Advocating with respect: litigation counsel and human rights

David W Rivkin - 07 August, 2018

How litigation lawyers – both in-house lawyers and those in private practice - navigate the challenges of managing business responsibility for human rights, in the context of commercial disputes, poses real challenges, as a recent discussion involving lawyers from Debevoise & Plimpton, UBS, Nestlé, Liberty Asia, and Enodo Rights illustrates.

Over the last few years, business responsibility for human rights has evolved from a niche public relations concern to a complex and multifaceted legal discipline.

The evolution was spurred by widely endorsed voluntary standards like the United Nations guiding principles on business and human rights (the UNGP) and the Organisation for Economic Co-operation and Development (OECD) guidelines for multinational enterprises.

That evolution has accelerated significantly with the proliferation of transnational human rights litigation against businesses and government initiatives to mandate human rights due diligence and disclosure by corporate clients.

Recognising the implications of these developments, the International Bar Association released its *Practical Guide on Business and Human Rights for Business Lawyers* (the IBA Guide) in 2016.

In-house and external counsel now face two compliance challenges across the broad spectrum of their advice: firstly, ensuring they consider their clients' human rights-related risks and obligations, including the consequences of breach; and secondly, meeting their own ethical obligation to respect human rights. Each is as complex as it is pressing.

This article explores how disputes lawyers might navigate these challenges, particularly in the context of a dispute. The idea for it emerged from a panel at the most recent United Nations Forum on Business and Human Rights, where this feature's authors, spanning in-house, external, and civil-society counsel (Civ Soc), set out to engage in a debate before realizing that we shared very similar perspectives.

RESOLVING A MODERN SLAVERY DISPUTE

Consider a fairly common (hypothetical) scenario: United Kingdom Sub, a wholly owned Asian subsidiary of UK Corp, a UK-domiciled consumer products company, is accused by a civil society group of having relied on forced labour.

UK Corp adopted a group-wide human rights policy in 2015 and filed a Modern Slavery Act statement in 2017, stating that

there were “little to no risks of modern slavery” in the company’s global operations. Civ Soc has not yet made its allegations public. UK Corp’s general counsel has conducted a preliminary investigation and believes the claims are credible. She has also learned that a claimant-side law firm is preparing to file a class action tort claim in the UK against UK Corp on behalf of affected workers.

HUMAN RIGHTS ARE PART OF DUE DILIGENCE

Our first takeaway is stated above. The cornerstone of business respect for human rights is due diligence. The same applies for lawyers. It is their ethical responsibility to assess the potential human rights impact of client engagement. A key question any lawyer, including disputes lawyers, should seek to answer is whether, in undertaking this particular engagement, they or the client would risk becoming involved with adverse human rights impacts. This is a forward-looking enquiry focused on marginal impact.

The responsibility is not to determine whether UK Corp adversely impacted human rights; rather, it is to assess whether the company is seeking advice in good faith and will endeavor to respect human rights in the future. As the IBA Guide stresses, companies are entitled to defenses, and the Guiding Principles do not abridge a client’s right to assert a robust legal defense to claims that it has engaged in conduct that violates human rights.

Opting not to act for a company like UK Corp in these circumstances even if it was involved in modern slavery, could be seen as detrimental. Rather than removing themselves from all tricky situations, counsel should endeavor to use their influence to improve UK Corp’s human rights governance, including policies, due diligence, remediation and disclosure.

The circumstances in which counsel would be ethically obliged to avoid taking on the engagement on human rights grounds are limited: i.e., where UK Corp is unwilling to address adverse impacts or improve its human rights governance. Counsel should also make clear to UK Corp that, if engaged, the UNGP and respect for third parties’ human rights will inform their advice regarding how to resolve the dispute.

REMEDIATION IS IMPORTANT

Our second takeaway is that direct, out-of-court remediation may be in the best interests of UK Corp and affected stakeholders

The IBA Guide stresses that business lawyers should consider their role as being “wise professional counsellors” to their clients, rather than as mere technical experts on the law. That entails examining the legal issues facing UK Corp in the broader context of reputational, financial, operational, and ethical concerns.

In this case, providing a direct remedy could help UK Corp ensure that it acts in compliance with its own human rights policy, but also addresses the environmental, social, and governance concerns of investors and other stakeholders proactively, and lastly, transforms a potential public relations risk into an opportunity to burnish its brand.

In the face of credible allegations of forced labor, UK Corp should immediately bring to an end any such practices and explore opportunities for out-of-court remediation, irrespective of the progress or merits of threatened litigation.

A few specific considerations come to mind. Firstly, under international law, human rights remedies do not have to be monetary. They may include restitution, compensation, policy changes, apologies, and disciplining of offenders. Effective remedies can be offered directly to victims or through participation in a public or private grievance process.

Secondly, UK Corp may be involved in the forced labour directly, through its own policies and procedures, and/or indirectly, through third-party intermediaries, such as labour brokers and other suppliers. In the latter situation, UK Corp may not need to provide remedy directly, but should still seek to exercise leverage to encourage the intermediaries to provide remedy and to improve their practices.

Thirdly, while direct remediation may be the most appropriate approach in this case and for most human rights impacts, in circumstances of gross human rights or criminal law violations, the appropriate public authorities will of course need to be involved.

Lastly, the benefits of providing a remedy directly to victims and potential plaintiffs hold independently of the potential class action. At the very least, the company's initiative could help mitigate the reputational and operational risks of a public dispute.

CREDIBLE AND FAIR PROCESSES

Our third takeaway is that a credible and fair process to resolve grievances is as important as the remedy itself.

Direct remedies provided by UK Corp will only be effective if they are seen as legitimate by affected stakeholders and the wider community. The UNGP underscore the importance of fair, accessible, and transparent grievance mechanisms. This is particularly important in jurisdictions with weak rule of law protections, or where freedom of association is not guaranteed in practice. In this case, UK Corp and UK Sub may want to consider two remedial processes, one retrospective and the other prospective.

To be perceived as fair, both should be firstly, accessible to all potentially affected workers and secondly, ensure vulnerable workers can participate in an informed manner and without fear of retribution.

A few specific considerations apply. Firstly, there is no out-of-the-box guide to operational-level grievance mechanisms (OGMs). To ensure that any mechanism is appropriate to context and trusted by local communities, it is critical to engage with stakeholders throughout the design and implementation of the process. Stakeholder engagement is a delicate exercise of balancing and managing diverse interests.

Consensus may prove impossible. In the case of conflict, UK Corp and UK Sub should apply a premium to the views of those whose rights are impacted. This is because fair and trusted OGMs can be effective tools to identify grievances early and resolve them expeditiously.

For retrospective issues, particularly if victims have since moved away, UK Corp should consider an emergency response mechanism with an investigative function to identify affected rights-holders in immediate need of remediation.

Secondly, independence from UK Corp and UK Sub is not strictly necessary for either mechanism type, but it would enhance legitimacy in the eyes of affected and international stakeholders. The company may therefore seek to engage a third party that is trusted by local stakeholders and equipped to address cultural sensitivities to run or support the mechanisms.

MANAGING LEGAL RISK

Our fourth takeaway is that respect for human rights need not, and should not, come at the expense of managing legal risk. While seeking to respect human rights, counsel must consider how any human rights decisions could affect UK Corp's legal risk exposure. Thus, for instance, if affected stakeholders seek an apology, counsel will need to assess how such a remedy might bear on potential litigation.

Similarly, while corporate human rights regulation is gradually restricting the application of the corporate veil principle, it is incumbent on both internal and external legal counsel to consider and give advice upon corporate veil defenses where they are available.

Further, in the context of its Modern Slavery Act statement and other public disclosures, UK Corp will need to review and, where appropriate, correct information regarding modern slavery in the company's value chain. This is particularly true given the issue of compliance has been the subject of parliamentary and media scrutiny recently.

Any corrections, however, may need to be timed appropriately in light of legal, financial, and reputational risks. Swift remediation action will be relevant here, to underpin any such revised disclosures.

No matter how UK Corp addresses the current dispute, the company should prioritise an assessment as to how and why such issues arose and provide meaningful input so that UK Corp can revise its human rights governance effectively —particularly due diligence and grievance mechanisms—to avoid such risks in the future.

One immediate priority should be a review of UK Corp's contracts with business partners and suppliers to ensure human rights responsibilities, and consequences for failures, are integrated across UK Corp's business relationships.

CONCLUSION

The lawyer as wise counsellor is a long-heralded model of our profession, with integrity advice part and parcel of her fiduciary duty. Respect for human rights adds a new dimension to legal ethics without fundamentally reshaping lawyers' professional responsibilities or diluting the duty to represent client interests vigorously. The change asked of business lawyers is largely one of perspective: to appreciate how their clients' business risks and opportunities have evolved in the wake of emerging human rights standards and laws, and to advise them accordingly.

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