



University of Essex



Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains

A Legal Guide

Essex Business and Human Rights Project¹
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Introduction

It is difficult to think about a business that is not a part of a supply chain, regardless of its size, geographical location, and specialization. All businesses engage in various transactions on a daily, weekly, or monthly basis with other actors within their value chain. The nature, duration, and type of relationships in supply chains vary. Some actors in the chain hold a heightened level of influence over the actors they do business with, while others do not. Similarly, some actors possess special knowledge or skills that might induce reliance by other supply chain actors, while other actors do not. The focus of this guide is on the supply chain relationships with special features that move the relationship beyond an 'arm's length' transaction. These special features can be trigger factors for legal liability of a contractual partner for labour and human rights abuses taking place in its supply chain.

Looking beyond the 'arm's length transaction' between certain contractual parties in a special relationship, the purpose of this guidance is to identify paths to accountability for human rights abuses in global supply chains. In this guide, we aim to provide advocates with an informative and interpretive tool supporting them to push the boundaries of civil liability, for human rights abuses in global supply chains, grounded in existing legal principles. The underlying rationale behind this exercise is an attempt to overcome the disconnect between the law and the economic and social realities prevailing in global production networks.

TYPICAL ABUSES IN THE SUPPLY CHAIN

- Slavery
- Forced labour
- Debt bondage
- Labour brokerage
- Child labour
- Discrimination (e.g. women, minorities and migrant workers)
- Freedom of association
- Harassment
- Informal work (persons excluded from labour law protections)
- Habitual use of precarious short-term contracts
- Low wages
- Unsafe work and use of dangerous substances
- Forced overtime and excessive working hours
- Unpaid wages and social contributions
- Right to privacy and right to family life
- Inhuman and degrading treatment
- Right to life
- Right to liberty and security
- Freedom of movement
- Right to an adequate standard of living
- Complicity in crimes against humanity and war crimes

Global supply chains are highly complex, and the structure of supply chains might differ from one industry to the other and change over time. The structure might also differ depending on the business model adopted by a particular entity, and the buying/selling arrangements might even differ within the same enterprise with regard to different products. The volume of business between purchasers and suppliers can vary significantly. In addition, the same supply chain actor might be a supplier and a purchaser at the same time with varying degrees of market power in each position. It is not possible to offer a one size fits all approach to the question of human rights liability in supply chains. This guide sketches out the paths that might enhance accountability, but it does not aim to provide definitive answers for every possible supply chain scenario. Mindful of the diversity of relationships in supply chains, we attempted to keep this guidance as general and as flexible as possible, so that it can be adapted to the diverse supply chain relationships. This guide is not sector-specific. We tried to identify the general principles and interpretations that could potentially be tailored to any sector. When applying this guide, users should bear in mind that factual matrix of each case might be different, leading to varying outcomes for liability. The guide focuses on some of the most common scenarios found in supply chains.



The key challenges to holding companies liable for abuses taking place in their supply chain arise from the contractual nature of relationships (assuming a contract is in place, which may not be so) and indirect/tenuous links between suppliers/purchasers and their business partners beyond the first tier relationships. It is particularly difficult to determine when a supply chain actor owes a duty of care to the victims in its supply chain; to establish a causal link between the harm and the actions or omissions of the company, especially for abuses taking place beyond the first tier of their supply chain; and to strike the appropriate balance between achieving heightened accountability and avoiding this being a factor that dissuades companies from engaging with their supply chain and using their leverage to improve standards. The risk is that new routes to accountability could push supply chain actors to develop business models which distance themselves from the human rights harms that occur in their supply chain. In order to avoid businesses pushing responsibility further down the supply chain tiers, courts and policy-makers should make sure that the right legal requirements and economic incentives are in place to allocate responsibility among the relevant actors. There is also a growing public pressure on companies to respect human rights throughout their operations, and these pressures make it more difficult for them to distance themselves from the problem using creative tactics. When the challenges identified are combined with the diversity of relationships, the best approach to liability would be to consider different degrees of responsibility for different supply chain relationships.

TYPICAL TRIGGER FACTORS FOR LIABILITY AND CHALLENGES FOR SUCCESSFUL STRATEGIC LITIGATION

POTENTIAL TRIGGER FACTORS FOR LIABILITY

- Control
- Market power
- Leverage
- Reliance
- Saliency/Materiality
- Same line of business
- Superior/Special knowledge
- Vulnerability of the victims
- Severity of the abuses
- Volume of business

CHALLENGES

- Complexity of contractual and non-contractual relationships
- Indirect links between the supply chain actors beyond first tier
- Shifting responsibility in the supply chain downwards (e.g. through subcontracting)
- Information asymmetry between claimants and defendants
- Difficulties in access to remedies in host and forum countries
 - Accessibility of legal aid for victims
 - Collection of evidence
 - Admission and standard of evidence in courtroom

The scope of this guidance is limited to four groups in supply chain relationships: (1) powerful or influential purchasers and suppliers, or those that possess or should possess certain types of specialized knowledge or skills (including major brands falling under the category of what the supply chain management literature calls 'lead firms', as well as SMEs); (2) social auditors, as actors possessing special knowledge and instilling reliance on their expertise by businesses and third parties (consumers, workers, communities); (3) contractual partners of the firms identified in (1); and (4) third parties (e.g. labour force and communities) whose human rights have been adversely affected by the acts and omissions of the actors identified in (1), (2), and (3).

This guide focuses on substantive law and it does not discuss issues of jurisdiction and enforcement. Section I focuses on the way in which tort law developed by UK courts can be utilized in the context of supply chain relationships to give effect to human rights protections. It also aims to identify the concrete difference that can be made by taking a human rights centred approach in allocating liability. English tort law places importance on severity of the injuries suffered by victims, i.e. it is more willing to compensate for physical injuries as opposed to pure economic loss. Bringing a human rights dimension into the interpretation of tort law principles could assist claimants in demonstrating the severity of the abuses and injuries suffered. In section II, we assess the potential benefits of contractual undertakings in improving accountability. Finally, in section III we assess the potential benefits of due diligence and disclosure requirements.

PRELIMINARY CONSIDERATIONS FOR STRATEGIC LITIGATORS BEFORE BRINGING A CIVIL LAWSUIT

PRELIMINARY FACTUAL AND LEGAL INFORMATION HELPFUL FOR STRATEGIC LITIGATION

1. Number of tiers in the supply chain
2. Nature of relationships between purchaser and supplier(s)/suppliers and third parties/social auditors and supplier (contractual and non-contractual)
3. Duration of relationships
4. Size of the corporations involved - purchaser and supplier(s), of particular importance is economic capacity
5. Nature of business activity and type of industry
6. Violation in question: labour rights and/or human rights and whether the claim can be formulated in civil liability terms

PROCEDURAL QUESTIONS

7. Who are the claimants, and do they have legal standing: individual victim (e.g. worker in a supplier factory or consumer) or groups of individuals (e.g. indigenous communities)?
8. Who are the defendants, and do they have legal standing: purchasing corporation or supplier?
9. What are the standards for admissibility of evidence?
10. Who bears the burden of proof? Can the burden of proof be shifted towards the defendant?
11. What is the applicable law to (a) the procedure and (b) the substance of the claim? Is it the law of the forum state or of the state where the harm occurred?
12. Are class actions or group claims admissible in the jurisdiction selected for the lawsuit?
13. Is legal aid available to cover the costs of litigation?

Tort

In this section, we consider the application of the English tort law principles in the supply chain context. The core question we are asking is what **the elements of a special relationship are between supply chain actors that would allow holding one actor liable for human rights and labour abuses taking place elsewhere in its supply chain**. While human rights law and labour law are distinct areas, injuries or losses caused as a result of their breach can both give rise to tort claims. For instance, a violation of right to life, prohibition of inhuman treatment, prohibition of slavery or respect for right to health can give rise to tort claims for death, physical injury or psychiatric damage. A violation of the right to just and favourable conditions of work could give rise to tort claims for property or personal damage. In this section, we will focus on grounds for tortious liability for human rights abuses in the supply chain giving rise to the tort of negligence and involving, inter alia, breach of non-delegable duties of care, and vicarious liability.

Tort of Negligence

AT A GLANCE: WHAT TO LOOK FOR WHEN ESTABLISHING NEGLIGENCE LIABILITY IN SUPPLY CHAINS

- **AN ACT OR OMISSION THAT HAS CAUSED THE HARM**
- **Three conditions for liability:**
 1. Defendant owes a duty of care to the claimant through assumption (action-oriented approach) or imposition (framework-oriented approach) of responsibility.

When does the relationship between the parties give rise to an imposition or assumption of responsibility necessary for a duty of care? Three-stage analysis:

 - a) Harm must be reasonably foreseeable
 - b) Proximity of relationship between the claimant and the defendant
 - c) It must be fair, just, and reasonable that the law imposes a duty of a given scope on one party for the benefit of the other
 2. Breach of that duty
 3. Causation: Harm suffered by the defendant is a consequence of the breach of duty

In order to establish a supply chain actor's liability in negligence, three conditions must be satisfied: (1) the defendant (e.g. a purchaser) owed a duty of care to the claimant (e.g. a worker in a supplier factory); (2) breach of that duty; (3) harm suffered by the defendant as a consequence of that breach.

Duty of Care

The most challenging aspect of applying tort of negligence to supply chain relationships is to demonstrate that a supply chain actor owed a duty of care to prevent/mitigate harm to the victims of human rights abuses in its supply chain.

"[A] duty of care is a duty owed in law by one person or class of persons to another particular person or class of persons. The duty comprises an obligation to take reasonable care to ensure that the person or persons to whom the duty is owed do not suffer a particular type or types of damage."⁵

To assess this, one must determine what the legitimate scope of the duty of care is. **Essentially, the question asked here is whether a supply chain actor is within the circle of people that owe a duty to take care to avoid damage to certain potential victims**

To date, there has not been, in the UK, a judicial determination of the ground and reach of this duty in the

supply chain context. For novel contexts in which a finding of negligence is possible, English courts apply a three-stage analysis articulated in *Caparo v Dickman* to determine whether a duty exists: ⁶ (a) the harm must be reasonably foreseeable; (b) there has to be proximity of relationship between the claimant and the defendant; (c) it has to be fair, just, and reasonable that the law imposes a duty of a given scope on one party for the benefit of the other. When assessing the existence of a novel duty of care, it is also important to bear in mind that while “the categories of negligence are never closed”, ⁷ English courts have consistently reaffirmed an ‘incremental approach’ to extending duties of care to novel situations by analogy. ⁸

In the tort of negligence, the law draws a distinction between acts and omissions. A leading authority has explained this distinction in the following words: “Liability for positive acts of carelessness is well recognised, but liability for failure to act is treated differently, with ‘duties for affirmative action’ being imposed only in exceptional circumstances.” ⁹ Most supply chain cases concerning human rights harm are likely to be falling under the ‘omission’ category. This is because, in most cases, it is not the positive acts of the defendant that will cause the harm, but its failure to do its share to prevent the abuses taking place within its supply chain. In other words, these are duties to act to protect party A (victim) from acts of party B (contractual partner) – fixing liability in relation to another person’s harmful conduct.

Before moving to establish that a supply chain actor failed to do its share to prevent the abuses in question, we must determine whether it had a legal duty to do something to prevent these abuses in the first place. In order to investigate the existence of such a duty to act, we must assess whether a duty arises from a relationship between the parties which gives rise to an “imposition or assumption of responsibility”. The facts of a case are of utmost importance in determining whether a new situation can be brought within existing principles such that a duty of care will be held to exist. In assessing whether such an imposition or assumption of responsibility is called for, courts often distinguish between cases of physical injury, psychiatric injury (particularly for secondary victims), and pure economic loss. They are less willing to find a duty where the injury in question is psychiatric harm or pure economic loss.

To determine whether the relationship between a supply chain actor and the victims of abuse in its supply chain gives rise to an “imposition or assumption of responsibility”,¹⁰ we will investigate the *Caparo* requirements laid out above. There might be, in any given situation, two ways of fixing a duty of care on a supply chain actor: taking an action-oriented approach, responsibility for damage done arises from an act that falls below a standard of reasonable care, with foreseeable damage - as could happen when a driver negligently causes an accident, hurting a pedestrian. A framework-oriented approach widens the enquiry. It examines the relationship between various bodies that might share in the responsibility for damage done. If the driver in our example is an employee there might be good reasons for deciding that the employer shares in liability, not because the latter helped cause the accident but because there are good reasons of policy for adding the employer as responsible party. The latter might have greater resources available to compensate the victim, or might have a level of competence which it would be desirable to see relied on in order to prevent such accidents. These two approaches are distinct, but are at certain points able to complement one another. The action-oriented approach can, for example, fix responsibility on a party who has taken a dangerous course of action, while the framework-oriented approach can ask which other parties should have taken action to prevent the danger from arising.

In supply chain relationships we see both kinds of potential responsibility at work. It will be important to keep them separate in order then to see their interaction in any given case.

Assumption of responsibility - Action oriented approach

The action-oriented approach, comprises situations in which a supply chain actor has assumed responsibility through its actions vis-à-vis its contractual partner and the partner's workers, thus creating a special relationship between itself and its supply chain partners. Where assumption of responsibility is not explicit, in order to assess whether the defendant is nevertheless deemed to have taken on or assumed such a responsibility towards the victims, we will turn to the *Caparo* test. This test sets as ingredients of duty of care a reasonable foresight of the injury, proximity of relationship between the defendant and the claimant, and the fairness/reasonableness of imposing a duty. No precise definitions of these concepts were established in *Caparo*. They are viewed as "convenient labels" to be assessed in light of the circumstances of each case. ¹¹

Foreseeability in supply chain relationships

AT A GLANCE: HARM MUST BE REASONABLY FORESEEABLE

WAS THE INJURY SUFFERED BY THE CLAIMANT WITHIN THE REASONABLE CONTEMPLATION OF THE DEFENDANT?

Possible trigger factors

- **Knowledge or presumed knowledge of risks of harm in a given situation. Such knowledge can be grounded on subjective and objective factors**
 - Subjective factor: nature of relationship
 - purchaser gives specific instructions to supplier (labour and human rights conditionality)
 - compliance monitoring and audits
 - human rights due diligence
 - Objective factor: level of risk for human rights abuses
 - country context: prevalence of labour and human rights abuses
 - industry-specific risks
 - the extent to which abuses are publicly known

Determining the foreseeability of the harm by the defendant requires probing whether the injury suffered by the claimant was within the reasonable contemplation of the defendant. In assessing the reasonable foreseeability of the harm, the focus would be on the knowledge that a person in the position of the defendant would be expected to possess in relation to the injuries suffered by the claimant as a result of the defendant's act or failure to act. ¹² This was explained in *Attorney General of the BVI v Hartwell* as:

"One of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of reasonable care, harm of the relevant description might be suffered by the plaintiff or members of a class including the plaintiff?"¹³

What then would make human rights harm reasonably foreseeable in the supply chain context? Here, the analysis will focus on the knowledge that a person in the position of a particular supply chain actor has or should have had in relation to the damaging consequences of its acts or omissions suffered in its supply chain. This can potentially capture a wide group of victims, and thus the courts have limited this requirement by the proximity and fairness elements described below.

For the sake of convenience, we will focus here on the relationship a purchaser has with its suppliers, including its suppliers beyond the first-tier. A purchaser's knowledge (or presumed knowledge) of the harmful consequences of its acts or omissions can be assessed by first looking at the **features of the relationship it has with its suppliers (subjective factor)**. Not every purchaser will be in a position to reasonably foresee the human rights harm resulting from its acts or omissions. The mere act of purchasing from a supplier is not likely to satisfy this prong of the Caparo test. If a purchaser, however, gives **specific instructions** to its suppliers in relation to the **standards concerning the manner in which the goods are to be produced** (such as labour and human rights conditionality), and monitors supplier compliance with these standards, arguably this is indicative of the foreseeability of the injuries, resulting from the supplier's failure to comply with these standards. This type of **standard-setting and monitoring** is more likely to be present in first-tier relationships. There can be a strong presumption of foreseeability where the defendant has carried out **human rights due diligence** for its supply chain relationships.

A second contributor to the foreseeability assessment in the supply chain context is **the level of risk for labour and human rights abuses prevalent in the country where the supplier is located or the level of risk inherent in the product or industry in question, e.g. conflict minerals. This is an objective factor**. If a purchaser is aware of or should have been aware of such risks, this is indicative of foreseeability of the harm. For instance, sub-standard working conditions in garment factories in Bangladesh are well-publicised. If a brand subcontracts production of its branded goods to a garment factory in Bangladesh, the foreseeability of the harm is heightened. In these cases, foreseeability can also be present for suppliers beyond the first tier. Brands often trace each stage of the production process in their supply chain to ensure quality of products. Even though the measurability of product quality and standards may be stronger than is the measurability of labour and human rights conditions, the ability to trace the former indicates at least an ability to acquire knowledge concerning labour and human rights conditions in a supply chain.

Proximity in supply chain relationships

AT A GLANCE: PROXIMITY BETWEEN DEFENDANT AND CLAIMANT

- **Indicates physical closeness or**
- **Closeness of the relationship**
 - The defendant has conducted itself in such a way that the claimant is entitled to rely upon the defendant in relation to a given subject-matter > cf. Assumption of Responsibility
 - Person that suffers the harm (e.g. employee of a supplier) has a close interest in a contract between other parties (e.g. between a supplier and a purchaser) and is affected by the non-compliance of one of those parties
- **Parameters that can help to establish proximity in the supply chain context:**
 - Mentoring and standard-setting through Code of Conduct
 - Monitoring compliance and imposition of sanctions for failure to comply
 - Volume of transactions and the duration of relationship between purchaser and supplier
 - Outsourcing of the manufacture of a self-branded product

Proximity encapsulates the closeness between the defendant and the claimant. It is not restricted to physical closeness, but also extends to certain close and direct relations where the wrongdoer knows or should have reasonably known that the careless act or omission complained of directly affects the victim.¹⁴ The proximity requirement limits the scope of the foreseeability requirement.¹⁵ Foreseeability alone is not sufficient to find a duty of care.

Some indicators of proximity include physical, circumstantial or causal proximity.¹⁶ The requirement for proximity of relationship will also be fulfilled where it can be shown that the defendant has assumed responsibility to the claimant. This was described by Deane J. in *Sutherland Shire Council v Heyman* as “an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken where the other party ought to have known of such reliance.” In cases, which conclude that a voluntary assumption of responsibility has been recognized, the finding has been that the defendant has so conducted him/herself that the claimant is entitled to rely upon the defendant to act appropriately in relation to the subject matter of the duty created. According to Van Dam, “in many of these situations the ‘relier’ is a person who has a close interest in a contract between other parties and is affected by the non-compliance of one of those parties.”¹⁷ Where a purchaser sets labour and human rights conditionality in contracts or purchase orders, the beneficiaries of these conditions would clearly have a close interest in fulfilment of those contractual terms.

A significant challenge to establishing proximity between a purchaser and victims of human rights harm in its supply chain is overcoming the argument that a defendant, e.g. the purchaser, cannot be held liable for failing to prevent another party, e.g. supplier, from inflicting damage on a third party, e.g. supplier’s employees. Prima facie, the purchaser is, at best, merely in a contractual relationship with the supplier, and as such has no duty to compel the latter to avoid inflicting harm on third parties, since in principle there can be no liability for an omission.¹⁸ However, **if the relationship between the purchaser and the supplier goes beyond an ‘arm’s length’ transaction, depending on the level of closeness of the relationship, there can arguably be sufficient proximity between the harmed third parties and the purchaser.**

A number of factors can be taken into account when assessing proximity. It might be possible to take some or all of these factors together in such an assessment. For instance, a purchaser’s **mentoring suppliers through standard-setting in supplier contracts and monitoring compliance,**¹⁹ **especially when non-compliance is attached to sanctions,**²⁰ could indicate closeness. The standard setting might be via **incorporating a Code of Conduct stipulating the labour and human rights standards expected from the supplier in the commercial contract,** or by **direct contractual reference to relevant international standards. The volume of purchases and the long-term nature of a relationship with a supplier** could also contribute to the assessment of proximity.²¹ Another indicator of closeness could be the outsourcing of the manufacture of branded products to suppliers. In these cases, the purchaser sells the products manufactured by the supplier under its own brand.

It is important to bear in mind that in assessing both foreseeability and proximity, the correct approach is to focus on **knowledge and closeness vis-à-vis the particular risks and harms in question.** A purchaser might not be involved or have any influence over how the supplier runs its business in a general manner, but if it is involved in and has influence over, for instance, working conditions or health and safety in the supplier’s factory, this might indicate foreseeability and proximity to the victims for harms suffered due to inadequate safety.

Is it fair, just and reasonable to assign a duty of care on supply chain partners?

AT A GLANCE: ELEMENTS FOR ASSESSING FAIRNESS

- Allocation of responsibility between purchaser and supplier – who should bear the primary responsibility? Is it possible to hold both parties responsible jointly and severally?
- Damage recovery: can an adequate compensation be obtained from the primary wrongdoer?
- Leverage of certain supply chain actors in the market can contribute to preventing future abuses
- Disparity between public image promoted by company and actual human rights performance (brand salience)
- Materiality of the business relationship – outsourcing manufacture of branded goods
- Severity of violation: Violation giving rise to human rights harm
- Heightened risk due to high volume of orders with unreasonably short deadlines at unreasonably low prices

Fairness/reasonableness can be viewed as another qualifier to acknowledging a duty in a novel situation. Its role is to “limit the duty of care in exceptional circumstances where the criterion of proximity is satisfied, but where there is, nevertheless, an overriding public or general interest in denying a particular type of claim.”²² While in many cases fairness can be seen as a consequence of proximity of relationship,²³ the role of this distinct element appears to act more as a gatekeeper against expanding the duties too far.

In the supply chain context, even if we can establish foreseeability of the harm and proximity, courts might oppose fixing a duty on a supply chain actor for abuses taking place under the fairness assessment. Is it fair to hold a purchaser of goods liable for workplace abuses suffered by the workers of its supplier? Should we not simply hold the supplier liable for the abuses resulting directly from its acts and omissions? The liability of a supplier arising from its own acts is not ruled out by also holding the purchaser liable. In some circumstances, there can be shared responsibility between the supplier and the purchaser. This is especially important where damages cannot be recovered from the supplier itself, because the latter is bankrupt, or ceased to exist, or remedies at the local level are unavailable or ineffective for other reasons.

There are a number of factors that can contribute to the fairness analysis in the supply chain context. For instance, if a purchaser is branding and marketing as its own the goods manufactured elsewhere under hazardous working conditions, it might be considered fair to hold the purchaser liable for abuses that were committed in the name of producing that brand. It is also important to bear in mind the fact that, while knowing intimately all aspects of the business from production to sales, many big brands might not be manufacturing any of their branded products themselves. They might have outsourced manufacturing entirely to countries in which standards are lower than they would be in the countries where brands are domiciled.²⁴ A duty on certain influential purchasers might promote better labour and human rights performance in supply chains.

Another consideration in assessing fairness is the public image painted by the company to its investors and consumers. It is important for business reputation and consumer confidence that the business in question does not profit from exploitation and abuses. If a business acquires goodwill from its consumers after making public commitments that claim compliance with international minimum standards of labour and human rights throughout their supply chain,²⁵ but then fail to fulfil those commitments, arguably it would be fair to hold it accountable for its failings causing harm to workers and communities within their supply chain. In addition, courts should take into consideration the creation or heightening of risk of injury when the purchaser sets strict and unreasonable deadlines, at unreasonably low prices.²⁶

Another consideration often taken into account in the fairness assessment is whether extending liability to novel situations would cause ‘floodgates’ of litigation and indeterminate liability. Courts consider this argument particularly when resisting claims for pure economic loss and psychiatric harm, as they consider these types of claim to have a potential for “ripple” effects.²⁷ While many labour and human rights abuses in the supply chain might result in physical injury or property damage, some might merely result in pure economic loss (like unpaid wages, forced over-time, debt-bondage) or psychiatric harm (family members of deceased victims). In cases of these injuries, courts might confine the duty to a clearly limited and defined class of claimants.²⁸ Arguably, at least the workers of first tier suppliers with which the purchaser has a direct contractual relationship could be treated as a clearly limited and defined class of claimants.²⁹ An assumption of responsibility will more readily be recognised where the injury suffered is physical and where there is no threat that the burden of liability may be disproportionate to the conduct involved. Provided there is sufficient proximity and foreseeability of harm, a duty to prevent/mitigate harm beyond the first-tier of suppliers might be considered fair to impose on purchasers for abuses resulting in physical injury. Furthermore, even the pure economic losses and psychiatric injuries resulting from human rights abuses should arguably be treated as ‘serious harm’ by courts when assessing the fairness of attaching liability due to the severity of these abuses.

Adapting the principles in *Chandler v Cape Industries* to the supply chain context

AT A GLANCE: CHANDLER V CAPE CASE AS A PRECEDENT-SETTER

The principles established in this decision could arguably ground a duty of care within a supply chain if it can be shown that the:

- businesses of the purchaser and the supplier are in **relevant aspects** the same
- purchaser had or ought to have had **superior knowledge of some relevant aspect** in a particular industry
- supplier’s **system of work was unsafe** as the purchaser knew or ought to have known
- purchaser/ knew or ought to have foreseen that the supplier and/or the supplier’s employees would rely on purchaser’s using its superior knowledge for the employees’ protection

A crucial precedent in assessing proximity between an entity and the employees of another entity, and fairness/reasonableness of finding a duty of care is the decision in *Chandler v Cape Industries Plc.*³⁰ In that case, a parent company was held to have a duty of care to an employee of its subsidiary, and a duty to intervene in order to fulfil that duty, where the employee had been made ill by asbestos dust on the subsidiary’s premises. The judge assessed proximity, as well as fairness/reasonableness by reference to the role of the parent company in directing policy on health and safety issues, and thus assuming responsibility to prevent and mitigate harm from asbestos exposure to its subsidiaries’ employees. While the judge acknowledged that the subsidiaries themselves had a part to play in maintaining safety, particularly via implementing the policies of the parent, the parent company retained overall responsibility for this part of health and safety policy, establishing a sufficient degree of proximity.³¹

The Court applied the following criteria in finding a duty of care: (1) the businesses of the parent and subsidiary were in a relevant respect the same; (2) the parent had, or ought to have had, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work was unsafe as 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. The Court of Appeal found that while the parent company had no de jure power to intervene in its subsidiary’s business, simply because it was the parent company, in that particular case, it could still be held liable for failure to intervene to correct its subsidiary’s unsafe practice. This was possible due to the de facto involvement of the parent in the health and safety policy of its subsidiary. In this respect, the court has observed that “... at any stage it (the parent company) could have intervened and Cape Products (the subsidiary) would have bowed to its intervention. On that basis ... the Claimant has established a sufficient degree of proximity between the Defendant and himself.”³²

How can this guidance provided in *Chandler* be applied in supply chain relationships? The facts of *Chandler* seem at first glance to be distinguishable from those in a purchaser/supplier relationship due to the fact that the purchaser does not have the powers that a parent company has over its subsidiary. Nevertheless, despite the supply chain relationship being simply one of sale and purchase, the *Chandler* guidance is still relevant here. Its operative principles reach beyond the context of a parent company's relationship with its subsidiary.

The first step in the *Chandler* guidance is assessing whether the purchaser's business is in relevant aspects the same as the supplier's. Both in *Chandler* and in its aftermath, English courts have withheld liability from parent companies that are not operating companies but that "merely hold the shares in its subsidiaries as if [they] were an investment holding company."³³ Certain purchasers of goods in the supply chains of concern here will not play the passive roles of an investment holding company. It is more likely that they will be actively carrying out business as retailers, manufacturers etc. The crucial question is whether the business of a purchaser can be viewed, in relevant aspects, the 'same' as the supplier's business. The *Chandler* judgment qualified 'sameness' of business with 'in relevant aspects'. This can mean that the business of a purchaser and a supplier need not be the same in all aspects. For instance, a purchaser and retailer of garments and a supplier of garments might be considered in the same line of business in that both entities trade in garments. It would be more difficult to establish sameness of business in 'relevant aspects' where a supplier is producing a component used in a final product, e.g. a producer of a mineral used in an electronic product by a purchaser might have little in common.

It is important to read the first component of the *Chandler* guidance with the rest of the elements laid out in that decision: purchaser having superior knowledge of the risk of certain types of injury in a particular industry; actual or presumed knowledge of the purchaser that the conditions of work in the supplier's premises carried these risks; and the purchaser's actual or presumed awareness that the supplier or the harmed individuals would partially rely on the purchaser acting on that knowledge in order to avoid harm. If a purchasing company has in place, for example, policies on workplace health and safety that it expects or requires its suppliers to follow, this could be evidence that the purchasing company has superior knowledge on these issues as compared with that of its suppliers. The drafter of the contract could then be seen as a quasi-regulator, which either defectively formulated the rules or failed to follow them through, and thus helped to create a risk.³⁴ In some cases, superior knowledge might also be attributed to the purchaser if it audited the standards in the supplier's premises by itself or via social auditing firms. In each case, the courts might evaluate whether the purchaser was in a line of business that overlapped with that of its supplier sufficiently to make it fair that its knowledge and experience should be brought to bear on the improvements sought.³⁵

As explained above when considering foreseeability as a constituent of the duty to take care, actual or presumed knowledge that there are abuses further down in the supply chain can be inferred by reference to the purchaser's level of engagement with its supplier and by looking at the severity and prevalence of the risks involved. A purchaser with a wide experience in a particular sector might be in a position to evaluate good practice using advanced methods, regardless of whether its suppliers have expertise on such issues. Where a purchaser has such superior knowledge of e.g. labour and human rights standards, requires its suppliers to comply with its standards, and monitors compliance, this might create an environment where the supplier and the harmed third parties rely on the purchaser's pressure to avoid harm. The latter could then be held liable for failing to bring that pressure to bear, thereby contributing to the harm done. A conscious reliance by the victims on the defendant is not considered necessary by courts.³⁶ It is enough that, "... where A advises B as to action to be taken which will directly and foreseeably affect the safety or well-being of C, a situation of sufficient proximity exists to found a duty of care on the part of A towards C. Whether in fact such a duty arises will depend upon the facts of the individual case..."³⁷

Imposition of Responsibility - Framework oriented approach

AT A GLANCE: FRAMEWORK-ORIENTED APPROACH

- **Imposition of liability requires actors possessing certain institutional qualities to take steps to identify, prevent, mitigate and remediate abuses in the supply chain.**

Possible trigger factors for liability in framework-oriented approach:

- outsourcing elements of the core business of the company
- special knowledge of the actor on labour and human rights issues in supply chain, including industry-specific and country-specific knowledge
- influence and leverage

Fixing a duty on companies by following the action oriented approach, i.e. looking for initial steps by the businesses to regulate and mentor their supply chain partners, may create incentives for companies to take a hands-off approach to their supply chain relationships, which would result in no assumption of responsibility. The question then is whether in certain situations a duty to act could be imposed on the defendant if there is a certain type of relationship between the parties and if the defendant carries certain characteristics, regardless of whether the defendant had actively taken certain steps to assume responsibility. In the supply chain context, this route could be considered when the purchaser or the supplier does not actively set standards for and monitor compliance of its supply chain partners but should do so.

This type of framework oriented approach is captured in the UN Guiding Principles under the human rights due diligence requirement, and it applies to all business enterprises regardless of their size³⁸ Unless such a due diligence obligation is made mandatory by legislation,³⁹ it would be difficult to convince the courts that a business is under a duty to take those initial steps to identify, prevent, mitigate, and remediate abuses taking within its supply chain, as common law only recognises a duty of affirmative action in tort in exceptional circumstances.⁴⁰

However, even in the absence of a statutory due diligence requirement, it might be possible to push the boundaries of existing legal principles so as to fix a duty on certain businesses that carry certain institutional qualities. In order to fix a duty of affirmative action, aimed at preventing injuries directly inflicted by third parties (e.g. a supplier), the tort of negligence often calls for examining “a pre-tort relationship between the parties.”⁴¹ The relationships recognised as fixing an affirmative duty have so far included occupiers’ liability, employers’ duty to ensure safety of their employees, the relationship between parents and their children, between a school and the children in its care, and between prisons and similar authorities and those in their charge.⁴² These examples indicate two types of duty: to ensure the safety of the other person in the relationship, or to prevent the other party from causing harm to third parties.⁴³ In the first category, the vulnerable party (e.g. child) is in the care of the defendant (e.g. school). And in the second, the party causing harm (e.g. a child or an inmate) is under the supervision of the parent or the custodial authority.⁴⁴ In the second category, English courts have also included certain situations where the defendant creates the risk of injury.⁴⁵ It might appear far-fetched to argue that the victims of human rights abuse in the supply chain are in the purchaser’s care or that the supplier is under the supervision of the purchaser where the latter has not actively assumed responsibility. However, as stated by the Privy Council in *AG of BVI v Hartwell*:

“The law of negligence is not an area where fixed absolutes of universal application are appropriate. In each case the governing consideration is the underlying principle. The underlying principle is that reasonable foreseeability, as an ingredient of a duty of care, is a broad and flexible objective standard which is responsive to the infinitely variable circumstances of different cases. The nature and gravity of the damage foreseeable, the likelihood of its occurrence, and the ease or difficulty of eliminating the risk are all matters to be taken into account in the round when deciding whether as a matter of legal policy a duty of care was owed by the defendant to the plaintiff in respect of the damage suffered by him.”⁴⁶

Could certain institutional qualities of a supply chain actor place it in a special position such that it should exercise supervision over its contractual partners and their workers on labour and human rights concerns? While liability for pure omissions is a restricted category,⁴⁷ certain institutional qualities of the supply chain actor combined with the vulnerability of the workers and the severity of the human rights injury suffered by them might arguably trigger a duty to protect the latter.⁴⁸ The presence of a pre-existing relationship and the knowledge (actual or presumed) of the risk of abuse, as well as the ability to prevent or mitigate those risks might assist in establishing proximity⁴⁸ and foreseeability. The relationship with the primary tortfeasor and the victim can be considered in assessing proximity. The question then is what makes it fair, just and reasonable to hold the purchaser liable for the abuses in its supply chain. Among the policy reasons for holding defendants liable for acts of third parties are the potential insolvency of the tortfeasor (e.g. supplier), which could produce an injustice to a victim unless one can transfer the costs of the harm onto the party who benefits most from it (e.g. purchaser), and finally, prevention of harm by placing a duty on the party “who is best positioned to prevent the harm from arising”.⁵⁰ Van Dam states that in cases where affirmative duties to act exist, the defendant has “specific knowledge of the risks involved (or ought to have known of them) and that he is able to prevent, remove, or limit those risks.”⁵¹ This special position of the defendant is usually combined with lack of knowledge of the risks or the inability to avoid the risk on the victim’s side.

Fixing an affirmative duty on a supply chain actor would require a factual and normative analysis. Normative elements of the of this duty might include (this is not a closed list):

(1) Outsourcing elements of the core business of the company: The closer the areas of outsourcing is to the defining purpose of the company, as opposed to the outsourcing of an ancillary function, the higher likelihood of assuming an affirmative duty. These are often transactions of a commercial nature (outsourcing the manufacture of branded garments for the high-street brands) as opposed to transactions in which the enterprise takes on the role of consumer of a good or service (outsourcing the catering services in the workplace). In the former situation, suppliers and purchasers are contributing to the essential functions and the success of each other’s businesses. In outsourcing the core elements of the business, a purchaser is delegating the task of complying with labour and human rights standards to others, while purchasing at the lowest cost possible, thus absolving itself from paying for the cost of compliance.⁵²

(2) Special knowledge of labour and human rights issues: The supply chain actor need not be a labour or human rights expert. If they have drawn up human rights and labour policies, or recruited a human rights or CSR specialist these can give rise to a presumption of special knowledge. If a supply chain actor is transacting with businesses in places where risks of abuse are higher, especially if it carries on doing business with actors in environments where there are obvious failings, this should be taken into account in assessing its affirmative duty. While it has been held that the fact “that one has expert knowledge does not in itself create a duty to the whole worlds to apply that knowledge in solving its problems”⁵³, if combined with other factors, knowledge can be an element for triggering liability. This is particularly so where the class of potential claimants is a clearly defined group, i.e. workers of suppliers.

(3) Influence and leverage: This could be identified by reference to being in control of the relationship with the supplier. It is not about being in control of the other entity, but about the decisive influence exercised by a purchaser over aspects of supplier’s business.⁵⁴ Indicators of this would be the volume of business between the parties,⁵⁵ the duration of their business relationship; the special nature of the product manufactured by the supplier (i.e. whether the supplier is easily replaceable),⁵⁶ the level of revenue generated by the supplier from the purchaser’s orders; etc. These are elements that feed into the purchaser’s ability to exert decisive pressure by ceasing the relationship with the supplier, if the latter engages in labour and human rights abuses. Another important element of influence and leverage is whether an influential purchaser is contributing to the creation of a dangerous situation for the supplier’s workers by, for instance, placing excessive orders with tight deadlines.⁵⁷ In these situations, the purchaser would have constructive knowledge that this pressure would create an environment in which abuses are common-place. The influence and leverage of some influential supply chain actors could trickle down, at various strengths, beyond the first-tier relationships.

Breach of Duty

Once it is established that a supply chain actor owes a duty of care to the victims of labour and human

AT A GLANCE: HOW TO ASSESS THE BREACH OF DUTY

A failure to meet the standard of care expected from the supply chain actor in fulfilling its duty to prevent and mitigate human rights harm can be assessed on basis of:

- an objective standard: based on the reasonable person
- a higher standard: if the person is skilled or an expert, level of diligence required by ordinary person exercising and professing to have that special skill (supply chain actors would fall under this category)

The degree of care required may vary also based on the risk involved – human rights risk should require a heightened level of care.

rights abuses in its supply chain, it is necessary to establish that the duty was breached. The exact scope of the duty might differ from one case to another, but in the most general terms it would be a duty to prevent/mitigate human rights harm, inflicted by its contractual partners, to workers, or other third parties in its supply chain. In cases of workers injured in the workplace, the specific duty would be to procure a healthy and safe working environment.

In order to assess whether the duty was breached, English law applies an objective standard of care, based on what is required of the reasonable person.⁵⁸ If the person to whom the duty attaches is skilled or an expert, the standard of care will be determined by reference to a standard that would be expected from the ordinary skilled person “exercising and professing to have that special skill”.⁵⁹ Whether that standard was followed or not will be determined by looking at the facts of each case. However, it has been accepted by English courts that “the degree of care required varies directly with the risk involved.”⁶⁰ The risk of harm to human rights can arguably increase the standard of care required from the defendant.

In the action-oriented approach, where a supply chain actor assumes responsibility to prevent/mitigate labour and human rights abuses in its supply chain through codes of conduct, public statements, and monitoring processes such as audit and inspection, it shall carry out the requirements of such responsibility with reasonable care expected from the ordinary skilled person. If it fails to identify, during audits, the most obvious defects giving rise to abuses, fails to follow up on corrective action plans and fails to impose the sanctions envisaged in the contract, it cannot be treated as acting with reasonable care. A reasonable standard for audits, for instance, would be to conduct unannounced visits, so that a realistic assessment of the situation can be made.

For the framework oriented approach, the expected standard of care would also be that of the ordinary skilled person. In these cases, the breach of the duty might be due to failing to exercise positive influence on the supply chain partner, contributing to precarious working conditions by placing excessive orders with short deadlines; or due to continuing business relationships with partners that severely abuse the rights of their workers

Causation

The final step in establishing negligence liability is to show that the defendant's breach of duty has caused

AT A GLANCE: CAUSALITY BETWEEN BREACH OF DUTY AND THE DAMAGE SUFFERED

Has the defendant's breach of duty caused the damage suffered?

■ Two-stage analysis

1. But-for test:

If the claimants would have suffered the injuries regardless of defendant's negligence, the negligence has not caused the harm.

2. Causation in law:

Damage suffered must be a foreseeable and not too remote a consequence of the breach of duty.

the damage suffered. The first step is to establish causation in fact by applying the 'but-for' test – if the claimants would have suffered their injuries regardless of the defendants' negligence, the negligence has not caused the claimants' loss.⁶¹ But-for causation is established on the balance of probabilities, so in assessing causation in the supply chain context, the courts would assess, on the facts of the case, whether the harm could have been prevented or mitigated had the supply chain actor not breached its duty. Where more than one actor contributed to the damage, they could each be found liable (jointly and severally) for their contribution to the damage if each one's negligence had materially increased the risk of harm.⁶² In these cases, the burden of proof is reversed, in that the defendant must show, on balance of probabilities, that its negligence did not cause the harm.⁶³ Following this principle, a purchaser, for instance, could be jointly liable with a supplier for injuries suffered by the latter's workers due to the negligent actions/ omissions of each.

The second step in establishing causation is 'causation in law' which refers to the scope of liability. The damage suffered must be a foreseeable consequence of the breach of duty, sometimes described as requiring that any damage should not be too remote a consequence of the harm.⁶⁴ This, again, will be decided by a factual inquiry. The nature of loss, i.e. personal injury or pure economic loss, will play a role in deciding the foreseeability of the damage.⁶⁵ In supply chain cases, one might look for a substantial effect on the outcome by assessing whether the ability to intervene would likely result in an improvement of behaviour on the part of its supply chain partner. It will become more difficult to show causation in law as we move beyond the first tier in the supply chain.

Non-Delegable Duties

AT A GLANCE: NON-DELEGABLE DUTIES

A personal duty of one actor that cannot be delegated to another (e.g. duty owed by employer to employees to provide safe place of work)

Limited to the following situations

- Antecedent relationship between the parties
- Defendant has control over significant aspects of life of victims
- Limited class of persons: Personal vulnerability and dependence of victims on the duty bearer for the observance of proper standards.
- Victim has no control over how the defendant chooses to perform its duties.

Most relevant for delegation of duties to prevent human rights harm in context of social auditing

- social auditors appointed to monitor compliance can be held liable, BUT purchaser must itself monitor that auditor carries out risk assessment with appropriate standard of care
- Standard setting and monitoring places the purchaser in a position of a quasi-regulator

In certain supply-chain relationships, it might be possible to argue that a supply chain actor owed the employees of its contractual partners a non-delegable duty of care. Such a duty is personal to the defendant and not vicarious.⁶⁶ A classic example of the non-delegable duty of care is the duty owed by an employer to its employees.⁶⁷ These duties particularly require providing a safe place and system of work.⁶⁸ The underlying goal of non-delegable duties is “to protect those who are both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives.”⁶⁹ As they are recognised, non-delegable duties hinge on an antecedent relationship between the parties placing the defendant in a position of control over an aspect of the victim’s life; and it is owed to a limited class of claimants, in a vulnerable position, for a particular class of risks where the victim has no control over how the defendant chooses to perform its obligations.⁷⁰

Non-delegable duties can be most relevant in the supply chain context where purchaser appoints a social auditor to monitor compliance with labour and human rights standards applied by its supplier. The key question here is whether a purchaser can delegate all or parts of its duty to prevent/mitigate harm to the victims in its supply chain to an auditor. If, on the facts of a case, a purchaser exercises control over the conditions of safety in its supply chain partner’s workplace, e.g. by assuming a quasi-regulator role, arguably, it has a non-delegable duty to provide a safe place and system of work to its supplier’s workers. Control can be manifested through the terms of, and threatened sanctions associated with codes of conduct, and the impacts on the workplace of the volume of orders, generating the hours it was necessary to work in order to meet the orders. The workers of a supplier for instance will have no control over how a purchaser elects to discharge its duties, either itself or via its auditors. If an auditor it appointed carries out the monitoring negligently, liability for harm and losses arising from the auditor’s negligence can be attributed to the purchaser/supplier. A supply chain actor who has assumed responsibility over workplace safety and labour standards must not only appoint a suitable auditor but must take adequate steps to assure itself that the auditor has carried out a suitable risk assessment.⁷¹ Careful selection of the auditor with the mission of assessing risk does not absolve the party which selected the auditor from the obligation itself to monitor the adequacy of the auditor’s performance.⁷²

Vicarious Liability

AT A GLANCE: WHAT TO LOOK FOR WHEN ESTABLISHING VICARIOUS LIABILITY IN SUPPLY CHAINS

Requires a sufficiently close relationship between the tortfeasor and the party vicariously liable (e.g. employer-employee) AND the tort must be sufficiently linked to the relationship (e.g. in the course of employment).

Sufficiently close relationship in the supply chain context:

Independent contractors normally not liable vicariously for each other's torts.

Exceptions:

- If one party (e.g. auditor) is acting as the agent of the other (e.g. purchaser)
- De facto employment = 'relationship akin to employment' – factors to consider when assessing the relationship
 - looking at the function carried out by the contractor and NOT at the formal appearances
 - activity of the contractor being at heart of de facto employer's business (e.g. outsourcing manufacture of branded products) and its integration into the employer's organizational structure
 - degree of control exercised by the de facto employer over the aspects of the contractor's business policies and practices: e.g. Was the supplier under the supervision of and accountable to the purchaser? To what extent was the supplier autonomous to take decisions on labour and human rights standards?
 - Deeper pockets: Who can better compensate the victims?
 - Economic dependency of supplier on purchaser
 - Creation of risk by the de facto employer by appointing the contractor
 - Would vicarious liability promote better behaviour on the relevant actors?

In the supply chain context, vicarious liability might be an alternative ground for liability in cases involving the relationship between a purchaser and its certain suppliers or its auditors. In order to consider vicarious liability, there has to be a sufficiently close relationship between the tortfeasor and the party vicariously liable, and the tort committed must be sufficiently linked to that relationship. In its classic form, vicarious liability is a strict liability regime under which an employer is held liable for harm caused by negligent conduct of its employee(s) in the course of employment.⁷³ Another relationship giving rise to vicarious liability is the relationship between a principal and an agent.⁷⁴ English courts also now accept that certain relationships that appear as one of 'independent contractor' might be classified as "akin to employment" and give rise to vicarious liability.⁷⁵ There is a shift in focus from looking at the formal appearance of the relationship to the function exercised by the contractor. A recent decision concerning the relationship between Uber BV and its drivers from the employment tribunal shows how courts are willing to adapt the law to the modern economic conditions and relationships.⁷⁶ If a supplier can be classified as having a relationship akin to employment with the purchaser, or if a social auditor can be classified as an agent of the purchaser, it might be possible to hold a purchaser vicariously liable for the torts committed by the supplier or the auditor.⁷⁷ The rationale behind vicarious liability is to reach deeper pockets of the party economically stronger than the tortfeasor, as well as to promote improvement of behaviour on the part of the tortfeasor and the party held vicariously liable.⁷⁸

The relationship between a purchaser and its suppliers or auditors is not one of formal employment. Prima facie, the relationship is one of 'independent contractor', and thus the parties would not be held liable for the harm caused to third parties by each other's acts and omissions.⁷⁹ However, a formal employment relationship is not always necessary to establish vicarious liability.⁸⁰ In extending vicarious liability to novel relationships, English courts give consideration to whether it would be fair, just and reasonable to extend liability. In *Various Claimants v Catholic Child Welfare Society*⁸¹ Lord Phillips summarised these considerations as follows:

"(i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer; iii) The employee's activity is likely to be part of the business activity of the employer; iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; v) The employee will, to a greater or lesser degree, have been under the control of the employer."

These policy considerations can be unpacked as follows in the supply chain context.

Relationship between a purchaser and its suppliers

Depending on the factual circumstances of each case, a relationship between a purchaser and a supplier might be sufficiently like employment. In such cases, even if, on the face of it, the relationship appears as one of independent contract, it might be possible to argue that the purchaser is vicariously liable for the labour and human rights harm inflicted by the supplier. The success of such an argument will also depend on the willingness of courts to take into consideration the changing social and commercial realities that might justify new relationships as akin to employment.⁸² One of the policy considerations identified by Lord Phillips in *Various Claimants* is having the better means to compensate the victims. While this would not be the case in every supply chain case, in some cases the purchaser might be in a better position to compensate the victims, not only because it has deeper pockets, but also because there might no longer be a supplier to hold liable. This is particularly so if, like the *KiK* and *Rana Plaza* cases, the supplier's business was run to the ground.

In determining the nature of the relationship between a purchaser and its supplier, the key question to answer is whether the supplier was under the supervision of and accountable to the purchaser.⁸³ There are a number of elements in the relationship between a supplier and a purchaser that can indicate supervision and accountability. The first indicator is the level of control exercised over the policies and practices of the supplier. Control is understood as an "entitlement", and as such it is not necessary to show an actual exercise of control, but can be satisfied by showing an "ability to control".⁸⁴ Control may not be exercised on all aspects of the supplier's business; but might be exercised with respect to the labour and human rights standards that must be followed in the supplier's workplace, via assuming the role of a quasi-regulator discussed above in the duty of care context. In other words, "employment for one purpose is not necessarily employment for another purpose." Other factors contributing to the control analysis would be the economic dependency of the supplier on the purchaser, its autonomy in taking decisions on labour and human rights standards, and the supplier's integration into the purchaser's overall organizational structure.

In *Aslam and Farrah v Uber BV*, the employment tribunal found an employment relationship between Uber and its drivers, even though all the contractual arrangements between the relevant parties explicitly stated that the relationship was one of independent contractors. This finding was supported by the fact that the function provided by the drivers was at the heart of Uber's business. The same could be said for some supply chain relationships where a business outsources a core function of its business to a contractor, and this way hopes to offload the labour and human rights compliance requirements onto the supplier. An assessment of this consideration can help determine whether the employer has created the risk by employing the supplier. The employment tribunal in the Uber case also took into consideration the public statements made by Uber about its drivers, which gave the impression that these drivers were employed by Uber. Similar public statements are sometimes made by supply chain actors about the control they exercise over the labour and human rights policies of their partners. The employment tribunal also highlighted that Uber does not market transportation services provided via its software application for the benefit of any individual driver, but instead to promote its own brand and sell its services. The same can be said where a supply chain actor is outsourcing the production of branded products, and markets goods produced in violation of labour and human rights standards as its own. The marketing is not done for the benefit of its suppliers, but for its own brand name. This can arguably satisfy the condition that the activity was being carried out on behalf of the employer.

Another consideration for the Uber tribunal was the strict terms set by Uber which had to be followed by the drivers, otherwise the drivers would face sanctions. Where a purchaser stipulates in contract the conduct that must be followed by a supplier in discharging its obligations under the contract, and the party imposing the terms is in a superior bargaining position, this, read together with the above elements, could result in a relationship akin to employment, as opposed to an arm's length contract between two independent businesses. In these cases, while the supplier might be in a position to elect not to enter into a business relationship with the purchaser, if it does choose to enter into the relationship, it will be required to follow the labour and human rights standards and instructions provided by the contract, especially if the failure to comply is accompanied by sanctions for breach of contract or otherwise. This can show whether the employee is, to a greater or lesser degree, is under the control of the employer.

All of these factors can indicate the integration of a supplier to its purchaser's organizational structure, not only in terms of what the supplier produces, but also how it produces the goods.⁸⁵ The degree of economic integration of a business could assist in determining what is akin to employment. The required level of integration could be present even if the business relationship between the parties is not stable and long-term, but are short-term and flexible, and the supplier is manufacturing goods for multiple purchasers, and not just one. In order to determine this, the courts should consider the existence of the above-mentioned elements of supervision and accountability, as well as the mechanisms purchasers put in place for the regulation of their relationships with all their suppliers, particularly, the organizational steps by which the purchaser investigates, evaluates, and approves or rejects a supplier. The consideration of these issues could help determine whether the employee's activity was a part of the business activity of the employer.

The Relationship between a Purchaser and Its Auditors

It is a widespread practice for purchasers to engage social auditors to monitor supplier compliance with the labour and human rights standards they set in their supplier contracts.⁹¹ Negligently conducted audits might give rise directly to the liability of the auditing company, if it can be established that the auditors owed a duty of care to the employees of the supplier. Another route for accountability could be via the application of vicarious liability principles to the relationship between the purchaser and its auditor, if the latter can be classified as the 'agent' of the former. An agent has authority to represent the principal or act in principal's behalf and can legally bind the principal vis-à-vis third parties.⁹²

An auditor might be classified as an agent, if it is exercising the duty of monitoring supplier compliance on behalf of the purchaser. Acts carried out by the agent on behalf of the principal are attributed to the principal. If, in the course of exercising its authority, the agent signs a contract or commits a tort, the principal will directly be a party to these relationships with third parties. If an auditor's negligent conduct of audits acts as a cause of harm to the employees of the supplier, there might arguably be a case for the vicarious liability of the purchaser who appointed the auditor.⁹³ The auditor is the 'conduit pipe' between a purchaser and the supplier and its injured employees, given that it was the purchaser's obligation to monitor compliance with labour and human rights standards, which it delegated to its auditor, either by finding faults that needed to be fixed, or by giving clearance that the standards applied were system was fit for purpose. Even where there are multiple purchasers from a supplier, and each engages their own auditor, each negligently conducted audit could give rise to a joint and several liability of the respective purchasers who have engaged the auditors, if each audit has made a material contribution to increasing the risk of damage.⁹⁴

Contract

AT A GLANCE: WHAT TO LOOK FOR WHEN ESTABLISHING CONTRACTUAL LIABILITY

Liability could be established through

- Codes of Conduct
- Unilateral declarations
- If these are misleading or unfairly gaining the consumer goodwill, rules of unfair competition or consumer protection are likely to apply.
- Contracts with rights enforceable by third-party beneficiaries

As the main legal instrument governing the relationship between supply chain actors, contracts can act as a device for improving accountability in the supply chain context. They can be used to create human rights obligations on purchasers and suppliers towards workers and communities. Such contractual terms could be included as part of the general terms and conditions of the agreements. These contractual obligations can be accompanied with rights enforceable by third-party beneficiaries,⁹⁴ i.e. workers of the supply chain partners or communities whose basic rights are harmed by the partner. Contracts can potentially have an important contribution to improving accountability in this area. Companies should use their leverage and bargaining power in this area to push for human rights compliant behaviour.

A relevant component of supply chain contracts is codes of conduct, which are usually developed by, large companies, incorporating their standards on labour and human rights impacts of their business. These codes also stipulate the behaviour expected from supply chain partners, if they are incorporated into contracts with business partners. Codes are also sometimes incorporated into the relationship via purchase orders. While some codes use vague language, others are quite sophisticated. Typically, they have a unilateral focus, in that they reserve the right to monitor and impose sanctions to the author of the Code. The question arises as to whether these codes have a binding nature.

If the stipulations in codes of conduct are concrete enough they can give rise to clear and binding obligations for the contracting parties. They could be considered precise, for instance, if they incorporate international human rights and International Labour Organization's standards by reference. They need not stipulate the content. However, unless these codes create explicit third-party beneficiaries, they cannot be directly enforced by the injured third parties in breach of the code.

They arguably could be treated binding as unilateral declarations, even if they have not been incorporated into supplier contracts, as long as they have been published on a company's website or declared in its annual reporting in binding terms (e.g. 'we require all our suppliers to comply with the terms of the code'). In terms of such public representations, rules on unfair competition or consumer protection could be utilized to hold companies accountable for making misleading statements and unfairly gaining consumer goodwill.⁹⁵ This would not necessarily provide remedies to the victims, but it might be used as a pressure point. It could also shift the cost of litigation from victims to consumer groups. Even where contractual stipulations about labour and human rights standards do not provide a direct path to a remedy for the victims, as explained above, they can act as evidence of proximity and foreseeability of harm in tort terms.

Is it possible to view codes of conduct as contracts with third party beneficiaries? The importance of having third party beneficiary rights is that harms that cannot be framed as a tort claim could be covered by contract. For instance, it might be difficult to frame excessive over-time or low wages as a tort claim, but these can be covered by contract. In practice, third parties are mentioned throughout codes of conduct, but they are often explicitly excluded from the scope of the Contracts (Rights of Third Parties) Act 1999. According to s.1 of the Act, unless third parties are given explicit protection within the meaning of the Act, or upon proper construction of the contract if the terms purport to confer a benefit on a third party, third parties cannot enforce the code. The Act also requires in s.1(3) that the beneficiaries must be expressly identified in the contract, e.g. in the code of conduct, by name, as a member of a class or as answering a particular description.

Express exclusions of benefits to third parties in codes of conduct could potentially be treated as a breach of the good faith principle in some jurisdictions, although English law does not recognise a general good faith principle in contract.⁹⁶ In order to secure effective third party protection, codes of conduct should explicitly agree on the protective effect of the Code and make this information available to potential beneficiaries. Rights and remedies can be explicitly stipulated in the Code. Remedies available under the 1999 Act include any remedy that is available for breach of contract, e.g. damages and specific performance. Once third party benefits are secured in a code of conduct, amending the terms of the code will require assent from the beneficiaries, unless otherwise stipulated in the contract.⁹⁷

Human Rights Due Diligence and Reporting

AT A GLANCE: HOW HUMAN RIGHTS DUE DILIGENCE AND REPORTING COULD IMPROVE SUPPLY CHAIN ACCOUNTABILITY

- Human rights due diligence and reporting requirements urge companies to identify risks and take preventative measures
- Due diligence and annual reporting can demonstrate knowledge and assumption of responsibility
- Reporting can increase transparency and decrease information asymmetry

Laws requiring companies to conduct human rights due diligence throughout their business operations, including their supply chains have a significant potential in increasing improved behaviour and accountability.⁹⁸ Another contribution to improving accountability can come from reporting requirements on human rights. Non-financial reporting rules on human rights impacts have been introduced in the EU for certain large companies.⁹⁹ Under the Directive, covered companies are required to disclose information on human rights impacts of their activities, including those arising from subsidiary and supply chain operations and how these impacts are managed; and the due diligence processes adopted to identify, prevent and mitigate adverse impact. Reporting can be avoided where a company does not pursue policies relating to human rights, but it has to provide a 'clear and reasoned' explanation of this choice

In the UK, the Modern Slavery Act 2015 introduces a transparency obligation for commercial organizations that fall within the scope of the Act.¹⁰⁰ S.54 requires these entities to prepare an annual slavery and human trafficking statement. Pursuant to s.54 (4) of the Act the statement could either state what steps were taken by the organization "to ensure that slavery and human trafficking is not taking place– (i)in any of its supply chains, and (ii)in any part of its own business" or it could state that "the organisation has taken no such steps".

While these are very positive steps, challenges remain. There is little clarity on the content of these reports and questions over sanctions for failure to report accurately. Consequences for failing to report or misleading reporting are unclear. There is no clarity as to the substantive standards against which the reports shall be assessed and who shall conduct these assessments. Reporting has so far remained vague, with no actionable information coming out of company reports.

On the other hand, there is still value in reporting and due diligence requirements. They urge companies to identify risks and take preventative measures. They can also aid in demonstrating knowledge and involvement of a company in its partners' human rights performance. Lack of information is a serious challenge for victims seeking accountability against corporate groups and supply chain actors. In order to demonstrate 'knowledge' or even 'assumption of responsibility' in tort terms for human rights issues, claimants can make use of company reports that convey the relationship of a company with its supply chain partners.¹⁰¹ While potential liability can be a disincentive for companies to disclose information, there is a growing pressure on companies to become more transparent on human rights and labour issues, as well as a trend for introducing mandatory reporting requirements. These public and legislative pressures can have an impact on companies' attitude towards reporting. Beyond reporting, a mandatory due diligence obligation could result in a duty of care being attached to the company vis-à-vis the claimants.¹⁰² If states wish to establish a level playing field for business actors respecting human rights, mandatory due diligence and reporting obligations could make an important contribution to achieving such a level playing field.

Endnotes

- 1 This guide is drafted by Dr Anil Yilmaz-Vastardis (ayilma@essex.ac.uk) and Professor Sheldon Leader (leader@essex.ac.uk). The information contained in this guide does not constitute legal advice.
- 2 A supply chain can be defined as “a set of three or more entities directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer.” SHERPA, ‘Supply Chain and Liability: Legal tools for parent company’s accountability’ (November 2007) p.1.
- 3 First tier partners are those that have a direct contractual or non-contractual relationship with a buyer or a seller. Beyond the first tier, the relationships are indirect involving sub-contractors or sub-suppliers/buyers.
- 4 As indicated earlier, these procedural questions will not be discussed in these guidelines, though they are clearly of central importance to a full litigation strategy.
- 5 Attorney General of the British Virgin Islands v Hartwell [2004] 1 WLR 1273, p.1279.
- 6 [1990] 2 AC 605.
- 7 Donoghue v Stevenson [1932] AC 562, per Lord Macmillan.
- 8 Caparo Industries Plc v Dickman and Others [1990] 2 AC 605 (HL), per Lord Bridge of Harwich; *Chandler v Cape Industries Plc* Court of Appeal, [2012] EWCA Civ 525, para.63; X v Bedfordshire County Council [1995] 2 AC 633 per Lord Browne-Wilkinson p.749.
- 9 S Deakin et al., *Markesinis and Deakin’s Tort Law* (7th ed. OUP 2013) p.103.
- 10 In *Smith v Littlewoods Organisation Ltd* [1987] AC 241, Lord Goff identified four circumstances in which a party may become liable for an omission to act: (a) where there is a special relationship between defendant and plaintiff based on an assumption of responsibility by the defendant; (b) where there is a special relationship between the defendant and the third party based on control by the defendant; (c) where defendant is responsible for a state of danger which may [be] exploited by a third party; and (d) where the defendant is responsible for property which may be used by third party to cause damage; See also *Watson v British Boxing Board of Control* [2001] QB 1134, *Chandler v Cape Industries*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; Clerk & Lindsell on the Law of Torts (21st ed) Ch. 8.50 -8-54.
- 11 *Caparo Industries Plc v Dickman and Others*, per Lord Bridge of Harwich.
- 12 Clerk & Lindsell on the Law of Torts, Ch. 8-16.
- 13 Attorney General of the BVI v Hartwell p. 1279.
- 14 *Donoghue v Stevenson* per Lord Atkin.
- 15 J Steele, *Tort Law: Text, Cases, and Materials* (3rd Edition, OUP 2014) p.149.
- 16 See *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 pp. 55-56 per Deane J.
- 17 C Van Dam, *European Tort Law*, (2nd Edition, OUP 2013) p.214.
- 18 *Sutradhar v National Environmental Research Council* [2006] UKHL 33, [2006] 4 All ER 490.
- 19 *Watson v British Boxing Board* para. 72.
- 20 *Watson v British Boxing Board* para.82.
- 21 For a leading example of this approach see the recently enacted French Law on Duty of Vigilance for parent companies LOI n° 2017-399 du 27 mars 2017 Art. L. 225-102-4.-I.
- 22 *Markesinis and Deakin’s Tort Law*, p.114.
- 23 See *Chandler and Watson*; *Stovin v Wise* [1996] AC 923, 932 per Lord Nicholls.

- 24 According to an ITUC Report 50 largest companies only employ 6% of people in a direct employment relationship, but they rely on a hidden workforce of 94%. ITUC describes this as a business model based on exploitation and abuse of human rights in supply chains; See ITUC Frontlines Report 2016, Scandal: Inside the global supply chains of 50 top companies, available at https://www.ituc-csi.org/IMG/pdf/pdffrontlines_scandal_en-2.pdf
- 25 C Terwindt et al, 'Supply chain liability: Pushing the boundaries of the common law?' (Forthcoming in Journal of European Tort Law), p.19.
- 26 Many large brands externalize compliance with labour and human rights requirements by passing these on to their suppliers, thus shifting the cost of compliance to suppliers, without any guarantees that the suppliers have the means to respect these standards; See Y Queinnec and W Bourdon, Regulating Transnational Companies: 46 Proposals, (December 2010, Proposal Paper Series, FnWG and Sherpa) p.50.
- 27 The classic example of claims that may be rejected in part due to fears of indeterminate liability are claims for pure economic loss, that is loss which is not consequential upon physical damage; see, for example the claim for lost production at a factory due to the negligent cutting of a cable in *Spartan Steel and Alloys Ltd. v Martin & Co Ltd* [1973] QB 27.
- 28 *Caparo v Dickman*.
- 29 See also *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140, para. 122 Davis J held that placing a duty of care on an association responsible for safety standards at a racing track, owned and run by another party, to track users who suffer physical injuries in racing accidents would not amount to imposing liability to an indeterminate class. The liability would simply be to those using the track in question over which the association had in practice a degree of control for safety measures; See also *Watson* para.78 -80.
- 30 *Chandler v Cape Industries Plc* Court of Appeal, [2012] EWCA Civ 525 (This precedent on assumption of responsibility is certainly not limited to parent-subsidiary relationships. This point was affirmed by LJ Arden in para.69 of the case where she held that "There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.")
- 31 *Chandler v Cape Industries Plc* [2011] EWHC 951 (QB) para. 75, confirmed by LJ Arden on appeal.
- 32 per Arden, LJ para. 75.
- 33 *Chandler* para.8; see also *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635; *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).
- 34 Ameashi et al, 'Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications', *Journal of Business Ethics*, vol. 81, no.1. pp. 223-234 p.228 "Determining-the-outcome" is connected to the setting and monitoring of a general policy framework. Being in a position to set or monitor such policies is as good as actually setting or monitoring them. Where this control exists, the indication is that the relationship between the corporations is not a normal "arms-length" business relationship."
- 35 C Terwindt et al, 'Supply chain liability: Pushing the boundaries of the common law?' (Forthcoming in Journal of European Tort Law) p.16.
- 36 In *Watson*, para.48, Lord Phillips in discussing the whether the beneficiary of a duty of care should consciously rely upon the duty bearer stated: "I do not consider that a conscious reliance by the patient on the hospital to exercise care is an essential element in this duty of care. The duty will be owed to the victim of a road accident who is received by the hospital unconscious."
- 37 *Watson*, para.72.
- 38 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (United Nations publication, Sales No. 13.XIV.5), < www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>, Principle 17.
- 39 France recently introduced a requirement for mandatory human rights due diligence from certain large companies headquartered in France.

- 40 Smith v Littlewoods Organisation Ltd. [1987] AC 241.
- 41 Markesinis and Deakin's Tort Law p.178.
- 42 Markesinis and Deakin's Tort Law p.178.
- 43 Markesinis and Deakin's Tort Law p.178.
- 44 Ellis v Home Office [1953] 2 QB 135; Dorset Yacht v Home Office [1970] AC 1004.
- 45 Mitchell v Glasgow City Council [2009] UKHL 11, para 81, per Lord Brown; C Van Dam p.250.
- 46 AG of BVI v Hartwell, para.25.
- 47 Dorset Yacht v Home Office, at 1061 per Lord Diplock; J Steele, Tort Law, p.165.
- 48 Duty to act was considered most commonly in cases involving public bodies who have a statutory power to carry out certain functions; however, it was consistently held that "[a] simple failure to exercise a statutory power [does] not give rise to a common law claim for damages". Stovin v Wise [1996] AC 923; they might however be liable in common law negligence if the Caparo criteria are met, J Steele, p.423; C Van Dam, p.491 and 519
- 49 C Van Dam, p.248
- 50 C Van Dam p.491
- 51 C Van Dam p.249
- 52 Queinnec and Bourdon p.29.
- 53 Sutradhar v National Environment Research Council, para. 27, per Lord Hoffmann.
- 54 J Hartmann and s Moeller 'Chain liability in multitier supply chains? Responsibility attributions for unsustainable supplier behavior', Journal of Operations Management 32(2014) 281-294 (refer to the influence that a firm has over specific problems, decisions or outcomes in its supply chain).
- 55 J Hartmann and S Moeller, (larger focal firms have more power to influence suppliers as they have more opportunity to allocate business to suppliers. They are also better placed to provide resources and guidance to the supplier to improve its performance).
- 56 In buyer driven markets where tens of thousands of suppliers produce the same goods, risk of losing customers to other suppliers and even to suppliers in other countries can put the buyers in a position of influence over its suppliers.
- 57 ITUC Frontlines Report 2016, p.33 reports that the exploitative terms of trade set by buyers lead to labour sub-contracting to unregistered factories, illegality, workforce casualisation and exploitation, thus creating the conditions in which abuses flourish.
- 58 Articulated in Blyth v Birmingham Waterworks Co as follows: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent and reasonable man would not do." (1856) 11 Ex 781 p.784 per Alderson B; See also Clerk & Lindsell, para 1-65
- 59 Bolam v Friern Hospital Management Company [1957] 1 WLR 582 per McNair J.
- 60 Glasgow Corporation v Muir [1943] AC 448, p.456.
- 61 Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428.
- 62 Fitzgerald v Lane [1987] QB 781; Markesinis and Deakin's Tort Law, p.224
- 63 McGhee v National Coal Board [1973] 1 WLR 1, 6 per Lord Wilberforce "where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause."; Markesinis and Deakin's Tort Law p.225

- 64 Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co Ltd. (The Wagon Mound (no. 1) [1961] AC 388.
- 65 C Van Dam p.318.
- 66 In Woodland v Essex County Council, [2013] UKSC 66 Baroness Hale, JSC, commented in para.33 that “In the one case [vicarious liability], the defendant is not liable because he has breached a duty which he owes personally to the claimant; he is liable because he has employed someone to go about his business for him and in the course of doing so that person has breached a duty owed to the claimant. In the other case [the non-delegable duty of care], the defendant is liable because he has breached a duty which he owes personally to the claimant, not because he has himself been at fault, but because his duty was to see that whoever performed the duty he owed to the claimant did so without fault”.
- 67 Markesinis and Deakin’s Tort Law p.543.
- 68 Wilsons and Clyde Coal v English [1938] AC 57.
- 69 C Terwindt et al, ‘Supply chain liability: Pushing the boundaries of the common law?’ (Forthcoming in Journal of European Tort Law) p.22.
- 70 Woodland v Essex County Council paras.7 and 23 per Lord Sumpton JSC.
- 71 [2011] EWCA Civ 66 Court of Appeal.
- 72 Uren v Corporate Leisure (UK) Ltd and Ministry of Defence (MOD) [2011] EWCA Civ 66 Court of Appeal.
- 73 Markesinis and Deakin’s Tort Law at p.554.
- 74 Morgans v Launchbury and Others [1972] WLR 1217; J Steele, p.563.
- 75 Various Claimants v Catholic Welfare Society [2012] UKSC 56, [2013] 2 AC 1, per Lord Phillips para.19.
- 76 Aslam and Farrar v Uber BV and others 2202550/2015 Employment Tribunals 28 October 2016.
- 77 The possibility of vicarious liability in a parent-subsidiary relationship is explored in P Morgan, ‘Vicarious liability for group companies: the final frontier of vicarious liability?’ (2015) 31(4) Professional Negligence 276.
- 78 J Steele, pp.565-576.
- 79 E McKendrick, ‘Vicarious Liability and Independent Contractors: A Re-examination’, (1990) 53 MLR 770, p.772.
- 80 Ibid.
- 81 [2012] UKSC 56.
- 82 On this see, P Giliker, ‘Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective’, (2001) 2 JETL 31.
- 83 E v. English Province of Our Lady of Charity [2013] QB 722.
- 84 Viasystems v Thermal Transfer [2006] 2 WLR 248 CA para 18, per May LJ.
- 85 JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938, per Ward LJ at para.59 (Employment for purposes of vicarious liability is not necessarily the same as employment in other contexts, such as taxation, unfair dismissal, and sex discrimination.)
- 86 J Steele, p.575.
- 87 Aslam and Farrar v Uber BV and others para.86.
- 88 P Morgan, p.296 (“Indeed one company may control another and integrate it into its enterprise, even where that company is not their subsidiary.”)

- 89 C Terwindt et al, 'Supply chain liability: Pushing the boundaries of the common law?' (Forthcoming in *Journal of European Tort Law*) p.25.
- 90 C Terwindt and M Saage-Maass, 'Liability of Social Auditors in the Textile Industry' (December 2016, ECCHR and FES), available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia.html
- 91 C Murray et al. *Schmithoff's Export Trade: The Law and Practice of International Trade*, 11th Ed. p.682.
- 92 P Morgan, 'Vicarious liability for group companies: the final frontier of vicarious liability?' p.294 ("Agency is a conclusion rather than a characteristic which triggers vicarious liability.")
- 93 See *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 (The HL held that where there might be multiple causes of a harm and it is impossible to pin down which one is the actual cause, it is possible to hold each contributor to harm liable if their breach made material contribution to the risk of injury.)
- 94 Rights of Third Parties Act 1999.
- 95 See for instance the consumer complaint filed against Lidl, <https://business-humanrights.org/en/germany-ngos-file-consumer-complaint-against-lidl-over-working-conditions-in-its-bangladeshi-textile-suppliers>
- 96 E McKendrick, *Contract Law: Text, Cases and Materials* (6th ed. 2014 OUP) p. 490.
- 97 S.2(1) - (1) Subject to the provisions of this section, where a third party has rescission of a right under section 1 to enforce a term of the contract, the parties to the contract. contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if– (a) the third party has communicated his assent to the term to the promisor, (b) the promisor is aware that the third party has relied on the term, or (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it ... (3) Subsection (1) is subject to any express term of the contract under which– (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).
- 98 The new French law on duty of vigilance stipulates the following requirement for certain large companies: "The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls within the meaning of Article L.233-16, II, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship." -Unofficial English Translation; In the UK, the House of Lords and House of Commons Joint Committee on Human Rights in its report on 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability' Sixth Report of Session 2016-17, 5 April 2017, recently recommended the UK Government to introduce legislation to impose a human rights due diligence obligation on companies, covering subsidiaries and their whole supply chain.
- 99 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
- 100 Commercial organizations (including corporations and partnerships) that carry on a business, or part of a business, in any part of the UK.
- 101 Queinnec and Bourdon, p.40 "the value of an enhanced and binding transparency regime also lies in the uses that might be made of that information (or lack of information) provided by businesses."
- 102 R Chambers and A Yilmaz-Vastardis, 'The new EU rules on non-financial reporting: Potential Impacts on Access to Remedy?' 2016(1) *Human Rights and International Legal Discourse* 18-40; D Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' 1 *Business and Human Rights Journal* 02, July 2016, pp 179 – 202.

