopiston laatujärjestelmän mukaisesti tämän julkaisun alkuperäisyys on tarkastettu Turnitin Originality Check -järjestelmällä.

Tutkielman tarkoitus on selvittää erityisesti lainopin keinoin niitä ehtoja ja olosuhteita, joiden läsnä ollessa monikansallista suuryritystä voitaisiin pitää vastuussa tähän intressiyhteydessä olevan yhtiön, kuten tytäryhtiön tai alihankkijan kolmannelle osapuolelle aiheuttamasta vahingosta. Tämän osalta tämä tutkielma pyrkii vastaamaan kahteen itsenäiseen tutkimuskysymykseen.

Nämä tutkimuskysymykset ovat: 1) miten monikansallisen yrityksen mahdollisesti harjoittama kontrolli siihen intressiyhteydessä olevassa yhtiössä tai näiden toiminnassa vaikuttaa monikansallisen yrityksen vastuun muodostumiseen sekä muotoutumiseen; ja 2) onko yritysvastuusitoumuksilla, kuten yrityksen eettisellä ohjeistolla ('Code of Conduct') juridista merkitystä monikansallisen yhtiön vastuun muodostumisessa. Tämä tutkielma on ajankohtainen muun muassa siksi, että Euroopassa on vireillä useita yritysvastuuta koskevia lainsäädäntöhankkeita. Toisaalta Euroopassa ilmentynyt, yritysvastuuta koskeva tuomioistuinkäytäntö vaikuttaa olevan yhtä lailla eräänlaisessa murroksessa. Sääntelyhankkeiden ja tuomioistuinkäytännön kulkusuunnat uhkaavat kuitenkin poiketa toisistaan ainakin vastuuperusteiden osalta.

Esimerkiksi Suomessa selvitetään parhaillaan yritysvastuulain säätämistä, jolla tavoitellaan ainakin nykytiedon mukaan eräänlaisen huolellisuusvastuun asettamista monikansallisille yrityksille. Huolellisuusvastuun kohteena olisivat tyypillisesti vapaaehtoisen yritysvastuun piirin kuuluvat sosiaaliset riskit, kuten ihmisoikeudet ja ympäristö, ja sovellettavuuden piirinä puolestaan monikansallisen yrityksen oma toiminta sekä sen intressiyhteydessä olevan yhtiön toiminta. Huolellisuusvastuu edellyttäisi käytännössä sitä, että monikansalliset yritykset käyttäisivät erinäisiä kontrollimekanismeja, kuten vaikkapa tilintarkastus- ja valvontamekanismeja, joiden avulla monikansallinen yritys pystyisi paremmin varmistumaan huolellisuusvastuunsa täyttämisestä. Toisin sanoen huolellisuusvastuun täyttäminen edellyttäisi mahdollisuutta ulottaa ja käyttää jonkin asteista kontrollia suhteessa intressiyhteydessä oleviin yhtiöihin.

Nämä lainsäädäntöhankkeet yritysvastuun alalla heijastavat kuitenkin suhteellisen uutta kehitystä. Vielä hyvin vastikään on monikansallisen yrityksen vastuu sen tytäryhtiöstä tai alihankkijoista kielletty moneen otteeseen. Tätä lähtökohtaa on kuitenkin vastustettu jo pitkään. Nyt oikeuskäytännössäkin on havaittavissa liikehdintää, joka on taannoista myönteisempää nk. *monikansallisen vastuun* tunnustamiselle. Näistä lupaavimmat tapaukset odottavat vielä pääkäsittelyä, mutta jokainen näistä on esikäsittelyssä tunnustanut roolin monikansallisten yritysten yritysvastuusitoumuksille. Tapauksissa on ennakollisesti otettu kantaa myös kontrollin rooliin monikansallisten yritysten vastuun muotoamisessa. Vastoin yritysvastuulakien aikeita ja tarkoituksia, nämä kannanotot ovat kuitenkin vahvistaneet, että mahdollinen vastuu perustuisi nimenomaan kontrollin käyttöön intressiyhteydessä olevien yhtiöiden toiminnassa. Näin ollen yritysvastuusääntely kehottaisi käyttämään erinäisiä kontrollimekanismeja, kun taas oikeuskäytännön osoittama vastuukehitys kannustaisi lähinnä luopumaan tällaisista mekanismeista, mikäli tahtoo välttää vastuun.

Viimeisin kehitys oikeuskäytännössä perustuu pitkälti englantilaiseen tapaukseen *Chandler v Cape,* jossa tunnustettiin emoyhtiön vastuu sekä yritysvastuusitoumuksista että tytäryhtiön toiminnasta, ja josta erinäiset auktoriteetit sekä oikeuskäsittelyt ovat sittemmin johtaneet perusteita laajemmalle *monikansallisen vastuulle.* Tämä vastuu perustuisi tavalla tai toisella kontrolliin. Näistä syistä kontrollin ja yritysvastuun yhteen punoutuva merkitys monikansallisen vastuun muodostumiselle on tärkeä tutkimusaihe.

Asiasanat: yritysvastuu, vahingonkorvausvastuu, huolimattomuus, sopimus, arvoketju, huolellisuusvastuu, CSR, tort liability, negligence, contract, value chain, due diligence, doctrine of separability, privity of contract

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1 PREFACE

1.1 Introduction

Today, most products and services on offer are no longer the result of a singular and local input. Instead, globalization has allowed for companies to externalize significant parts of their business operations.[1] A modern clothing company, for instance, might assign physical manufacturing to a foreign subsidiary and outsource the raw materials and labour from a network of foreign suppliers and subcontractors. This process is the foundation for the modern *Multinational Company* ('MNC').[2] The MNC, by definition, conducts business operations in several countries through a network of interconnected companies. Through such a network of *affiliates,*[3] the MNC may well obtain a global presence. However, laws and legal traditions are at odds with this modern reality of global business and the MNC.

Laws are mostly national with very little extra-territorial reach.[4] The MNC's business, however, is transnational in nature. This means that the foreign subsidiaries and suppliers of the Western-based MNC are not subject to the same rules as the Western parent company – no matter how strong or deep are their ties with the Western entity. This appears especially problematic, since many (mostly western) MNCs have outsourced their labour-intensive production to the developing nations.[5] These nations still struggle with such

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[1] Andreas Rühmkorf 'Contract law, global supply chains and corporate social responsibility', in *Corporate Social Responsibility*, *Private* Law *and Global Supply Chains* (Edward Elgar Publishing 2015)

[2] The applicable authorities and scholarly works may also use the term *Transnational Corporation/Company ('TNC')* or *Multinational Enterprise ('MNE')*; for the definition, *see* Henry C Black, *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed* (West Publishing 1910); or Eurostat Glossary: Multinational enterprise (MNE) available <https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Multinational_enterprise_(MNE)>

[3] eg, subsidiaries, suppliers and subcontractors; for further discussion on terminology, *see* Section 1.4

[4] The limitations of traditional (national) laws are further accentuated by the limited scope of International laws, which bind the nation states that regulate companies but not the companies themselves. this effectively leaves a sort of unregulated space within realm of transnational business. However, there is an identifiable and burgeoning push against this *status quo*, especially in the European states. *See* Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 Business and Human Rights Journal 265

[5] Andrew Millington, 'Responsibility in the supply chain', Andrew Crane et al *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Publishing 2008) 363

major social issues as human rights, labour standards and environmental protection.[6] Thus, due to the limitations of jurisdiction and national laws, the Western MNC may establish a presence in the developing nations through its various affiliates, whose operations in turn are only subject to the local regulations which often are either non-existent or not enforced, at least to an effective degree.

Generally speaking, the Western parent company can neither be held accountable for its subsidiaries or suppliers,[7] no matter how gravely the local environment, populace or economic integrity suffers from their conduct. Many argue that the absence of such liability allows the MNC to externalize their own liabilities on the unassuming people and societies in the developing world.[8] The argument therein – as the Author sees it – is that the MNCs can externalize their socially risky operations to legally separate, foreign entities via the use of corporate form or contract, and thereby avoid the regulatory cost and burden of those operations, while still deriving significant economic benefits from those functions. Critique and debate over this issue has been brewing for a good while, and it is finally gaining some traction.

France was the first jurisdiction to impose a liability framework upon the MNCs' transnational activities, including the MNCs subsidiaries, suppliers and subcontractors.[9]

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[6] Ibid, 364

[7] 'In particular, this applies to the European parent or buying companies, whose contribution to an abuse is rarely assessed by local courts, even where they may have influenced or effectively controlled the subsidiary's or supplier's conduct resulting in the human rights abuse.' Philipp Wesche and Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK' (2016) 16 Human Rights Law Review 370

[8] *see* Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 J Corp L 573, 576; For argument on this perspective, *see for instance* Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 Washington & Lee Law Review 1769; Claire Bright et al, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business and Politics 667

[9] Sandra Cossart, Jérôme Chaplier, Tiphaine Beau De Lomenie, The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" (2017) 2 Business and Human Rights Journal 317

The so-called *Vigilance Law*[10] introduced an obligation on companies to identify any serious risks that their transnational activities may have on human rights (e.g.) and to take appropriate action to address those risks.[11] Several legislative initiatives have since emerged to follow suit, including from the Author's home country of Finland[12] and the European Union itself.[13] These initiatives are no doubt spurred-on by the sporadic yet continued disasters that retain a connection to the Western MNCs.[14]

1.2 Corporate Social Liability

As said, the debates for MNC liability have been on-going for quite a while. These debates have been sparked by major tragedies, and later fuelled by the emergence of Corporate Social Responsibility ('CSR') as philosophy and practice in many – if not most – Western MNCS.

The general concept of CSR denotes *a voluntary commitment* by willing companies to address some social issues within the company's operations. Companies typically communicate their commitment to CSR by adopting a Code of Conduct ('Code').[15] In most cases, where a company or MNC adopts a Code or similar CSR instrument ('Adopting company'), the adopted Codes are drafted by the Adopting company itself.[16] Therefore, the

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[10] *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*; For the unofficial English translation, *see* European Coalition of Corporate Justice, 'Corporate duty of vigilance' (*Respect International*, 2016)

[11] Elsa Savourey and Stéphane Brabant 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6 Business and Human Rights Journal 141, 141

[12] Ernst & Young Oy: Sakari Helminen et al, 'Judicial Analysis on the Corporate Social Responsibility Act' (2020) 44 Työ- ja Elinkeinoministeriön Julkaisuja 1

[13] European Parliament Committee on Legal Affairs, 'Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2020/2129(INL))

[14] A study commission by the European Parliament was able to identify 35 cases filed in the European Union alone that allege corporate abuse of human rights. Axel Marx et al, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries' European Parliament Policy Department for External Relations (2019)

[15] Anna L Vytopil, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing, 2015), Ch 3

[16] There are Codes that have been drafted by an industry alliance or umbrella organization, as well as model Codes and other external sources. For multi-party Codes, *see eg* 'The Responsible Business Alliance Code of Conduct' (former 'Electronic Industry Citizenship Coalition'); Neogames, The Finnish Game Industry

can Codes address any number of issues which the Adopting company identifies as pertinent or suitable to tackle within its own business operations and/or sphere of influence.[17] A particularly pertinent commitment is that of Health and Safety (H&S), which has far been a core issue in most tragedies and resultant disputes addressed herein, including such disasters as *Rana Plaza*. In fact, the very nature of these commitments came under fire after the aforementioned disaster.

In terms of tragedies, the *Rana Plaza* disaster of 2013 is among the most notorious. Rana Plaza concerned the collapse of a large factory building in Bangladesh, which killed and injured thousands of local workers.[18] The disaster involved many Western MNCs, as they sourced their clothing products from Bangladeshi manufacturers housed in Rana Plaza. Reflecting on the more recent developments in Europe, Clerk argues that Rana Plaza should have been enough to show that EU needed to adopt and impose more responsibilities for MNCs.[19]

The value of Codes and similar CSR commitment attracted a lot criticism thereafter, partly because the MNCs involved in Rana Plaza had adopted such CSR commitment to the effect of addressing H&S within their supplier's operations. Regrettably, at least their commitments were of little help in avoiding the disaster. In the aftermath of Rana Plaza, the victims of the incident brought suit to some of the MNCs involved and argued that they had failed to take action to prevent the disaster.[20] The plaintiffs argued that the MNCs were aware of the prevalent issues in Bangladeshi factories, and thus the MNCs owed a duty of care to secure a safe working place to the employees of their suppliers.[21] To consolidate this argument, the plaintiffs tried to the invoke the CSR commitments made by the defendant

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Code of Conduct (30 August 2019); TRUST (2018) Global Code of Conduct for Research in Resource-Poor Settings.

[17] Codes, commitments and their implications for liability are discussed in Chapter 6

[18] *See for instance*, Julhas Alam and Fabrid Hossain, 'Bangladesh collapse search over; death toll 1,127' Yahoo News (13 May 2013)

[19] Christophe Clerc, 'The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains' [2021] ETUI Policy Brief No1 European Economic, Employment and Social Policy

[20] *Abdur Rahaman v JC Penney Corporation Inc et al* Superior Court of Delaware (4 May 2016)

[21] *Rahaman v JC Penney et al, 20*

MNCs,[22] but to no avail. The court found that the plaintiffs' failed in establishing any duty of care on part of the respondents.[23]

The case of *Rahaman v JC Penney* perfectly demonstrate the most common critiques aimed at CSR.[24] These CSR commitments have yet to bring meaningful change in the social issues that concern business in the developing countries. Further, these commitments rarely incur any real liability on the Adopting company or MNC. This fact is problematic enough. However, the Adopting company may choose to impose the Code beyond its own operations and upon the operations of its affiliates. Further, the Adopting company may seek to instil, cultivate and impose various means of control to observe the compliance of its affiliates with the Code. Nevertheless, the Adopting company rarely undertakes any real accountability – or much less liability – for any failure of its affiliates to comply with the Code.

1.3 The interest of this Thesis

What really caught the interest of this Author was the recurrent theme of *control*. Indeed, The Author finds that most arguments purporting for MNC liability are somehow based on a notion of *control* or its derivatives, such as influence. The MNCs are believed to exercise relevant control over their affiliates, which in turn should warrant some degree of liability or responsibility if the MNC fails to exercise that control so as to avoid their affiliates from occasioning various disasters and harm to third-party stakeholders.

This theme was equally identifiable in regard to CSR. In fact, some find that these Codes are just another way for the MNCs to exert their influence over foreign affiliates and maintain a degree of control, while avoiding any liability for the harm and damage suffered

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[22] *Rahaman v JC Penney et al, 25*

[23] *Rahaman v JC Penney et al, 26;* Herein the court referred to *Doe v. Walmart* (discussed in chapter 2.3.3.), wherein the plaintiffs failed to invoke Walmart's Code and establish therefrom any duty of care or obligation upon Walmart

[24] *See also* ibid.

by the locals, environment or economy of the developing world.[25] Further, the Author finds that these future due diligence obligations must necessarily rely on *the presence and exercise* of such control by the MNC, since the MNCs are unlikely to have any effective means to prevent or mitigate any third-party harm unless they can somehow intervene in the operations of their affiliates. Furthermore, the Author also finds that control seems to be a rather well recognized basis of liability in legal theory. What gave the final spark to this Thesis was an article by Rott and Ulbeck.[26] which concerned a parent company's liability over harm occasioned by its subsidiary company to an employee of the subsidiary.

The case involved the parent company's *voluntary commitment to H&S*, and the judgement essentially found the parent liability for a failure to preventing its subsidiary from causing H&S related harm to the subsidiary's own employees. What is more, the relevant basis for the Parent's liability was essentially the *Parent's relevant control over the operations giving rise to the underlying harm*, i.e., H&S. This prompted Rott and Ulfbeck to argue that the case could be used to argue for buyer's liability over their contractually affiliated suppliers and subcontractors, too. This, they found, was because the Buyers supposedly exercised similar control over their suppliers and subcontractors as parent companies exercise in and over the corporate group. The argument of Rott and Ulfbeck finally convinced the Author to uncover the role that control has (or may not have) in establishing the liability of MNCs for harm occasioned by their affiliates.

In this regard, the main question of this thesis is whether and under what circumstances can a MNC be held liable for the harm its affiliates might occasion to harm to third party stakeholders. Secondary questions are: 1.) whether and to what extent the MNCs control over the affiliate informs or mediates such liability; and if so, 2.) whether Codes inform such liability and MNC liability more generally. The first sub-question will be tackled by

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[25] 'There are nevertheless several dangers associated with the growth of codes of conduct. The first is that they may come to be seen as something more than they really are. In some cases, they can simply be a means to deflect public criticism, without really changing what is happening on the ground.' Rhys Jenkins, 'Corporate Codes of Conduct Self-Regulation in a Global Economy' (2001) United Nations Research Institute for Social Development Technology, Business and Society Programme Paper Number 2, 29

[26] Peter Rott and Vibe Ulfbeck, Supply Chain Liability of Multinational Corporations? (2015) 23 European Law Review of Private Law 415

focusing on parental liability over subsidiary companies and deriving necessary theories and abstractions therefrom, to then develop a theory on the buyer's liability over its suppliers and subcontractors. This order is largely dictated by the relevant case law and applicable issues in establishing any liability of the MNC over its affiliates.

The research method of this thesis is legal dogmatic, where the Author seeks to identify relevant rules of law which may establish a relevant liability upon the MNC. However, the Thesis also involves some perspectives of sociology, which Author finds necessary to address the value-laden subject of CSR. As for the limitations of this Thesis, the Author will limit the scope of this work to the European framework since that is where most of these new CSR inspired due diligence obligations are taking root. In this regard, it should be noted that there is thus far very little case law on the substantive issues addressed herein. Practically all applicable case law is found in UK, but the Author nevertheless attempts to both establish and derive some useful abstractions and general rules from this rather restricted sample to adequately address the chosen subject herein.

As for earlier literature on the subject, the Author would note especially Phillip Blumberg's work on corporate structures and limited liability of parent companies. Gwynne Skinner is also a notable authority in this regard, although her works are more focused on human rights implications of MNCs and limited liability. Regarding limitations of liability in contracts and contractual control, Jaakko Salminen was great source of inspiration for this thesis, and an invaluable resource, too. Regarding the core focus of this thesis, the work of Cees van Dam on the European Tort laws deserves special recognition. The work of Lisbeth Ennekin was also especially valuable in tying the Tort law aspects to the focal issues of MNC liability. The work of Dalia Palombo and Rott and Ulfbeck must be recognized in tying the underlying issues of parental and buyer's liability. Finally, the Author must recognize the works of Louise Vytopil and Richard Locke in terms of both contractual control and control established in CSR commitments. Locke's work was a key-inspiration to the Author and this thesis, even if his works find limited application herein.

1.4 Core concepts, Definitions and limitations

The accountability of the MNC has been pursued under various theories, concepts and arguments. As such, there is a significant risk of confusion. The discussion held within this

thesis would be no less confusing, unless the Author attempted to define and elaborate on the terminology and the applicable context thereof.

The term 'MNC' technically refers to the entire corporate group, encompassing the parent company and all of its subsidiary companies (etc). In practice, however, the term refers to the parent of the corporate group of companies ('Parent'), who owns, governs and gives its name to the multinational entity.[27] Especially in legal discussions, the concept of *MNC liability* thus refers to the Parent's liability over the corporate group of companies and the various operations of the group. However, this concept can be a little opaque. The Parent's liability in law takes different forms depending on whether we are addressing the Parent's liability over the *entities that partake in the corporate group* of companies or its liability over *external entities* that interact with, and provide value to, the corporate group.

Regarding the former paradigm of liability, this Thesis will only address the Parents liability over its subsidiary companies under the well-established concept of '**Parental liability**'. Parental liability is much different from the paradigm(s) of liability that concerns the Parent's liability over external entities, which are not part of the group but provide value to the group, specific group entity, or the groups products and services. Such liability is often discussed under the premise of supply chain liability, but the concept is meant to address the MNCs liability (i.e. the Parent's ultimate liability) over the various suppliers and subcontractors that partake in the provision of the MNCs products and services. However, this concept and notion can be rather restrictive.

In reality, there is a vast spectrum of various external entities that provide value to the MNC or its products and services. The concept of supply chain liability addresses the MNC's liability over the suppliers of raw materials and parts, or subcontractors of laboursome processes etc. However, the concept misses the various other companies that participate in the chain of entities that provide service and value to the MNC, such as consultants, freight

[27] When we address such MNC's as Nokia or Microsoft, we are technically addressing all the subsidiary companies held under the name but, in practice, refer to the Parent of the corporate group, the *name company* – ie, Nokia or Microsoft

and forwarding or sales agents. The entire spectrum of contributing entities is often addressed under the notion of a Global Value Chain ('GVC'): [28]

> The GVC is the descriptive chain of all the value-added activities required for the development, creation, sale, and distribution of a final product; all process steps required for the final product, including conceptual product inception, research and development, multiple stages of material processing like production, manufacturing, and assembly processes, to logistics, marketing, distribution, sales, and aftersales services.

Accordingly, this Thesis will address the more recent concept of **'Value Chain liability'**, when discussing the Parent's accountability over such external entities that participate in providing value to the MNCs products and services.

Both supply chain and Value Chain liability are sometimes addressed under the notion of *buyer's liability* (as above). Seeing that the Parents liability and applicable liability paradigms are very different in regard to its subsidiary companies and its GVC, the Parent will be referred to as the buyer ('Buyer') whenever the discussion refers exclusively to the legal relationship and issues that pertain to the Parent's accountability as a over its GVC. Further, as the GVC accommodates a wider spectrum of contributors than mere suppliers, the spectrum of possible contributors to the GVC will be addressed under the notion of affiliated external companies ('affiliate').

Thus, henceforth, the issues that particular to the Parent's accountability over its subsidiaries are discussed under the notion of *Parental liability.* Conversely, the issues that are particular to the Buyer's accountability over its GVC are discussed under *Value Chain liability,* whereas the various contributors to GVC are discussed under the notion of *affiliates.*

Further, as the Buyer and Parent are the same exact entity, except considered in the context of a different legal relationship, the concept of *MNC liability* ('MNC liability') will be used to denote and address any issues that apply to the Parent regardless of the applicable legal context or its capacity as a *Parent or Buyer*. Furthermore, when addressing *MNC liability*

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[28] Peter Hertenstein, Multinationals, Global Value Chains and Governance: The Mechanics of Power in Inter-Firm Relations (Routledge, 2020), 21–22

the notion of *affiliates* will also be used to denote both the subsidiaries and various contributors that participate in the MNC's GVC.

2 Contemporary Issues of Liability and Multinational Companies

Whether and why the MNCs should be held liable for the conduct of its affiliates has not been a mere question of academic debate. A fair share of that *debate* has been tried in courts, too.

The *status quo* of MNC liability has been challenged in Western courts on several occasion, especially under the premise of Foreign Direct Liability ('FDL').[29] Under the notion of FDL, the injured or interested parties choose to pursue a claim against the Parent company in its home jurisdiction, instead of a claim in the local courts against the affiliate that is (often) more directly connected to the event causing harm.[30]

Ennekin finds that FDL is most often pursued either under the premise that the subsidiary's conduct is somehow attributable to the parent ('Indirect liability'), or that the parent's own conduct either caused or crucially contributed to the event giving rise to harm ('Direct liability').[31] She also finds that the underlying argument, in either case, is found in the presumption of *control.*[32] Indirect liability is especially relevant to Parental liability, and logic thereof is based on the premise that the Parent *controls the subsidiary* and thus the subsidiary's conduct. The argument for Direct liability is more applicable to MNC liability in general, as it is based on the premise that the parent *is in control of the practice or operations of its affiliate*. Monitoring is a great example of this, where both the monitoring and monitored party exercise some form of control over the conduct subject to monitoring.

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[29] Liesbeth Ennekin, *Foreign Direct Liability and Beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven Publishing, 2012); Lucas Roorda, 'Jurisdiction in Foreign Direct Liability Cases in Europe' (2019) 113 American Society of International Law Proceeding of the Annual Meeting 161

[30] Ibid, 175; the subsidiary or affiliate that is more directly connected to the harm may be jointly sued under an action FDL, although not all national laws recognize jurisdiction over such foreign entities regardless of cause

[31] For control as a basis for attribution of the subsidiary's conduct to the parent, *see* ibid 179; for liability due to control over the harmful practice and event, *see* ibid 176

[32] Ibid

There are many reasons why a plaintiff might choose to pursue such a FDL claim instead of a claim in the local courts.[33] However, any FDL claim in its course will face a three-fold challenge, which serves to further complicate a case of both Parental liability and Value Chain liability[34] – although those challenges will play out a little differently. The first challenge is in establishing jurisdiction in the home courts of the parent (Section 2.1). The second is in establishing the law that applies to the substantive issues (Section 2.2).[35] The third and final challenge is in establishing any duty upon the parent to interfere in its affiliates or stand accountable for their conduct (Chapter 3–5).[36]

2.1 Jurisdiction

The first two challenges are met with in a reasonably uniform manner in Europe and especially within the EU.[37] In courts of the EU member states, jurisdiction in matters of civil and commercial law is established in accordance to the Brussels I Regulation (Recast).[38] Whereas, the so-called Lugano Convention[39] is a comparable instrument to Brussels-I between the European Union and a few other European nations. The Convention effectively represents even further integration in the rules of establishing jurisdiction within European economies. The Brussels I regulation applies a two-fold system in establishing

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[33] Cees van Dam, 'Tort Law and Human Rights/ Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221, 228

[34] Ibid, 229; van Dam addresses the issues of jurisdiction, applicable law and *fact finding* – the difficulties that plaintiffs will face in trying to prove the negligence of an MNC.

[35] Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 Hastings International & Comparative Law Review 451

[36] European Courts of Civil law tradition may treat these three challenges as separate stages of the proceeding at hand, whereby success in establishing jurisdiction should secure at least *access to justice*. Whereas courts of English law, a common law tradition par excellence, may consider whether they have jurisdiction, in connection to the question if the claim itself has substantive merit. Roorda, 'Jurisdiction in Foreign Direct Liability Cases in Europe', 165; van Dam, 'Tort Law and Human Rights/ Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights', 230

[37] Trevor C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 International & Comparative Law Quarterly 813

[38] Regulation (EU) No. 1215/2012 of Dec. 12, 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 OJ (L 351) 1.

[39] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 OJ (L 339) 3 ('Lugano Convention')

jurisdiction; one applicable to persons domiciled in a Member state (natural or juridical), and the other for persons domiciled elsewhere.

According to Article 4(1) of Brussels I, a parent company domiciled in the EU shall be sued in the Member State in which it is domiciled. Therefore, an FDL claim against an EU domiciled Parent may always be brough in the appropriate courts of the parent's home state. What is more, the European Court of Justice established in *Owusu* that a court may not decline from hearing the case if it finds jurisdiction according to Brussels I[40]. Thus, the home courts have no other option then to hear an FDL case against the Parent, effectively curbing any consideration of *forum non conveniens*. However, this is not the case for persons domiciled elsewhere, such as the Parent's foreign subsidiaries.

According to Article 6(1), if the defendant is not domiciled in a Member State, courts of the Member State shall find jurisdiction in accordance to the local rules of that Member State. Since local rules may not always find jurisdiction over a foreign affiliate,[41] there may be a degree of uncertainty in bringing a (joint) FDL claim to both the parent and foreign affiliate within the EU.[42] However, this carried a lot more intra-EU uncertainty prior to Brexit. English law applies the doctrine of *forum non conveniens,* and thus English court could decline jurisdiction against a foreign subsidiary in favour a of a more suitable court.

Since its departure from the EU, even UK has submitted its application to re-join the Lugano Convention.[43] It thus remains an open question, if UK will follow Brussels 1 despite

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[40] C-281/02 *Owusu v Jackson* (2005) ECR 1-1445. The decision concerns the Brussels Convention of 1968, which was thereafter adopted in law via the Brussels-I Regulation.

[41] Because the Parent and its subsidiaries are *separate entities*, jurisdiction over the parent does not imply jurisdiction over the entire MNC. The doctrine of separate entity will be discussed in section 2.3.1

[42] For instance, the foreign subsidiaries may not be sued in Germany except in very limited circumstances. *see* Wesche and Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts', 373; Generally speaking, however, issues of Jurisdiction are largely uniform within the Member States even if marginal issues lie beneath the apparent surface, *see* Arnaud Nuyts, 'Study on Residual Jurisdiction, General Report' (2007), para 16; *and* Roorda, 'Jurisdiction in Foreign Direct Liability Cases in Europe', 163

[43] European Parliament Committee on Legal Affairs, 'Question to the European Commission for oral answer O-000022/2021: UK application to accede to the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' European Parliament (24 March 2021)

Brexit, or its own tradition in establishing jurisdiction.[44] Regardless, there is a rather strong sense of uniformity in finding jurisdiction in any FDL case brough to European courts.

2.2 Choice of Law

In much of Europe, the applicable substantive law (*conflict of laws*) is also resolved in a uniform manner. The courts of EU member states must apply Rome I Regulation[45] if the action is based in contract, or according to Rome II[46] if the action is based on a non-contractual obligation such as tort.[47]

Simply due to the legal relationship between a Parent and its subsidiaries, claims pursuing Parental liability are more likely to involve Rome II.[48] Conversely, claims concerning Value Chain Liability more readily concern a contractual commitment and thus apply Rome I. However, whilst establishing the applicable law in the European context appears rather simple, the applicable law is likely not going to beneficial for most scenarios of FDL. This is simply because the primary rule of Rome II points to the application of the local laws in force within the jurisdiction where the violation or harm occurred.

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[44] The UK has submitted a request to re-join the Lugano Convention in April 2020, which is in most regards the same instrument as Brussels-1. Article 2 of the Convention is equal to Art 4(1) of Brussel-1, which implies mandatory jurisdiction for domestic persons; and, the Convention appears to decline *forum non conveniens, see* Fausto Pocar, on 'Lugano Convention — Explanatory report' OJ (C 319) 1. However, at least Hartley appears openly hostile towards the eradication of Common law tradition and, e.g., *forum non conveniens* brought on by the *owusu* case, *see* Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws', 826–828

[45] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) 2008 OJ (L 177) 6

[46] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) 2007 (OJ L 199) 40

[47] UK Retained the application of Rome I and Rome II by converting them to national legislation, The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834)

[48] Stephen M Bainbridge and M Todd Henderson, "What law applies?". In *Limited Liability: A Legal and Economic Analysis*; Bainbridge and Henderson note parent-subsidiary relationships may include contractual arrangements that are relevant for the realization of an indirect liability (i.e. piercing the corporate veil); for instance, a shareholders' agreement can include a choice of law provision that could influence a conflict of laws situation, although it is unlikely to do so, *see* id 140

Thus, any case of FDL in tort is most likely to apply the local rules and regulations that apply to the foreign affiliate.[49] Thus, the very same legal system that might have allowed or given rise to the violation or harm will be employed to judge whether the case should be tried and whether there is fault any fault on anyone's part. Conversely, Rome II allows for the contract to designate the applicable law, which in itself is more promising grounds for the application of a Western legal regime. Unfortunately, FDL claims in contract have thus far proven to be untenable.[50]

These issues of jurisdiction and conflict of laws are not at the core of this Thesis, and they will be largely ignored henceforth (as discussed in Chapter 3), but they are far from inconsequential. In fact, because of the hurdles in establishing jurisdiction and applicable law, there are precisely *zero* decisions thus far on the substantive issues of an FDL case in the European context.[51]

2.3 Indirect Liability – Attribution of Conduct

As said, the third challenge for any FDL claim is in establishing liability upon the MNC for the conduct of its subsidiaries and affiliates.

In this section, the Author will take a rather restricted look into the challenges in establishing Indirect liability. For instance, such notions as *enterprise liability* and *vicarious liability* are notable concepts in theories seeking to establish MNC liability, but their application is not relevant or wide enough to warrant analysis within the scope of this Thesis. Instead, the basic issues of Indirect liability will be tackled below.

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[49] Ennekin, *Foreign Direct Liability and Beyond,* 161; However, there may be an exception available in Rome II, Section 7, if the claim is based environmental damage. If applicable, section 7 affords the plaintiff to choose the applicable law of the jurisdiction giving rise to the environmental damage, which may effectively the defendant's home jurisdiction. *See* Ole Adag Due Diligence and Environmental Damages Under Rome II, *especially* Ch 2.2–2.3

[50] Discussed in the following Section 2.3.2

[51] Lucas Roorda, 'Jurisdiction in Foreign Direct Liability Cases in Europe', 161

2.3.1 The Doctrine of Separate Entity

A core issue for any meaningful Parental liability is the widely accepted separate entity doctrine.[52] The doctrine of separate entity is built upon entity law that is centuries old. It was never designed with the MNC in mind, and some accordingly argue that it is not suited for the globalized era of business.[53]

In effect, this doctrine of separate entity recognized that companies have a legal personality that is separate from their owners. At some unknown point, the doctrine converged with the doctrine of limited liability.[54] According to this newly synthesized doctrine, the company has its own legal personality and liabilities, which are removed from the company's shareholders and directors.[55] This effectively means that the shareholders are not personally liable for the company's debts; they are insulated from accountability beyond their invested capital. It limits the shareholders liability for *debts* incurred form wrongdoing and torts, too. This double-doctrine now predominates modern company law.[56]

The doctrine applies equally to all investors. It matters not whether the shareholder is a retail investor or a Fortune 500 company. In this regard, Blumberg finds the law almost disconnected from reality.[57] He wonders why law still refuses to see the MNC as nothing

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[52] Phillip Blumberg, 'Accountability of multinational corporations: The barriers presented by concepts of the corporate juridical entity' (2001) 24 Hastings International & Comparative Law Review 297

[53] ibid, 300–301

[54] Harris argues that the emergence of limited liability owes to no distinct event but instead three distinguishable periods in time. He finds that the '*manifestation of the attribute of limited liability in the modern sense were created both in Britain and the US in around 1800',* whereas the full limitation of shareholders' liability emerged only some hundred years ago. *See* Ron Harris, 'A new understanding of the history of limited liability: an invitation for theoretical reframing' (2020) 16 Journal of Institutional Economics 643, 660–661

[55] *Salomon v A Salomon & Co Ltd* [1897] AC 22, a decision by the British House of Lords, is perhaps the first judgement ever to acknowledge the doctrine. The currency of this decision in terms of English law was rather recently reaffirmed in the landmark decision *Prest v. Petrodel Resources Limited and others* [2013] UKSC 34, para 35

[56] 'The concept of separate legal personality is established all over the world.' Dalia Palombo, 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell', (2015) 4 British Journal of American Legal Studies 453, 453; *also* UN High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse' [2016] A/HRC/32/19, 9

[57] Blumberg 'Accountability of multinational corporations', 301

more than a collection of separate entities. Blumberg notes that this perspective is in stark contrast to the well-accepted notion of the MNC as an integrated enterprise – '*the firm*'.[58] Others are even more critical. Skinner, for instance, finds that the limitation of liability is an obstruction to legitimate remedy.[59] At its worst, this may be true:[60]

> 'legal liability for the adverse human rights impacts of a subsidiary's activities may not extend beyond the subsidiary itself, unless the liability of the parent company can be established on some other basis'.

Thus, Parent rarely stand accountable for the conduct and endeavours of their subsidiary companies. Although this is the prevalent presumption, courts may sometimes *pierce the corporate veil* and extend liability directly to the shareholders of the company.[61]

2.3.2 Attribution of Liability Due to Control

Piercing the corporate veil is a practice in law, which seeks to attribute the conduct of a company to its shareholder(s). *Piercing the veil* is the primary and most available example of *Indirect liability*, whereby the subsidiary's conduct could be attributed to the Parent if successful.

Piercing the veil is born and most developed in the US jurisprudence, but many European courts have long since recognized a similar practice.[62] The practice of piercing the veil is not

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[58] '*To the public and to economists, the multinational corporation is a single enterprise, "the firm". However, the law sees the multinational, […] with its tiers of sub-holding companies and […] subsidiaries as 1,200-odd separate independent entities.'* Blumberg, Accountability of multinational corporations, 303; *see also* Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press, 2007)

[59] If a third party is injured by a subsidiary company, the doctrine may indeed prohibit the injured party from seeking compensation from the parent company. Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' 1792; *See also* Axel Marx et al, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', 14–15

[60] UN High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse', 9

[61] Blumberg notes that notion of the common-law agency affords another route to hold parents accountable for their subsidiaries' actions, wherein the parent has authorized the subsidiary to act on its behalf and thus the actions of the subsidiary equal those of the parent. He also finds the applicability of that route practically moot, since one reason the corporate structure is used (or abused) is for the allocation of risk and accountability, so such circumstances and occasion of agency are naturally avoided in practice. *See* Blumberg 'Accountability of multinational corporations', 307–308

[62] *See* E J Cohn and C Simitis, 'Lifting the Veil in the Company Laws of the European Continent' (1963) 12 International & Comparative Law Quarterly 189

exactly uniform, however. Miller argues that it is rather challenging to construe any definite standard for piercing the veil from the jurisprudence of either US, UK or Germany, and much less a common standard that would apply to them all.[63] Instead, he finds that courts show wide discretion in exercising the concept, wherever they may see it fit. Conversely, Bainbridge and Henderson note that the prevalent practice is remarkably convergent to the US model,[64] although the terminology can be illusive. They do employ a much wider sample but somewhat pick-and-choose the comparable elements from their sample jurisdictions.

Identifying the present differences, Miller finds that the German iteration of the doctrine is the most lenient. This owes in part to the fact that the German statutory rules and case law recognize a distinct form of *enterprise liability*[65], whereby the parent and subsidiary may be construed as one enterprise instead of separate entities.[66] Further, piercing in the German framework does not necessitate any misrepresentation or malfeasance on the part of the parent, as opposed to both US and UK practice.[67] Whether there is little or much disparity in these practices is, however, inconsequential to this Thesis. The one common factor in piercing the veil is the requirement of domination and/or *factual control* by the parent/shareholder(s).[68]

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[63] All, however, evince a will to set aside the corporate form to discourage abuse and wrongdoing. Sandra K Miller, 'Piercing the Corporate Veil among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches' (1998) 36 American Business Law J 73, 77

[64] Bainbridge and Henderson, 'Limited liability in comparative perspective'; for the prevalent similarities in the French experience, *see* id 258; and, for the German similarities, *see* id 266

[65] As opposed to the traditional view of entity law, '(e)nterprise law rests on the realities of the complex business enterprise in which business activities are collectively conducted by interrelated and intertwined juridical entities under the "control" of a dominant parent corporation'. Phillip I Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37 Connecticut Law Review 605, 609

[66] Miller, Piercing the Corporate Veil among Affiliated Companies, 76

[67] Ibid, 79–84

[68] Ibid

As this is the case, the circumstances where a court maybe convinced to pierce the veil remain very limited and mostly apply to small and closely held companies.[69] This is partly due to the fact that the requirement of *control* is not satisfied by mere ownership (stockholding) in the subsidiary. At least in the US and UK, the subsidiary should almost resemble a puppet – or a *façade* – in the factual control of its stockholder(s).[70] In this regard, the US practice appears more influential than its German comparison. Indeed, in a landmark decision, the Finnish Supreme Court affirmed the applicability of the veil piercing doctrine in the Finnish legal framework[71] Although the Finnish legal system is squarely rooted in a Germanic tradition, the Supreme Court recognized that veil piercing must depend on a doctrine that is far more a kin to that of the US practice.[72]

Setting aside the requirement of malicious or deceptive intent, the core requirement for veil piercing is still excessive control over the subsidiary or the particular operation in question.[73] In this regard, Skinner argues that the difficulties in convincing a court to pierce

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[69] David H. Barber, 'Piercing the Corporate Veil' (1980–81) 17 Willamette Law review 371; *also* Bainbridge an Henderson, 'Limited liability in comparative perspective'; *and* Blumberg 'Accountability of multinational corporations', 306–307

[70] In terms of UK practice, the decision in *Prest v. Petrodel* (regarding ancillary relief) is *the* landmark decision in terms of lifting the corporate veil: *'There is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.' See Prest v. Petrodel Resources Limited and others* [2013] UKSC 34, 12 June 2013. Para 35 (emphasis added)

[71] *KKO 2015:17*

[72] The decision recognized the authority of the Finnish academia on veil piercing which precede the decision, and therefrom construed three factors that may influence a decision to pierce the corporate veil. *See especially KKO 2015:17,* paras 26–27, 29*;* thus, the decision in *KKO 2015:17* appears to consolidate a three-fold test for piercing the veil in Finnish Jurisprudence: the veil may be pierced if 1) the corporate form has clearly been abused or misused, and 2) the shareholder has exercised its *control* in a reprehensible or disloyal manner in regards to the company's debtors or third parties 3) which has resulted in damage or the avoidance of a legal duty. Seppo Villa, 'Samastaminen: KKO 2015:17' (2015) 3-4 Lakimies 541; Anssi Kärki 'Piercing the Corporate Veil in Finland – A Multijurisdictional Study Aimed at Developing the Finnish Piercing Doctrine' (2020) 276 Acta electronica Universitatis Lapponiensis, 3

[73] It is not necessary that the subsidiary is wholly operated like a puppet, but that the particular operation in question was under the factual control.

the veil, in effect, shields parent corporations from most claims arising from wrongful acts of their foreign subsidiaries.[74]

Thus, for Indirect liability to be a valid avenue for liability in the Parental concern, the Parent must exercise excessive, almost subsuming control over the underlying subsidiary that is causing harm. Whilst it is possible that MNC may employ such shell corporations or externalize their risky operations under such a *façade,* the applicability of the practice for our consideration appears very limited.

2.3.3 Privity of Contract

Much like the doctrine of separate entity, the *privity of contract* doctrine can prevent the enforcement of legitimate third-party interests – if not even more so.

In principle, only parties in the privity of contract should have the right to demand performance of the rights or obligations vested in their contract. Third-party stakeholders, such as the suppliers' employees, cannot invoke the contract even where they have a justifiable interest in enforcing its terms.[75] Therefore, if the contract between a buyer and supplier includes terms to effect of implementing more strict H&S measures, a third-party stakeholder has no right to invoke that commitment on either party. However, this rule is not absolute; an argument can be made that the Code or policy (or any relevant agreement) is intended to create actionable rights upon the stakeholders.

Codes are a prime candidate for such claims, as they often provide for social values with clear effects on third parties. However, most Codes tend to be more aspirational than definite.[76] Thus, they often contain somewhat vague obligations which provide vary little

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[74] Skinner, Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law, 1804

[75] Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar Publishing, 2015), 218

[76] Ibid, 344; If the relevant H&S policy would include an obligation to maintain *adequate fire safety,* instead of an obligation to observe the local fire safety regulation, it would certainly be more difficult to establish what constitutes adequate fire safety or what may be required under such a notion.

grounds for enforcement. Codes might not even be legally binding on the relevant parties.[77] *Doe v Walmart*[78] is perhaps the most influential case to ever pursue third-party rights arising from a Code. The suit argued that Walmart's Code intended to create rights upon the third-party employees of Walmart's suppliers, as well as a corresponding obligation upon Walmart to secure those rights.[79] Walmart supposedly infringed upon its Code, and the rights and obligations vested therein, by not securing its suppliers' compliance with the Code. The court, however, found that Walmart' Code placed *no obligation* on Walmart to secure the compliance of its suppliers. The Code only gave Walmart the opportunity to observe their compliance, if Walmart so desired.

A more recent FDL case regarding Value Chain liability, *J*abir *v KiK Textilien*[80] demonstrates how unappealing it (still) is to pursue a third-party action in contract. In theory, the underlying circumstances of the case showed fruitful grounds for a third-party claim based on the Buyer's Code.[81] The case involved a surprisingly definite Code, which addressed the circumstances giving rise to harm in an explicit and detailed manner (fire safety), and a rather clear commitment by the Buyer to monitor and observe compliance with its Code.[82] Regardless of these facts, the plaintiffs preferred to pursue an action in the tort the negligence,[83] instead of invoking a third-party right arising form said contract.

Thus, it appears that an action in Tort or equivalent legal duty is the more desirable avenue of pursuing MNC liability. Partly thus, but also due to the recent development in case law concerning Torts, this Thesis will focus on finding the constituents of Direct liability.

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[77] Ole Hansen, Clement Salung Petersen and Vibe Ulfbeck, 'Private Governance and the Potential of Private Law' (2020) 28 European Review of Private Law 333, 343

[78] *Jane Doe I et al v Wal-Mart Stores Inc* No 08-55706 US CA Ninth Circuit (10 July 2009) 8611

[79] Ibid, 8618

[80] Jabir v. KiK Textilien und Non-Food Gmbh Landgericht Dortmund 7 O 95/15

[81] Benedikt Reinke and Peer C Zumbansen, 'Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability' King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2019-18, 15–16

[82] Wesche and Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts, 373

[83] The case is briefly discussed further in supra Ch 5.1.2

3 Direct Liability – Liability for Own Conduct

The doctrines of separate entity and privity of contract insulates the MNC from any meaningful accountability for the conduct of their affiliates. Yet, the MNC may still be liable for its own conduct. Such liability could follow if the MNCs own action or omission is found to have contributed to the event giving rise to harm. In this regard, Skinner identifies two of the most pertinent approaches to pursuing the Direct liability of the MNC.[84] According to her, Direct liability may be most readily pursued by either 1) establishing a duty of care or 2) relying on a due diligence obligation. These paradigms, and their connection to control, will thus be discussed below.

However, the discussion on choice of law in section 2.2. should be noted in this regard. Due to the prevalence of Rome II, any FDL claim in Europe that seeks to invoke an extracontractual duty is most likely to apply the foreign law of the host country, instead of the domestic laws of Europe. However, this fact will be disregarded for three specific reasons: 1) all applicable and perceivable due diligence obligations pursue extra-territorial effect (discussed in section 3.4.1); 2) the foundational premise in the tort of negligence is rather universal (discussed in section 3.4.2), and 3) the Author wishes to keep the focus of this Thesis intact and within the European framework.

3.1 Negligence

van Dam finds that the basic rule for establishing liability in tort is rather consistent if not universal, which is that of the *bonus pater familias*.[85] This standard derives from Roman Law, wherein it supposedly 'was an objective standard that allowed a defendant's conduct to be assessed against an external standard of expected conduct, rather than in light of the defendant's own intentions.'[86] Within the realm of modern tort laws and this Thesis,

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[84] Skinner, Rethinking Limited Liability of Parent Corporations, 1819; for evaluation on the efficacy of those approaches, *see* id Ch VI, 1825 et seq

[85] van Dam, 'Tort Law and Human Rights: Brothers in Arms: On the Role of Tort Law in the Area of Business and Human Rights', 237; van Dam

[86] Jonathan Bonnitcha, Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899, 902

'*conduct'* herein refers to a commission (positive act) or omission (failure to act) of human origin.[87]

According to the rule of *bonus pater familias*, imprudent conduct is a sign of *fault*, and fault is the basis for liability. This standard of prudent conduct (or conduct of a *reasonable man*) found its way to more modern European laws on torts and delicts[88] and anchored itself into the concept of negligence.[89] Thus, in the general context of European Tort law,[90] liability for negligence may arise if one's conduct does not correspond to what could be expected of a prudent person in similar circumstances (implying fault),[91] and harm occurs as a result of that conduct (causality). However, these so-called *European* legal traditions have wide appeal, especially since many former colonies still hold on to their inherited legal systems.[92] Partly thus, this standard of care is practically universal to the tort of negligence,[93] rather than strictly European.

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[87] Ultimately, the conduct of a MNC can be boiled down to commissions and omissions at the board, management and individual level. *See* Raheel Ahmed, 'The Influence of Reasonableness on the Element of Conduct in Delictual Or Tort Liability - Comparative Conclusions' (2019) 22 Potchefstroom Electronic Law Journal 1

[88] van Dam, *European Tort Law* (Oxford University Press, 2013), 234; for the English Common law experience specifically, and its formulation of the *reasonable man* standard in negligence, *see for instance* David Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (2003) 26 UNSW Law Journal 475

[89] Bonnitcha and McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 903; van Dam, 'Tort Law and Human Rights/ Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights', 244;

[90] There both is and is not a common 'European Tort Law', since all European systems have their own peculiarities but also share much of the same history, as well as current developments. *See generally,* van Dam, *European Tort Law*; Reiner Schultze, *Compensation of Private Losses – the Evolution of Torts in European Business Law* (Sellier. European Law Publishers, 2011), especially Ch III

[91] Franz Werro and Erdem Büyüksagis. 'The bounds between negligence and strict liability', in *Comparative Tort La*w (Edward Elgar Publishing, 2015), 206

[92] See also 'Europe, with its two grand traditions of civil law and common law, is the touchstone for departure. These European traditions dominate, not only within Europe, but throughout the world.' Christopher J. Roederer, 'Working the Common Law Pure: Developing The Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights' (2009) 26 Arizona Journal of International & Comparative Law 429, 430

[93] van Dam, 'Tort Law and Human Rights/ Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights', 237; for a concurring view, *see* James Gordley, 'The architecture of the common and civil law of torts: An historical survey'. In *Comparative Tort Law* (Edward Elgar Publishing, 2015), 180

Having the European framework in mind, The French tort of negligence is based on a simplistic formula of *fault* and damage, and causality between the two.[94] The most common yard stick for finding fault is the *expected standard of care* (i.e. prudent conduct). No additional qualifications apply. Thus, 'any relationship can give rise to liability; [...] it suffices that negligent conduct caused damage.'[95] In contrast to the French paradigm, the German liability in negligence is limited to violations of a protected right, statutory rule or intentional damage.[96] Fault for such violations may follow from either intent or negligence. Conduct is considered negligent if it does not live up to the s*tandard required by society* (essentially, being that of prudent conduct).[97] The framework within English Common law is a bit more restricted and complicated.

The English law of torts is built upon a patchwork of case law, and a system of particular *actions* according to which suit must be brought – such as the action for negligence.[98] As such, there is no general paradigm of liability but a spectrum rather particular and case-specific paradigms. However, a general rule for negligence is still identifiable: '[n]egligence as a tort is the breach of a legal duty to take care which results in damage to the claimant.'[99] The aforesaid statement also illustrates the three generally accepted elements of negligence, those being *a duty of care*, *a breach* of that duty and *damage* as a result of that breach.[100] In a rather familiar fashion, *the conduct of a reasonable man* is the standard against which a breach is generally established.[101]

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[94] van Dam, *European Tort Law,* 57

[95] Ibid

[96] The French notion of fault (*faute*) 'can be established on the basis of the breach of an unwritten pre-existing duty. Unwritten duties can be derived from regulations, morals, customs, and technical standards.' *ee* van Dam, European Tort Law, 57; and for the German paradigm, *see* id 80

[97] van Dam, European Tort Law, 80

[98] James Gordley, 'The architecture of the common and civil law of torts: An historical survey', 174; van Dam, *European Tort Law, 102*

[99] W.H.V. Rogers (ed), *Winfield and Jolowicz on Tort* (18th edn, London: Sweet & Maxwell, 2010), para 5.1

[100] van Dam, *European Tort Law, 102*

[101] van Dam, *European Tort Law, 230*

However, in English law (and common laws more generally), the defendant must owe a duty of care to the plaintiff for there to be a finding of negligent conduct.

3.2 Duty of Care

Common law requires a duty of care for liability to arise. The concept is meant to limit the scope of liability that may arise in any given circumstance, as English common law does not recognize a general duty to take care of everyone.[102]

Within such a framework, the MNC does not owe a duty of prudent conduct towards all imaginable interests and plaintiffs. Instead, for a duty of care to arise, there must be a pre-established relationship between the plaintiff and defendant MNC.[103] The relationship must be one of sufficient proximity or neighbourhood, and the risk must be reasonably foreseeable.[104] In the Author's perspective, the duty of care, both as a concept and requirement in law, appears to derive from the expected conduct of a reasonable (prudent) man, too. To determine the conduct of a reasonable man in any particular circumstance, one must necessarily consider the underlying circumstances themselves. In this regard, the duty of care indicates a sphere of responsibility or foreseeable influence which a reasonable man must or ought to have considered when undertaking a particular course of conduct.

The duty of care seems to encapsulate the following relationship between the conduct of the supposed tortfeasor and the event causing harm:

> if a reasonable man should undertake a similar course of conduct:[105]
> 1.) which and whose interests should he find likely to be affected;
> 2.) how likely should he find that harm occurs; and
> 3.) how grave might that harm be.

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[102] Werro and Büyüksagis. 'The bounds between negligence and strict liability', 204

[103] Percy H Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 Law Quarterly Rev 184

[104] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (discussed further in Chapter 4)

[105] For an interesting insight to the notion of reasonableness and how it affects the evaluation of conduct, *see generally* Ahmed, 'The Influence of Reasonableness on the Element of Conduct in Delictual Or Tort Liability - Comparative Conclusions'

If there is a relevant risk of harm, a duty may arise to exercise reasonable care so as to avoid causing harm to the relevant stakeholders – i.e. *a duty of care*. Conversely, a duty of care might not be recognized if the underlying risk of harm was not foreseeable or highly unlikely, or the risk was inconsequential in nature. What is more, if a stakeholder or interest was an unlikely or inconsequential victim of that particular course conduct, a reasonable man might not be expected to take their interest in to consideration.

As illustrated above, Civil law systems do not require a duty of care for liability to arise in negligence, nor do they recognize such a duty. However, the foundational elements that underlie the *duty of care* can still be identified in civil law notions of prudent conduct and fault.[106] Indeed, van Dam considers that '[i]t is generally accepted that the negligent character of the defendant's conduct has to be established by balancing the expected risk, on one hand, and the precautions, on the other':[107]

> This balancing of care and risk reflects the general task of tort law to balance freedom and protection [...] The level of risk can be determined by: (a) the seriousness of the expected damage and (b) the probability that an accident will happen.

Similarly, the duty of care can be understood as a concept that seeks to identify and limit the risks that a reasonable man must account for when orienting its conduct:[108]

> If the conduct of the actor has brought him into a human relationship with another, of such character that sound social policy requires either some affirmative action or some precaution on his part to avoid harm, the duty to act or take the precaution is imposed by law [i.e. a duty of care].

Thus, whereas the civil law notion of negligence takes in to consideration the relevant circumstances underlying the conduct, such as the foreseeability of risk and magnitude of harm, the common law notion of a duty of care appears to pursue a more definite limitation on the sphere of stakeholders and interest that a particular person should reasonably consider and find in harm's way.

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[106] Werro and Büyüksagis, 'The bounds between negligence and strict liability', 204

[107] van Dam, *European Tort Law,* 235

[108] Fowler V Harper and Posey M Kime, 'The Duty to Control the Conduct of Another' (1934) 43 Yale L J 886, 886

In this regard, the German paradigm of negligence practically enforces a duty of care, too. Since liability can only arise in terms of a protected interest, only the risks that are relevant to such interest should be considered or known when undertaking the conduct in question. There is no *duty of care* for unprotected interest. The French system is much more liberal, and liability may arise simply where harm is caused due to fault. Still, a faint notion of a duty care is identifiable, since the duty to observe prudent conduct arises (only) in such circumstances 'where an absence of care would give rise to a foreseeable risk'.[109] If there is no foreseeable risk associated with the planned course of conduct, there is no duty of care since *prudent* conduct cannot be expected.

It should be noted herein that the basic notions of a duty of care do not invoke the quality of control and neither does negligence. In fact, neither of these paradigms even mention control as factor, as may be evident from the generalizations above. However, that presumption must necessarily change when we begin to consider whether the MNC should be liable for a failure to monitor its affiliates or enforce compliance with its Code. This fact will be further discussed in Chapter 4

3.3 Due diligence

The obligation of due diligence can be understood in at least two alternate ways,[110] and this dichotomy can cause confusion for any stakeholder.

For business and business-minded people, *Due diligence* translates to an exercise in analysis and risk assessment.[111] Especially within the domain of business transactions, all concerned parties are expected to conduct *reasonable inquiry* to the underlying object of

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[109]Werro and Büyüksagis *on* Suzanne Galand-Carval, 'Fault Under French Law', in Pierre Wilder and Willem H van Boom (eds) Unification of Tort Law: Fault (The Hague, 2005) 89, 92 et seq; Werro and Büyüksagis, 'The bounds between negligence and strict liability', 204

[110] Bonnitcha and McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 899-900

[111] ibid, 901

the transaction, including any (legal) risk that may follow.[112] Conversely, for human rights lawyers, the concept of due diligence refers to *prudent conduct* in the performance of one's duties.[113] Within the latter framework, *due diligence* does not merely refer to a process of risk assessment or management. Instead, the focus is on actual conduct and care that is shown in the day to day business operations and, especially, in addressing the relevant risks of harm.

Having regard to CSR and emergent due diligence laws, the former framework would imply that MNCs are obliged to thoroughly analyse the relevant negative externalities that their operations, or the operations of prospective affiliates, might have on third-party rights. In the spirit of such an obligation, the MNC could not claim immunity from such liabilities it should have identified in the process of proper due diligence. In the latter framework, however, the focus would be much more on the actual, proactive efforts by the MNC to address the negative externalities in its everyday operations. This dichotomy is better illustrated by the pertinent European due diligence frameworks.

3.3.1 European Due Diligence frameworks

There are a few laws within Europe, which frame due diligence like it is a tool in risk assessment and management – as an exercise in fact finding and reporting.[114] The UK Modern Slavery act is the best European example of such legislation. The act, in practice, only *encourages* MNCs to employ due diligence, and it has been accordingly criticized for its lack of enforceable duties.[115]

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[112] As a broader concept, due diligence can be understood as part of good governance and profit maximazation; an exercise that seeks to identify the various risks that may apply to the company's business, now and in the future. The basic tenets of profit maximization must, conversely, imply a necessity of minimizing any damage and risk of cost that may come, and to mitigate the damage that has already realized. At the core of basic risk management, due diligence should predict, prevent and minimize all possible risk of economic detriment.

[113] Bonnitcha and McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 902

[114] For instance, the UK Modern Slavery Act 2015 or Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards to disclosure of non-financial and diversity information by certain large undertakings and groups (2014) OJ (L 330) 1

[115] The Act has attracted a lot of criticism for not imposing any definite duties upon the MNCs. The basic obligation to perform the risk assessment exercise and make it public can be subverted by a declaration that

There are also a few regulatory instruments in the European framework that require companies to employ due diligence,[116] such as the EU Timber Regulation,[117] Conflict Minerals Regulation,[118] or the UK Bribery Act[119] to name a few. The UK Bribery Act is a better example of such legislation which treats the underlying *obligation* of due diligence as a level of expected and rigorous care – instead of a mere risk management tool. However, its application is strictly limited to issues of corrupt conduct. Therefore, the French Vigilance Law[120] is the primary example of an enforceable due diligence obligation with wide appeal. The law pertains to a wide array of CSR issues, and it paints the obligation of *due diligence* as both an endeavour in risk assessment and proper *careful* conduct.

The Vigilance law establishes a so-called *Duty of Vigilance*, which is based on three distinct but intertwined obligations.[121] The first obligation is to set up a plan for monitoring that includes reasonable measures to identify and prevent severe violations of core social values

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no such due diligence has been performed. *See,* Home Office, 'Independent Review of the Modern Slavery Act 2015: Final Report' (2019), especially 14–15, and 40 et seq

[116] Cossart, Chaplier, Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All', 320; *for a deeper analysis* of such laws and regulations, *see for instance* EY, 'Judicial Analysis on the Corporate Social Responsibility Act', Ch 3 and 4, 24 et seq

[117] Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market (Timber Regulation) 2010 OJ (L 295) 23

[118] Regulation (EU) 2017/821 of the European Parliament and of the Council 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 (Conflict Minerals Regulation) 2017 OJ (L 130) 1

[119] Bribery Act 2010, sec 23; see

[120] In fact, the most prominent instruments on due diligence are voluntary, such as the UN Guiding Principles ('UNGP'). Chiara Macchi and Claire Bright, 'Chapter 10 Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', In *Legal Sources in Business and Human Rights* (Leiden, The Netherlands: Brill | Nijhoff, 2020); Further, Savourey is of the opinion that the UNGP should be used to interpret the Vigilance Law and its obligations, which would make the UNGP at least a relatively legal source. *See* Elsa Savourey, 'France Country Report', in EC study on Due Diligence Requirements Throughout the Supply Chain, Annexures, Part III Country Reports, 65

[121]Savourey, 'France Country Report', 64; Technically there are five measures that can be boiled down to just the three referenced obligations: '[t]he law lists five of these measures: a mapping that identifies, analyses and ranks risks; procedures assessing the situation of certain subsidiaries, subcontractors or suppliers; actions to prevent and mitigate risks and serious harms; an alert mechanism; and a monitoring scheme to follow-up on the plan's implementation and efficiency[…]', Cossart, Chaplier, Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All'

by the MNC and its foreign affiliates (the *vigilance plan*).[122] Seeing that the plan entails the discovery of relevant risks and stakeholders, as well as the means to combat said risks, this first obligation corresponds with the risk management notion of due diligence. The second obligation then requires the *effective implementation* of the plan. Whilst this obligation appears vague, the qualification of effective implementation clearly points towards careful conduct in the observance of said plan and its underlying values. Thus, this obligation correlates more with the notion of due diligence as a form of *prudent conduct*.

However, Savourey and Brabant find a few of these qualifications quite problematic. Firstly, there is no authoritative guidance on what constitutes a *severe* impact, and what kind of measures are included in the notion of *reasonable* measures;[123] and secondly, the qualification of *effective implementation* is so ambiguous that it is likely to be the focus of vigorous contest in future legal proceedings.[124]

The third obligation is to simply make the vigilance plan available to the public.

3.3.2 Due Diligence and control

Regardless of variance within its meaning, a due diligence obligation necessarily implies the existence of a control relationship between the MNC and its subsidiaries and affiliates. Even a mere obligation in proper and thorough risk assessment is dependent on the MNCs access to information, especially if that assessment is to cover the operations of its subsidiaries and affiliates. If we, however, understand due diligence as an *endeavour in prudent conduct*, which seeks to prevent and mitigate the relevant risks from materializing,

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[122] Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals', 275; the vigilance plan should cover the activities of the company, and its subsidiaries, but also suppliers and subcontractors with whom there is an established commercial relationship; Savourey and Brabant 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption', 144–145

[123] Savourey and Brabant 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption', 145–146; however, Savourey is also of the opinion that UNGP should be used as an interpretive tool in this regard, *see* supra note 120

[124] Savourey and Brabant 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption', 146

that endeavour depends on the MNCs capability to affect *and control* the conduct and operations of others.

Indeed, in the opinion of Skinner, what sets the due diligence obligation apart from indirect liability frameworks, such as piercing the veil or enterprise liability, is that it encourages parents to employ the control they possess over the subsidiaries, instead of keeping their distance.[125] Cassel agrees with Skinner. He finds that the doctrines of indirect liability create perverse incentives: 'in order to avoid exposure to legal liability, the parent company has an incentive to minimize its control over the subsidiary.'.[126]

However, without wider application of current European due diligence obligations, the most likely liability regime is still found within Torts and especially the tort of negligence. In this regard, Pietropaoli et al find that the same issue of perverse incentives applies to the recent UK case law regarding a duty of care.[127] This is to say that liability may, in fact, follow from the exercise rather than lack of control, which thereby incentivises MNCs to distance themselves from their subsidiaries and affiliates – to exercise as little control as possible – in order to avoid a finding of liability.

3.3.3 Due Diligence and Tort of Negligence Intertwined

What the Author finds interesting is the connection with the duty of care and negligence to the Due Diligence obligation(s). Indeed, it could this connection that is responsible for the confusion and dichotomy in the application and meaning of due diligence.

Indeed, Palombo notes that the legal paradigms which concern the *duty of care* and *due diligence* are showing signs of convergence in the European context due to recent

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[125] Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries', 1828

[126] Doug ro, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence'(2016) 1 Business and Human Rights Journal 179, 182

[127] Pietropaoli et al, 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms' (British Institute of International Comparative Law, 2020), 51

developments in case law and legislation.[128] In saying this, she is likely referring to the risk assessment notion of the due diligence obligation. As said, *duty of care* is meant to limit and demarcate one's sphere of foreseeable influence. It is essentially an exercise in hindsight, which seeks to establish whether a particular risk of harm should have been foreseeable to a reasonable person undertaking a particular course of conduct. Whereas, risk assessment is an exercise in foresight, which seeks to identify all relevant risks to the business before a course of conduct is undertaken. Thus, due diligence (as an exercise in risk assessment) should serve to expand one's duty of care, as more and more stakeholders and risks are identified as relevant. Conversely, the (non)performance of such due diligence will equally inform the duty of care, as it serves to answer whether the risks *should* have been foreseeable if adequate due diligence was undertaken.

Further, as was noted above, most legal cultures recognize prudent conduct as the relevant standard for establishing negligence. As was also noted thereafter, some consider due diligence to represent proper and prudent performance of one's duties.[129] Thus, if a company fails to live up to its due diligence obligations in its everyday conduct, that conduct could be accurately describes as negligent. Therefore, the notions of due diligence and negligence can be understood as the polar opposites of each other;[130] either as taking the expected steps to dispose of a duty of care or failing to do so.[131] Within such a framework, the concept of due diligence interacts with the notions of duty of care, as noted by Palombo, but also with the tort of negligence.

From this, it appears that there is a degree of convergence and synergy between the obligation of due diligence and the tort of negligence. The Author finds it likely that any

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[128] Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals', 270

[129] In terms of modern due diligence obligations, that duty would likely be the prevention and mitigation of harm to relevant social values.

[130] 'The opposite of Negligence is Diligence, vigilance, attention, which, like Negligence, admits of an infinite variety of gradations.', E.A. Whittuck, *Institutes of Roman by Gaius*, with a Translation and Commentary, translated by Edward Poste (4th edn, 1905), 441

[131] For a more concrete and practical perspective into how a due diligence obligation could be tied to a duty of care, *see generally* Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence'

relevant and positive finding of a duty of care or negligent conduct will feed into the analysis of proper due diligence in the years to come.[132] Similarly, the enforcement of due diligence obligations will/should provide the companies with more awareness of their exposure to certain risks, and that fact should inform the analysis of negligence even if the obligation of due diligence is found inapplicable in the circumstances. This is an important finding, since most case law on MNC liability within Europe has been tried in UK courts and on the grounds of Common law. The most significant issue within these proceedings has been the duty of care, and whether the MNC owes a duty of care over those harmed by its affiliates.

Seeing that the duty of care has informative value to future due diligence obligations, and that Civil law systems apply a similar but nondescript concept in establishing liability for negligence, the analysis of Common law findings on MNC liability becomes a worthwhile endeavour even if we are trying to say something of MNC liability within the European context.

4 '*Control Liability*' – Liability for the Conduct of Others

As identified by Skinner, establishing a duty of care is an alternative avenue in the pursuit of Direct liability of the MNC. Unfortunately, it is also a major hurdle to any FDL claim.

As said, establishing a duty of care is a necessity in the Common law tort of negligence. Seeing that our interest is specifically the MNCs liability for the harmful conduct of its affiliates, there are at least two, core issues in establishing the MNC's duty of care over such issues. Such a claim would likely seek to argue that the MNC should be held liable for either 1) a failure to adequately observe its affiliate or 2) for a failure to intervene in the affiliate's conduct. Effectively speaking, the former claim would argue for negligence based on *a failure to act*, while the latter would argue for negligence based on the *failure to prevent the conduct of another*.[133]

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[132] The applicable case law and findings on positive legal duties might expand or consolidate the sphere of interest and risks that an MNC is expected to (always) consider when undertaking its due diligence obligation.

[133] '[T]he ground on which these MNCs are held liable is often that they should have intervened in their suppliers' course of business, or they should have inspected their factories or upheld their CSR codes of

Common law(s) in general does not recognize an affirmative duty to act.[134] Thus, a *failure to act* is far less likely to give rise to a duty of care than a positive act:[135]

> The principle is thus ordinarily formulated that while an actor is always bound to prevent his acts from creating an unreasonable risk to others, he is under the affirmative duty to act to prevent another from sustaining harm only when certain socially recognized relations exist which constitute the basis for the legal duty.

Further, there is *no duty to rescue* in Common law as it is.[136] There is neither a duty to prevent someone else from causing harm to another, unless there is such 'a relationship which gives rise to an imposition or assumption of responsibility'.[137] Thus, it is evident that the presumptions in Common law are strongly against the finding of a duty of care on the MNC for the harmful conduct of is affiliates.

According to the default presumptions of Common law, a failure by the MNC to observe the conduct or compliance of its affiliate is unlikely to give rise to a duty of care, since negative acts are less likely to invite such a duty. Further, as there is no duty to rescue, the MNC is not under any general duty of care to address even the most evident of perils to third-party stakeholders such as its affiliate's employees. Furthermore, it requires a special relationship for the MNC to owe a duty of care over the conduct of others. As side note, while Civil law has a more permissive stance on liability due to omission, it is still conceivable why a choice to *do something* might bear more responsibility, and for a wider range of relevant stakeholders, than the decision to abstain from action.[138]

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conduct, but neglected to do so. These cases amount to either liability for omissions, or liability in respect of a third party.' Vytopil, *Contractual Control in Supply Chains,* 182

[134] Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90 The Yale Law Journal 247

[135] Harper and Kime, 'The Duty to Control the Conduct of Another' (1934) 43 Yale Law Journal 886

[136] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th ed, Oxford University Press, 2012), 179

[137] Lord Goff in *Smith v Littlewoods Ltd* [1987] AC 241, 270

[138] 'There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties or natural causes.' Lord Hoffman in *Stovin v Wise* [1996] 3 WLR 389

4.1 Proximity and Liability for Control

According to van Dam, liability for omission in Common law requires one of the established exceptions, such as the *assumption of a responsibility* or *control over the tortfeasor*.[139] Others argue that such a *special relationship* can instead be adequately identified according to the general requirement of 'proximity' as established in *Caparo v Dickman*[140].

The case of *Caparo v Dickman* is best known for establishing the relevant test for finding a duty of care in novel circumstances.[141] Accordingly, in order to establish a duty of care in situations where there is no precedent, three requirements need to be satisfied: (a) the harm must be reasonably foreseeable; (b) there has to be *proximity* between the claimant and the defendant; and (c) imposing a duty of care has to be fair, just, and reasonable.[142] Thus, we may seek to find a duty of care upon the MNC, over the harmful conduct of its affiliate, either by establishing that the MNC exercised effective control over the tortfeasor, or that there is sufficient proximity between the MNC, tortfeasor and underlying harm.[143]

However, the notion of Proximity appears hard to define in any definite manner. Lord Oliver stated in *Caparo v Dickman* that proximity:

> 'is an expression used not necessarily as indicating literally "closeness" in a physical or metaphorical sense but merely as a convenient label to describe circumstances from which the law attributes a duty of care'

If proximity is truly to be understood in this manner, the logic in establishing a duty of care appears almost circular: [144] If a duty of care requires sufficient proximity in the given

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[139] van Dam, *European Tort Law,* 250–251

[140] *Caparo Industries plc v Dickman* [1990] 2 AC 605

[141] van Dam, *European Tort Law,* 105

[142] Winfield and Jolowicz (2010), para. 5.11

[143] As will be later noted in Section 4.1, the notion of sufficient proximity, assumption of responsibility and control over tortfeasor show a significant degree of convergence in the applicable case of the MNC's duty of care over the harmful conduct of its affiliates. By convergence in this, the Author also implies confusion; it is not always clear which of these three notions are used to establish a duty of care or how they interact.

[144] Robyn Martin, 'Categories of Negligence and Duties of Care: Caparo in the House of Lords' (1990) 53 Modern Law Review 824, 827

circumstances, but proximity denotes such circumstance which give rise to a duty of care, the given test is inane and offers no real guidance on establishing a duty of care.

However, Ripstein offers some opinion on the meaning of proximity. He implies that the notions of a duty of care and proximity denote a sort of social contract.[145] Whereas actions in tort used to be limited to the privity of a contract, Donoghue v Stevenson famously established in to law that there can be a duty of care towards persons external to privity.[146] Thus, it would make sense that the notion of proximity is meant imitate such circumstances and *relationships* where an inferred social contract should have warranted the defendant to exercise reasonable care so as not to cause harm to its inferred counter-party (the plaintiff) in such circumstances.[147] Referring to the Authors assessment on the constituents of the duty of care (in section 3.2), proximity as a sub-test in identifying *relevant stakeholders.*

As for the exceptions identified by van Dam, the most relevant case in terms of *control over the tortfeasor* is that of *Home Office v Dorset Yacht*[148]. The core question in this case was whether one party can be liable for the conduct of another party, when that conduct results in harm to a third party.

> The case concerned officers of the Home Office and a group of young offenders under the officers' supervision, who escaped in the night, stole a yacht and caused harm to third-party property in the course of their escape.
>
> It was established that the offenders were under the control of the officers, and a core task of the officers was to maintain that control. It was also established that the officers conduct in maintaining that control was negligent. As the stealing of a yacht and resultant damage was a reasonably foreseeable result of the officers' conduct, the court found a duty of care.

As shall be seen in the following sections, it appears that a Code could be the basis of such *proximity*, and basis of the MNCs duty of care over both the conduct of its affiliates and the interests of third-party stakeholders. What is more, the means of control that are often

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[145] Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 Fordham L Rev 1811, Ch III

[146] *Donoghue v Stevenson* [1932] UKHL 100

[147] 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' Lord Atkin in id.

[148] Home Office v Dorset Yacht Co. Ltd [1970] AC 1004

employed to secure affiliate compliance with Code may serve to show relevant control over the tortfeasor's harmful conduct.

4.2 Chandler v Cape

If we disregard such cases where the court has been convinced to pierce the veil, the case of *Chandler v Cape*[149] is perhaps the first European case to impose liability upon the Parent for its subsidiary.[150] Since then, the case has attracted a lot of discussion, and hope for a future Parental liability framework.[151]

The case involved Chandler (plaintiff), an employee who developed asbestosis as a result of prolonged exposure to asbestos at his work in Cape Building Products (subsidiary), and Cape Asbestos plc (the defendant and Parent company of CBP). As CBP was since dissolved, at issue was whether the Parent had *assumed a direct liability* to ensure or advise on safe working condition for its subsidiary's employees.

Since the case at hand concerned a new duty of care, the judgement accordingly invoked the *Caparo* test. At issue was especially if there was a relationship of proximity between the plaintiff and defendant.[152] Finding that proximity could be established if there was an *assumption of liability,* Lady Arden noted that such an assumption does not require that the defendant voluntarily assumed liability, but that the circumstances are rather such that the law should assume liability on the defendant.[153] As an example of such circumstances,

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[149] *Chandler v Cape* [2012] EWCA Civ 525

[150] There were quite a few cases that argued for such a liability based on similar grounds, but they were settled or otherwise did not reach a judgement on the substantive issues. Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States' (2011) 3 City University of Hong Kong Law Review 1

[151] Palombo, 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell', Ch IV et seq; Ennekin, *Foreign Direct Liability and Beyond,* 178–179

[152] The three elements of the Caparo test are foreseeability, proximity and whether the imposition of such a duty would be just and fair. *See* supra ##. In Chandler v Cape, the defendant was demonstrably aware of the risk of harm to group employees and acted on that risk; further, the defendant had not pursued any argument that the imposition of a duty would be unfair; furthermore, lady Ardent found that the question of whether there was such a relationship to warrant a duty of care (i.e. proximity), and whether the imposition of such a duty would be fair and just, both pointed to the same direction.

[153] *Chandler v Cape* [2012] EWCA Civ 525, para 64

Lady Arden referred to *Home office v Dorset Yacht,* where a duty of care was imposed due to the defendant's control over the tortfeasors.[154] Drawing upon the Lady's statement, *control over the tortfeasor* might be adequate proof of such circumstances where *the law should assume the responsibility of the controller*.

Lady Arden developed a test regarding the appropriate circumstances where the law may impose a responsibility on a parent company for the health and safety of its subsidiary's employees:[155]

> 1) the business of the parent and the subsidiary are in a relevant respect the same;
> 2) the parent 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 and the parent company knew, or ought to have known; and
> 4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. [...]

In this regard, among the decisive facts of the case where that the Parent had in place a group-wide H&S policy, and health professionals to record and address any health issues at group level (in excess to any statutory requirement); the parent had an active presence in the subsidiary's business and intervened when it saw fit to do so, while the subsidiary clearly allowed it; and the working conditions at Cape Products where clearly unsafe, of which the Parent was undeniably aware of. For these reasons, the parent was found to owe a duty of care over the H&S safety related harm occasioned to its subsidiary's employees.

4.2.1 The Implications of the Case

Palombo finds that this newly created framework on the 'involuntary assumption of liability' should have wider application. She finds that the framework should work to assume the

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[154] id, para 65; *see,* supra ##

[155] *Chandler v Cape* [2012] EWCA Civ 525, 1313

liability of Parent companies, simply where they knew or ought to know their subsidiary is causing harm to their employees.[156]

In Palombo's analysis, the Parent's overall control of the subsidiary's activities is the core factor in establishing such liability.[157] Ennekin would concur with Palombo's finding. She also argues that the framework should work to impose liability for control and knowledge of relevant issues.[158] However, she also finds that it was the Parent's control over the specific operation or risk of harm which was the crucial fact in the case, rather than *mere* overall control.[159] Ennekin also finds that the underlying issue should probably arise from a serious and structural issue, rather than just poor day-to-day management. This would make sense, too, because day-to-to management is necessarily a core responsibility of any independent company.

Regardless of its extent, the *notion of control* nevertheless appears crucial in establishing a duty of care. As lady Ardent put the fact, an assumption of liability need not be voluntarily assumed. Instead, liability can be assumed by law where the circumstances deem it necessary. A perfect example of such circumstance is the case of *Home office v Dorset Yacht.* Thus, an MNC could be found to owe a duty of care over the conduct of its affiliate(s) if the MNC exercised decisive control over the affiliate, and if it was foreseeable that harm could come to the affiliate's employees if the MNC would fail to maintain and/or exercise that control.

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[156] Palombo, 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell', 466

[157] 'Once we establish that the holding company has such overall control, the parent company has a direct duty of care toward its subsidiary's employees.' ibid; *see also* Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States', 10

[158] Ennekin also finds that Cape's control and knowledge of the H&S policy and issues is likely the key fact in the case, rather than overall control of subsidiary's activities as Palombo suggests. Ennekin, *Foreign Direct Liability and Beyond,* 342

[159] Ibid.

An interesting perspective in this regard is the argument that *Chandler v Cape* could perhaps offer adequate grounds to argue for Value Chain Liability,[160] too (discussed in Chapter 5). What should be noted, however, is that both the Parent and subsidiary in question where UK companies and thus the case did not involve FDL nor the issues that are inherent in such claims.

4.2.2 The Influence of the Case

Whereas *Chandler v Cape* concerned Parental liability strictly within the confines of UK, quite a few FDL proceedings have since either involved or referenced the case, even outside the UK. These cases show the influence that English Common Law carries, especially in the developing world.

One of those cases was *J*abir *v KiK Textilien* in the District court of Dortmund. The case was the first-ever FDL case in German courts, and it also happened to invoke Value Chain Liability on the premise of *Chandler v Cape*.[161] It concerned the German retailer KiK Textilien and a fire at its supplier, Ali Enterprises, in Pakistan. The fire was deadly, and the plaintiffs claimed that the tragedy was worsened by the deficient fire and safety systems in place at Ali.[162] In this regard, the plaintiffs argued that the Buyer had *assumed responsibility* over the health and safety of the suppliers employees, and that the Buyer's failure in ensuring the safe working conditions contributed to the tragedy. Although the case showed promising grounds for Value Chain liability, it was found time barred.

In a preliminary hearing by the Appellate Court of Hague, in *Milieudefensie,*[163] the court found that the Parent company Royal Dutch Shell could owe a duty of care to those harmed

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[160] Rott and Ulfbeck, 'Supply Chain Liability of Multinational Corporations?'; *see also,* Madeleine Conway*, '*A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains', (2015) 40 Queens Law Journal 741

[161] As the underlying harm occurred in Pakistan, a Common law country, the Rome II point to the application of local Common law (and the influence of UK case law) rather than German Civil law.

[162] Sheldon Leader, Jane Wright and Anil Yilmaz, 'Legal Opinion on English Common Law Principles on Tort – Jabir and Others v Textilien und Non-Food Gmbh' (2015)

[163] Court of Appeal of The Hague*, Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others* 200.126.843 (case c) + 200.126.848 (case d)

by its Nigerian subsidiary and granted trial. Seeing that English caselaw is an authoritative source in the Nigerian Common Law system, the Appellate Court found it possible that the Parent had assumed the duty of care in accordance to *Cape v Chandler*. Noting the test therein, the Appellate Court noted that the environmental harm underlying the claim ought to have been foreseeable to the Parent, and that the Parent's knowledge in environmental protection is also of superior quality. The court referred to the Parent's Code and CSR commitments to evidence such knowledge.

What is more, the Appellate court noted that the Parent had made the prevention and mitigation of the underlying environmental harm (oil spills) a *focus* of its Code and public communications. In this regard, the court also found the *Code to establish a standard of monitoring and supervision that was to be expected* from the Parent.[164] Thus, at least from the perspective of this preliminary finding, Codes can imply an assumption of liability and/or a notion of control which the Parent might therefore be expected to observe. Unfortunate for our analysis, the substantive case awaits trial.

What is interesting, however, is that the Appellate courts preliminary stance in *Milieudefensi* is in stark contrast to a preliminary decision in *Okpabi v Royal Ducth Shell,*[165] by the England and Wales Hight Court, concerning the very same defendants. However, what is even more interesting, is that the Appellate court's decision and analysis is *precisely in line* with the findings of the UK Superior Court on the appeal of *Okpabi v Royal Dutch Shell*[166]*,* and recent developments in English Common law.

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[164] Claire Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands', in Bonfanti A, *Business and Human Rights in Europe* (Routledge, 2019), 222

[165] *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC). The High Court applied the Chandler test, and found that the Parent was not operating in the same business as its Nigerian subsidiary; that the subsidiary in fact had the superior and specialist knowledge in the particular operations of the subsidiary; and that the Parent could only have very general or superficial overview of the subsidiary's practice of work. For a commentary on t preliminary hearings, and the different perspectives of the Dutch and English courts, *see generally* Claire Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands'

[166] *Okpabi and others v Royal Dutch Shell Plc and other* [2021] UKSC 3; [2018] EWCA civ 191

4.3 Lungowe v Vedanta: Towards Direct Liability for Control?

In a preliminary hearing, The UK Superior Court ('UKSC') reversed earlier judgments on *Okpabi v Royal Ducth Shell*. The UKSC found it at least possible that Royal Dutch Shell may owe a duty of care to the Nigerian people allegedly harmed by its Nigerian subsidiary.[167]

This decision is in line with the recent developments in English caselaw, and especially the preliminary findings of the Superior Court in *Lungowe v Vedanta.*[168] In said case, The UKSC refined the grounds whereby a Parent may be found liable for its own part or conduct in relation to an alleged harm occasioned by a subsidiary:[169]

> Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations [...] of the subsidiary.
>
> All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.

The UKSC further noted that Codes and CSR policies, for instance, may invite a duty of care. Codes and policies may give rise to a duty of care if the Parent takes an active role in promoting and supervising compliance with said instruments or, alternatively, if the Parent undertakes a degree of monitoring or supervision in its Code but neglects to abide by its commitment. Liability may also ensue if the underlying advice or guidance in a Code or policy is found faulty, or they otherwise contribute to harm.

What is more, The UKSC also clarified the application and limits of *Caparo* and *Chandler* tests for finding Parental liability. The court stated that there was nothing new or special in the issue of Parental liability; there was no course of action or definite test to find a duty of care in the specific circumstances of *Parental liability*. Instead, the UKSC finds that 'it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all'.[170] Thereby, the court referred to the case of *Home Office v Dorset Yacht,*[171] wherein, again, a duty of care for third party

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[167] *Okpabi and others v Royal Dutch Shell Plc and other* [2021] UKSC 3, para 153

[168] *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2017] EWCA Civ 1528

[169] Lord Briggs in *Lungowe v Vedanta Resources* plc [2019] UKSC 20, 49

[170] Ibid, para 54

[171] Ibid

harm was recognized as a matter of law since the plaintiffs exercised decisive control over the tortfeasor.

Palombo finds that the UKSC effectively established the applicable test for future purposes by its reference to *Home Office v Dorset Yacht.*[172] If this were to be the case, control over the tortfeasor or its operation(s) may be enough to invite liability of the controlling Parent - or any entity in control for that matter. Indeed, it appears that it is not *de jure* control that matters, but *de facto* control of the circumstances giving rise, contributing, or leading to the harm.[173] Codes and policies may well serve as the basis of such control and a concurrent duty of care, as was also established in *Milieudefensie*. In line with earlier findings, the UKSC in *Okpabi v Royal Ducth Shell* accepted that the Parent *may* owe a duty of care for the harm caused by its Nigerian subsidiary, since the Parent appeared to have *assumed the management* of the relevant activity giving rise to the harm at trial. The Parent had also promulgated group-wide policies and ensured their implementation in the subsidiary.

While these cases show promise for Parental liability over CSR concerns and third-party harm, none have yet to find a decision on the substantive issues and, therefore, we have no way of knowing whether a duty of care will be recognized in the final judgement.

5 Control liability of Buyers in the Global Value Chain

5.1 Control as the Basis of Value Chain Liability?

There might not be any recognized duty of care on MNCs to prevent affiliated companies from causing harm to third parties. However, it appears evident that the dissemination of a Code and the concurrent observance thereof can invite a court to find the MNC has assumed liability over some of the Code's underlying concerns – especially in regards to concerns of H&S.

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[172] Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals', 274

[173] Nicolas Bueno and Claire Bright 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 International & Comparative Law Quarterly 1

If liability can follow from the dissemination of a Code, observance of or interventions in the operations of another - or simply from a public commitment to that effect – it is only reasonable to ask whether a Buyer could invite Value Chain liability on the same grounds. Indeed, many do find that the Buyers, too, should attract liability for the harmful practices of their affiliates. Just as with Parental liability, the core argument for Buyers' liability is the control that they supposedly wield over their suppliers, subcontractors and the extended GVC.[174]

In this regard, some authorities found that the case of *Chandler v Cape* did not impose Parental liability *per se* but, instead, liability for relevant control. Thus, they argued that the case and test developed therein should have opened the doors for Value Chain liability, too.

5.1.1 The Applicability of Chandler v Cape

Conway finds that Buyers should face liability for any harm caused by their affiliates, at least where the circumstances are similar to *Chandler v Cape*.[175] She argues that the Buyers' control over the GVCs is often equal to the Parent's control of the corporate group.[176]

Somewhat conversely, Rott and Ulfbeck find that the nature of GVCs cannot be generalized in this manner. Instead, they find that the structure and realities of GVCs vary according to industry and Buyer.[177] Otherwise, they appear convinced that Buyers can influence, if not assure, the compliance of their GVCs.[178] In this regard, Rott and Ulfbeck are confident that

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[174] Peter Hertenstein, *Multinationals, Global Value Chains and Governance: The Mechanics of Power in Inter-Firm Relations* (Routledge, 2020)

[175] Conway, 'A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains'

[176] ibid 769–770; 'when addressing a buyer/supplier relationship it may be appropriate for a court to find a duty of care even though not all of the factors identified in Chandler are present, particularly if there is evidence of a high degree of control and involvement by the buyer[…]', ibid 772

[177] Rott and Ulfbeck, 'Supply Chain Liability of Multinational Corporations?', 420

[178] '[a]ll the statements made by traders about their CSR policies related to the production by their suppliers in developing countries would be highly problematic in legal terms if the traders had no way of influencing that production', ibid, 421

the *Chandler* test should be applicable in cases concerning Value Chain liability.[179] This, they find, is due to the fact that the *Chandler* test did not invoke any category of company law but instead focused on the factor of control.

Rott and Ulfbeck find that there is *no doubt* that the typical buyer–supplier relationship will fulfil the first three criteria of the test.[180] In this regard, they surmise that:

> 1) the business of the Buyer and Supplier are usually the same in relative respect;
> 2) the Buyer most often has the superior knowledge in issues of H&S; and
> 3) the Buyer ought to be aware of the unsafe condition in its Value Chain, especially if the prices are low and lead times short.

However, the Author finds that the argument of Rott and Ulfbeck is contrary to their own preliminary point, which noted that GVCs are inherently varied in their nature. If there is no so-called cookie cutter GVC or Buyer-affiliate relationship, there can neither be a definite presumption that Buyers exercise a certain degree of control over all those who participate in their GVCs.

Further, the argument draws a rather *idealistic* picture of the reality of global business. Many Western MNCs provide highly technical products that are necessarily comprised of various processes and components – including services, semi-processed goods and raw materials. Whilst acting as the *Buyer*, these MNCs may wield great power and influence in their GVCs, but to state that their business is *generally* comparable to that of their affiliates is a gross over-simplification.[181]

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[179] Ibid, 424

[180] Ibid

[181] The European automotive giant or elevator and escalator conglomerate, for instance, are not in the business of, *e.g.*, metallurgy, rubber manufacturing or semi-conductors and electronics. Thinking of the more basic processes involved in their respective products, these actors are even less so in the industries of conveyance, chemistry or mining etc.

5.1.2 The Promise of Lungowe v Vedanta

With the preliminary decisions in *Lungowe v Vedanta* (and the other undecided cases above), Value Chain liability appears ever-more tenable.[182] Although none of these cases declare it so, Value Chain liability may now depend on a mere finding that the Buyer exercised *de facto* control over the tortfeasor and/or the relevant operations giving rise to harm. In this regard, Bright et al. find that such control is at least possible in a contractual relationship.[183]

The most relevant case in this regard is certainly *Vedanta v Lungowe* is. In said case, the UKSC declined to identify a specific test for Parental liability. Instead, the court boiled down the relevant issues of Parental liability, and the court found them to concern the already well-established issue of the defendant's *control over the tortfeasor's conduct*. To reiterate, the UKSC stated in this regard that 'it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all'.[184] In saying so, the court was referring the case of *Home Office v Dorset Yacht* as an exemplary case to this end. The Author finds that the implications of this for Value Chain liability are two-fold.

Firstly, there is no cause of action that is specifically restricted to Parental liability. Instead, the wording suggests that any entity (whether in the capacity of a Parent or Buyer) can owe a duty of care to a third-party for the harmful conduct of another entity. This leaves a lot of leeway for the application of Value Chain liability. Secondly, such a duty of care is, at least for now, based on *Home Office v Dorset Yacht.* Thus, the relevant question in establishing Value Chain liability is whether the Buyer exercised relevant control over the tortfeasor and its conduct. If so, the Buyer could be held liable for any negligence in the exercise of that control, where such a lapse in control results in harm to a foreseeable third-party stakeholder.

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[182] Bright et al, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?', 682

[183] Ibid

[184] *Vedanta v Lungove,* ibid supranote, para 54

5.2 Contractual Control

As Lord Briggs stated in *Lungowe v Vedanta,* the necessary question in establishing a duty of care on the Parent is not whether it had control of its subsidiary – the *presence of control* is an assumed fact in the parent-subsidiary relationship – but *how, and to what extent,* the Parent exercised that control in the relevant operations that gave rise to the harm.

However, in contrast to the presumption of control in the parent-subsidiary relationship,[185] control cannot be merely assumed in a buyer-seller relationship. The Parent owns its subsidiaries, and thereby the Parent may intervene in their busines by default.[186] Conversely, the GVC is not built upon ownership but various contractual arrangements and agreements.[187] Whilst contracts can include various measures of control, the presence of control is not an *assumed fact.*

Thus, in terms of Value Chain liability, the first relevant question is whether the necessary notion of control can be established in contract. Only thereafter, we may ask *how and to what extent* contractual control allows for a similar *degree of control* and intervention in the operations of a supposed tortfeasor.

5.2.1 The Means of Control

As said, Parents may wield control in the corporate group by mere virtue of their ownership. Conversely, Buyers must rely on their influence and contractual means to exert the desired means of control[188].

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[185] *See also* Phillip I Blumberg, 'The Corporate Entity in an Era of Multinational Corporations' (1990) 15 Delaware Journal of Corporate Law 283, 330

[186] At the very least, to the degree a holder of company stock may coerce the compliance of the subject company and its management by exercising its rights as a stockholder.

[187] *In fact,* according to the prevailing economic theory on the *nature of the company*, the company is nothing more than a nexus of contracts, either. Everything about the company is supposedly rooted in explicit or implied agreements. *See eg* Victor Brudney, 'Corporate Governance, Agency Costs, and the Rhetoric of Contract' (1985) 85 Columbia L Rev 1403

[188] van Dam, 'Tort Law and Human Rights/ Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights', 246

If we consider the matter of H&S, Buyers commonly exert control over such issues by requiring that their affiliates comply with the Buyer's Code, or terms to that effect.[189] To impose their Code through-out the GVC, the Buyers may then demand that their suppliers and subcontractors enforce the Code upon their own respective suppliers and so forth.[190] What emerges is a new form of transnational business governance that is not built upon ownership, but where the Buyer nevertheless holds a relative degree of control over the relevant affiliates.[191]

This fact challenges the traditional notions of contractual privity.[192] Technically speaking, the caveat of contractual privity should prevent the Buyers from exerting control over any affiliate that is not in privity with the Buyer. Even if all relevant affiliates and affiliate contracts down-along the Buyer's GVC would implement the Buyers Code, the Buyer should have no legal means to enforce terms of contract if the Buyer itself is not a party. In reality, however, contracts are used to create, organize and govern vast co-ordinated networks of various inputs.[193] These contractual arrangements (may) grant the Buyers with relative amounts of control over the contributors that have no contractual ties with the Buyers.[194]

5.2.2 Global Value Chains and the Dissipation of Control

Contractual frameworks allow the Buyers to influence a vast network of contributors. Especially the Buyers situated at the very top end of their respective GVCs (so-called 'Lead

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[189] Vibe Ulfbeck, Ole Hansen and Alexandra Andhov 'Enforcement of CSR clauses by contract', in Ulfbeck V, Andhov A & Mitkidis K (eds), *Responsible Supply Chain Management* (Routledge 2019), 47; this is achieved by the Buyer demanding that its first-tier suppliers disseminate the Buyers Code to their own supplier, and so forth. (discussion further in Chapter 5)

[190] Ibid; *see also* McBarnet, Corporate Social Responsibility Beyond Law

[191] Jenkins 'Corporate Codes of Conduct Self-Regulation in a Global Economy', 7

[192] Jaakko Salminen, 'Sopimusinstituutio ja globaalin tuotannon järjestelmä' (2018) 7–8 Lakimies 1073

[193] Jaakko Salminen, 'Sopimusinstituutio ja globaalin tuotannon järjestelmä', 1074

[194] Hansen, Petersen and Ulfbeck, 'Private Governance and the Potential of Private Law', 341

Buyers'), are found to exercise considerable control over the GVC, and how that GVC is organized and co-ordinated.[195]

However, the contractual frameworks that make-up the GVCs can be both ingenious and highly convoluted[196] Thus, law is having real difficulties in dealing with the GVCs and the contractual frameworks that give them life and order. Just as the law finds it difficult to conceptualize the MNC as a singular economic enterprise – despite the centralized co-ordination that is often undertaken by the Parent – the law equally struggles with the concept of the contractually organized co-operation, orchestrated by a (Lead) Buyer. In this regard, a key issue may be that business partners are generally not accountable for the damage that results from each other's activities.[197] The GVC serves to further dissipate any notion of such liability, and to disconnect the harm from those who have contributed to its occasioning. Since there is no apparent contractual relationship between the Buyer and most of GVC, the law may find it difficult to construe one.

As the issue stands, there is no instrument or consensus on a *global supply chain law.*[198] And it is likely going to be a while before one. Regardless, what matters for our endeavour is that contracts can be used to obtain control. That control can involve matters of H&S – or any other issue of CSR for that matter. This notion of control is neither limited to the privity of contract, but Buyers may employ various contractual arrangements and frameworks to exert their will upon more distant affiliates within the GVC.

5.3 Control in Global Value Chains – How and to What Extent

What the above discussion shows is that there can be a relationship of control between the Buyer and its affiliates. What the discussion did not address is the degree and intensity of that control.

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[195] Peter Hertenstein, *Multinationals, Global Value Chains and Governance: The Mechanics of Power in Inter-Firm Relations*

[196] *See* Reinke and Zumbansen, 'Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability', Ch 2 sect d)

[197] Bright et al, 672

[198] Reinke and Zumbansen,, 'Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability', 4

By analogy of Lord Briggs in *Vedanta v Lungowe,* if a control relationship can be assumed in the buyer-supplier relationship, the necessary question then becomes whether, and to what extent, the buyers may *intervene in, control, supervise* or direct the relevant operations of their affiliates.[199] Essentially, the question becomes whether contracts allow for Buyers to exercise effective control over the conduct of their affiliates.

The fact that Buyers can co-ordinate their GVCs and impose their Code beyond the privity of contract does not imply that Buyers wield any actual control over the operations of their affiliates. This may be a matter of contract and the rights and obligations therein, but it is much more likely to be a very case-specific issue. Thus, the Author believes that a positive finding on the applicability of the *Lungowe v Vedanta* in cases of Value Chain Liability will have to wait for court analysis of a relevant case.

5.3.1 The Degree of Control in and via Contract

The Author, however, is somewhat critical of the premise that contracts could afford Buyer's with equal or similar degree of control over the operations of their affiliates as the Parents might wield over their subsidiaries and in the corporate group. Indeed, the famous research of Locke finds that Private governance – i.e. control via contractual frameworks – has largely failed in its attempts at securing the compliance of foreign affiliates with western Codes and CSR commitments.[200]

This finding of Locke, and his research in general, is interpreted by many to disprove the efficacy of CSR. This interpretation is the MNCs claims that they are making a difference with their private efforts at securing social values. In this regard, Locke makes some interesting conclusion on the circumstances where private regulation could prove more effaceable. Firstly, he finds that integration and co-operation (so-called relational contracting) where both derive increasing value from the relationship appears to be more

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[199] *Lungowe v Vedanta Resources* plc

[200] Locke R M, The Promise and limits of Private Power: Promoting Laboor Standards in the Global Economy (Cambridge University Press, 2013)

conducive actual control.[201] Secondly, he concludes that private efforts can never truly succeed on their own to establish any meaningful change in issues of CSR (Locke's focus is on H&S), at least without the aid and support of public law efforts and local governments.[202]

The Author find that the significance of these findings might have gone amiss on some of the CSR critics. Firstly, his research shows that more collaborative frameworks provide better and more successful ground for control. This could well mean that the corporate structure allows for (better) effective control of the participating constituents. Secondly, it implies that contracts are an inherently in-effective tool of control – at least when they involve the imposition of value-laden ideals over long-established societal rules, cultural habits and deep-rooted social issues.

Therefore, it remains to be seen whether a court will find that a Buyer exercised relevant control over an affiliate tortfeasor. However, corporate structures allow for a degree of control by default, upon which the Parent can build further controls and policies, as well as co-operation for a common goal and identity. A Buyer would have to instil and maintain each control mechanism and institutions by way of contracts or influence. Further, thus far contracts have proven rather dismal in the control of CSR violations in GVC. On paper, however, both Parent and Buyer can coerce and enforce Code's and similar commitments upon their Affiliates.

5.3.2 Philosophy of Control

Bayne applies a philosophical perspective to find the constituent's corporate control.[203] In doing so, he seeks to find *what* control is in the corporate context and where that control might be located. Essentially, he seeks to establish the division of *control in the company* in between the stockholders and managers of the company. In line with his endeavour, he

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[201] Ibid, 154

[202] Ibid, 156 et seq

[203] David C Bayne, 'Philosophy of Corporate Control ' (1963) 112 University of Pennsylvania Law Review 22

states that the philosophical notion of control is built upon three basic elements: 1) the Notion of Relation, 2) the Notion of Custody and 3) the Principle of Finality.[204]

The Notion of Relation relies on the basic metaphysical assumption that *a relationship* of any kind always comes with some form of responsibility.[205] The nature of the relationship defines the rigor and extent of that responsibility. Further, a relationship – and the concurrent responsibilities – can be assumed by either explicit or implicit consent, or the relationship can arise naturally during one's life.[206]

The Author finds that the Notion of Relation resonates well with the Common law duty of care. For instance, the MNC has a sort-of relationship with any imaginable stakeholder. However, the core question is if the *nature* of that relationship warrants a responsibility of *due care* from the MNC. Further, such a relationship which warrants due care from the MNC could be either assumed or follow from natural circumstances. As we have seen, an assumption of such a responsibility could follow as a matter of law where the MNC exercises relevant control over the Tortfeasor, or perhaps where the MNC effectively assumes such a responsibility by recognizing the interest(s) of said stakeholder(s) in a Code or similar CSR commitment. What this means, is that an MNC can assume a position of *control and concurrent responsibility* over both the conduct of its affiliates *as well as* harm incurred by third party stakeholders, if the relationship between the parties warrants such assumption.

The second element of control - *The Notion of Custody* – assumes that custody begets accountability.[207] Whenever something is entrusted into someone's custody, the custodian

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[204] Bayne argues for philosophical perspective in determining the *control of a corporation*, in terms of the company's shareholders (as the owners), the management and board (the custodians). However, he himself argues that the underlying philosophy applies to anything where control needs to be identified. ibid, 25

[205] 'The principle that relationship begets responsibility is clarified upon reflection on the various types of human relations. The broadest categories of human relations are natural relations and assumed relations. Some of the natural relations are founded on the social nature of man himself, as is the relation of father to son. Man also freely assumes many relationships. These relationships may be either formally contractual, […] or inferentially contractual, when the responsibility arises out of justified reliance by one on another' ibid, 26

[206] Ibid.

[207] Ibid, 26–27

obtains direction over that *something* (the 'subject'). Since the subject is then dependent on the custodian's direction, the custodian stands accountable *for the proper use* of that direction.[208] However, the custodian can only be held accountable to *the extent* that it has the *right to exercise direction* over the subject: '[e]ssential to culpability for nonperformance is the ability to perform. The custodian must therefore possess whatever rights are necessary to fulfil his duties.'[209]

This Notion of Custody can be loosely connected to case of *Home Office v Dorset Yacht,* which again appears to be the current test for finding liability of [The MNC] over harm incurred to [Third-party stakeholder] as a result of [affiliate] conduct. The officers of the Home office had custody over the young delinquents, and thus they were also liable to keep them in check and form causing harm to foreseeable third parties. In a similar, vein an MNC (either in the capacity of Buyer or Parent] can obtain a notion of custody over such operations that are either directly concerned with or are often associated with H&S. For instance, the MNC might undertake a role in advisory, monitoring or actual intervention in its affiliates H&S measures and thereby derive a notion of custody over their affiliates H&S concerns. However, according to the philosophical notion, the liability that follows from that custody must necessarily be limited to the capacity and rights of the custodian. In this regard, we might note a difference between Buyers and Parents.

Let us take the example of a foreign entity employing severely lacking H&S measures, and two Western MNCs, one which is the entity's Parent and one of which is the entity's Buyer. The entity itself is the property of the Parent, trusted in the custody of its management and board of directors. If the Parent cannot successfully impose a H&S policy and measures upon its subsidiaries by sheer influence, it can start to exercise the rights vested in its stockholding.[210] Often the Parent has either its own or appointed directors on the board,

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[208] 'The custodian must guard and keep that property as he would his own. Custody involves more than physical possession; it is a stewardship. Since there is dependence, one who undertakes stewardship of goods bears a corresponding responsibility properly to care and account for them.' ibid, 27

[209] Ibid

[210] For a contrary finding on *control* vested in stockholding, *see* Victor Brudney, 'Corporate Governance, Agency Costs, and the Rhetoric of Contract' (1985) 85 Columbia Law Review 1403, 1411-1420; however, Brudney's findings are not contrary in the truest sense. He effectively describes the apparent lack of control

through which it may pressure the management or change it, if management refuses to comply with the Parents demands. Further, the Parent may use its stockholding to upend the board if they, too, refuse to comply. As a final and ultimate measure, where the Parent finds the endeavour to be a lost cause, it may seek sell the entity or even apply for voluntary dissolution. Conversely, the Buyer can only take degree of custody in an affilaite's business and it lacks the legal rights to impose its will upon the affiliate. The Buyer's ultimate weapon – changing its suppliers – will not change the course of events one way or another unless the affiliate caves in under the fear of losing its customers.

The third and last constitutional element of control, *the principle of finality,*[211] argues that the very *nature of control is defined by its purpose*:[212]

> Control is the complexus of duties and rights possessed by the custodian of an other's goods. Close scrutiny of the purposes and objectives of control will reveal the true nature of control. Control must have the means to achieve its end, the rights to fulfill its duties, a nature conformable to its activities. The purpose, objective, end, goal of any control determines the nature or kind of that control.

Thus, the purpose for which an instance of control is created also determines the duties in the exercise of that control. Since a duty can only exist in connection to a corresponding right, that goal – *the final purpose* – of control must be the realization of some right. Which means to say that '*[i]f there is no right, there can be no duty.*'[213] Thus, the duties that are vested in the MNC's supposed control, in regards to its supply chain and relative externalities, are determined by the rights that give effect to that control.

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in traditional stockownership, and ascribes it to the information disparity that exists between the company's management and the less involved, experienced and organized stockholders. His findings can be read in the light of affirming corporate control, where the stockholding Parent is much of a different situation in relation to its subsidiaries.

[211] As an interesting note, the principle of finality – the idea that an artifact is defined by its purpose – has fallen out fashion within the science of philosophy, since *purpose* is supposedly beyond the objectively observable universe; it relias on an inherently subjective perspective. However, law and ethics – the basic foundations of *responsibility and accountability* – are human artifacts, born from humanity itself to serve societal purposes, which human institutions readily re-interpret to better fit societal demands. The subjective experience must thus be an acceptable tool in arguing for control, ethics, law etc. For insight on the premise and use-case of finality, as well as an interesting argument for the 're-discovery of finality' for the purposes of understanding technology, *see* Gonzalo Génova and Ignacio Quintanilla Navarro, 'Discovering the Principle of Finality in Computational Machines' (2018) 23 Foundations of Science 779

[212] Bayne, 'Philosophy of Corporate Control', 29 [emphasis added]

[213] Ibid, 28

In this regard, it could be argued that the control vested in Codes and other contractual means are established for the benefit of third-party interests and rights, since they so clearly purport to pursue/uphold/observe such social values. Therefore, the MNC would be liable to exercise that control in the interest of securing those third-party rights and interest. However, the matter of the fact is that these control mechanisms have been established in order to secure the rights of the MNC. The purpose of those mechanisms is to assure the MNCs right to assure that its affiliate is not engaging in unsavoury practices, harming its direct stakeholders, inviting scandal and/or besmirching the MNCs brand in the process. In such a framework the, the control establishes no duty on the MNC to secure or intervene any third-party right or interest. Unless, that is, the promise or assumption of control and concurrent responsibilities have been clearly-enough established and/or maintained in the benefit of such third parties – as seemed to be the case in *Chandler v Cape.*

What the Author derives form this is that control – established for the sake of CSR and exercised through various measures, such as monitoring or audit regimes – do not necessarily imply any control or liability over harm incurred by third parties. They are only established and maintained for the MNCs benefit. However, this assumption can be reversed if the MNC has assumed a relationship to certain third parties, which is of such nature or *proximity* that it warrants the MNC to exercise its control in the benefit of such third parties. Further, the MNC might also assume a commitment to uphold control in the interest of such third parties. As established in the aforementioned case law, such an assumption can follow from an involuntary assumption, too. However, it appears that the cases of *Rahaman v JC Penney* and *Doe v Walmart* are in line with the philosophical notion of control and concurrent responsibilities, in finding that Codes and associated control mechanism are established in the benefit of the MNC implementing them – and not third parties who have an interest in invoking that Code and control to their benefit.

Further, we may note from the above that Buyers cannot seem to obtain similar control and liability under the Notion of Custody as Parent companies can, partly because the framework of custody is reversed in the corporate structure; while the Parent can obtain custody over a particular operation of the subsidiary, same as the Buyer can, the subsidiary *in its entirety* is actually held in custody for the Parent.

6 CSR and its Role in Control and Liability

Currently, the true legal nature of CSR and its implications in law remain in limbo. Whether liability could (or should) follow from the adoption of a CSR commitment is a topic of long-standing debate and uncertainty.

6.1 The legal nature of CSR

In its essence, CSR is supposed to be an initiative by willing corporations to regulate their own business conduct to an extent that is not required under any applicable laws.[214] Beginning the 2000s, the European Commission ('EC') had also adopted this view,[215] solidifying the preconception that CSR was a form of private, *voluntary* regulation. If we accept that CSR is truly voluntary, and that the practice endeavours to regulate business conduct beyond any applicable law, it could be easy to assume and conclude that CSR in itself is beyond law and legal implication.

Earlier perspectives on CSR claimed that the practice should, instead, be against the law. Generally, these arguments revolved around the company's foundational purpose, which most modern company laws recognize as the pursuit of stockholder value.[216] The claim is most famously represented by Friedman,[217] and it argues that the pursuit of anything other than stockholder value – understood as maximum profit – goes against the purpose of the

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[214] These initiatives can also include a commitment to regulate conduct beyond the Adopting company, such as the conduct of their corporate group and global value chain, as they often do in some degree.

[215] European Commission, 'Green Paper Promoting a European framework for Corporate Social Responsibility' COM (2001) 366 final; Later EC recognized the majority sentiment that the practice of CSR went beyond what law requires and emphasized its voluntary nature, *See* EC, 'Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution To Sustainable Development' COM (2002) 347 final

[216] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' [2001] 89 Georgetown Law Journal 439, 468; including, e.g., the Finnish Company Act 'The purpose of a company is to generate profits for the shareholders, unless otherwise provided in the Articles of Association.' Limited Liability Companies Act (624/2006), Pt 1 Ch 1 Sect 5 – Purpose

[217] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times* (13 September 1970) Sect SM 17

company.[218] The more current trends in both law and business, however, appear to firmly refute such a strict interpretation of company purpose and/or company laws.

Stout argues that the premise that companies must pursue profit maximation is objectively false.[219] Conversely, Strine Jr holds that profit maximization is still the primary and driving purpose of companies,[220] although he does not necessarily celebrate this fact. On a more neutral stance, Millon agrees that the current practice in business and law clearly prefers profit maximization, but a more long-term business perspective might require companies to consider CSR for various reasons.[221] Chaffee instead offers up an entirely alternative theory for the *essential nature* of the corporation (aka 'collaboration theory'), which instead argues that companies are not only allowed but obliged to opt for CSR where it may be profitable or cost neutral for the company to do so.[222]

Indeed, just a decade after the ECs statement, McBarnet contested that the practice of CSR was no longer voluntary and that it never truly was.[223] She found legal pressure on multiple

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[218] Also debated under such descriptive definitions as 'shareholder primacy' or the 'obligation of profit maximization'; *see* eg supra note 220

[219] Lynn A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (1st edn , Berrett-Koehler Publishers 2012) Pt 1 Ch 2

[220] Leo O Strine Jr, 'Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit' (2012) 47 Wake Forest Law Review 135; It should be noted that Strine still takes a very critical view of profit maximization, although he recognizes its primary role in corporate life. He frames dissenting views as rather naïve: '[i]nstead of recognizing that for-profit corporations will seek profit for their stockholders using all legal means available, we imbue these corporations with a personality and assume they are moral beings (…)', ibid 136

[221] David K Millon, 'Two Models of Corporate Social Responsibility' (2011) Wake Forest Law Review 523, 528-530; Strine Jr does not disagree with this perspective per se, but he clearly does not have faith in the shareholders being convinced to forgo the pursuit of short-term profit. *See eg* Strine Jr, 'Our Continuing Struggle…', 167–170

[222] Eric C Chaffee, 'The Origins of Corporate Social Responsibility' (2017) 85 University of Cincinnati Law Review 353, 371–378. The 'collaboration theory' is interesting and even persuasive to an extent. However, the theory is also rather naïve. The theory provides that governments and companies are in mutual co-operation, where the aim of that co-operation is economic well-being. As there is a sort of contract between governments and companies, they owe each other the duty of good faith. Finally, it is assumed that governments necessarily pursue the good of the society, *and thus* companies must *in good faith* take those aims into consideration when they conduct their business if there is no detriment to the company. The consideration of the *good of society* then obliges the assumption and practice of CSR.

[223] Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' (2009) No 3 University of Edinburgh School of Law Working Paper 1

levels of society pushing for companies to adopt CSR.[224] Pitts equally questioned the voluntary nature of CSR, deriving his opinion from essentially the same grounds as McBarnet.[225] Instead of finding the practice to be voluntary, Pitts argued that CSR appeared to be much more like the new *lex mercatoria*.[226] Both authors represent CSR as a form of emergent law.[227]

The issue with idealizing pure profit maximization is two-fold: 1) it assumes that short-term profit is necessarily in the best interest of the stockholders, and 2) the consideration of any interest group beyond the stockholder must be against the latter's interest.[228] Although the pursuit of profit still undeniably survives as the core purpose of modern corporations,[229] the emphasis in debate and courts is more on the discretionary powers of the company management to decide how the company should pursue that value[230]. In this regard, the pursuit of CSR and third-party interest can be a valid means of attaining more consistent or even better profit.

In this regard, the 'sustainability model' of Millon is perhaps the most representative of the current sentiment in law and business:[231]

> The sustainability model of CSR avoids the standard objections to the constituency model based on shareholder primacy. Long-run sustainability requires economic success over time. Strategic investments beneficial to nonshareholders are thus

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[224] Ibid, 46–47; For discussion on the various forms of legal pressure, eg indirect regulation that sought to promote CSR, and the use of private law by interested parties as a tool and weapon to encourage and coerce the adoption of responsibility, *see* ibid 30–44

[225] Pitts III Joe W (Chip), Corporate Social Responsibility: Current Status and Future Evolution (2009) 6 Rutgers Journal of Law and Public Policy 334, 357–359

[226] Ibid

[227] *See also* Hansen, Petersen and Ulfbeck, 'Private Governance and the Potential of Private Law'

[228] *See generally* Millon, 'Two Models of Corporate Social Responsibility'

[229] *See generally* Strine Jr., 'Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit'

[230] It is very rare that a court would challenge the management of the company in how they pursue shareholder value. *See eg* McBarnet, 'Corporate Social Responsibility Beyond Law'

[231] Millon, 'Two Models of Corporate Social Responsibility', 530 and 539. For a contrary view on the acceptability of CSR, *see* Friedman M, 'The Social Responsibility of Business Is to Increase Its Profits' 173, in Ch Zimmerli W C, Holzinger M, Richter K, *Corporate Ethics and Corporate Governance* (Berlin, Heidelberg: Springer-Verlag 2007). Friedman still thinks that CSR is nonsensical, almost fraudulent but a definite threat to free society. ibid 177–178

> designed ultimately to enhance profits. The long-run perspective facilitates appreciation of the relevance of future returns on current investments and their potential to promote shareholder value.

In addition to many companies opting for CSR, we are witnessing several laws, regulations and emergent legal frameworks that solidify CSR within the domain of law.[232] These developments include common law nations, European and US states, as well as the EU. More recently, India and China have shown interest towards CSR legislation, too.

What this all means to say is that there is a definite push for the adoption of CSR commitment and practices. That is pressure originates from society, peers and even legal instruments. Further, if we accept Pitts' perspective, CSR was is not only pushed by various external stakeholders and public initiatives, but also by market expectations. Thus, the practice appears far from truly voluntary. Now, we also witness legislative changes and case law that appears recognise an assumption of liability based on such CSR instruments.

6.2 Recent developments

From the experience of Common law, discussed in Chapters 4, we may witness that the assumption of CSR can have a legal effect on the Adopting Company. The same goes for present and future endeavours in due diligence laws, as will be discussed below in 6.4.

The case of *Chandler v Cape* shows that voluntary initiatives can invite liability. This particular paradigm of liability, however, is rather specific and restricted.

> In line with *Chandler v Cape*, a voluntary H&S commitment might invite liability of the Adopting Parent if it is aware of a systemic H&S issue at its subsidiary (or affiliate), has proven its willingness and capacity to intervene in the operations of its subsidiary, and the issue nevertheless remains unaddressed and thereby occasions harm to an employee.

The later cases – *Milieudefensi*, *Okpabi v Royal Dutch Shell* and *Vedanta v Lungowe* – show that these voluntary commitments can also invite liability beyond the issues of H&S.

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[232] Due diligence laws necessarily concern CSR commitment to some extent. (discussed further in 6.4); *see also* Gatti L et al, 'Are We Moving Beyond Voluntary CSR? Exploring Theoretical and Managerial Implications of Mandatory CSR Resulting from the New Indian Companies Act' (2019) 160 Journal of Business Ethics 961

All three of these relevant cases concern environmental harm, with effects on local third-party stakeholders.

What is more, *Vedanta v Lungowe* also affirmed that a Parent's active role in the downstream implementation of its Code, or a (public) commitment towards a specific undertaking (e.g. monitoring), might induce liability if the Parent's conduct in the observance of its own commitment is found negligent. Thus, it appears that a shift in the legal implications of CSR is perhaps on the horizon. If a Code provides for third-party rights, an Adopting MNC might invite a duty of care for those third-party interest if it is found to exercise relevant control over its affiliate operations, or to have promised the observance of such control.

6.3 The Implications of *Corporate Social Liability*

If we were to assume that Codes and similar CSR commitments could carry liability in general – a sort of *Corporate Social Laibility* – what could such liability even entail?

The Author finds this question to be an unresolved issue in most authoritative works on the legal implications of CSR. Within just the Adopting company itself, CSR can be given very different interpretations by different actors and departments.[233] If the practice of CSR might someday carry liability, there should be very little uncertainty of what the practice actually means (or entails). Unfortunately, the concept of CSR remains abstract and escapes uniform definition in law (and academia more generally)[234] – but one is *sorely* needed.

Sheehy argues that a more scientific definition of CSR is necessary, including for the reason of fulfilling any related legal duties.[235] Of course, attempts at an uniform definition have

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[233] For instance, the marketing, sales and compliance departments likely all have a very different perspective on CSR and its relevance. *See generally* Marcel van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003) 44 Journal of Business Ethics 105

[234] Benedict Sheehy, 'Defining CSR: Problems and Solutions' (2015) 131 Journal of Business Ethics 625

[235] Ibid 628–629

been made.[236] However, any attempt at identifying the constituents, meaning or implications of CSR is inevitable going to face some serious difficulties.[237] The problem is that CSR is a value-laden concept, [238] simply for the fact that it provokes the interests of so many stakeholders.[239] Each of these stakeholders has a vested interest in establishing a uniform and legally meaningful definition for CSR. However, having regard to the ambit of this Thesis, the Author cannot undertake to develop a neutral and workable definition. We must thus settle for a mere attempt at identifying some of CSR's basic constituents, in order to make some comment on the plausible implications of the practice for MNC liability in the future – *assuming, of course,* that liability could even arise from CSR commitments.

To understand the basic constituents of CSR, the Triple Bottom Line[240] concept developed by Elkington might be of use. The Triple Bottom Line ('TBL') famously proclaimed that companies have three values that they are beholden to – those being People, Planet and Profit.[241] The three P's represent the responsibility of businesses to consider the effect that their operations might have on the surrounding society, environment and economy.[242] In line with TBL and/or its foundational sentiment, Codes and similar CSR communications often involve fairly definite commitments that address e.g. slavery (people), pollution (planet) and corruption (profit) within the company's own operations and the operations of its affiliate companies.

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[236] van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion'; Alexander Dahlsrud, 'How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions' (2008) 15 Corporate Social Responsibility and Environmental Management 1

[237] In terms of scholarly interest, Sheehy takes issue with the various concepts and limited perspectives that different academic persuasions apply to CSR. Sheehy implies that CSR can never be effectively debated or understood if the incoherence and biased perspectives persists. For a discussion on limitations inherent in various academic scholarships; Sheehy, Defining CSR, 629-633

[238] Ibid

[239] Such stakeholders include companies, NGOs, local societies and governments etc.

[240] John Elkington, *Cannibals with Forks: the Triple Bottom Line of 21st Century Business* (Oxford: Capstone 1997).

[241] Due to these three values (*People, Planet and Profit*), TBL is also known by the acronym '3P's'.

[242] The concept was meant to induce change in the business practices. "the TBL wasn't designed to be just an accounting tool. It was supposed to provoke deeper thinking about capitalism and its future(…).". John Elkington, '25 Years Ago I Coined the Phrase "Triple Bottom Line." Here's Why It's Time to Rethink It' (*Harvard Business Review* 28 June 2018);

In this regard, issues such as these are definite enough, measurable and workable grounds for liability. It is perceivable how (and why) a MNC might be held liable for a commitment to rid its business from forced labour. Especially, where it has become clear that the MNC has not exercised the means that are reasonable available to it to secure that commitment to any meaningful end. However, companies are increasingly choosing to address more complex and vague issues in a CSR context.[243] These commitments can reflect key concerns within a particular business segment.[244] Thus, such commitments can address more novel issues, such as animal welfare, diversity or even obesity. The range of *possible* commitments is likely limited only by the limits of human ingenuity and imagination.

If liability were to ever follow from Code commitments, these more ambiguous and *progressive* values might prove much more problematic to an Adopting company.

> Whilst a company might well undertake a commitment to pursue diversity and sustainability (e.g.) in its global operations, how can a company effectively exercise control over such vague issues to any meaningful degree?

Of course, the argument can be made that the legal risk of such uncertainty rightfully belongs upon the company that voluntarily undertakes to pursue such an unattainable commitment. However, in this regard, Buhman notes that it is not necessarily the companies themselves that are coming up with these commitments – in fact, it seems quite rarely to be the case.[245]

Rather, companies seem to follow unidentified external sources, such as social pressure, public debates and buyer sentiment.[246] This effectively means that some external stakeholders are imposing commitments upon the MNC, which might thereafter attain an unpredictable and undefendable legal implication. If we consider the notion that CSR in itself does not appear to be a matter of voluntary choice any longer, the true implications

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[243] McBarnet, Corporate Social Responsibility Beyond Law, 1

[244] For instance, in the clothing industry there is growing demand for ethical products that also concider animals in the making of the product. *See* Rossella Esther Cerchia and Katherine Piccolo, 'The Ethical Consumer and Codes of Ethics in the Fashion Industry' (2019) 8 Laws 23

[245] Karin Buhmann, 'Corporate social responsibility: what role for law? Some aspects of law and CSR' (2006) 6 Corporate Governance 188, 189; what is perhaps even more interesting is that she was not able to identify any particular instance or source to these norms.

[246] Ibid

of CSR for MNC liability paint a very interesting but unpredictable scenario. Regardless of ones view on this issue, if any form of liability is ever to follow from the practice of CSR, it should be imperative to define what CSR means.

Most of all, there should be very little uncertainty in what kind of commitments are actionable and could induce liability. The current uncertainty in meaning and implications of CSR should apply all the same to companies and external stakeholders, including legislators and courts. The ambiguity in the practice and terminology should not be allowed to remain for long.

6.4 Legal effects of CSR

The Author finds that CSR, as the practice currently stands, already has some pseudo-legal effect. This effect will only widen with the imposition of further due diligence laws.

A key example is the Vigilance law, discussed in Section 4.1, wherein the applicable due diligence obligations impose a three-fold uncertainty in the practice of *legally required* due diligence. The Vigilance law dictates that companies subject to the law must seek to 1) *effectively implement* their plan that includes 2) *reasonable means* to address 3) *severe* violations of protected interest. As these definitions leave much room for legal uncertainty, any company subject to the law is likely unable to draw a clear distinction between what is – and what is not – required due diligence within the ambit of the Vigilance obligation. By definition, any private undertaking in due diligence that happens to go *beyond* those ambiguous standards – i.e. beyond what is specifically *required* by the law – is an endeavour in voluntary private regulation, *aka CSR*.

If a company chooses to address a human or labour rights issue that is (later) found to be less than severe, the company's endeavour to address that issue has been entirely voluntary. However, since the above three definitions afford the companies with very little insight on the limitations of these obligations, the companies might choose to err on the side of caution and implement compliance regimes that have wider application than is specifically required by the underlying regulation. This, however, carries a risk to the company. A company's presumption of a due diligence obligation – regardless if there is one by law - might imply the *assumption of a due diligence liability*. The court is not a professional in

the subject company's business and might therefor assume that the company's own recognition of the issue is proof enough of its severity.

> If an MNC finds active monitoring to be an erroneous duty, or excessive overtime as a pertinent but less than severe risk to labour rights, the MNC might face liability if its preventive measures are later found wanting, or the risk is later identified as severe by a court of law. Conversely, if the MNC errs on the side of caution and adopts a more aggressive plan than necessary, the MNC might be held to that standard.
>
> Further, if the MNC then adopts a Code that implements additional private regulation that seeks to secure its compliance or further align its operations with the vigilance plan, those commitments in the Code might well attain a dimension of legal validity or bindingness.

Indeed, case law on the UK Bribery Act shows that companies may *practically* be obliged to adopt so-called *voluntary* policies to address the relevant risks within the ambit of a due diligence obligation.[247] In this regard, whilst the adoption of a bribery-policy (or any other CSR policy) might not be specifically required under the due diligence obligation, the omission of internal policies may show that the defendant's conduct in the observance of its due diligence obligation has been less than prudent. Thus, MNCs may be effectively expected to implement sympathetic CSR practices to prove their compliance with the applicable due diligence obligation.

Even if that were not the case, and the up-and-coming due diligence regimes would not suffer from the same ambiguity as their French comparative, any due diligence obligation will inevitably have to resort to some generalizations since social issues are always vague. An obligation to *prevent environmental harm* will necessarily leave a lot of uncertainty as to what constitutes relevant environmental harm. This will leave the companies guessing what specifically is required under such obligations, and what might still be considered voluntary. To this end, the MNCs may be inclined to adopt supplementary policies and commitments to secure its compliance. There is a degree of uncertainty in whether those commitments may be found equally binding on the MNC.

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[247] Pietropaoli et al, 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms', 51

Whether this is a positive or negative fact is a matter for another discussion. However, considering the aforementioned discussion on the ambiguous nature of CSR in general, and the various commitments that may be undertaken under its premise, the implications of this pseudo-legal nature can be unpredictable. The Author predicts that CSR undertakings will attract a degree of liability on the Adopting company in the coming years, but also some increased confusion in what is to be regarded as a *voluntary* undertaking and what is not.

7 Conclusion

Contemporary issues of MNC liability are still vast and almost insurmountable at times. The problems in over-coming procedural issues, such as establishing jurisdiction and applicable law, have thus far effectively thwarted all FDL cases in Europe. We still await the first-ever trial of the substantive issues inherent in FDL claims.

If such procedural matters could be bested, most imaginable FDL concerns would still fail due to the limitations in establishing the Indirect liability of the MNC. The doctrines of separate entity and privity of contract make sure that an affiliate's conduct does not invite any meaningful liability of the MNC – unless somehow interconnected with the MNCs own conduct. True, separate entity of companies can be set aside if a court is convinced to pierce the veil. however, this practice is limited to such circumstances were the subsidiary in question has almost no will of its own, at least over the relevant operation or conduct giving rise to harm. Similarly, the privity of contract is not absolute if the contract provides for actionable rights upon third parties. Nevertheless, Codes and CSR commitments have proven to be a less than desirable route to purse compensation and MNC liability. Instead, a FDL claim in the tort of negligence seems to be the more tenable option, and recent case law appears to support this presumption.

An alternative avenue for pursuing the liability of the MNC, herein for the harmful conduct of its affiliates, may be found under the premise of Direct liability. Although the term embraces all possible liability that could arise from the MNCs own conduct, the most pertinent avenues of Direct liability are found in the tort law and negligence law, as well as due diligence obligations. In this regard, it is interesting to note that MNC liability will likely become more common place if due diligence laws take root in Europe, or if the EU adopts

relevant regulation before this. Whether this liability will be meaningful, or whether it will serve to compensate those that have been harmed by affiliate conduct, remains to be seen. Nevertheless, torts and due diligence are interesting and feasible avenues for MNC liability.

Regarding European Tort laws, the standard for finding negligence in any conduct appears to be rather uniform. That standard is *bonus pater familias* which suggests that imprudent conduct is evidence of fault, which in turn is the basic constituent of negligence in tort. Of course, the system in practice is not that simple. Prudent conduct, in any given circumstances, is necessarily contingent upon the relevant circumstances. An MNCs conduct must be considered in light of prevalent circumstances that were reasonably known to the MNC. In this regard, the consideration of risk – its likelihood, gravity and sphere of influence – is the most decisive. Common law systems – such as English law – requires that the defendant owed a duty of care over the harmful conduct or event, in order for there to be a finding of negligent conduct. The duty of care is a rather opaque concept that is meant to establish and limit the interests and risks that a person should account for when orienting its conduct. Essentially, an exercise that seeks to find a duty of care also seeks to find the relevant and foreseeable risks that underlie any particular course of conduct, and therefrom derive a finding of whether the risk of harm was sufficient to warrant due care from the defendant so as to avoid from occasioning such harm.

Although Civil law systems do not recognize such a requirement, they nevertheless implement similar qualifications in finding negligent behaviour. Thus, it is both a necessary and worthwhile endeavour to identify the circumstances in which an MNC might owe a duty of care over the harmful conduct of its affiliate. What is more, both the notions of negligence and duty of care are intertwined with the current understanding of what a due diligence obligation is, and what a due diligence obligations entails. Thus, the analysis of MNC liability herein, which is mostly focused on establishing MNCs a duty of care over the conduct of their affiliates, should still inform a discussion on and analysis of due diligence obligations to some extent.

However, what appears to separate the current and up-and-coming due diligence obligations from the duty of care and negligence is their relationship to control. Due diligence obligations encourage the use of control and, as such, rely on the presence

thereof. These obligations require MNCs to conduct thorough investigation and risk analysis, as well as to undertake the *effective* implementation of reasonable measures aimed at the prevention and mitigation of relevant harm. If the MNC does not employ the control measures at its disposal, the MNC might face repercussions for a failure observe its due diligence obligation. Conversely, the exercise of control might *invite* liability in the tort of negligence.

In this regard, the presence and exercise of control is clearly the key for establish a duty of care relevant for the purposes of this Thesis. Indeed, the pursuit of a relevant duty of care will likely face some grave challenges in Common law courts. This is because English Common law is not that inclined to find liability for omission. It also does not recognize a general duty to rescue nor a duty to intervene in the conduct of others. Thus, the default presumption is strongly against the MNC incurring any liability for a failure (omission) to prevent someone else (intervention) from occasioning harm to a third-party (rescue). However, the case law shows that such a duty may be found where the MNC exercised effective control of the tortfeasor and/or its conduct.

In *Chandler v Cape,* it was effectively established that a Parent could owe a duty of care over the employees of its subsidiary if it had assumed liability to that effect. Further, the case also established that an assumption need not be voluntary, but liability could be assumed as a matter of law if the circumstances would warrant such an assumption. In this regard, Lady Ardent identified *Home Office v Dorset Yacht* to be a perfect example of such circumstances. Applying these two findings in conjunction, it appears that law might assume the liability of the Parent where the Parent exercised effective control over its subsidiary, and it was foreseeable that harm could come to the subsidiary's employees if the Parent subsequently failed to exercise and/or uphold that control. Lady Ardent also established a test in the case for identifying such circumstances in which liability could be assumed as a matter of law. Addressing the case, a few authorities noted that *Chandler v Cape* should serve as grounds for Parental liability where parent knew of issues in its subsidiaries and exercised some control over operations giving rise to harm.

Later cases have since followed to refence the *Chandler v Cape* in FDL claims and courts beyond the UK, too. The more recent developments and/or derivatives on the case show

much more promise for Parental liability in the foreign context, and even Value Chain liability. The Flagship case of these is no doubt *Lungowe v Vedanta*. This case is set to change the course of MNC liability if a duty of care an negligence is recognized on the Parent in the case. However, just in its preliminary stages, the UKSC gave a fairly decisive statement on the issue of establishing Parent liability and the necessary duty of care. The court refused to recognize any test that would specifically apply in establishing a duty of care upon the Parent over the harmful conduct of its subsidiaries. Instead, the UKSC found that the relevant issue did not concern the Parent-subsidiary relationship but a well-established question of whether in what circumstances *Person A* might owe a duty of care over the harm suffered by *Person C*, when said harm is occasioned by *Person B.* In this regard, the UKSC refer to *Home Office v Dorset Yacht,* which some argue to establish the relevant test for finding such a duty of care.

The Author fin that these statement in the preliminary finding of *Lungowe v Vedanta* imply two major things. Firstly, that the relevant issue is not whether a Parent owes a duty of care over the conduct of its subsidiary. The relevant question is if any one person or entity (whether in the capacity of Parent or Buyer) owes a duty of care over the harmful conduct of its affiliate. Thus, the case appears to clearly and intentionally leave the door open for Value chain liability. Secondly, such a duty of care can be established in accordance with *Home Office v Dorset Yacht* – at least for the time being. Thus, the relevant question in establishing a duty of care in the relevant circumstances is whether the MNC exercised effective control over the affiliate tortfeasor. What is more, the case also recognized the role of Codes and CSR commitments in informing the control that is to be expected from a MNC, and the liability that might ensue if the MNC were to fail in living up to its commitments.

Therefore, if Codes and commitments can inform the liability of an MNC, representing either an assumption of liability or expected rigour of control, and the presence of *de facto* control is the basis of such liability, the Author assumes that this paradigm of liability in negligence is directly applicable to Value Chain liability. In this regard, Lord Briggs stated that it is not the presence of control that matters -since control is an assumed fact in the Parent-subsidiary relationship, but how the plaintiff employed that control. The Lord stated that it was pertinent whether the plaintiff employed that control to, e.g., intervene or take

over the particular operations that gave rise to harm. In this regard, contracts and contractual arrangements definitely can establish a similar notion of control than is present between the Parent and its subsidiaries. However, it remains to be seen if a court will find that the control vested in such contracts is adequate to allow for the Buyer to *de facto* intervene, take over and factually influence the operations of its subsidiaries.

On paper, the answer seem apparent since contractual freedom and ingenuity certainly allows for any imaginable means of governance. However, the research of Locke shows that contracts have a dismal history in assuring and enforcing affiliate compliance with social ideas such as CSR commitments. True, it may well suggest that the attempts at enforcing CSR thus far have not been genuine or undermined by some other fact. However, Locke also finds that co-operation and mutual benefit in the pursuit of a joint goal *is* an effective way to institute a true notion of control. Thus, it would appear that mere contractual coercion an exercise of control are inadequate means in the pursuit of real social change or affiliate compliance with CSR values. Although this finding would hurt the CSR agenda, it would also hurt the accepted notion that contracts offer effective control over such value-laden issues as environmental practices, equality of sexes and social classes or corruption etc. Conversely, it appears evident form the same finding that the corporate groups, based both on legal ownership and a sense of common identity, under one governor and ruke should allow the Parents with much more (default) control over the corporate group and their conduct.

Regardless if one accepts the Authors argument on *contractual control v corporate structures*, both undeniably allow for the dissemination and observance of Codes and similar CSR commitments. Seeing that the latest preliminary decisions all recognise a role on such commitments in establishing a duty of care *and* liability of the Adopting entity, these Codes may offer grounds for any number of liabilities – effectively providing grounds for a *Corporate Social Liability.* Indeed, it is at least imaginable that commitments addressing other issues than environmental or H&S concerns might invite liability of the Adopting company. Therefore, a pertinent question is what such Corporate Social Liability could entail for the Adopting company. In this regard, the Author finds CSR to be an unfortunately underdeveloped and misunderstood subject and issue within law. This

effectively renders any definite findings, as opposite of general assumption, on the liability that a Code or CSR might invite on the Adopting company.

What is more the Author also notes that the practice of CSR already has some pseudo-legal effect on the MNCs. Under any imaginable due diligence obligation, such as the Vigilance law, it is difficult – if not impossible – to make a clear distinction between *what is* and *what is not* required under such obligations. Thus, the MNCs are likely to err on the side of caution and seek to address such issues they are not specifically obliged to consider. Further, MNC are likely to bolster and/or assure internal compliance with voluntary polices and Codes. These voluntary commitments – i.e. any measure or endeavour not specifically required by the underlying obligation – are nevertheless likely to be involved in the assessment of a MNCs due diligence obligation, thereby blurring the line between what the MNC must do and what it has committed to do.