Who’s at fault with the cobalt?

Published 11/03/2020 on cdr-news.com - Commercial Dispute Resolution

Class actions against corporate end users for supply chain working conditions: Graham Coop and Maria Fogdestam-Agius of Volterra Fietta consider questions of jurisdiction, knowledge and repercussions.

Courts are increasingly asked to consider manufacturer responsibility for human rights impacts that occur within their operations in foreign locations. A class action filed in December 2019 in the United States District Court for the District of Columbia proposes to expand this litigation field by arguing that manufacturers using cobalt components should be responsible for human rights abuse in the operations of their suppliers within the global mineral supply chain.

A QUESTION OF JURISDICTION

Human rights-based litigation often relies heavily on emerging international soft law standards, such as the United Nations Guiding Principles on Business and Human Rights (UNGP) and industry-specific codes of conduct. However, such standards are not domestically actionable. Suits before domestic courts must find legal footholds in domestic law to confer jurisdiction over defendants and to provide a cause of action to remedy the alleged misconduct.

Doe and Others v Apple and Others is a class action brought against five of the world’s largest tech companies headquartered in the United States: **Apple**, **Alphabet**, **Microsoft**, **Dell** and **Tesla**. The representative plaintiffs are 14 families of under-aged children who suffered injuries or death while working as artisanal miners in cobalt mines in the Democratic Republic of Congo (DRC). The representative plaintiffs claim to represent a similarly situated class of tens of thousands of minors under the principles in the US Federal Rules of Civil Procedure Rule 23.

The suit relies on a cause of action arising specifically under US law, namely the civil remedy provided under the Trafficking Victims Protection Reauthorization Act (TVPRA). This legislation allows victims of forced labour to bring a civil action in an appropriate US District Court against an entity present in the US, which knowingly benefits, financially or by receiving anything of value, from participation in a venture which that

entity knew or should have known involved forced labour.

The complaint asserts that the class members were unlawfully trafficked, or forced by extreme poverty, to work in primitive mines that supply cobalt to the defendants, who benefit from and exploit the pervasive use of child labour in the cobalt mining industry. Cobalt is a precious mineral essential to power rechargeable lithium-ion batteries used in electronic devices and electric cars produced by the defendants and other manufacturing companies. According to the complaint, the global cobalt supply chain constitutes a 'venture' within the meaning of the TVPRA, encompassing mining operations as well as processing and distribution to end users for their consumption, and serving to maintain a steady supply of cheap cobalt.

Human rights advocates in the US have increasingly turned to the TVPRA as a vehicle for extraterritorial human rights claims since 2013, when the US Supreme Court limited US jurisdiction over claims against foreign nationals for overseas violations of international law under the Alien Tort Statute. But the extent to which extraterritorial supply chain TVPRA claims are feasible remains to be seen. In December 2017, a District Court in California ruled in *Keo Ratha et al v Phatthana Seafood Co et al* that US courts had no jurisdiction over alleged human rights violations against Cambodian seafood workers employed at factories in Thailand processing shrimp and other goods for the US market.

The court dismissed the claims against two US distribution companies, citing previous case law that 'participation' in a venture would require not only passive benefit but 'some action to operate and manage the venture', such as directing or participating in labour recruitment, employment practices or working conditions in the supplier's operations. That case is currently being considered by the Ninth Circuit Court of Appeal, which heard oral argument in September 2019.

The requirement of some managerial control comports with the approach of the UNGP, where the obligation to remedy adverse human rights impacts arises where an enterprise has caused or contributed to the harm, but not where it is merely linked through a business relationship to harmful operations of other actors. This requirement has also been applied in court decisions in other jurisdictions. For example, in April 2019, the United Kingdom Supreme Court found arguable a tort claim against a UK parent company for the impact that its Zambian subsidiary mining company's operations had had on Zambian villagers. However, in order to arrive at that finding, the court required that the parent should have assumed a duty of care by, for example, developing guidelines for the address of human rights harm by companies in the corporate group, supervising their implementation or offering training on them.

A QUESTION OF KNOWLEDGE

The *Doe v Apple* complaint invites the court to find that wilful ignorance of harmful conditions in the supply chain amounts to contribution to harm and is capable of leading to legal liability. The United Nations Office of the High Commissioner for Human Rights has indeed expressed the view that failure to conduct adequate human rights due diligence can create a permissive environment for human rights abuse and thereby contribute to the occurrence of harm.

If the case proceeds to the merits, as a matter of US federal law, the plaintiffs will need to prove that the defendants 'knew or should have known' that cobalt sourced for their products could be linked to child labour. Referring to reports by Amnesty International, the plaintiffs assert that it is well documented that children perform artisanal mining under hazardous conditions in DRC cobalt mines.

Notably, in the above-mentioned *Keo Ratha v Phatthana Seafood*, the court declined to construe a company's knowledge of forced labour at a factory it did not own, operate or control from mere general reports, contrasting this with cases where defendants were fixed with first-hand knowledge on the basis of site visits or labour

complaints filed directly with the company.

In *Doe v Apple*, the complaint asserts that the price of cobalt reflects the fact that the raw materials are mined by children earning as little as USD 2 per day; that no defendant did "actually perform the required due diligence to verify whether children are mining cobalt in their supply chains"; and that the defendants would have had first-hand knowledge of the conditions, unless they "have never had a representative visit the cobalt mining areas of the DRC, which is extremely unlikely".

The complaint also cites Amnesty International's critical review of the defendants' compliance with the Organisation for Economic Co-operation and Development's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

It remains to be seen whether this will be accepted as sufficient proof of constructive knowledge. By way of comparison, the Court of Appeal for England and Wales in February 2020 upheld a finding by the English High Court that a UK company was not liable for excessive use of force by Sierra Leonean police in the protection of the company's African mine site, although it was aware of the local police's tendency towards brutality and had failed to implement its commitments to international industry standards for engaging with public security forces.

The mere fact that the company benefitted from local law enforcement services for its protection did not create a source of danger entailing a duty of care towards the local population.

As part of the argument to construe 'specific knowledge', the *Doe v Apple* complaint invokes the defendants' significant investments in initiatives to improve responsible sourcing of minerals as evidence that they were aware of problems in the supply chain but failed to act on that knowledge.

This argument may have countervailing implications. On the one hand, scrutiny of the quality of mitigation measures may prompt enterprises to take more effective steps to secure responsible sourcing.

On the other hand, companies may be deterred from engaging in voluntary initiatives for fear that their participation may be used against them. This may undermine efforts towards audit and certification systems and other general governance standards. Ironically, four of the five defendants, all described in the complaint as "rapacious exploiters", rank in the global top five for efforts to source conflict-free minerals from the DRC, pursuant to a 2017 report by the Enough Project; underscoring how there is no single objective criterion mandating how much diligence is 'due'.

A QUESTION OF REPERCUSSIONS

Doe v Apple will be a case to watch. The representative plaintiffs have requested a jury trial and seek injunctive relief as well as different forms of damages, including punitive damages, disgorgement of profits and the creation of a fund for appropriate medical care for class members. They thus seek to draw on a number of features of US litigation procedure that may be generally helpful to the plaintiffs' cause. Moreover, the plaintiffs' counsel has announced that it is continuing to investigate other tech and car companies and expects to add additional companies to the lawsuit.

By bringing a complaint against end users of a product for problems in their global supply chain, the complaint in *Doe v Apple* is effectively testing the extent to which a business enterprise must make itself aware of the conditions in its value chain and exercise its influence over its suppliers to induce compliance with human rights.

Corporations with global supply chains or sourcing from countries with complex human rights conditions should anticipate claims such as that in *Doe v Apple* that scrutinise supply chain due diligence and benchmark

corporate conduct against the many guidance documents compiled by international organisations, industry associations and civil society. Regardless of whether or not courts ultimately find for the plaintiffs in such cases, such suits in themselves may considerably impact the public perception and reputation of defendant companies.

Graham Coop is a partner and solicitor (Higher Rights of Audience (Civil)), and Maria Fogdestam-Agius an associate, with public international law firm Volterra Fietta in London. The views expressed in the article do not necessarily represent those of Volterra Fietta or any of its clients.