

# Client Alert

International Arbitration Practice Group

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## What Do In-House Counsel Need to Know About Business Human Rights Benchmarking?

### Business Compliance with Human Rights

The subject of compliance by businesses (from small to multinational) with human rights norms is in the news every single day. Following the endorsement by the UN Human Rights Council of the *UN Guiding Principles on Business and Human Rights* in 2011, we have seen a proliferation of regional and national laws mandating businesses comply with human rights norms. Businesses have also voluntarily taken on the responsibility to respect and protect human rights. They have done so by formulating and mainstreaming human rights policies, conducting human rights due diligence enabling them to assess and mitigate the risks of human rights violations in their operations and supply chains, and creating grievance mechanisms to address and remedy actual violations.

And then there is the subject of “benchmarking.”

### Corporate Benchmarking Regarding Human Rights Compliance

A number of corporate institutions and non-governmental organizations (NGOs) have partnered together to “benchmark” how peer companies compare to each other in the area of human rights compliance. The goal is to promote a “race to the top.” The assessors assign a numerical value or grade to each company, and these rankings are made public. Shareholders and consumers take this information into account when assessing the performance of companies in the same sector against each other.

The number of these studies is increasing. Recently, a consortium of organizations conducted the “Corporate Human Rights Benchmark” (CHRB), which ranked the largest 98 companies (measured by market cap) in the agricultural products, apparel, and extractive industries. For example, the CHRB evaluated 41 extractive companies on their human rights policies, their human rights due diligence, and their responses to allegations of human rights violations (including how such violations, if verified, were remedied). The overall average “score” awarded to the companies in this sector was 29.4 percent, with the highest scores in the 60-69 percent range. The study concluded that the areas in which these companies were lacking the most were showing a true respect for human

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rights and undertaking sufficient human rights due diligence into areas of their business that were susceptible to human rights violations.

Similarly, in 2016, another organization, KnowTheChain, issued a series of reports ranking the steps that the largest companies in the information & communications technology, food & beverage, and apparel & footwear industries took to protect workers in their supply chains from forced labor. KnowTheChain was initially created to encourage greater corporate understanding of the *California Supply Chain Transparency Act*, but now serves to research and identify corporate response trends, develop insights and provide practical resources for companies. For example, in its report evaluating the 20 largest global food & beverage companies, KnowTheChain assessed food & beverage companies under the following themes: commitment and governance; traceability and risk assessment; purchasing practices; recruitment; monitoring; and remedy. The report found that aside from the areas of awareness and commitment, companies tended to score low across all themes assessed, with an average overall score of 30 percent. KnowTheChain intends to “benchmark” 125 companies in 2018, using an updated methodology.

Finally, some studies compare the disclosures made by companies about their human rights practices pursuant to applicable reporting laws. For example, CORE, a UK NGO, recently reviewed the reporting done by certain companies, including hotel brands, under the *UK Modern Slavery Act of 2015*. In its report, CORE faulted a number of companies for failing to provide substantive details about their human rights risk factors, and for failing to identify concrete steps to mitigate and prevent those risks from materializing.

Of course, all of this information is made public – that is the purpose.

## **Criticisms of Corporate Benchmarking**

Corporate benchmarking has been subject to some criticism, including:

- Methodologies used to assess the respect for and protection of human rights are unclear;
- Targeted companies have been not been given the opportunity to help develop the methodologies;
- The methodologies have been inconsistently applied across companies;
- The assessors do not sufficiently engage the target companies, resulting in information gaps; and
- The results (distilling the results into a single number, for example) are overly simplified.

The “benchmarkers” have been made aware of these criticisms. However, it is not likely that these peer-to-peer comparison studies will disappear, and the reputational damage that the studies can cause should not be underestimated. Both the CHRB and KnowTheChain have reviewed the feedback of their initial studies and reports, and have incorporated them into their methodologies that will be used during the new assessments they will launch in 2018.

## **Impacts of Corporate Benchmarking**

Notwithstanding the identified criticisms, corporate benchmarking may be a catalyst for many real consequences for the companies being assessed. For example, in 2014, a blog post on KnowTheChain’s online forum publicly shamed ten companies for stating in their disclosures that they did not take action in any of the suggested categories.

This clearly weighed on the companies, with at least one leaving a public response to the criticism on their website in an effort to salvage their reputation. Certainly, shareholders and consumers absorb all of this public discourse.

## What Do You Need To Do If Your Company Is Being Benchmarked?

To fare as well as possible in the benchmarking process and avoid shaming from the general public along with shareholders, it is important to take the following steps if your company is being benchmarked:

- Do not ignore the study. It will not go away, and failure to cooperate will likely result in a lower score vis-à-vis peer companies.
- Identify the core team that will participate in the study. The core team should include an in-house counsel.
- Consider an “outside-in” approach. Legal experts have stressed the importance of external engagement, such as a law firm or human rights advisor, in identifying important issues and helping to implement best practices and improve performance.
- Review the proposed methodology of the study to identify how the company will be assessed.
- Companies that have already been assessed in previous years should review their company score cards and determine where improvements can be made.
  - 2017 results indicate that specific attention should be paid to the areas of: embedding respect and human rights due diligence, and ensuring effective remedy, performance, and transparency.
- Learn from the approaches and practices of leading companies—both peers and across industries—and improve preventative measures as well as effective remedies for victims.
- Review the *UN Guiding Principles on Business and Human Rights* to ensure that, at a high-level, the norms have been incorporated into the business. For example, through formulating a human rights policy that is made publicly available.
- Begin implementing human rights responsibilities immediately, as further delay runs the high risk of often preventable abuses occurring.

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