COVINGTON

Business and Human Rights Update

September 30, 2019

International Employment

Recent global trends have placed significant scrutiny on matters related to modern slavery and human rights issues in supply chains. New legislation has steadily been introduced across the globe (including in the U.S., the U.K., France and Australia). In this update, we provide an overview on a variety of international and national developments in the business and human rights space in the last few months alone, demonstrating continued legal pressure surrounding corporate responsibility for respecting and protecting human rights in global operations and supply chains.

I. National Legislation

Netherlands: Child Labour Due Diligence Act

On 14 May 2019, almost three years since its introduction into Parliament, the Dutch Senate voted to adopt the Child Labour Due Diligence Act requiring companies to identify, prevent and assess the issue of child labour in their supply chains. The law covers companies that sell or supply goods or services to Dutch customers, including companies registered outside of the Netherlands. Relevant companies must:

- determine (using sources that are "reasonably knowable and consultable") whether there is a reasonable suspicion that a product or service involves child labour;
- develop and implement an action plan, if there is a reasonable suspicion; and
- publish a statement declaring that the company has conducted due diligence.

The text suggests that further regulation specified in a General Administrative Order (yet to be enacted) will take into account the ILO/IOE's "Child Labour Guidance Tool for Business" to define how companies should assess the risk of child labour in their activities and supply chains. The law appoints a regulator (yet to be specified) who will publish statements on an online public registry. Victims, consumers and other stakeholders may file a complaint with the regulator on the basis of concrete evidence of non-compliance. The regulation introduces administrative sanctions for failure to exercise human rights due diligence. If a company fails to fulfil its obligations to publish a statement, the regulator may first give the company a binding instruction and then initially impose a fine (of €4,150) for non-compliance. If a company fails to fulfil its obligations to conduct due diligence and/or draft an action plan, the regulator may impose a fine of up to €830,000 (or 10% of revenue). If the company is a repeat offender within five years, this may be considered an economic offence (entailing fines or imprisonment of up to four years).

The Act will come into force on a date to be determined by Royal Decree (and no earlier than 1 January 2020). Certain details of the law will be detailed in further regulations (e.g. which authority will perform the role of regulator). In advance of these regulations, companies might begin taking preparatory steps, including conducting a preliminary assessment into whether group companies will be caught by the legislation and aligning their practice with the ILO/IOE Child Labour Guidance Tool.

United Kingdom: Independent review of the UK Modern Slavery Act

The government recently published a report on the independent review of the Modern Slavery Act 2015. Among other recommendations relating to issues such as reform of the Independent Anti-slavery Commissioner post, the review committee made several recommendations relevant to the reporting requirement under section 54 (see here for an earlier alert on this requirement). The government may decide to implement the recommendations - which include more robust enforcement mechanisms - through further legislation.

The committee's recommendations included:

- Removing section 54(4)(b) which currently allows companies to state that they have taken "no steps" to address modern slavery in their supply chains, which would mean all relevant companies would be required to detail steps taken;
- Turning the six areas of reporting currently recommended for inclusion in company statements into mandatory requirements;
- Increasing board accountability by introducing provisions: (i) requiring companies to name a designated board member accountable for the production of the statement; and (ii) entailing offences under the Company Directors Disqualification Act 1986 in the event of failure to fulfil the reporting requirements or to act when instances of slavery are found; and
- Strengthening sanctions for non-compliance including initial warnings, fines (as a percentage of turnover), court summons and directors' disqualification.

Other Legislative Developments

- **Canada -** In April 2019, the Canadian All-Party Parliamentary Group to End Modern Slavery and Human Trafficking announced that it had completed a draft Transparency in Supply Chains Act (the "TSCA"). Details announced to date suggest that the law would fall somewhere between a transparency law which would require covered entities to report on their efforts to combatting prohibited conduct (akin to section 54 of the UK Modern Slavery Act) and a vigilance law which would require companies to adopt policies and practices to monitor and combat certain conduct (akin to the French Duty of Vigilance). It appears that the law would (i) create reporting obligations on covered entities regarding policies and procedures related to forced and child labor and human trafficking; and (ii) establish a duty of care for covered entities that creates a legal responsibility to take reasonable steps to prevent the use of modern slavery in overseas operations.
- **Switzerland** - A civil society initiative ("Swiss Responsible Business Initiative") was launched in 2015 to amend the Swiss constitution to introduce corporate liability for companies registered in Switzerland for human rights and environmental impacts caused by the company or its subsidiaries. A relevant company would have a legal

defence if it could demonstrate that it has conducted human rights due diligence and taken necessary measures to prevent violations. The initiative is currently under review in parliament. In June 2019, the National Council reaffirmed its decision to pursue a counter-proposal (which would mandate due diligence but with less stringent liability provisions).

II. Case Law

U.K. Supreme Court's approach to parent company liability

(A) Vedanta Resources Plc v Lungowe and others

In July 2015, a group of victims of alleged toxic emissions from the Konkola Copper Mine in Zambia brought a negligence claim against Konkola Copper Mines ("KCM"), owner of the mine, and its (then) UK parent company, Vedanta Resources Plc ("Vedanta"). In 2017, the U.K. Court of Appeal dismissed the jurisdictional challenges of the defendants and held that the High Court could hear the merits of the case (see our alert here). Earlier this year, the Supreme Court rejected Vedanta and KCM's further appeal upholding (in most part) the Court of Appeal decision.

Broadly, the court's significant findings include:

(1) In certain circumstances, the "proper place" (*forum conveniens*) of a claim against a company domiciled abroad ("foreign defendant") whose parent company is domiciled in England ("anchor defendant") may be the jurisdiction of the parent company. In this case, the Supreme Court affirmed that England was the proper place as there was evidence that access to substantial justice would be denied in Zambia, the alternative forum; and

(2) A parent company may owe a duty of care towards persons affected by its foreign subsidiary companies' actions. Giving the leading judgment and distinguishing earlier case law (including the "Okpabi" case, about which see below), Lord Briggs identified various ways in which a parent's group-wide policies might give rise to a duty of care: (i) if the policies are defective, regardless of the parent's implementation of the policies; (ii) if the parent provides policies as well as training, supervision and enforcement of those policies; or (iii) if the parent's published materials set out policies and hold the parent out as exercising a degree of supervision and control over its subsidiaries (even if it does not in fact do so). Here, evidence suggested that the claimants might be able to prove at full hearing, a "sufficient level of intervention" on the part of Vedanta and as such, a duty of care. Lord Briggs noted that the four indicia in the earlier negligence case of *Chandler v Cape* imposed an unnecessary "straightjacket" on courts and were "no more than particular examples of circumstances in which a duty of care may affect a parent". This line of reasoning may open up the circumstances in which a parent owes a duty of care to persons affected by a foreign subsidiary.

The case will now proceed to be heard on the merits.

(B) His Royal Highness Emere Godwin Bebe Okpabi and others v Royal Dutch Shell Plc

In 2018, the Court of Appeal held that Royal Dutch Shell Plc ("RDS") did not owe a duty of care to a group of claimants alleging they had suffered as a result of pollution and environmental damage caused by RDS and its subsidiary, and as such RDS could not be considered an anchor defendant for a claim in the English Courts. The claimants applied for permission for

appeal to the Supreme Court, but the decision on permission was suspended pending the judgment in the *Lungowe* case. Following the *Lungowe* decision, we understand that the Supreme Court has allowed an application for leave to appeal to the Supreme Court (although official Supreme Court sources on permissions to appeal are yet to be updated).

III. International Developments

Revised Draft of an International Treaty

In July 2019, the U.N. Working Group on Business and Human Rights ("Working Group") published a revised draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the "Revised Draft"). The Revised Draft builds on and includes some significant amendments to the "Zero Draft" published last year. The Working Group was tasked with drafting an instrument that would strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities of transnational corporations. The Zero Draft required member states to regulate and enforce certain business requirements and liabilities, but was heavily criticised, in particular, for its lack of specificity on certain key issues such as the scope of its application. The Revised Draft has several significant amendments, including:

- **Scope**: the Revised Draft applies not only to business operations "of a transnational character" (a heavily criticized element of the Zero Draft), but more broadly to all "business activities, including particularly but not limited to those of a transnational character". The Zero Draft only applied to business activity "for profit" which suggested that other certain entities, such as state-owned entities, might not be covered by the treaty. However, this limitation - and the unusual loophole it seemed to imply - has been removed in the Revised Draft.
- **Substance:**
  - **Due Diligence Requirements:** the Zero Draft included an obligation on states to require business to prevent human rights violations within the context of their business activities, a broader understanding of human rights due diligence than envisaged by widely accepted standards in the UN Guiding Principles on Business and Human Rights, and an almost impossible task for many businesses with complex, global operations. The Revised Draft requires states to legislate to mandate human rights due diligence for business by requiring businesses to "take appropriate steps to prevent human rights violations or abuses in the context of it business activities…", a less exacting standard.
  - **Failure to prevent human rights violations:** a new provision requires states to establish liability (including criminal liability) for failure to prevent another natural or legal person with whom a business has a contractual relationship with from causing harm to third parties. The limitation of liability to situations where there is a contract between parties is interesting in that it would apparently not apply to parent/ subsidiary relationships, something that is being explored in national courts, particularly in the U.K. and Canada.

The Revised Draft addresses some of the weaknesses of the Zero Draft. However, there are plenty of ambiguities and challenges in both scope and substance left to be resolved. For example, the draft still purports to cover "all human rights", without defining what that includes. The next round of treaty negotiations will begin in October 2019. The first reading of the Draft

Optional Protocol - which relates to certain national implementation mechanisms to promote compliance with, monitor and implement the treaty - is also scheduled for October 2019.

Covington is one of the few international law firms that has strong expertise in the area of Business and Human Rights. Our team draws upon attorneys and policy experts with deep human rights backgrounds including service in government and international organisations, with non-governmental organisations, in media, and within multinational corporations, and integrates them across our U.S., European, African, and Asian offices. We regularly advise clients with respect to human rights due diligence, best emerging practices in their policies and procedures, political risk mitigation, and litigation. This is done in the context of internationally recognised standards, including the UN Guiding Principles on Business and Human Rights, as well as domestic regulatory and legal regimes. If you have any questions concerning the material discussed in this client alert, or would like further information about our Business and Human Rights initiative, please contact the following members of our firm:

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