Panel III sub-theme 2

I will briefly outline standards of civil liability for HR abuses applicable to MNC parent companies, focusing on developments in English law and wider potential implications.

**Background**

1. Duty of care under English tort (common) law:

(a) To take reasonable steps to avoid harm to those to whom a duty of care is owed (overlaps largely with "HR due diligence" under UNGPs and OECD Guidelines)

(b) duty owed in respect of activities that present a foreseeable risk of harm; where relationship with victim is sufficiently close (proximate) to make the imposition of a duty "fair, just and reasonable".

2. This approach has resulted in successful claims e.g. Cape plc; Trafigura; Shell Nigeria; gold miners' silicosis (Anglo American). (NB Trafigura and Shell claims did not raise issue of parent co liability)

3. To overcome legal obstacle of the "corporate veil", cases focused on *direct negligence* of the parent co ie deficiencies in functions and responsibilities of the parent that caused harm. Not arguing that parent is liable for wrongdoing of subsidiaries. Eg Thor Chemicals; Cape Plc.

4. MNC cases also led to first judicial ruling on issue of MNC parent co liability - Chandler v Cape in which UK Court of Appeal specified circumstances where duty would be imposed viz:

(a) business of parent and subsidiary same in relevant respect

(b) superior knowledge of parent on relevant aspects

(c) parent know subsidiary system of work unsafe

(d) parent knew subsidiary would rely on parent.

5. But Chandler does not represent the limit of parent co duty under English law. Underlying principles can be developed to cater for other scenarios.

6. As regards the nature of the duty, recognised national/international standards may apply ,especially where company claims to abide by such standards e ongoing in Xstrata (Peru) case claimants allege failure to comply with VPSHR with regard to role of public security ie the Peruvian police in the commission of HR abuses.

**Points to note re the above**

**Not all HR violations fit into tort law jacket**.

7. Many HR violations will be actionable as tort claims e.g. injury/environmental damage

8. But others will not eg:

(a) in modern slavery context, economic oppression preventing workers from leaving employment may not qualify as false imprisonment.

(b) damage/loss is required - legal action to **prevent** harm from occurring could not form the basis of tort claim

**Tort-based approach entails significant procedural and practical implications**

 9. whilst certain duties are automatically imposed - e.g. Employer/employee; manufacturer/consumer - others depend on evaluation of facts. In MNC parent co cases this means being able to evaluate the role the parent played. This requires:

(a) effective discovery/disclosure mechanisms (contrast UK with Netherlands/Germany)

(b) substantial resources to evaluate and prove the role.

10. The problem for victims being able to amass such evidence is has led to arguments for:

(a) automatic imposition of a duty of care/due diligence on MNC parent co

(b) reversal of the burden of proof

11. But, even if a duty was imposed automatically would still need to prove, through largely the same factual evidence, the precise relationship between the MNC parent and the locally operating entity. Otherwise it would not be possible to evaluate what constitutes "reasonable" steps or what level of "due diligence" is required. (NB whereas UNGPs would require business to exercise "leverage" even where no "effective control" a tort law duty of care might not impose any such requirement.

**UK approach will be relevant in states with English-based common law legal systems**

12. See Shell Nigeria, Netherlands case (Akpan v RDS) where Hague Court of Appeal decided that Nigerian law could well reflect UK with regard to parent co duty .

13. See also *Hudbay Minerals* cases where UNGPs HR due diligence failures specifically alleged before Ontario Superior Court .

14. On the other hand, since the common law is not static but develop in accordance with societal expectations and conditions, existence and scope of duties of care may vary between states.

**Impact of Rome II Regulation in non-English based systems**

**15.** Rome II invariably stipulates application of local law. Problem where:

(a) local laws are less stringent. Not usually the case eg Peruvian Civil Code in Monterrico g Colombia air quality standards

(b) international standards eg the VPSHR direct companies to be "mindful of the highest applicable international standards".

(c) International standards should apply eg VPHSHR in the Xstrata case

**Conclusion**

16. Tort law approach is powerful mechanism for achieving legal accountability of MNCs in a variety of circumstances and places. But in order to be applicable more universally modifications need to be made. Equally important, and to be discussed in other sessions, are the practical obstacles to access to remedy, which are of particular significance in tort litigation

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