Corporate (case) law in the age of sustainability

Groot, C. de; Kemp, B.; Olaerts, M.

Twenty Years of *European Company Law*

European Company Law Series

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Editor

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Introduction

The European Company Law Series is closely linked to the bimonthly journal European Company Law, also published by Kluwer Law International.

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The series covers subjects of company law in a broad sense, including insolvency, co-determination and securities law. Topical issues such as merger control, corporate governance, and piercing the corporate veil have been covered.

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Analysis of topical or complex subjects in European company law.

Readership

Academics; regulators; practitioners.

The titles published in this series are listed at the end of this volume.

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Corporate (Case) Law in the Age of Sustainability

Cees de Groot

§7.01 INTRODUCTION

Having been appointed as professor of company law at Leiden University, Steef Bartman took the initiative to set up a completely new law journal: *European Company Law* (ECL). The first issue was published in April 2004. Jaap Winter wrote an Editorial on this issue ('We all want to go to heaven but nobody wants to die') on the 13th company law directive on takeover bids, Steef Bartman wrote an article on this Directive ('Analysis and consequences of the EC Directive on takeover bids'), and Christel M. Grundmann-Van de Krol wrote an article ('New EC Prospectus Directive and the Lamfalussy Process'). The issue also held a number of country reports that highlighted recent developments in several European jurisdictions: a report from Belgium, a report from Denmark, a report from France, a report from Germany, a report from Italy, a report from the Netherlands, a report from Spain, and a report from the United Kingdom. Furthermore, the issue contained a survey of (recent) legislation and case law as well as a summarized selection of articles from other legal periodicals. This first issue was 40 pages long. With this issue, ECL got off to a flying start. ECL is now well established and in its twentieth year of publication.

Since 2004, company law has gone through many developments, including – more recently – the rising of sustainability-related issues. These issues have led to important legislation and case law. In the field of sustainability legislation, the European Union (EU) takes the lead with a large number of initiatives, including, e.g., the Taxonomy Regulation,[1] the Corporate Sustainability Reporting Directive (CSRD),[2] and the (proposed) Corporate Sustainability Due Diligence Directive (CSDD, CSDDD, CS-triple-D or CS-3D).[3] These three important initiatives are closely intertwined:

(1) the CSDD establishes obligations for affected companies 'regarding actual and potential human rights adverse impacts and environmental adverse impacts with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship' (Article 1, section 1, under a);
(2) the CSRD obliges affected undertakings and parent undertakings to 'include in [the management report/the consolidated management report] information necessary to understand [the undertaking's/the group's] impacts on sustainability matters, and information necessary to understand how sustainability matters affect the undertaking's development, performance and position';[4] and
(3) the Taxonomy Regulation 'establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable' and does so 'for the purposes of establishing the degree to which an investment is environmentally sustainable' (Article 1, section 1).

In the field of sustainability case law, climate change case law has especially gained importance.[5] Two examples of this kind of case law will be discussed below.

This contribution starts (in §7.02) by placing the development of corporate law (both legislation and case law) in a historical perspective. It does so by following the analysis of the time period of the so-called modern era, as that era is subdivided by the (Marxist) British historian Eric Hobsbawm (1917-2012). His narrative starts in 1789 and ends in 1991. Hobsbawm divides the modern era into four 'ages', which he calls the age of revolution, the age of capital, the age of empire, and the age of extremes. In §7.02, added to his analysis of these ages are a few notable examples of legislation and case law (chosen from both the United Kingdom and the Netherlands) that show how a particular age affects the legislation and case law of that period.

1. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (text with EEA relevance), OJEU L 198/13-43.
2. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (text with EEA relevance), OJEU 2022 L 322/15-80.
3. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (text with EEA relevance), COM(2022) 71 final.
4. Implemented in Arts 19a and 29a of the Accounting Directive (Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/ 660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (text with EEA relevance), OJEU 2006 L 157/87-107.
5. Cf. e.g. https://climatecasechart.com.

Section §7.03 gives a timeline for the years 1989-2022. This is the time period that (approximately) follows the four ages described by Hobsbawm. This timeline shows that climate change and sustainability are (also politically) high on the agenda from (at least) 2015. Building on this, §7.04 and §7.05 discuss recent case law from the Netherlands in the field of climate change: §7.04 goes into the judgment of the Supreme Court of the Netherlands in the case between *Stichting Urgenda* and *de Staat der Nederlanden*, and §7.05 gives a short discussion of some elements of the judgment of the district court of Den Haag (The Hague) in the case between *Vereniging Milieudefensie et al.* and *Royal Dutch Shell Plc*. In both judgments, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) played a pivotal role. This is to be expected in a court case where a state is the defendant, but it is somewhat striking in a case where a corporation is the defendant, as the ECHR addresses states but not corporations. Building on these judgments, §7.06 ends with a short conclusion.

§7.02 THE MODERN ERA

[A] Introduction

The modern era is a phrase used to describe a historical epoch that started at the end of the eighteenth century and continues up until today. This implies that the modern era covers (parts of) four centuries: the eighteenth, nineteenth, twentieth and twenty-first centuries. This is a long time frame that itself could be subdivided into several parts. Hobsbawm does so for the period 1789-1991 in four books.

[B] The First Book

The first book in the series is *The Age of Revolution: 1789-1848*, originally published in 1962.[6] The book tells that in 1789, the world was largely rural (p. 11). In Europe, there were only a few cities that could be called large. These were London and Paris, maybe two more cities in France, two in Germany, four in Spain, five in Italy, two in Russia, and one in Portugal, Poland, Holland, Austria, Ireland, Scotland and the European part of Turkey. Against this background occurred the ‘dual revolution’ (p. 25). These revolutions are the Industrial Revolution in Britain (discussed in Chapter 2) and the French Revolution (discussed in Chapter 3). The Industrial Revolution produced ‘the labouring poor’ (Chapter 11). The French Revolution led to a focus on reason, science and progress (Chapter 12). Then came economic depression and the failure of harvests in the middle 1840s (p. 307).

As regards the development of company law in this period, in the Netherlands, the Commercial Code was enacted in 1838. This code regulated, *inter alia*, business partnerships and public limited companies. In a business partnership, the partners are liable for the debts of the partnership; in a public limited company, the shareholders are

6. Edition used: New York: Vintage Books 1996.

not liable for the debts of the company. The public limited company was (and still is) called the *naamloze vennootschap* (NV), from the French name *société anonyme* (SA). The words *vennootschap* and *société* mean 'company'. Both the word *naamloze* and the word *anonyme* can be translated as: not carrying a name, without a name. Article 23 of the Commercial Code described the *naamloze vennootschap* as follows: 'The naamloze vennootschap shall not carry a name, [in the sense that it] shall not carry the name of one or several of its partners, but derives its name solely from the object of its business enterprise.' This (now) somewhat obsolete provision meant that (whereas a business partnership that is engaged in the mining industry may, for instance, carry the name 'Jones and Smith'), a *naamloze vennootschap* that was engaged in the mining industry was not allowed to carry the name 'Jones and Smith NV'. It could be called, e.g., 'Mining Business of the Southern Netherlands NV'. This shows that the *naamloze vennootschap* at that time was a relatively new phenomenon and that the Commercial Code sought to avoid confusion. No one should be tempted to think that an enterprise was a partnership (where the partners are liable for the debts of the partnership), while, in fact, it was a *naamloze vennootschap* where the shareholders are not liable for the debts of the company.

The provisions in the Commercial Code fit neatly in *The Age of Revolution*: they reflect the beginning of the modern era, where the public limited company was recognized as an incorporated entity, but with some hesitation and reluctance.

[C] The Second Book

The second book, originally published in 1975, is *The Age of Capital: 1848-1875*.[7] This book discusses in Chapter 3 'the extraordinary economic transformation and expansion of years between 1848 and the early 1870s' (p. 43), and the way the world became more interconnected, *inter alia*, by railways and steamships, and telegraph systems, as a result of which an international economy came into existence. At the same time, the world remained a conglomerate of rivalling national economies in different nation-states. In Chapter 6, the book deals with the rise of representative democracies where liberal parties (supported by the entrepreneurial class) were mostly in power. The factory working class, however, remained largely poor (Chapter 12).

[D] The Third Book

The third book in the series, originally published in 1987, is *The Age of Empire: 1875-1914*.[8] This book deals with imperialism (i.e., colonialism: the partitioning of the world by the colonial powers, especially in Africa and the Pacific) and the globalization of the world economy. The latter was spurred, *inter alia*, by a technological revolution (the telephone, the phonograph, automobiles, planes) and the growing market for consumer goods (vacuum cleaners, gas cookers, but also bananas and tea) (Chapter 2).

7. Edition used: London: Abacus 2003.
8. Edition used: London: Abacus 2002.

The technical revolution and the growing market for consumer goods needed vast imports of products like oil, rubber, sugar and coffee (Chapter 3). This age also witnessed the coming into being of labour movements and social democratic parties (Chapters 4 and 5). In politics, nationalism was also on the rise (Chapter 6). In August 1914, a war broke out: World War I. As Hobsbawm puts it: 'the development of capitalism inevitably pushed the world in the direction of state rivalry, imperialist expansion, conflict and war' (p. 316).

As regards the development of corporate law in this period, the judgment of the (United Kingdom) House of Lords of 16 November 1896 in *Salomon v. Salomon* stands out.[9] In this case, following the bankruptcy of the company A. Salomon and Company, Limited (in the judgment also referred to as Salomon & Co Ltd), the liquidator (receiver) of the company, brought an action against the company's main shareholder, Mr A. Salomon. The liquidator held Mr Salomon liable for the unpaid debts of the company. The liquidator argued that the company was nothing more than an extension (an 'alias') of Mr Salomon. To advance this claim, the liquidator relied on the argument that the other shareholders of Salomon & Co Ltd played no real role in the affairs of the company. The House of Lords, however, decided that Mr Salomon could not be held personally liable for the debts of Salomon & Co Ltd.

Mr Salomon was in the business of producing shoes and boots in Whitechapel. He mainly sold to government agencies. Mr Salomon and his spouse had five children: four sons and one daughter. The sons, who also worked in the enterprise, argued that their position within the business should be put on a higher level. Mr Salomon, in order to accommodate that wish, decided in 1892 to convert his business into a company. The Companies Act (of 1862), as it then stood, required that a company should be established by at least seven founders who also became the company's shareholders. Mr Salomon, his spouse and their five children signed the memorandum of association of the company Salomon & Co Ltd. The memorandum of association designated Mr Salomon and his two eldest sons as the company's directors. At some point in time, the government agencies, which were Salomon & Co Ltd's major buyers, bought much fewer shoes and boots. Mr Salomon and his spouse, in an effort to rescue the company, lent money to Salomon & Co Ltd. This was of no avail. Salomon & Co Ltd went into bankruptcy. The company's liquidator found not enough assets to pay up the debts of the company to the full.

The judgment of the House of Lords centres around the question of whether Mr Salomon had simply continued his business in a company that he controlled, with the other shareholders being just mock shareholders. Both the trial judge and the Court of Appeal concluded that this was indeed the case. The trial judge 'was of opinion that the company was only an "alias" for Salomon; that, the intention being that he should take

9. *Salomon v. Salomon*, House of Lords, 16 November 1896, in the case between Aron Salomon (Pauper) (Appellant) and A. Salomon and Company, Limited (Respondents) (Lord Halsbury L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Davey; leading speech by Lord Halsbury L.C.; Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Davey concurring); www.bailii.org, databases, United Kingdom and Commonwealth, United Kingdom House of Lords Decisions, 1896, November, *Salomon v. Salomon & Co Ltd* [1896] UKHL 1 (16 November 1896).

the profits without running the risk of the debts, the company was merely an agent for him' (phrasing by Lord Herschell). The Court of Appeal also considered 'that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company' (phrasing by Lord Halsbury).

Mr Salomon appealed to the House of Lords. The House of Lords reversed the judgment of the Court of Appeal. In the words of Lord Macnaghten: 'In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own [...] or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.'

The judgment of the House of Lords perfectly reflects *The Age of Empire*: a public limited company is a corporation that is an entity that is distinct and separate from its shareholder(s), and the shareholder(s) cannot be held liable for the debts of the company. Any opposite judgment would have been contrary to the needs of an expanding and modern economy. This judgment was groundbreaking in the development of company law as it recognized the company as an incorporated entity as opposed to a partnership. In the words of David Kershaw, the judgment was 'a case which foregrounded the legal entity in a way that was widely viewed as contrary to the prevailing understanding of the company as [...] a partnership'.[10]

[E] The Fourth Book

The fourth book, originally published in 1994, is *The Age of Extremes. A History of the World, 1914-1991*.[11] Eric Hobsbawm calls the years 1914-1991 the Short Twentieth Century (p. 3), that begins with World War I and ends with the collapse of the Soviet Union (p. 5). Within this period, (1) the years 1914 to the end of World War II are the Age of Catastrophe (p. 7), and (2) the years 1947-1973 are the Golden Age (p.8). The Golden Age was followed by the years 1974-1991: (3) the Crisis Decades (p. 8).

Within the Age of Catastrophe fell the economic decline of the years 1929-1933 (the Great Slump) (p. 87), which brings Eric Hobsbawm to the question: 'Why did the capitalist economy between the wars fail to work?' (p. 97). One of the reasons could be that during the preceding market boom in the 1920s, over-production occurred in the United States because demand for products could not keep pace with high production

10. David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law*, Cambridge: Cambridge University Press 2018, p. 235.
11. Edition used: New York: Vintage Books 1996.

rates. As a result, car production in the United States in the following years 1929-1931 went down by half (p. 101). 'Would fascism have become very significant in world history but for the Great Slump? Probably not', Eric Hobsbawm argues (p. 130). World War II saw the mobilization of a broad antifascist coalition (p. 147), and a large number of countries stood up against fascism (p. 150). As Germany invaded the Soviet Union and declared war on the United States, the war became a (temporary) alliance between these latter countries (p. 164). World War II also demonstrated to the people living in the colonies of European countries that these countries were weak and could be defeated (p. 216).

During the Golden Age, the Cold War emerged (p. 226): 'while the U.S.A. was worried about the danger of a possible Soviet world supremacy some time in the future, Moscow was worried about the actual hegemony of the U.S.A.' (p. 234). The Cold War eventually ended in 1987. Apart from the Cold War, during the Golden Age, the world economy grew enormously, although at the cost of pollution and ecological deterioration (p. 261). Technological innovations boomed (pp. 265-267), and the welfare state came into being (p. 267). The economy became a transnational economy in which transnational firms played a major role (p. 277).

During the Crisis Decades, the world economy became less stable (p. 404). In this respect, Eric Hobsbawm writes: 'the central fact about the Crisis Decades is not that capitalism no longer worked as well as it had done in de Golden Age, but that its operations had become uncontrollable. Nobody knew what to do about the vagaries of the world economy or possessed instruments to manage them. The major instrument for doing so in the Golden Age, government politics, national or internationally coordinated, no longer worked. The crisis decades were the era when the national state lost its economic powers' (p. 408).

As regards the development of corporate law in this period, the judgment of the Supreme Court of the Netherlands of 21 January 1955 in the *Forum-Bank* case still stands out.[12] In the *Forum-Bank* case, two shareholders of NV Forum-Bank (Forum-Bank) had proposed that Forum-Bank would buy back shares these shareholders held in the company and that the price to be paid by Forum-Bank would mainly be used to reduce the amount of debt these shareholders owed to the company. When this proposal was discussed at the general meeting, both the management board and the supervisory board of Forum-Bank, as well as five of the eight shareholders who attended the general meeting, opposed the proposal. The management board and the supervisory board argued that accepting the proposal would not be in the interest of Forum-Bank itself and its shareholders, as it would undermine the liquidity of the bank, and that in accordance with the articles of association, this was a matter not to be decided by the general meeting but by the management board. When it came to a vote, the voting power of the two shareholders who had made the proposal (296 and 110 shares), combined with the votes of the one shareholder who supported the

12. Supreme Court of the Netherlands 21 January 1955, *NJ* 1959/43 (Forum-Bank). This paragraph is based on C. de Groot, 'The Duty of Directors to Be Guided by the Best Interests of the Company', in: C.G. Breedveld-de Voogd & A.G. Castermans et al. (eds), *Core Concepts in the Dutch Civil Code: Continuously in Motion*, Deventer: Wolters Kluwer 2016, pp. 187-209.

proposal (5 shares), was enough to have the proposal accepted by a majority of 411 votes in favour of the proposal to 117 votes against the proposal. This prompted two opposing shareholders to bring the matter before the district court, asking the district court to declare that the decision by the general meeting was null and void as it was outside the realm of the general meeting's powers. The district court ruled in favour of these claimants, and the court of appeal confirmed this judgment.

One of the two shareholders who had originally proposed that Forum-Bank would buy back the shares lodged an appeal to the Supreme Court of the Netherlands. In this appeal, the main argument was as follows: even if it were to be accepted that the competence to decide on buying back Forum-Bank's shares fell within the powers of the management board, the decision made by the general meeting could *not* be null and void because (in the phrasing by the Supreme Court):

> in spite of the fact that buying back the company's shares […] falls within the competence of the management board, the general meeting has the power to instruct the management board to buy back shares of the company for a specified price from certain sellers because the managing directors are subordinate to the public limited company and the general meeting exercises the ultimate power in the public limited company.

The Supreme Court rebutted the appeal in a very short consideration:

> this argument, thus read, ignores that the general meeting too shall not transgress the powers given to it by statutory law or by the articles of association.

The judgment of the Supreme Court is an interesting outcome of *The Age of Extremes*: the board of directors of a public limited company is best in place to lead the corporation (as opposed to the shareholders). If decided otherwise, the Supreme Court would have halted economic development to occur in an efficient way. This is all the more so because *The Age of Extremes* was an age of confusion and uncertainty. The Supreme Court has since stuck to its view that the board of directors is at the heart of a public limited company rather than the shareholders.[13]

§7.03 THE AGE OF SUSTAINABILITY

The years shortly before and following 1991 show an era with an ongoing stream of events that seem to have no correlation with one another, but each has significant consequences. A number of these events are identified in two timelines: one timeline drawn up by the European Union (EU)[14] and another timeline drawn up by The Gilder Lehrman Institute of American History (GLI).[15] Combining these timelines, the following important events occurred (starting in 1989, all entries are citations):

13. Examples are Supreme Court 13 July 2007, ECLI:NL:HR:2007:BA7971, *JOR* 2017/178, *NJ* 2007/434 (ABN AMRO Bank) and Supreme Court 9 July 2010, ECLI:NL:HR:2010:BM0976, *JOR* 2010/228, *NJ* 2010/544 (ASMI).
14. https://european-union.europa.eu/principles-countries-history/history-eu.
15. https://www.gilderlehrman.org/history-resources/online-exhibitions/timeline-1945-present: 'The Gilder Lehrman Institute of American History was founded in 1994 by Richard Gilder and

(EU) 9 November 1989 – Fall of the Berlin Wall;
(GLI) After Iraq, led by Saddam Hussein, invaded Kuwait in August 1990, President Bush headed a coalition to set a deadline for Iraqi withdrawal;
(EU) 1991 – Break-up of Yugoslavia;
(GLI) The Soviet Union collapsed with Gorbachev's resignation in December 1991;
(EU) 7 February 1992 – Maastricht Treaty – The Treaty on European Union is signed in Maastricht in the Netherlands;
(EU) 1 January 1994 – The European Economic Area is created;
(GLI) 11 December 1997 – The Kyoto Protocol treaty was adopted by the United Nations Framework Convention on Climate Change;
(EU) 1 January 1999 – The euro is born;
(EU) 11 September 2001 – Terrorist attacks in the United States / (GLI) On Tuesday, 11 September 2001, terrorists executed a series of attacks masterminded by al-Qaeda leader Osama bin Laden;
(GLI) October 7 2001 – With British support, the United States launched 'Operation Enduring Freedom,' a combat effort in Afghanistan. The Taliban refused to cooperate with efforts to root out al-Qaeda in that country;
(EU) 1 January 2002 – Euro notes and coins launch in 12 countries;
(EU) 31 March 2003 – Peacekeeping operations in the Balkans;
(GLI) 20 March 2003 – President Bush ordered an attack on Baghdad with the intent of eliminating Saddam Hussein and his government;
(EU) September 2008 – Global economic crisis / (GLI) The 'Great Recession' in the United States lasted and the global recession that resulted from it lasted from December 2007 to June 2009;
(EU) 2010 – Europe tackles the financial crisis;
(EU) 12 December 2015 – Paris Agreement on climate change;
(EU) December 2019 – Towards a climate-neutral Europe [the European Green Deal];
(EU) January 2020 – Common EU response to COVID-19;
(EU) 31 January 2020 – United Kingdom leaves the EU;
(EU) February 2022 – Russia invades Ukraine.

In this timeline (at least) from 2015, climate change and sustainability are subjects that are high on the agenda. That is also reflected in the Taxonomy Regulation, the CSRD and the CSDD, which are discussed in the Introduction. The present era could, by all accounts, therefore, be called the Age of Sustainability. The growing importance of sustainability comes to the fore not only in legislation but also in case

Lewis E. Lehrman, visionaries and lifelong supporters of American history education. The Institute is the leading nonprofit organization dedicated to […] history education while also serving the general public. Its mission is to promote the knowledge and understanding of American history through educational programs and resources.'

law. The following sections discuss a judgment of the Supreme Court of the Netherlands on sustainability and (shortly) a judgment of the district court of Den Haag (The Hague) on sustainability that builds on the judgment of the Supreme Court.

§7.04 THE JUDGMENT OF THE SUPREME COURT OF THE NETHERLANDS IN THE CASE BETWEEN URGENDA AND THE NETHERLANDS

[A] Introduction

The Supreme Court of the Netherlands rendered a groundbreaking judgment on 20 December 2019 in the case between *Stichting Urgenda* and *de Staat der Nederlanden, ministerie van Economische Zaken en Klimaat*.[16] *Stichting Urgenda* translates into English as Foundation Urgenda (wherein Urgenda stands for Urgent Agenda), and *de Staat der Nederlanden, ministerie van Economische Zaken en Klimaat* translates into English as the State of the Netherlands, Department of Economic Affairs and Climate. The judgment of the Supreme Court was the apex of a lawsuit between *Stichting Urgenda* and *de Staat der Nederlanden* in which the former pleaded that *de Staat der Nederlanden* had not availed itself of its obligation to reduce the emission of greenhouse gases within the territory of the Netherlands.

[B] The Background of the Urgenda Case

The court case between *Stichting Urgenda* and *de Staat der Nederlanden* started in 2013 when *Stichting Urgenda* had brought proceedings against *de Staat der Nederlanden* before the district court of Den Haag (The Hague). *Stichting Urgenda* requested the district court to order *de Staat der Nederlanden* to take measures that would reduce the total emission of greenhouse gases in the Netherlands, preferably by 40% in 2020 (compared to 1990), or in the alternative by 25% in 2020 (compared to 1990), or as a fallback position by 40% in 2030 (compared to 1990). *Stichting Urgenda* substantiated its claim by arguing – basically – that:

(1) the global emission of greenhouse gases (especially carbon dioxide ($CO2$)) would lead to global warming, resulting in climate change;
(2) the emission of greenhouse gases in the Netherlands was above average in comparison to other countries;
(3) *de Staat der Nederlanden* was in a position to take measures to counter the emission of greenhouse gases in the Netherlands and had a duty of care to do so; and that
(4) *de Staat der Nederlanden* – by relying on an insufficient climate policy – breached its duty of care, resulting in a tort under Netherlands law.

16. ECLI:NL:HR:2019:2006, *AB* 2020/24, *NJ* 2020/41.

Stichting Urgenda based its claim that *de Staat der Nederlanden* committed a tort under Netherlands law, *inter alia*, in Articles 2 and 8 of the ECHR. Article 2 states that every person's right of life shall be protected by law; under Article 8, every person has the right to private life and family life (as well as every person's home and correspondence) are respected. The district court of Den Haag considered in respect of Articles 2 and 8 that these provisions can indeed serve as a source of inspiration to give substance to general standards of (private) law such as the prohibition to commit a tort (paragraph 4.46). The district court also referred to an authoritative 'Manual on human rights and the environment' (2012 edition) that had been compiled on the instructions of the Committee of Ministers of the Council of Europe. This manual mentioned in Article 2 of the convention that 'So far, the [European Court of Human Rights] has considered environmental issues in four cases brought under Article 2, two of which relate to dangerous activities and two which relate to natural disasters' (cited in paragraph 4.49). In Article 8 of the convention, the manual stated that 'The [European Court of Human Rights] highlighted […] that neither article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such' (cited in paragraph 4.50). Nevertheless, the district court concluded on the meaning of Articles 2 and 8 for the court case between *Stichting Urgenda* and *de Staat der Nederlanden* that these provisions were relevant to establish the minimal measure of care that *de Staat der Nederlanden* should take into account to avoid committing a tort as pleaded by *Stichting Urgenda* (paragraph 4.52).

The district court granted the application made by *Stichting Urgenda* in its judgment of 24 June 2015, ordering *de Staat der Nederlanden* to take measures that would lead to a reduction of the emission of greenhouse gases in the Netherlands in 2020 by 25% as compared to 1990.[17]

De Staat der Nederlanden lodged an appeal to the Court of Appeal of Den Haag (The Hague). The court of appeal also discussed Articles 2 and 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. A particularly important paragraph in the judgment of the court of appeal is:

> […] the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right of home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. […] (paragraph 43)

The court of appeal affirmed the reasoning of the district court by considering that on the basis of Articles 2 and 8 of the ECHR, *de Staat der Nederlanden* would disregard its duty of care if it would not take measures that would lead to a reduction of the emission of greenhouse gases in the Netherlands in 2020 by 25%: 'A reduction of 25% should be considered a minimum' (paragraph 73). Thus, the appeal by *de Staat der*

17. ECLI:NL:RBDHA:2015:7145, *AB* 2015/336.

Nederlanden was without success, as the court of appeal in its judgment of 9 October 2018 confirmed the judgment of the district court.[18]

De Staat der Nederlanden lodged a final appeal to the Supreme Court of the Netherlands. This appeal was also to no avail, as it was dismissed by the Supreme Court.

[C] The Judgment of the Supreme Court of the Netherlands

The core of the judgment of the Supreme Court is Part 5. In this part ('Do articles 2 and 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms require the State to take measures?'), the Supreme Court analyses Articles 2 and 8 of the ECHR and the case law of the European Court of Human Rights on these provisions. The Supreme Court discusses the position adopted by *de Staat der Nederlanden* that the risk of climate change is a general concept that is not covered by Articles 2 and 8 because it is not specific enough to fall within the ambit of these provisions.

In Part 5, section (a) of the judgment, the Supreme Court considers – referring to the case law of the European Court of Human Rights – that the right of life that is enshrined in Article 2 of the ECHR also protects every person from the dangers caused by, *inter alia*, industrial activities and natural disasters, if these activities or disasters involve a real and immediate risk. This protection also extends to risks that occur in the long term (paragraph 5.2.2). Article 8 of the ECHR, although it does not protect the living environment of a person in general, likewise protects every person against serious environmental hazards. The Supreme Court goes on to consider that – in accordance with case law of the European Court of Human Rights – Article 8 obliges States to take reasonable and appropriate measures in the field of environmental matters, also concerning risks that do not materialize in the short term (paragraph 5.2.3). Also, it follows from the foregoing that Articles 2 and 8 of the ECHR have concurring scopes (paragraph 5.2.4).

The Supreme Court considers on a more general level that Articles 2 and 8 of the ECHR oblige States to take – in accordance with the so-called precautionary principle – (precautionary) measures, either to mitigate rising risks or to be able to adapt to risks that may occur (paragraph 5.3.2). These measures shall be consistent, timely, and taken with due diligence (paragraph 5.3.3). Although Articles 2 and 8 do not require that States take on impossible or disproportionate burdens, States do have the obligation to take measures that are both reasonable and appropriate (paragraph 5.3.4).

In Part 5, section (b) of the judgment, the Supreme Court considers that the ECHR shall be interpreted in accordance with the principle of effectiveness. This principle brings along that the provisions of the ECHR shall be interpreted in good faith, according to their common meaning, within the context in which they are being used

18. ECLI:NL:GHDHA:2018:2591, *AB* 2018/417 and (unofficial translation) ECLI:NL:GHDHA:2018:2610.

and according to their subject and purpose (paragraph 5.4.1). Furthermore, in interpreting the ECHR, regard must be given to other (similar) instruments of international law and the way these instruments are being interpreted as well as to the way the ECHR is being applied by its Member States: this is the so-called common ground method that also guides the interpretation of the ECHR (paragraph 5.4.2).

In addition to the precautionary principle and the common ground method, scientific knowledge and generally accepted standards may also play a role in the interpretation of the ECHR (paragraph 5.4.3).

The Supreme Court reiterates (in Part 5, sections (d) and (e) of the judgment) the stance taken by *de Staat der Nederlanden* that the European Court of Human Rights had never rendered a judgment in which it dealt with climate change as such. In this respect, the Supreme Court considers that the central question that it has to answer is whether Articles 2 and 8 of the ECHR can be used to impose an obligation on *de Staat der Nederlanden* to take measures to reduce the emission of greenhouse gases within the territory of the Netherlands (paragraph 5.6.3). This question is all the more difficult since the emission of greenhouse gases is not a national, but a worldwide issue. Had it been a purely national issue, the answer to the question could only have been positive (paragraph 5.6.2). Nonetheless, according to the Supreme Court, even taking into account that the emission of greenhouse gases is a worldwide issue, the answer to the question is 'sufficiently clear' (in Dutch: 'voldoende duidelijk') (paragraph 5.6.4). For that reason, *de Staat der Nederlanden* is obliged 'to do "its part"' (in Dutch: '"het zijne" te doen') (paragraph 5.7.1). The Supreme Court refers in particular to the United Nations Framework Convention on Climate Change to underline this conclusion (paragraphs 5.7.2-5.7.4).

Interlude: The United Nations Framework Convention on Climate Change of 1992 refers in the preamble to 'the valuable analytical work being conducted' by, *inter alia*, the World Meteorological Organization and the United Nations Environment Programme. The objective of the convention is the 'stabilization of greenhouse gas concentrations in the atmosphere' (Article 2). Under Article 3 section 1 of the convention, all parties to the convention 'should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'. Added to that, under Article 4 section 2 of the convention, the developed country Parties and other Parties (as included in annex I) commit themselves specifically to the following: *inter alia*, to adopt policies and measures that 'will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions' (under a). Furthermore, under Article 4 section 3 of the convention, the developed country Parties and other developed Parties (as included in annex II) shall provide financial resources to the developing country Parties, and under Article 4 section 4, the Parties (as included in annex II) shall assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects.

Also, according to the Supreme Court, the obligations that states have under the United Nations Framework Convention on Climate Change are in line with the internationally recognized so-called no harm principle (paragraph 5.7.5). Under this principle, states shall not cause damage to each other. As concerns the emission of greenhouse gases, this principle entails that all states have a partial obligation to do what they can to reduce the emissions within their own territory.

§7.05 THE JUDGMENT OF THE DISTRICT COURT OF DEN HAAG (THE HAGUE) IN THE CASE BETWEEN VERENIGING MILIEUDEFENSIE *ET AL*. AND ROYAL DUTCH SHELL PLC.

The judgment of the Supreme Court of the Netherlands in the case between Urgenda and the State of the Netherlands is groundbreaking in the sense that the Supreme Court bases a legal obligation on the State of the Netherlands to reduce the total emission of greenhouse gases in the Netherlands in 2020 by (at least) 25% on Articles 2 and 8 of the ECHR that deal with the right of life and the right of private of life and family life respectively. This approach was followed by the district court of Den Haag (The Hague) in its judgment of 26 May 2021 in the case between (among others) Vereniging Milieudefensie (Friends of the Earth Netherlands) and Royal Dutch Shell Plc. (now: Shell Plc.).[19] Vereniging Milieudefensie *et al*. requested the district court to order Royal Dutch Shell Plc. to take measures that would reduce the total level of CO_2 emissions caused by the operations of the whole Shell group, preferably by 45% in 2030 (compared to 2019), or in the alternative by 35% in 2030 (compared to 2019), or as a fallback position by 25% in 2030 (compared to 2019). The request advanced by Vereniging Milieudefensie et al. related to three emission 'scopes':

- Scope 1: emissions that are the result of the operations of the companies within the Shell group of companies itself.
- Scope 2: emissions that are caused by the suppliers of the Shell group of companies. These emissions are 'indirect emissions' caused by parties from which the Shell group of companies purchases electricity, steam, or heating for its own operations. The Shell group of companies is in a position to influence the level of these emissions through its contractual relations with its suppliers.
- Scope 3: emissions that are caused by the customers of the Shell group of companies. These emissions are also 'indirect' emissions caused by customers of the Shell group of companies, including major customers that purchase crude oil and gas from the Shell group of companies. The Shell group of companies is in a position to influence the level of these emissions by deciding what products it sells or does not sell.

The district court granted the primary application made by Vereniging Milieudefensie et al., ordering Royal Dutch Shell Plc. to reduce (scope 1) or cause to be reduced (scopes 2 and 3) the total level of CO_2 emissions caused the operations of the Shell group of companies by 45% in 2030 (compared to 2019). In reaching this decision, the

19. ECLI:NL:RBDHA:2021:5337 and (unofficial translation) ECLI:NL:RBDHA:2021:5339, *JOR* 2021/208.

district court applied a wide variety of arguments. Among these were Articles 2 and 8 of the ECHR. The district court considered more specifically that '[f]rom the Urgenda ruling it can be deduced that Articles 2 and 8 of the ECHR offer protection against the consequences of dangerous climate change due to CO_2 emissions that lead to global warming' (paragraph 4.4.10). The district court acknowledged that the rights enshrined in these provisions in principle apply in the relationship between states and citizens, meaning that Vereniging Milieudefensie et al. 'cannot directly invoke these human rights with respect to [Royal Dutch Shell Plc.]' (paragraph 4.4.9). However, the district court also considered: 'Due to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between Milieudefensie et al. and [Royal Dutch Shell Plc.]. Therefore, the court will take into account the human rights and the values they embody in its interpretation of the unwritten standard of care.'

The latter considerations of the district court are remarkable. The district court acknowledges that Articles 2 and 8 of the ECHR in principle only have a 'vertical' scope of application: they govern the relationship between states and citizens. This means that these articles lack 'horizontal' application: they do not govern the relationship between citizens themselves. However, the district court takes a bold step in considering that, although these provisions do not have a 'horizontal' effect, they can play a role in the relationship between citizens themselves when applying the duty of care.[20]

§7.06 FINAL REMARKS: THE AGE OF SUSTAINABILITY

Section §7.01 discussed the rise of sustainability-related issues in legislation by referring to three (EU) legislative initiatives: the Taxonomy Regulation, the CSRD, and the (proposed) CSDD. Section §7.02 went into the history of the modern era and how that era is subdivided by Hobsbawm into four ages. This section also highlighted some elements of company law that show how company law developed in line with these ages. Section §7.03 concluded that the present era may be referred to as the Age of Sustainability. The judgment of the Supreme Court of the Netherlands in the case between *Stichting Urgenda* and *de Staat der Nederlanden*, discussed in §7.04, shows the importance of climate litigation and may be regarded as reflecting the Age of Sustainability. In this judgment, Articles 2 and 8 of the ECHR played a decisive role. The Supreme Court interprets these provisions in a broad way, including giving protection against the emission of greenhouse gases. In its judgment of 26 May 2021, discussed in §7.05, the district court of Den Haag (The Hague) in the case between (among others) Vereniging Milieudefensie and Royal Dutch Shell Plc., elaborated on the judgment of the Supreme Court by also applying Articles 2 and 8 of the ECHR. This is remarkable because these provisions are not written for 'horizontal' relationships between citizens themselves. This raises the interesting question of whether courts in

20. Cf. for a (critical) analysis of the judgment. B.M. Katan, 'Ieder het hare. Enkele opmerkingen bij het klimaatvonnis tegen Shell', *Ondernemingsrecht* 2021/106.

future cases relating to sustainability (including climate change) will find other novel ways to interpret the law in a way that reflects the challenges of the Age of Sustainability.