Cross-border Human Rights and Environmental Damages Litigation in Europe: Recent Case Law in the UK

Over the last few years, litigation in European courts against gross human rights violations and widespread environmental disasters has intensified. Recent case law shows that victims domiciled in third States often attempt to sue the local subsidiary and/or its parent company in Europe, which corresponds to the place where the latter is seated. In light of this, national courts of the EU have been asked to determine whether the parent company located in a Member State may serve as an anchor defendant for claims against its subsidiary – sometimes with success, sometimes not:

For example, in *Okpabi & Ors v Royal Dutch Shell Plc & Anor*, the English High Court, Queen's Bench Division, by its Technology and Construction Court, decided that it had no international jurisdiction to hear claims in tort against the Nigerian subsidiary (SPDC) of Royal Dutch Shell (RDC) in connection with environmental and health damages due to oil pollution in the context of the group's oil production in Nigeria. To be more specific, Justice Fraser concluded that the Court lacked jurisdiction over the action, inasmuch as the European parent company did not owe a duty of care towards the claimants following the test established in *Caparo Industries Plc v Dickman*. Under the Caparo-test, a duty of care exists where the damage was foreseeable for the (anchor) defendant; imposing a duty of care on it must be fair, just, and reasonable; and finally, there is a certain proximity between the parent company and its subsidiary, which shows that the first exercises a sufficient control over the latter.

On 14 February 2018, the Court of Appeal validated the first instance Court's reasoning by rejecting the claimants appeal (the judgment is available here). In a majority opinion (Justice Sales dissenting), the second instance Court confirmed that the victims' claims had no prospect of success. Nevertheless, Justice Simon provided a different assessment of the proximity requirement: after analysing the corporate documents of the parent company, he observed that RDS had

established standardised policies among the Shell group. According to the Court, however, this did not demonstrate that RDS actually exercised control over the subsidiary. At paragraph 89 of the judgment, Justice Simon states that it is "important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies (…). The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (…) such as to give rise to a duty of care". Therefore, the Court of Appeal set a relatively high jurisdictional threshold that will be difficult for claimants to pass in the future.

Conversely, in *Lungowe v Vedanta*, a case that involved a claim against a parent company (Vedanta) seated in the UK and its foreign subsidiary for the pollution of the Kafue River in Zambia, as well as the adverse consequences of such an occurrence on the local population, the Court of Appeal concluded that there was a real issue to be tried against the parent company. Moreover, the Court considered that the subsidiary was a necessary and proper party to claim and that England and Wales was the proper place in which to bring the claims. Apparently, this case involved greater proximity between the parent company and its subsidiary compared to *Okpabi*. In particular, the fact that Vedanta hold 80% of its subsidiary' shares played an important role. The same can be said as regards the degree of control of Vedanta's board over the activities of the subsidiary (see the analysis of Sir Geoffrey Vos at paragraph 197 of the *Okpabi* appeal).

Unsatisfied with the current landscape, some States adopted –or are in the process of adopting– legislations that establish or reinforce the duty of care or vigilance of parent companies directly towards victims. In particular, France adopted the Duty of Vigilance Law in 2017, according to which parent companies of a certain size have a legal obligation to establish a vigilance plan (*plan de vigilance*) in order to prevent human rights violations. The failure to implement such a plan will incur the liability of parent companies for damages that a well-executed plan could have avoided. In Switzerland, a proposal of amendment of the Constitution was recently launched, the goal of which consists in reinforcing the protection of human rights by imposing a duty of due diligence on companies domiciled in Switzerland. Notably, the text establishes that the obligations designated by the proposed amendment will subsist even where conflict of law rules designate a different law than the Swiss one (overriding mandatory

provision). Finally, some other States, such as Germany, propose voluntary measures through the adoption of a National Action Plan, as this was suggested by the EU in its CSR Strategy.

For further thoughts see Matthias Weller / Alexia Pato, “Local Parents as ‘Anchor Defendants’ in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends” forthcoming in Uniform Law Review 2018, Issue 2, preprint available at SSRN.