Is This the Real Life? Is This Just Fantasy? Caught in a Landslide, No Escape From Reality

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What on mother earth was going on in the first months of 2021? While I was teaching my Business and Human Rights course at King's College in London, almost every week another significant business and human rights development hit the headlines. Exciting times for my students but in many a company board room, directors may have wondered:

Is this the real life?
Is this just fantasy?
Caught in a landslide,
No escape from reality.[1]

Between mid January and late March 2021, the following no-escape-from-reality events for company directors and company lawyers happened in the area of business and human rights, currently also known as ESG (Environmental, Social and Governance) risks.

1. THE VEDANTA SETTLEMENT[2]

On 19 January, Vedanta, a UK incorporated parent company, and its Zambian subsidiary KCM settled claims by over 1,800 Zambian claimants, following the UK Supreme Court's landmark ruling in 2019.[3] The claimants, members of rural farming communities, alleged that the watercourses they used for themselves, and their livestock and crops had been polluted by repeated discharges of toxic matters from a copper mine operated by KCM.

In *Vedanta*, the Supreme Court considered that a parent's duty of care is nothing out of the ordinary and is governed by the general principles of tort law: a parent may incur a duty of care through its own conduct (depending on the level of involvement in the subsidiary's operations), through its liability for the act of a third party, or by an assumption of responsibility. The Supreme Court considered that it was arguable that Vedanta in its sustainability report assumed responsibility for the maintenance of environmental standards over the activities of its subsidiaries, particularly the operations at the copper mine. It decided that the claimants therefore had an arguable case in common law against Vedanta and that the case could go to trial. As a trial implies disclosure, defendants are usually keen to settle, and so was Vedanta. The parties reached an out of court settlement for an undisclosed amount.

2. THE HAGUE COURT OF APPEAL: SHELL LIABLE FOR OIL SPILLS IN NIGERIA[4]

On 29 January, the The Hague Court of Appeal held Shell parent company RDS and its subsidiary SPDC liable for oil spills in

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1 Queen (Freddy Mercury), *Bohemian Rhapsody*, in *A Night at the Opera* (Los Angeles: Nonesuch Records 1975).

2 Joint statement by the villagers, represented by Leigh Day solicitors, and Vedanta Resources Ltd, https://www.leighday.co.uk/latest-updates/news/2021-news/legal-claim-by-more-than-2-500-zambian-villagers-in-a-case-against-vedanta-resources-limited.

3 *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC 20.

4 Court of Appeal The Hague 29 Jan. 2021, ECLI:NL:GHDHA:2021:132 (*Oguru-Efanga-Milieudefensie/Shell*); Court of Appeal The Hague 29 Jan. 2021, ECLI:NL:GHDHA:2021:133 (*Dooh-Milieudefensie/Shell*). *See also* in this issue of ECL: Steef M. Bartman and Cornelis de Groot, 'The Shell Nigeria Judgments by the Court of Appeal of The Hague, a Breakthrough in the Field of International Environmental Damage? UK Law and Dutch Law on Parental Liability Compared'.

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Nigeria. The claims were brought in 2008 by Nigerian farmers and NGO Milieudefensie (Friends of the Earth, The Netherlands) against parent companies of Shell and its Nigerian subsidiary SPDC. They concerned oil spills in the Niger Delta from underground pipelines and an unprotected oil well, causing the farmers loss of livelihood and damage to health.

On the basis of the applicable Nigerian law, the Court of Appeal held SPDC strictly liable for the cause of the oil spills. It also held SPDC liable in negligence for not installing a Leak Detection System (LDS) on one of its pipelines; this would have enabled remote observation of oil leaks and could have considerably limited the consequences of the spills. As Nigerian law did not provide indications for the liability of Shell parent company RDS, the Court of Appeal applied the English common law because this still has authority in Nigeria. On the basis of *Vedanta*, it considered that RDS owed the people living in the vicinity of the oil pipeline a duty of care and ordered RDS to ensure that the pipeline was equipped with an LDS. This decision was breaking new legal ground, as it was the first time a parent company was held responsible for the operations of its subsidiary abroad.

3. UK SUPREME COURT: SHELL PARENT MAY OWE NIGERIAN FARMERS A DUTY OF CARE[5]

On 12 February, the UK Supreme Court confirmed *Vedanta* and dismissed Shell's argument that its parent company did not owe a duty of care as regards its subsidiary's operational activities. The case was brought by some 40,000 claimants from Nigerian farming and fishing communities in the Niger Delta against parent RDS and its subsidiary SPDC. It concerned numerous oil spills from oil pipelines, causing widespread damage to the environment, to livelihood and health.

Shell had adamantly maintained that its parent company RDS did not intervene with its subsidiaries' operations and the Court of Appeal accepted this on the basis of scant evidence. More extensive evidence surfaced in the Supreme Court and this strongly suggested that RDS was heavily involved in its Nigerian subsidiary's operations (see also 2). The Supreme Court confirmed its Vedanta decision and considered that the Court of Appeal had erred in dismissing the claim against RDS in a pre-trial decision. It held that the parent's duty of care question could only be answered at a full trial after ascertaining all the facts. At the pre-trial stage it is sufficient that the claimants' pleaded case discloses an arguable claim. This low threshold makes it very hard for parent companies to avoid a full trial and this considerably strengthens the hands of claimants to reach out of court settlements (see 1).

4. UK SUPREME COURT: UBER DRIVERS ARE WORKERS[6]

On 27 February, the UK Supreme Court held that Uber drivers must be considered as workers for the purposes of the Employment Rights Act 1996, National Minimum Wage Act 1998 and Working Time Regulations 1998. It made clear that the focus in determining worker status is on the true nature of the relationship between the 'worker' and the 'employer'. Not the terms of the contract written by Uber's lawyers are decisive, but the purpose of the relevant statutory provisions. It was not for the 'armies of lawyers' to define the contractual relationship so as to defeat the purpose of the legislation.

The result is that Uber's 70,000 drivers in the United Kingdom are entitled to a minimum wage, minimum holiday pay, rest breaks, protection from discrimination and whistleblowing. Although Uber had already been adapting its contracts while the case passed through the courts, the decision has important ramifications for platform based working arrangements in the gig economy and beyond. It also endangers the economic viability of gig economy-based business models (see also 10).

5. UK COURT OF APPEAL: SELLING A SHIP TO BE SCRAPPED MAY TRIGGER LIABILITY[7]

On 10 March, the English Court of Appeal allowed a shipping company to be sued, after it had sold a vessel to be scrapped in dangerous conditions in Bangladesh. The case was brought by the widow of Khalil Mollah who fell to his death whilst working on the demolition of an oil tanker on the beach at Chittagong. Work on shipbreaking yards in South Asia is known to be extremely dangerous. The case was brought against Maran Ltd., a London based company that had sold the ship on behalf of the owner and the contractor. The Court of Appeal held that it was arguable in a trial that Maran Ltd. owed the shipbreaking workers a duty of care, even though multiple third parties were involved in the transaction.

The contract obliged the immediate buyer to sell the vessel to a yard that would carry out the demolition in accordance with good health and safety working practices. The Court of Appeal considered that the seller could have achieved compliance by the buyer, such as by making the payment contingent on evidence that the ship was demolished in a safe way but did not do so. This decision shows the legal risks of selling goods to areas where human rights are violated at a considerable scale. One may also think of selling dual use goods, like cyber security technology, to repressive regimes cracking down on human rights defenders. Contracts should not be aimed at shifting the risk to third parties but at minimizing the risks for individuals that might be adversely affected by the transaction and its aftermath.

5 *Okpabi and others v. Royal Dutch Shell plc and another* [2021] UKSC 3.
6 *Uber BV and others v. Aslam and others* [2021] UKSC 5.
7 *Hamida Begum (on behalf of Khalil Mollah) v Maran (UK) Ltd* [2021] EWCA 326.

6. GERMAN GOVERNMENT ANNOUNCES HUMAN RIGHTS DUE DILIGENCE BILL[8]

On 12 February, the German coalition government agreed on a mandatory human rights due diligence bill, with a focus on corporate accountability for human rights violations in global supply chains. Companies that do not comply with this obligation face fines of up to 10% of their turnover, for example if they procure materials from suppliers that fail to observe human rights and environmental standards. The bill covers companies with over 3,000 employees as from 2023 and companies with over 1,000 staff one year later. It is similar to the French Act on the duty of vigilance that was introduced in 2017, be it that this Act does not contain any administrative sanctions in case of non-compliance.[9] The German bill is supposed to be discussed and voted on before the end of this parliament in September 2021.

7. EUROPEAN PARLIAMENT ADOPTS RESOLUTION ON CORPORATE DUE DILIGENCE AND ACCOUNTABILITY[10]

On 10 March, the European Parliament adopted a resolution on corporate due diligence and accountability. This followed EU Commissioner for Justice Didier Reynders' announcement in April 2020 that the European Commission aimed to introduce rules for mandatory corporate environmental and human rights due diligence.[11] In its resolution, the European Parliament (EP) took a stand on how such a Directive should take shape. The EP Committee on Legal Affairs adopted the report in January 2021, and it was adopted by the plenary by an overwhelming majority (504 votes in favour, seventy-nine against and 112 abstentions). This put pressure on the Commission to not only deliver on its promise but also to introduce a proposal with teeth.

8. DUTCH PRIVATE MEMBERS' BILL ON RESPONSIBLE AND SUSTAINABLE INTERNATIONAL BUSINESS[12]

On 10 March, a number of Dutch MPs introduced a Private Members' Bill on responsible and sustainable international business. In the autumn of 2020, the Dutch government announced that it preferred mandatory due diligence legislation to be introduced at the EU level but that it would consider domestic legislation if the EU makes insufficient progress or shows a lack of ambition. Some Dutch MPs did not want to wait for the EU and presented their own bill. The bill aims to impose a due diligence duty on all companies in The Netherlands to address human rights violations and environmental damage in their value chains. A regulator may issue financial sanctions. It will also be possible for third parties to hold companies liable in court for harms suffered as a consequence of breaching their statutory duties.

9. BLACKROCK TO PRESS COMPANIES ABOUT THEIR HUMAN RIGHTS POLICIES[13]

After it announced last year that it will address climate change issues of its investees, BlackRock announced on 18 March that it will also press its investees about their human rights policies, biodiversity, deforestation and water. They will be asked to identify and show how they intend to prevent human rights abuses and provide 'robust' disclosures about those practices. Companies will also need to explain the board's role in overseeing these issues and BlackRock may vote against directors who fail to act. It said that its announcement was not only prompted by the increasing regulatory, reputational and operational risks for companies in this area, but also by the fact that employees, consumers and investors increasingly expect companies to manage their environmental and social impacts in order to preserve their social license to operate. BlackRock is the world's largest asset manager; in 99% of the S&P companies it is one of the top five shareholders.

10 DELIVEROO'S FLOTATION FIASCO ON THE LONDON STOCK EXCHANGE[14]

Much fuss was made of Deliveroo's IPO on the London Stock Exchange, but on 31 March it turned out to be the biggest flotation fiasco in LSE's history. At the end of the first trading day, the shares were trading more than a quarter lower than the initial asking price. One of the reasons was the concern several investors expressed about Deliveroo's gig economy-based business model. Its 100,000 couriers are independent self-employed contractors and, hence, not entitled to minimum wage or holiday pay. The UK Supreme Court's decision in the Uber case (4) did not help creating trust in the IPO. But also independent from legal issues, there is growing concern among large investors that these business models are socially unsustainable, something that was poignantly depicted in Ken Loach's film 'Sorry we missed you'.[15]

8 Business and Human Rights Resource Centre *Govt. Agrees on National Mandatory Due Diligence Law*, https://www.business-humanrights.org/de/neuste-meldungen/germany-govt-agrees-on-national-mandatory-due-diligence-law.

9 Article L. 225–102-4 Code de commerce.

10 Report of the Committee on Legal Affairs of the European Parliament of 11 Feb. 2021, with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), adopted by the European Parliament on 10 Mar. 2021.

11 Business and Human Rights Resource Centre, *EU Commissioner for Justice Commits to Legislation on Mandatory Due Diligence for Companies*, https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies.

12 Business and Human Rights Resource Centre, *Dutch Bill on Responsible and Sustainable International Business Conduct*, https://www.business-humanrights.org/en/latest-news/dutch-bill-on-responsible-and-sustainable-international-business-conduct.

13 Bloomberg, *BlackRock to Press Companies on Human Rights and Nature*, https://www.bloomberg.com/news/articles/2021-03-18/blackrock-to-press-companies-on-human-rights-and-nature.

14 CNN Business, *London Needed a Win: Instead It Got Its Worst IPO in History*, https://edition.cnn.com/2021/04/02/investing/london-deliveroo-ipo/index.html.

15 https://en.wikipedia.org/wiki/Sorry_We_Missed_You.

10.1 Some Brief Observations

10.1.1. *Lessons Learned from Litigation, Regulation and Investors' Demands*

These ten events indicate the speed with which the business and human rights agenda is currently developing, not only through litigation, but also through regulation and through the investors' demands. Litigation risks are relatively low (most damage caused by multinational companies is not addressed by any form of dispute resolution), but they have clearly increased by recent events (1–5). Piecemeal legislation in the business and human rights area has been around for about a decade, but the recent events make clear that general human rights due diligence legislation will be rolled out in the forthcoming years, not only in the EU but probably also additionally in some of the EU Member States (6–8). Next to litigation and legislation, business to business regulation (B2B) by global value chain leaders and investors is playing an equally important role in holding companies to account for respecting human rights. Recent events show that more investors tend to link their investment risks to gig economy business models and to a lack of human rights and sustainability risk management by their investees (9–10).

10.1.2. *A Transnational Legal World*

These events are all part of a development that is transnational in nature. The Dutch Court of Appeal (2) assessed the liability of Shell's parent company on the basis of Nigerian common law, interpreted through the lens of the English common law, as developed by the Supreme Court in London. More generally, norms and standards for companies are coming from all directions and in all shapes. Indeed, transnational law is polycentric and polymodal.[16] Rules are enacted at the global level (UN), regional level (EU) and national level. They are issued by public authorities and private actors. And they come as hard law, soft law, guidelines and guidance. This creates an increasingly complex environment in which fragmented rules are overlapping and colliding.

10.1.3. *Active and Proactive Business Attitudes*

How should companies deal with such a complex and dynamic reality of litigation, legislation, and investors' demands? One option companies are already benefiting from, is to stay ahead of this wave of events by taking an active or proactive human rights attitude based on a robust human rights due diligence practice. This also contributes to creating long-term value for the company and to reducing liability, reputational and operational risks.[17] For companies that remain inactive or reactive in respecting human rights, the events in early 2021 provide ten wake-up calls to get their house in order:

> *Admit that the waters*
> *Around you have grown*
> *And accept it that soon*
> *You'll be drenched to the bone*
> *If your time to you is worth savin'*
> *And you better start swimmin'*
> *Or you'll sink like a stone*
> *For the times they are a-changin*[18]

10.1.4. *A Different Perspective for Company Lawyers*

Rather than drafting contracts to undermine the labour protection of vulnerable individuals (Uber, 4), or shifting risks to people that may pay for them with their lives or limbs (Begum, 5) or creating a narrative about a parent company's remit to protect it from being accountable for its externalized costs (Shell, 2 and 3), company lawyers may assume a more meaningful role. By contributing to identifying human rights risks in the company's operations and those of its business partners, by being instrumental in addressing, preventing and mitigating these risks, and by initiating remedies where operations have gone awry. It's a new paradigm company lawyers need to make themselves familiar with. But it will be worth it. For people, planet and profit.

16 Stephen Korbin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights* 19(3) Bus. Ethics Q. 349–374 (2009).
17 Cees van Dam, *Enhancing Human Rights Protection: A Company Lawyer's Business*, Inaugural Rotterdam (Rotterdam: RSM 2017).
18 Bob Dylan, *The Times They are A-changing*, in *The Times They are A-changing* (New York City: Columbia 1964).