HUMAN RIGHTS

# Foreign liabilities can come home to roost

**UK companies and their subsidiaries increasingly are at risk of being sued in the courts of England and Wales for human rights or environmental harm in relation to their overseas operations. *Suzanne Spears*, Partner at Volterra Fietta, explains.**

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In recent years, foreign claimants have brought lawsuits alleging, for example, that companies acted in concert with public or private security forces to commit human rights violations or caused damage to water, land or human health. Several prominent companies have been caught up in these allegations, and a range of industries, including the oil and gas sector, have been affected. The costs of defending against these lawsuits are high and the reputational harm to a company can be severe.

## The case against Vedanta

The most significant risk to date emerged from the High Court in May 2016, when a judge ruled that a lawsuit against UK-based Vedanta Resources and its Zambian subsidiary Konkola Copper Mines would proceed in the English courts. The case was filed in 2015 by nearly 2,000 Zambian villagers alleging environmental damage and personal injury. The claim against Vedanta was brought principally in negligence, on the ground that Vedanta breached a duty of care allegedly owed to the claimants.

Vedanta and KCM argued that the English courts lacked jurisdiction over the claims. The claims should be tried in Zambia instead they asserted, because the claimants are Zambian and the damage occurred in Zambia. They pointed to the doctrine of '*forum non conveniens*', which historically meant that an English court could stay a case against any defendant if there was another competent and more suitable forum.

Justice Coulson rejected both defendants' submissions challenging jurisdiction. In response to Vedanta, the judge found that he no longer had discretion to stay the claim on *forum non conveniens* grounds as a result of developments under EU law. In response to KCM, the judge ruled that, because of the claims against Vedanta, the UK was the appropriate place to try the claims against KCM. Conducting separate proceedings in Zambia and the UK on the same facts would be 'unthinkable'.

The judge's opinion with regard to the duty of care allegedly owed by Vedanta was also noteworthy. The judge found that a claim in negligence against a parent company arising out of the subsidiary's operations might give rise to liability.

## Practical implications

*Vedanta* is a judgment of considerable commercial significance. It demonstrates that English courts will have little scope to decline jurisdiction over a UK parent company. It also demonstrates that the English courts remain open to submissions that a parent company owes a direct duty to persons affected by the actions of its foreign subsidiaries.

Despite the chilling spectre raised by *Vedanta*, UK companies may take some comfort from parallel developments. First, given that the High Court's jurisdictional decision relied primarily on EU law, the UK's decision to leave the EU may revive the long-standing common law doctrine of *forum non conveniens*. Second, while the High Court has shown willing to hear the argument, no judgment on the merits has been rendered to date holding that a parent company owes a direct duty of care to communities affected by its overseas subsidiary's operations.

Nonetheless, some companies have paid significant settlements in transnational tort cases, in addition to high legal fees and extreme costs to their reputations. Given the possibility of large settlements or judgments, there are signs that the filing of tort actions will continue apace.

## Ways to minimise risk

There are, however, steps a company can take to minimise its chances of becoming the target of a transnational tort lawsuit even while its subsidiaries operate in challenging overseas environments. As a preliminary matter, companies can implement codes of conduct and incorporate them into contracts; rigorously observe the due diligence and compliance procedures recommended by multi-stakeholder initiatives; provide training for employees, contractors and security forces; initiate prompt investigations (internally or through outside counsel) when abuses do occur; and establish grievance mechanisms capable of providing effective remedies.

In the area of human rights, companies that use security forces to protect their operations also may limit exposure to liability by agreeing to contractual language that expressly places conditions on the behaviour of the security providers and limitations on the company's liability, and, where appropriate, states that the company otherwise has no authority to control security forces' actions.

With respect to the environment, companies may structure agreements to mitigate liability through risk transfer mechanisms, such as warranties, indemnities and insurance.

Companies also may investigate possible failings in their own, their subsidiaries', their contractors' and host governments' human rights and environmental management techniques and take steps to rectify these failings.

The good news is that companies that take preventive measures and think critically about corporate compliance and responsibility with respect to human rights and the environment are much more likely to avoid transnational tort litigation in the UK and elsewhere. ●