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Limbu v *Dyson Technology Limited* and the *forum non conveniens* doctrine

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Introduction

The High Court decision in Limbu v Dyson tests the application of the doctrine of *forum non conveniens* ('FNC') in international human rights litigation for the first time since the UK's withdrawal from the EU.[1] Until the UK-EU Withdrawal Treaty, the position of the Court of Justice of the European Union ('CJEU') on the application of FNC was stated in Owasu v Jackson where the Court ruled that national courts are not permitted to apply the doctrine of *forum non conveniens* ('FNC') where the defendant is domiciled in an EU member state[2], and the subject matter of the dispute falls within the scope of Brussels I[3]. As a result, in many international human rights litigation cases the jurisdiction of the English court over a company deemed domiciled in the UK under Article 63 of Brussels I could not have been disputed on the basis that England was not the appropriate forum.[4] In Vedanta for instance, the allegation that England was FNC was only raised in relation to the request to join into the proceedings Vedanta's Zambian based Subsidiary under jurisdictional gateway 3.1(3) of Practice Directive 6B[5]. The same could not have been argued in relation to the parent company (Vendanta Plc) which was deemed domiciled in the UK.[6] Following the withdrawal from the EU, the UK repealed Brussels I, restoring the application of English conflict of laws rules and with it the doctrine of FNC, which will now apply even to cases brought against a corporation with presence in the UK.

In this case review I advance two arguments. First, that the court's reasoning in Dyson conforms to the core justice values of the doctrine of FNC, and although it has harsh impact on poorly resourced claimants, it is a sound decision. Second, even when claimants are successful at convincing the court that England is the appropriate forum, due to the fact-intensive discovery nature of the FNC inquiry, arguing it, is time and cost inefficient, defeating in that the very need to secure access to justice and an effective remedy to victims of business-related human rights violations. Therefore, I reiterate in this piece the need for a statutory binding framework that will relieve claimants from demonstrating

[1] Limbu v Dyson Technology Limited, [2023] EWHC 2592 (KB)

[2] C-281/02 Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others [2005] E.C.R. I-1383

[3] Council Regulation (EC) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2012) OJ L 351 [Hereinafter Brussels I Regulation]. Article 63 of Brussels I which deals with the domicile of corporations. On one occasion the court declined jurisdiction and found that the parent company was not domiciled in the UK. This was the case of *Vava v Anglo American of South Africa*[3] (full citation) where claimants brought a claim against the South African gold mine before the High Court in relation to the illnesses silicosis and silico-tuberculosis.

[4] Okpabi and others v Royal Dutch Petroleum plc and another, [2021] UKSC 3.

[5] Vedanta Resources v Lungowe [2019] UKSC 20. See Practice Direction 6B Service Out of the Jurisdiction. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b

[6].Vedanta *ibid*.

that England is the appropriate forum in relation to claims concerning human rights violations brought against UK present corporations.
I will provide a brief introduction to the doctrine of FNC under English law, and then summarise and critically assess the Dyson decision.

FNC under English law

The Jurisdiction of the English Court is discretional. This means that despite having jurisdiction under the civil procedural rules, the court may still decline jurisdiction if England is not deemed to be the appropriate forum (*forum conveniens)*. In the leading case of *Spiliada* the Supreme Court reasoned that the *forum conveniens* is the forum in which the case may be tried more suitably for the interests of all parties and the ends of justice.[7] Although, the doctrine of FNC has at times prevented claimants from pursuing a claim in England, and even on matters that implicate human rights violations, it is important not to lose sight that ultimately its application is intended to serve the 'interests of the parties and of justice'. For this reason, the doctrine of FNC should be viewed as an instrument of justice. According to Fentiman this is reinforced by two features of the doctrine. First, even if England is not the *forum conveniens*, an order declining jurisdiction must not itself be unjust to a claimant. Second, it is reflected in its underlying objective that proceedings should be heard in the most cost-effective forum.[8] Given that justice is the overriding consideration, staying a claim in favour of the most efficient forum, should in theory yield an efficient outcome, and an efficient outcome is in principle the just outcome.[9] Therefore, the doctrine of FNC aims to remove inefficiencies caused by cost and delay which inevitably benefits the stronger and better-funded party. By locating proceedings in the most appropriate forum, it is more likely to eradicate the 'inefficiency dividend' which favours the stronger party, thereby ensuring relative equality of arms'.[10]

Moreover, a reassuring pre-condition for the application of the doctrine of FNC is that the party contesting the jurisdiction must identify another forum that has jurisdiction to determine the dispute. This applies both when challenging jurisdiction and when seeking permission to serve out of the jurisdiction, where the burden is on the Claimant to show that England is the appropriate forum.[11]
The court applies the doctrine by following two stages. In stage I the court evaluates with which forum the claim has the most real and substantial connection,[12]which entails assessing the relative efficiency between England and the other available forum. As Lord Goff stated in *Spiliada* the court should give the appropriate weight to such factors considering all the circumstances of the case. In *Amin Rasheed Shipping Corporation* the court stated that 'the court must consider the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their

[7]Spiliada Maritime Corp v Cansulex Ltd ("The Spiliada") [1987] AC 460.

[8] Fentiman, R, International Commercial Litigation, (2015) OUP 2nd ed., chapter 13.

[9] *Ibid*, Fentiman, R,

[10] *Ibid*, Fentiman, R., chapter 13 para 16.

[11] Practice direction 6B-Service out of the Jurisdiction *supra* (no 6). Unwired Planet International Ltd v Conversant Wireless Licensing SÀRL [2020] UKSC 37, paras [97]-[98].

[12]*Supra* no (7) Spiliada.

evidence and expense.[13] It is not appropriate however to embark upon a comparison of the procedures, methods, reputation or standing of the courts of one country in comparison with those of another'.[14] It may be the case that there is more than one factor that influence the court's decision of whether to exercise jurisdiction. However, the court may in such circumstances give significant weight to the 'dominant connecting factor' and decide whether based on that factor, England is the appropriate forum.[15]
These connecting factors may include the language of the parties, case management concerns and techniques such as the availability of remote hearing, the ability to join a party or ability to split the claim between the substantive claims relating to breach and the quantum of the compensatory damage, the existence of parallel proceedings and how advanced they are, the desire that all claims to be heard in the same forum, the identity of the applicable law and the cost of proving it, the location of witnesses and evidence[16], the type of the claim, the location of the parties,[17] the place where the wrongful act or omission occurred and the place where the harm occurred.[18] Usually, in claims involving torts, the place where the tort is commissioned is usually the *prima facie* place with which the claim has the substantial connection. However, the importance of where the tort was commissioned may be 'dwarfed' by other considerations.[19] These are all fact-intensive enquiries which will cost the parties time and expense which are counter productive to the need of remediating victims who are often in a dire need for a reparation.

The second stage of the application of the FNC doctrine becomes relevant if the court reaches a conclusion that the on consideration of the connecting factors the foreign jurisdiction is the appropriate forum. At this stage, the claimant may provide 'cogent evidence' that by staying proceedings they will suffer substantial injustice. This will usually be proven by showing that the stay will deny them access to justice, or the right to an effective remedy.[20] Cogent evidence does not necessarily mean 'unchallenged evidence'.[21] The Court does not need to be satisfied on the balance of probabilities that the risk will occur, suffice to provide cogent evidence that the risk exists.[22]
In *Vedanta*, thousands of Claimants brought a tort action in relation to a gas leak at a mine operated by Vedanta's Zambian subsidiary. The Supreme Court found that even though Zambia was the appropriate forum, ordering a stay of proceedings in favour of Zambia will effectively deny the Claimants access to justice, because Zambia's civil justice system had insufficient access to funding and local legal resources to enable the Claimants to obtain substantial justice in Zambia.[23]

[13] Amin Rashid Shipping Corporation v Kuwait Insurance [1984] AC 50.

[14] *Ibid*, Amin Rashid Shipping.

[15] JSC BTA Bank v Granton Trade Ltd [2010] EWHC 2577 (Comm)

[16] Peacock v Del Seatek India and Hyundai HeAVY Industries Company [2019] EWHC 2867 (Admiralty)

[17] Jefferies International Ltd v Cantor Fitzgerald & Co [2020] EWHC 1381 (QB

[18] Vedanta *supra* no (5) at para [66].

[19] Dyson *supra* no (1) at para [36], quoting also VTB Capital Plc. v. Nuritek International Corp [2013] 2 AC 337. ("VTB")

[20] Fentiman, R., *supra* no (13).

[21] Vedanta *supra* no (5) para at [96].

[22] Cherney v Deripaska [2009] 2 CLC 408, at para [42].

[23] Vedanta *supra* no (5) at para [100].

In Unilever, the claimants brought a claim in England against Unilever PLC, a company incorporated in Switzerland which was also deemed domiciled in the UK under Article 63 of Brussels I.[24] The claimants also joined its Kenyan subsidiary UTKL under UK Civil Procedure Rules utilising specifically paragraph 3.1(3) of Practice Directive 6B. The claimants argued that Unilever PLC owed them a duty of care to protect them from third parties who committed against them various grave crimes such as rape, and that they breached that duty. Although the harm was committed by a third party, the claims did centre around the direct involvement of the Kenyan subsidiary in managing the risk posed to the party to their employees (seasonal workers). The court declined jurisdiction over the Kenyan subsidiary on the basis that there was not a real issue between the claimants and Unilever plc.[25]
Although the court declined jurisdiction based on the first point of Article 3.1(3) i.e. that there was not a real issue between the claimants and the First defendant (Unilever Plc), the trial court also proceeded to deal with whether England was the appropriate forum on the hypothetical assumption that they were wrong in their decision on the first point. The High Court reasoned that England was the appropriate forum and even if they were wrong on this finding, that staying proceedings will cause the Claimants substantial injustice. The Court reasoned that the Claimants will not be afforded effective legal representation in Kenya due to lack of effective legal representation and funding.[26] Another factor was that there was genuine fear about the safety of the Claimants should they try the claims in Kenya, due to the existing ethnic tension between the Claimants and another dominant ethnic group.

In Dyson, like in Unilever, the Claimants submitted that a stay would mean that they will not have access to legal representation in Malaysia arguing among other things that either there are not available lawyers with the expertise to deal with the case, and decisively that contingency fees basis will not be available in Malaysia. Additionally, they argued that they will be unable to participate effectively in a trial in Malaysia, either in person or remotely, due to the fear of detention in inhumane conditions and deportation should they return to Malaysia,[27] and that there was a real risk that the Malaysian court will not allow remote or a hybrid hearing.[28]The court was not convinced by these arguments. Relying on Vedanta,[29] the Court was not convinced that the case fell into one of those exceptional situations where the absence of funding litigation will lead to a real risk of the Claimants being deprived of substantial justice.[30] The court rightly stated that when

[24] Article 63 of Brussels I *supra* no (6), considers a corporation domiciled in the place of its (a) statutory seat, (b) Central administration, (c) Principal place of business.

[25] AAA & Ors v Unilever Plc & Anor [2017] EWHC 371 (QB), permission to appeal was denied by the Court of Appeal in ([2018] EWCA Civ 1532). Under Para 3.1(3) jurisdictional gateway of Practice Directive 6B, it is a requirement to show that there is a real issue between the Claimant and the Anchor defendant (first defendant) to be able to join the non-UK based defendant.

[26] *Ibid* AAA & Ors, paras [168]-[170].

[27] Dyson *supra* no (1) at para [71].

[28] Dyson *Ibid* at para [92].

[29] Vedanta *supra* no (5) at para [93].

[30] Dyson *supra* no (1) at para [171].

assessing whether effective representation and availability of funding, the court should not aim for affording the Claimants the Rolls-Royce quality of legal representation. The Court instead evaluate whether there is a real risk-as opposed to making a finding on fact-that the Claimants will be deprived substantial justice.[31]

Limbu* v *Dyson Technology Limited

Mr. Limbu and 22 other migrant workers from Nepal and Bangladesh, and the personal representative of the estate of a deceased migrant worker from Nepal brought proceedings in England and Wales against three Defendants who are part of the Dyson group, two of these Defendants are domiciled in England (Dyson Technology Limited and Dyson Limited), and the third is domiciled in Malaysia (Dyson Manufacturing SDN BHD). The Claimants argued that the Defendants are jointly liable (with the primary tortfeasors) for the commission of the torts of false imprisonment, intimidation, assault, and battery, and that the Dyson Defendants had been unjustly enriched at the expense of the Claimants. The primary tortfeasors were not sued by the Claimants.

These claims differ from the other business and human rights litigation brought before the English Court such as Vedanta.[32] and Okpabi[33] because the breaches the claimants complained about occurred during their employment by ATA/J (the primary tortfeasor), which is a third party operating along the supply chain of Dyson in Malaysia. The claims by the admission of both parties and confirmed by the court involved novel points of law (whether under English or Malaysian law), which focused on unjust enrichment, whether the unjust benefit in a claim for unjust enrichment must flow directly from the claimant to the defendant, and on tort, whether a party can be liable in negligence for the treatment by a third party.[34]

The Defendants did not apply to strike out the claims or ask for a summary judgment, conceding that the claims are arguable,[35] the latter being a condition for the exercise of jurisdiction under the English Civil Procedure Rules. Instead, the first and second Defendants petitioned the court to stay proceedings because in their view Malaysia was the appropriate forum. The third Defendant asked the court to set aside the order serving them with these proceedings. The High Court agreed with the Defendants and found that Malaysia is the appropriate forum and that the Claimants will not suffer substantial injustice if the proceedings are stayed in favour of the appropriate forum.

The court found that there are connecting factors that favour `both jurisdictions. For example, the prospect of avoiding parallel proceedings, multiplicity of proceedings and the risk of irreconcilable judgments thereof, favoured England as the appropriate forum.[36] In *Vedanta* this element was deemed very important but not exclusive of the other connecting factors[37]. The court reasoned in Dyson, that despite the threat of parallel

[31] Dyson *supra* no (1) at [140]. See also Connelly on the Rolls-Royce metaphor. Connelly v RTZ Corpn plc (No 2) [1998] AC 854 ("Connelly").

[32] Vedanta *supra* no (5).

[33] Okpabi *supra* no (4).

[34] Dyson *supra* no (1), para [18].

[35] Dyson *supra* no (1) para [18].

[36] Dyson *supra* no (1), para [121].

[37] Vedanta *supra* no (5).

actions, and that the first and second defendants are situated in England the centre of gravity was 'where the primary underlying treatment about which the claimants complain took place'.[38] It is the place where the policy the claimants rely on is applied to activities which took place in Malaysia, and it is the place where the third defendant had their direct contractual relationship with ATA/J, and their 'primary responsibility for policing ATA/J's treatment of its employees'.[39]

Moreover, another important factor shifting the centre of gravity to Malaysia as the appropriate forum was that Malaysian law was the applicable law to all matters put before the court. The court placed importance on the fact that Malaysian law may differ from English law on the questions of unjust enrichment and whether a party can be held liable for the actions of third-party. The novelty element of the points of law was decisive in reaching the decision that Malaysia was the appropriate forum. Moreover, the court reasoned that there are good policy reasons to allow Malaysian judges to consider these novel points of law. Equally, parties made extensive reliance on Malaysian constitutional and statutory law, which the court reasoned should best be considered by Malaysian Courts.

It worth noting that Dyson made few undertakings to the court on how they will proceed in the foreign jurisdiction if their claim on FNC was successful. Among these undertakings was the undertaking to submit to the Malaysian jurisdiction, not to seek security for costs, pay reasonable costs for instance for the assistance of the remote hearing, and pay the claimants' share of certain disbursements to the extent reasonably incurred and necessary[40]. Although, these undertakings may have influenced the court in its evaluation whether England is the appropriate forum, on the face of it, these undertakings did not occupy a prominent status in the court's reasoned decision that Malaysia was the appropriate forum and that the claimants will not be caused substantial injustice if the claim is stayed in favour of the Malaysian jurisdiction.

Analysis

The Dyson case highlights the damage that the doctrine of FNC could inflict on Claimants prospects to seek a remedy before the English court in relation to claims with substantial connecting factors outside the jurisdiction. These connecting factors become more insubstantial when the cause of action is based on breaches committed by a third party operating along the supply chain of the business. Although they usually arise in the context of serious human rights violations such as forced labour as in the case of Dyson, they are framed in tort, or under a protective statutory regime applicable at the place where the harm occurred. Invariably, they raise important public policy concerns, and with it the need to address the underlying cause and offer remediation to victims. Therefore, finding a solution to this challenge is very important both morally, and as a matter of public .policy.

However, in Lubbe the UK Supreme Court being consistent in relation to the application of the doctrine of FNC stated that the public interest consideration which does not affect the private interest of the parties has no bearing on the decision whether the court must

[38] Dyson *supra* no (1) at paras [103] and [122].

[39] Dyson *supra* no (1) para [103]

[40] Dyson *supra* no (1) at para [16].

remove the stay order in favour of South Africa.[41] In other words, the doctrine of FNC is only concerned with the private interest of the disputants. Therefore, it is wrong to expect of the English court to deviate from the doctrine's core principles, merely because the underlying nature of the dispute concerns the violation of human rights. Even if the FNC enquiry adjusts to accommodate the challenges brought about by international human rights litigation, an FNC inquiry before the court is fact specific and may require a long time to resolve and may include substantial financial resources. Thus, either way international human rights litigation in its current procedural design is not efficient.

Most notably, although not expressed forcefully by the various decisions which I covered in this case review, it appears that the court considers international comity and exercises judicial restraint before making a decision that implicates the sovereignty of another state by avoiding passing a judgement on the suitability or readiness of the civil justice system of another state.[42] The principle of international comity is 'neither a matter of absolute obligation,' nor of 'mere courtesy and goodwill'.[43]. The court often imbeds such values in its decision-making without clearly referring to them or identifying their jurisprudential foundation. The court in *Vedanta* stated that a court's conclusion that a competing jurisdiction would not provide substantial justice risks offending international comity.[44] In Dyson the court took notice of international comity and reasoned that the Malaysian courts should be able to determine public policy matters such as forced labour which in recent years has caught the attention of the people and policymakers in Malaysia.

However, it is difficult to ignore that in Lubbe, Vedanta, and Unilever,[45] the court effectively said that the absence of a developed funding system, and experienced lawyers at the appropriate forum will prevent the civil justice system in those states to effectively trial such procedurally complex cases. These are difficult decisions because the court indirectly passed judgement on the suitability of another sovereign to administer justice, when the justice enquiry should focus more on actual denial of access to justice, such as situations where cogent evidence shows that there is a real risk that justice will not be obtained in the foreign jurisdiction due to circumstances pointing to corruption, and lack of independence.[46] In other words, the court should not proceed on a quality comparative exercise between England and the appropriate jurisdiction. It is not about the risk of obtaining an inferior quality of access to justice, its more about the risk of its availability. Although it is important to remediate victims, this model of access to justice for victims is not sustainable, and more so, it is not predictable.

However, it is important to note that the English courts have stressed that any finding of a real risk that a claimant will not obtain substantial justice at the foreign (appropriate)

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[41] Lubbe and Others v Cape Plc [2000] 1 WLR 1545 ("Lubbe").

[42] See Supreme court decision in VTB on the role of comity in the application of FNC. *VTB Capital plc v Nutritek International Corp [2013] UKSC 5.*

[43] **Hilton v. Guyot, 159 U.S. 113 (1895).**

[44] Vedanta *supra* no (5) at para [12].

[45] Lubbe *supra* no (41) at para [277].

[46] AK Investment CJSC v Kyrgyz Mobil Tel [2011] UKPC 7, [2011] 4 All ER 1027 at para [95].

jurisdiction is fact sensitive and may have little influence in relation to another claimant litigating at a different time in relation to a different matter in the same jurisdiction.[47]
Therefore, removing this challenge posed by the doctrine of FNC to international human rights litigation is not the job of judges and will require either a response by the British Parliament, or through a binding international framework for business and human rights. In a different article, I argued that statutory routes for civil litigation are simpler, more coherent, and more effective for victims to use than international tort litigation.[48] Such routes should also determine the application of FNC to claims brought by victims in relation to the breach of such treaties.
Although a binding international framework is most ideal, and is in the making, realistically it will take a long time before it is achieved, and unfortunately due to poor compliance by states with international law may be less be effective than domestic law at a time when the need to justice for victims is paramount.[49] The latest version of the zero draft (2023) proposes in Article 9(3)(a) that a court should not apply the doctrine of FNC in situations where the alleged violator corporation is domiciled in that state, or where the victim has their natural habitat in that state.[50] Article 9(2) adopts a very permissive approach to determining the domicile of the corporation. If adopted, this approach will prevent the English court from applying FNC in relation to companies domiciled in the UK, even in relation to claims with substantial connecting factors with a foreign forum. However, it will not prevent the court from applying the doctrine to the foreign subsidiary such as the third Malaysian defendant in the case of Dyson.

This approach is both measured, and sound because human rights claims raise important public policy concerns that will benefit of greater scrutiny at the place with which the claims are most closely connected with. In other words, the doctrine of FNC is more amenable to its core justice values when the claims are brought in relation to the non-UK corporation, and less in relation to a company present in the UK which through its actions or omissions has caused human rights violations, even if commissioned outside the UK. A statutory route however will express the commitment of the UK to holding to account UK present corporations to their victims in relation to human rights violations wherever they occur. Thus, this will affirm the relevance of the public interest when applying the doctrine of FNC, whilst striking the balance with the need to respect international comity.
The House of Lords is considering the Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill. Section 8(4) stipulates that: 'For the purpose of this Act, Courts of England and Wales have jurisdiction over all commercial organisations that are alleged to have breached their duties under section 2, regardless

[47] Mousavi-Khalkali v Abrishamchi [2019] EWHC 2364 (Ch) at para [22].

[48] Farah, Y., Kunuji, V., & Kent, A. (2023). Civil Liability Under Sustainability Due Diligence Legislation: A Quiet Revolution? King's Law Journal, 34(3), 499–523. https://doi.org/10.1080/09615768.2023.2283234

[49] Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero draft, July 2023, https://www.business-humanrights.org/en/big-issues/binding-treaty/ (accessed on 11 July 2024).

[50] Zero draft, *ibid*.

of the location of the harm or part thereof, or of the physical presence, registration, or domicile of a commercial organisation more directly linked to the harm'.[51]

This Bill, if adopted, will express the UK's interest in allowing all disputes implicating human rights violations committed by companies incorporated in the UK or non-UK corporations 'which carries on a business, or part of a business, in any part of the United Kingdom',[52] to be tried in the UK wherever the harm occurred, commissioned or sustained, irrespective of whether they have direct link with the harm. This is the type of shift which is required to alleviate the challenge brought about by the doctrine of FNC.
Although the bill will undoubtedly be met with strong resistance from businesses in the UK and elsewhere, I do think that it will offer a much-needed change in approach to facilitating the effective remediation of business-related human rights violations, allowing human rights defenders to focus their energy on tools that will have strong access to justice and remediation processes.

Conclusions

In this piece I have shown that the doctrine of FNC is an instrument of justice. It however makes seeking justice a thorny journey due to its fact-intensive enquiry, and the tricky need to respect international comity. These are all evaluative exercises that will sometimes lead to harsh but sound results. Therefore, to solve this access to justice problem for victims of business-related human rights violations one requires a policy decision by the UK Parliament or through a consolidation of the efforts been done on the international sphere. For this to happen, one must wait patiently and hope for the UK to recognise that corporations who are present in the UK must respect international human rights law, and therefore, expect to submit to the jurisdiction of the English court even where the claims are substantially connected with another available forum. Although I argued elsewhere that the international community should design alternative grievance routes to court litigation for victims to pursue when seeking remediation (ADR)[53], I think as long as this has not matured, victims should have access to English courts as a matter of right against UK present corporations allegedly implicated in human rights violations.

[51] The Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill, available on https://bills.parliament.uk/publications/53150/documents/4066 . Lat visited on 11 July 2024.

[52] Section 1 of the Bill (*ibid*) adopts the definition of 'commercial organisation' under Section 7(5) of the Bribery Act 2020.

[53] Farah Y., and Makhoul M., 'The Remediation of Business-related Human Rights Violations caused by EU Oil and Gas Corporations', in Research Handbook on EU Energy Law and Policy, 2nd ed., in print, expected 2024.