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Human rights risk is a legal risk, and businesses should carefully consider how they manage this risk in their corporate structures and third party relationships.

Many companies in the energy and natural resources sector have extensive global operations, and work with other companies to finance and carry out their business abroad. Adverse human rights impacts may arise in the course of doing business, which in turn could crystallize into possible legal liability.

By way of illustration, in the past year alone the English Court of Appeal handed down three judgments involving companies operating in the energy and natural resources sector:

- *AAA & Ors v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 ("**Unilever**");
- *Okpabi and Ors v Royal Dutch Shell PLC and Anor* [2018] EWCA Civ 191 ("**Okpabi**"); and
- *Lungowe and Ors v Vendata and KCM* [2017] EWCA Civ 1528 ("**Vendata**").[1]

All three cases concerned tortious claims brought by claimants against an English-domiciled parent company for the adverse human rights impacts associated with the operations of its overseas subsidiaries.

Human rights within the corporate structure

The decisions in *Unilever*, *Okpabi* and *Vendata* considered the various circumstances where a parent company may owe a duty of care in tort to a third party affected by the operations of its subsidiary. For instance, a duty may be owed where the parent has taken over the management of the relevant activity of the subsidiary, or has devised some policy that is material to the harm suffered by the third party.

This should not dissuade companies from developing effective controls or establishing group policies concerning human rights. The Court was keen to stress that the mere existence of a group policy and standard procedures will not give rise to a duty of care provided that it is the

subsidiary that is responsible for implementing the policy. What's more, effective human rights due diligence is the best way to identify a risk and avoid it materialising in the first place. What matters is that these policies and procedures are not developed in a legal vacuum and are implemented in a meaningful way.

Managing external relationships

While these recent cases focus on the parent-subsidiary relationship, other non-equity relationships could also give rise to a duty of care. In Unilever, the Court considered that:

"The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary."

There is therefore nothing in principle which prevents a duty of care, and possible liability, arising from within a company's supply chain or in the context of a financing or consultancy relationship, subject to the necessary legal tests being met. This underscores the need for companies to conduct their "external" business relationships with human rights in mind.

Practically, this could mean considering possible human rights impacts when conducting due diligence or, where appropriate, incorporating clauses in contracts requiring the establishment of, and compliance with, human rights policies. In their business relationships, businesses should also consider what sort of leverage they may be able to exercise to prevent or mitigate possible human rights impacts.

Conclusion

The best way to reduce human rights related legal liability is to identify human rights risks throughout your value chain and to take steps to prevent these risks from materialising, as you do for any other legal risk. Get this wrong and the scope for legal liability expands.

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