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Human Rights: Developments For Cos. To Watch

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Companies are facing ever-increasing pressure from government bodies and stakeholders to run their businesses in a transparent and responsible manner with regards to the human rights impact of their operations.

This article provides an overview of recent legislative developments that will affect foreign companies conducting business in the U.K., and highlights ongoing developments in the U.K., the U.S. and further afield that may have a significant impact on the management of companies around the world.

Updated U.K. Government Guidance

The U.K. government has provided updated and firmer guidance on the section 54 Modern Slavery Act transparency in supply chain reporting requirement which applies to certain organizations "doing business" in the U.K., in addition to U.K. domiciled companies.

Relevant organizations are now expected to publish transparency statements "at most" six months after the organization's financial year end. Businesses are also encouraged to leave statements from previous years on their websites to enable investors, employees and other stakeholders to monitor progress.

The updated guidance states that relevant organizations "should aim" to (rather than "may") cover certain information in their statements. Organizations are encouraged to "paint a detailed picture" of all of the steps that they have taken to address and remedy modern slavery, forced labor and human trafficking, and are reminded that progress against prior years may be scrutinized by both stakeholders and civil society.

The guidance provides detailed information about the type of activity that could be included under each suggested heading, and why such information is recommended. For example, businesses may consider including information about the following topics.

Organizational policies

Such policies demonstrate commitment to address issues relating to modern slavery and ensure appropriate action is taken throughout the business. In drawing up organizational policies, businesses might consider questions such as:

- What minimum labor standards are expected of the business, its subsidiaries and suppliers?
- How does the business factor labor costs into production and sourcing costs?
- What due diligence will the company commit to conducting regarding its supply chain?

Due diligence

The guidance acknowledges that due diligence is an essential management tool to improve risk identification and long-term social, environmental and financial performance. Businesses might consider including details of their due diligence processes, including impact assessments, stakeholder engagement, risk management procedures and grievance mechanisms.

Due diligence in relation to modern slavery should form part of a business' "wider human rights due diligence process," where possible. A U.K. bill would, if passed, see content of such statements mandated.

Recent recommendations from the U.K. Joint Committee on Human Rights included commentary on the prospect of mandatory due diligence for businesses operating in the U.K. The government's updated guidance clearly recognizes human rights due diligence as best practice.

Broader Legislative Developments

Developments in the U.K. are not isolated. In the Netherlands, the Child Labor Due Diligence Bill is awaiting approval by the Senate (a session is scheduled in late November this year), and would, if passed, require any company supplying goods and services to Dutch consumers (including certain goods and services online) to identify instances of child labor within their supply chains, and develop plans to combat those practices. Non-compliance may lead to fines.

Beyond developments in the European regulatory space, the Australian government recently announced its intention to enact, and is currently consulting on proposals for, a corporate modern slavery reporting requirement. Draft legislation is anticipated in the first half of 2018.

Entities operating in Australia (not merely those headquartered there) and meeting certain turnover thresholds would be required to report annually on efforts to address modern slavery in their operations and supply chains. Among other things, relevant entities may be required (not merely encouraged) to provide information about their due diligence processes relating to modern slavery and the effectiveness of such measures.

At the international level, the U.N. intergovernmental working group has also published draft content for a proposed treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

The draft content — due to be discussed during the third session of the working group at the end of October 2017 — indicates that any state that ratifies an eventual treaty may be required to take action (including implementing legislation if necessary) to require private organizations to design, adopt and

implement effective due diligence policies and processes, including codes of conduct, and to identify and address human rights impacts resulting from their activities.

The draft also hints at the introduction of criminal legal liability for the acts of transnational corporations, including possible personal liability of directors and executives.

There is a growing recognition that conducting human rights due diligence in line with the U.N. Guiding Principles on Business and Human Rights represents best practice for business.

Cases to Watch

Claimants are continuing to turn to the courts in order to hold companies to account for the human rights impacts of their global operations.

Do parent companies owe a duty of care towards those affected by the operation of a subsidiary's business?

The U.K. Court of Appeal has upheld jurisdiction over claims made by Zambian citizens relating to alleged pollution and environmental damage caused by discharges from a copper mine. In Lungowe & Ors v. Vedanta Resources PLC & Anor [2017] EWCA Civ 1528, the three sitting judges dismissed appeals brought by Vedanta Resources PLC (an English company listed on the London Stock Exchange) and its Zambian subsidiary, Konkola Copper Mines PLC (KCM), against the High Court's decision to allow the claims to proceed in the English courts.

The case pleaded against Vedanta is in negligence. The claimants argue that Vedanta owed them a duty of care on the basis of its assumption of responsibility and control over health, safety and environmental standards at the mine operated by KCM and its superior expertise, knowledge and resources concerning the same, which it knew, or reasonably ought to have known, that KCM would rely on.

On Vedanta's appeal, the Court of Appeal has confirmed that the effect of the European Court of Justice (ECJ)'s decision in Owusu v Jackson (case c-281/02) [2005] QB 801) is that where a defendant is domiciled in England and Wales, the English court is precluded from declining (mandatory) jurisdiction, even if the court of another non-contracting state (i.e. Zambia) would be a more appropriate forum.

Although the merits of the case are yet to be heard, in assessing whether the English courts had jurisdiction to hear claims against the Zambian subsidiary, KCM, the Court of Appeal considered whether or not Vedanta owed a duty of care to the claimants by reference to the three-limb test established in Caparo Industries PLC v. Dickman [1990] 2 AC 605.

Giving the leading judgment, Simon LJ emphasized that a holding company will not automatically be deemed to owe a duty of care towards those affected by the operations of its subsidiary, and that additional circumstances will need to be identified in order to establish a duty of care. Such additional circumstances may arise where a parent company:

- Is directly responsible for devising a material health and safety policy, the adequacy of which is relevant to the dispute;
- Controls the operations which give rise to the claim;
- Is well-placed to protect employees of the subsidiary and/or those affected by its operations because of its knowledge and expertise; or

- Knew, or ought to have known, that its subsidiary's system of work is unsafe and that the subsidiary or its employees would rely on the parent's superior knowledge.

The Court of Appeal held that there was a real issue to be tried between the claimants and Vedanta. Simon LJ also stated that although there have been no reported cases of a parent company owing a duty of care to third parties affected by its foreign subsidiary's operations, this did "not render such a claim unarguable. If it were otherwise the law would never change."

The substantive merits of the case will now be heard before the High Court. However, the Court of Appeal judgment provides useful clarification of the factors that English courts may take into consideration when deciding whether they have jurisdiction to hear a claim relating to human rights infringements, as well as guidance on what evidence may be used to suggest the existence of a duty of care owed by a parent company to its subsidiary.

Does the Alien Tort Statute prohibit corporate liability?

On the other side of the Atlantic, the U.S. Supreme Court recently heard the oral arguments in the case of Jesner v. Arab Bank. The petitioners allege that Arab Bank financed and facilitated a number of terrorist organizations which were involved in attacks against Israeli citizens.

The Second Circuit dismissed the petitioners' claim on grounds that corporations cannot be held liable under the Alien Tort Statute, and the question of whether the Alien Tort Statute prohibits corporate liability has been referred to the Supreme Court. The Supreme Court's decision is expected to be handed down in spring 2018.

Although the final outcome of each of these cases is yet to be determined, it is clear that claimants are increasingly looking to the courts to enforce their rights, and related developments should be closely monitored.

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