

Sustentabilidade Empresarial, Direitos Humanos e Ambiente

**Antes e para lá da diretiva anunciada
(Dever de diligência das empresas em
matéria de sustentabilidade)**



Coordenação:
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ARTICLE 29 (1) CSDDD – A FAREWELL TO THE INDEPENDENT CONTRACTOR RULE*

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Hannes Wais**

Abstract: This article analyzes the legal concepts of tort liability for third parties that can be found in different legal systems and contrasts these with the liability rules found in Art. 29 CSDDD.

Keywords: Duty of care; liability for third parties; supply chain.

I. Introduction

Pursuant to Articles 8 (1), 10 and 11 CSDDD, companies are required to take measures to identify and assess adverse environmental or human rights impacts arising from their own operations and, where related to their chains of activities, those of their business partners, to prevent potential adverse impacts and to bring actual adverse impacts to an end. If a company fails to comply with these obligations, it shall be liable under Article 29 (1) CSDDD for damages that are a result of that failure, except where the damage was caused exclusively by the business partner in the chain of its activity. Importantly, exclusive causation is not to be mistaken with direct causation: Where a damage was caused directly by the business partner and only indirectly by the company, it cannot be regarded as being exclusively caused by the business partner within the meaning of Article 29 (1) CSDDD. Furthermore, the fact that the business partner's conduct is an act of free self-determination is not sufficient to exclude the liability of the company based on accountability.

For example, assume a Portuguese company has contracted with an independent supplier over the delivery of pre-fabricated parts. Assume further that the supplier is relying on forced labor and that the Portuguese company knew about this practice and did not take any measures to prevent it. Under these conditions, the Portuguese company may be liable for damages of the workers caused by the supplier when carrying out work as per the contractual agreement with the company.

Liability of one person for damages that were caused by another person is not unusual. In many legal systems, the principal may be liable for damages caused by his agent. What is rather unusual is that liability extends also to third persons who are independent contractors, i.e. persons that decide on their conduct autonomously because they are not subject to the principal's

* The following paper is largely based on the script of the short presentation given during the congress *Sustentabilidade empresarial, direitos humanos e ambiente*, held at the University of Coimbra on October 2023. CSDDD = *Corporate Sustainability Due Diligence Directive*: Directive (EU) 2024/1760, 13.6.2024.

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directions. In fact, in many legal systems the question of whether or not the third party is an independent contractor is the touchstone for the delimitation of third party liability (outside contractual relations). But there are exceptions to this general rule. In this brief article, the guiding principles for (extra-contractual) third party liability in England, the USA, Austria, Italy and Germany will be analyzed¹.

II. England

Under English law, two elements have to be shown before one person can be made vicariously liable for the torts committed by another. There must be a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Furthermore, there must be a connection between that relationship and the tortfeasor's wrongdoing².

The employer is liable for torts committed by the employee during the course of employment, without there being the need of a breach of a duty of care by the employer (so-called employer's vicarious liability)³. The liability also extends to relationships "akin to employment"⁴. But no such liability exists if the tort was committed by an independent contractor⁵. Whether or not the third party qualifies as an employee is determined on the basis of a tripartite test: First, the third party must be subject to the control of the principal (control test)⁶. Second, the principal must bear the (economic) risks associated with the third party's activity (entrepreneur test)⁷. Third, the third party must form an integral part of the undertaking (organization test)⁸.

There are two exception where the principal may be liable for a third party outside the scope of the employer's vicarious liability: First, the principal is liable if the damage caused by a third party is a breach of a non-delegable duty incumbent on the principal⁹. Where this is the case, the principal is considered to have breached that duty himself¹⁰. Duties are non-delegable in "extra-hazardous operations", as the principal must ensure that the independent contractor

¹ There is no particular reason as to why these legal systems were chosen other than language-related accessibility.

² Various Claimants v. Barclays Bank Plc [2020] UKSC 13 = [2020] 2 W.L.R. 960, 962.

³ Lister v. Hesley Hall Ltd, [2002] 1 A.C. 215, 223, n. 14; Various Claimants v. Catholic Child Welfare Society, [2012] UKSC 56 = [2012] 3 W.L.R. 1319, 1326, 1330, 1335, n. 19, 35,

⁴ Various Claimants v. Catholic Child Welfare Society, [2012] UKSC 56 = [2012] 3 W.L.R. 1319, 1326, 1330, 1335, Rn. 35.

⁵ Woodland v. Swimming Teachers Association, [2013] UKSC 13 = [2013] W.L.R. 1227, 1231, n. 3; Cox v. Ministry of Justice, [2016] UKSC 10 = [2016] 2 W.L.R. 806, 816, n. 29; Various Claimants v. Barclays Bank Plc [2020] UKSC 13 = [2020] 2 W.L.R. 960, 962, 970, n. 1, 27.

⁶ Various Claimants v. Catholic Child Welfare Society, [2012] UKSC 56 = [2012] 3 W.L.R. 1319, 1326, 1330, 1335, Rn. 35.

⁷ Various Claimants v. Barclays Bank Plc [2020] UKSC 13 = [2020] 2 W.L.R. 960, 962, 970, n. 13, 27.

⁸ John MURPHY, «Chapter 6 – Vicarious Liability», in Andrew TETTENBORN, *Clerk & Lindsell on Torts*, 23 ed., 2020, 6-12.

⁹ Armes v. Nottinghamshire County Council, [2017] UKSC 60 = [2017] 3 W.L.R. 1000, 1019 f., n. 75.

¹⁰ Armes v. Nottinghamshire County Council, [2017] UKSC 60 = [2017] 3 W.L.R. 1000, 1019 f., n. 75.

respects his duty of care¹¹. Second, liability of the principal may arise where he is under a duty to protect from harm (duty of protection) due to a special relationship to the victim¹². A duty of protection may stem from previous risk creation or the exercise of control over the contractor¹³.

In addition to these specific scenarios, it is generally assumed that the principal is also liable for damages if the principal breached his duty of care with regards to the selection and control the other person¹⁴.

III. USA

§ 7.03 (2) a) Restatement (Third) of Agency provides that a principal is subject to vicarious liability to a third party harmed by an agent's conduct when the agent is an employee who commits a tort while acting within the scope of employment. Pursuant to § 7.07 (2) Restatement (Third) of Agency an employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control, but an employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer. Vicarious liability of the principal is a form of respondeat superior¹⁵. No vicarious liability of the principal exists if the third party is an independent contractor, because the principal cannot control the independent contractor and neither does he dispose of the necessary information and resources to influence or direct his behavior¹⁶.

However, several exceptions exist with regards to liability in general: First, when a principal entrusts work to an independent contractor but retains control over any part of the work, the principal has a duty of reasonable care as to the exercise of the retained control¹⁷. If under these conditions the principal does not avoid a damage caused by the agent even though he would have been able to, he is liable¹⁸.

Second, when a principal conducts an activity through an agent, he is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent¹⁹. Also in this case, the reason for the principal's liability is the principal's fault; it is no vicarious liability.

¹¹ Woodland v. Swimming Teachers Association, [2013] UKSC 13 = [2013] W.L.R. 1227, 1231, Rn. 6.

¹² Woodland v. Swimming Teachers Association, [2013] UKSC 13 = [2013] W.L.R. 1227, 1231, n. 7, 11.

¹³ Woodland v. Swimming Teachers Association, [2013] UKSC 13 = [2013] W.L.R. 1227, 1231, Rn. 6.

¹⁴ John MURPHY, «Chapter 6 – Vicarious Liability», 6-66; James GOUDKAMP / Donal NOLAN, *Winfield & Jolowicz on Tort*, 2020, 21-041.

¹⁵ Dan B. DOBBS/Paul T. HAYDEN/Ellen M. BUBLICK, *Hornbook on Torts*, 2 ed., Rochester: West Academic Publishing, 2016, § 31.1, 753.

¹⁶ Wilson v. Good Humor Corp. (Fn. 104) 1301; Anderson v. Marathon Petroleum Co. (Fn. 103) 939.

¹⁷ In this sense § 56 b Restatement (Third) of Torts.

¹⁸ Gaytan v. Wal-Mart, 853 N.W.2d 181, 192 (Neb. 2014).

¹⁹ Dan B. DOBBS/Paul T. HAYDEN/Ellen M. BUBLICK, *Hornbook on Torts*, § 31.1, § 31.5, § 31.6, 754, 764, 770.

Third, the fact that the third party is an independent contractor does not exclude the principal's vicarious liability in the case of non-delegable duties²⁰. In these cases the fact that the principal to diligently selected and supervised the agent is not a defense. Non-delegable duties may stem from statutory law or from the inherent dangerousness of the activities that the contractor performs for the principal. It is often assumed that the question whether duties are non-delegable is a matter of policy²¹.

IV. Italy

Under Italian law, the principle is liable for a damage caused by the agent under the conditions set forth in Art. 2049 C.C. Pursuant to this provision, the principal is liable for the damages caused by the agent during the performance of the tasks assigned to them.

The principal's liability is based on the fact that the agent was included in the principal's undertaking and that the tasks entrusted to him by the principal made the damage possible²². While the existence of a subordinate employment relationship between the agent and the principal is not necessary, there must be a bond of dependence, supervision and surveillance, even if only temporary, and a connection between that assignment and the person who performs it in the interest of the principal²³.

No such liability exists for damages caused by an independent contractor²⁴. Due to the autonomy of the contractor who carries out his activity with his own organisation of means and management and at his own risk, the contractor cannot be considered as an auxiliary or mere executor of the principal's orders²⁵.

However, if the principal interferes with the management of the works, directly or through appointed technicians, to the extent that the contractor assumes the role of mere material executor, the principal may be liable also for damages caused by a (formally) independent contractor²⁶. Furthermore, the principal may be liable for the independent contractor if it was clear that the contractor would be unfit for the tasks assigned to him²⁷.

V. Austria

Pursuant to § 1315 ABGB, a principal who hires a habitually unapt agent or knowingly hires a dangerous agent, is liable for the damage the agent inflicts onto another. For an agent who is

²⁰ Restatement (Third) of the Law, Agency, Vol. II (2006) 196.

²¹ Dan B. DOBBS/Paul T. HAYDEN/Ellen M. BUBLICK, *Hornbook on Torts*, (Fn. 105) § 31.6, 766.

²² Corte di Cassazione, 25373/2018.

²³ Corte di Cassazione, 21685/2005.

²⁴ Corte di Cassazione, 11371/2006.

²⁵ Corte di Cassazione, 11371/2006.

²⁶ Corte di Cassazione, 8410/2014.

²⁷ Corte di Cassazione, 8410/2014; Corte di Cassazione, 4361/2005; Corte di Cassazione, 15408/2004.

habitually unapt, the principal is vicariously liable. Where the agent is dangerous, as indicated by the word “knowingly”, the principal’s liability is fault-based²⁸. The underlying rationale is that if the principal creates a risk by his doing, he cannot evade his liability through delegation as the advantages and disadvantages must go together²⁹. But the principal is only liable for mistakes of the agent that are associated with his habitual unaptness for the delegated task³⁰.

Uncertainty surrounds the question whether liability extends also to damages caused by independent contractors: According to the prevailing case law, liability under § 1315 ABGB does not require a relationship of dependence or instruction; the OGH either expressly denies this requirement³¹ or does not discuss the lack of a relationship of instruction as a problem that could prevent the application of § 1315 ABGB³². However, in a case regarding damages caused by protestors, the OGH held that the organisers of the protest were not liable under § 1315 ABGB for fault of the protest leader because the latter acted on his own responsibility³³. Since the OGH did not address the fact that this decision potentially conflicted with its previous case law, the implications of the decisions remain unclear.

Literature, in contrast, univocally denies a liability under § 1315 ABGB for independent contractors when they are not required to follow the principal’s instructions³⁴. This is based on the assumption that § 1315 ABGB applied only in situations in which damages originate from the principal’s sphere, which means that they can be controlled by him. Where the principal transfers a task to another independent contractor who is not required to follow instructions, the latter cannot be considered as being part of his sphere of influence, so that, accordingly, the principal has no control over the risk. Based on these considerations, independent contractors qualify as agents if they are bound by instructions or if there is a certain relationship of dependency. Liability for independent contractors who are not bound by instructions should only be assumed if the principal was at fault in choosing the contractor.

²⁸ Judith SCHACHERREITER, «§ 1315 ABGB», in: KLETEČKA/SCHAUER, *ABGB-ON – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Wien: Manz, 2019, n. 4.

²⁹ Helmut KOZIOL, *Österreichisches Haftpflichtrecht*, II, Wien: Jan Sramek Verlag KG, 2018, 918–919, n. 1, 3 f.; Judith SCHACHERREITER, «§ 1315 ABGB », n. 2.

³⁰ OGH 19.3.1952 – 1 Ob 119/52, OGH SZ 25/68; OGH 8.2.1968 – 2 Ob 164, 165/67, JBl 1968, 473, 474; OGH 30.1.2018 – 9 Ob, 69/17p; OGH 29.8.2022 – 6 Ob, 216/21i n. 43.

³¹ OGH 19.3.1952 – 1 Ob 119/52; OGH 30.3.1971 – 4 Ob 511/71.

³² 6 Ob 100/67 = EvBl 1968/24; 5 Ob 306/71 = ZVR 1972/174; 4 Ob 511/71 = JBl 1972, 205.

³³ 9 Ob 8/20x = EvBl 2021/96.

³⁴ Helmut KOZIOL, *Österreichisches Haftpflichtrecht*, 923, n. 12; Helmut KOZIOL «Entscheidungsbesprechung (Bei Besorgungshilfen muß kein Abhängigkeitsverhältnis bestehen)», *JBl* 1978, 93; Rudolf REISCHAUER «§ 1315» in Peter RUMMEL, *ABGB Kommentar*, Wien: Manz, 2004, n. 1; Christian RABL/Andreas RIEDLER, *Schuldrecht Besonderer Teil*, Wien: Verlag Österreich, 2017, n. 13/40; Friedrich HARRER, «§ 1315» in Michael SCHWIMANN/Georg E KODEK § 1315, Wien: LexisNexis Verlag Österreich, 2017, n. 6; Ernst KARNER «§ 1315» in Helmut KOZIOL/Peter BYDLINSKI/Raimund BOLLENBERGER, *ABGB*, Wien: Verlag Österreich, 2020, n. 2; Johannes ANGYAN, «Juristische Personen als Besorgungsgehilfen», *Jbl*, 5, 2016, 289–300, 291.

VI. Germany

Under German law, the principal may be held liable pursuant to § 831 para. 1, sentence 1, BGB for a tort committed by his agent during the performance of the service owed to the principal. Pursuant to § 831 para 1, sentence 2 BGB, no such liability exists if the principal can prove that he was not at fault selecting and supervising the agent. Liability under § 831 BGB requires that the agent is a *Verrichtungsgehilfe*: an (auxiliary) person who, with the knowledge and will of the principal, acts in the principal's sphere of interest and must follow his instructions³⁵.

According to the BGH, these requirements are met if the principal can at any time restrict or stop the activity of the other person or if he can determine the time and scope of that activity³⁶. Thus, whether or not that person qualifies as an agent within the meaning of § 831 para. 1 sentence 1 BGB depends largely on whether there is a lack of independence and autonomy.

Importantly, the BGH focuses on the integration of the agent into the principal's organization and the (actual) possibility of the principal to control the agent's activity of the vicarious agent³⁷. An agent who is an independent contractor does not fall within the scope of § 831 BGB, as the independent contractor is not required to follow the principal's directions³⁸.

Outside the scope of § 831 BGB the principal may be held liable for the damages caused by a third party only where the principal is under a specific duty of care (*Verkehrssicherungspflicht*), as that duty turns into a duty to select, instruct and supervise if the task associated with that duty of care is assigned to another person³⁹. Typically, a duty of care may originate from previous causation of a hazard or the capacity to control a hazard⁴⁰. In contrast, assigning a certain task to another person (that is not an agent within the meaning of § 831 para. 1 sentence 1 BGB) does not provide the grounds for a duty of care⁴¹.

Accordingly, where an independent contractor is commissioned to deliver certain goods or services, no duty of care is incumbent on the principal⁴², not least because any hazard that may

³⁵ BGH 10.3.2009 – VI ZR 39/08, *NJW* 2009, 1740, 1741, n. 11.

³⁶ BGH 30.6.1966 – VII ZR 23/65, *BGHZ* 45, 311, 313; BGH 6.11.2012 – VI ZR 174/11, *NZG* 2013, 279, Rn. 15.

³⁷ BGH 6.11.2012 – VI ZR 174/11, *NZG* 2013, 279, n. 15.

³⁸ BGH 13.12.2019 – V ZR 43/19, *NJW* 2020, 1798, 1799, n. 11; BGH 18.12.2015 – V ZR 55/15, *NJW-RR* 2016, 588, 589, n. 11.

³⁹ BGH 14.1.1982 – III ZR 58/80, *NJW*, 1982, 2187, 2187–2188; BGH 17.1.1989 – VI ZR 186/88, *NJW-RR* 1989, 394, 395.

⁴⁰ Mathias HABERSACK / Peter ZICKGRAF, «Sorgfaltspflichten und Haftung in der Lieferkette als Regelungsmodell», *RabelsZ*, 87/3 (2023), 532-607, 542; Mathias HABERSACK/Maximilian EHRL, «Verantwortlichkeit inländischer Unternehmen Verantwortlichkeit inländischer Unternehmen für Menschenrechtsverletzungen durch ausländische Zulieferer – *de lege lata* und *de lege ferenda*», *Archiv für die civilistische Praxis* (AcP) 219/2 (2019) 155-210, 200–201; Gerald SPINDLER, «Verantwortlichkeit und Haftung in Lieferantenkette», *ZHR* 186 (2022) 67-124, 96.

⁴¹ Mathias HABERSACK/Peter ZICKGRAF, «Sorgfaltspflichten und Haftung in der Lieferkette als Regelungsmodell», 544.

⁴² Mathias HABERSACK/Peter ZICKGRAF, «Sorgfaltspflichten und Haftung in der Lieferkette als Regelungsmodell», 544.

stem from the activity of the supplier is directly caused only by the supplier and is best controlled by him and not by the principal⁴³.

VII. Conclusion

Liability for damages caused by a third party is a concept that exists in all of the legal systems comprised in this short overview (and arguably exists in every other legal system, too). Differences relate to the requirements of such liability.

Liability of the principal for an agent who is subject to the principal's direction can be found in any of the four legal systems. Only under German law, the principal's liability always requires fault of the principal, whereas in the other four legal systems that liability is to some extent a strict/vicarious liability.

The legal systems also differ when it comes to independent contractors. In this regard, the German legal system is again the most lenient: the principal faces no liability for damages caused by the agent if that agent is an independent contractor. Pursuant to German doctrine, assigning an independent contractor does not provide sufficient grounds for a duty of care. Liability of an independent contractor will only exist if the principal was already under a duty of care prior to engaging the agent, and that duty of care will transform into a duty to thoroughly select and supervise the agent.

The Austrian legal system marks the other end of the spectrum, as, pursuant to § 1315 ABGB, a principal is liable for an agent even if he is an independent contractor.

Between these two extrema, we find the Italian legal system. Under Italian law, there are cases where the principal is not liable for an independent contractor. Nevertheless, there is no absolute rule, as the principal is considered to always be liable if the choice of the contractor was inadequate. Hence, unlike under German law, there is always a duty of care with regard to the selection of the agent. Furthermore, the principal is liable if the contractor, while formally being independent, is in fact merely executing the principal's orders (one could argue that, for lack of actual independence, this is not actually a case of liability for independent contractors).

Also the common law systems of England and the USA are positioned between the very lenient German approach and the rather strict Austrian approach with regard to independent contractors. In the common law systems, there generally is no liability for independent contractors, but again exceptions exist.

Article 29 (1) CSDDD is not conceptualized as a vicarious liability, as it requires a breach of a duty of care that results from the fact that the company has contracted with a supplier. That extension of liability may seem incompatible with German tort law, but not so much with Austrian and Italian law, where the engagement of an agent already entails a duty relating to the diligent selection of that agent. What may be deducted from these findings is that while the duties

⁴³ Mathias HABERSACK/Peter ZICKGRAF, «Sorgfaltspflichten und Haftung in der Lieferkette als Regelungsmodell», 544.

implemented by Article 10 and 11 CSDDD are far-reaching, the fact that there is a liability with regard to third parties damaged by the supplier is not as alien a concept as it may seem on first sight. It will be interesting to see how this concept plays out in the future.