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G7 Leaders Sharpen Focus on Labor Issues in Xinjiang: What Does This Mean for Multinational Businesses with Supply Chains in the Region?

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Introduction

June's G7 summit showed that eradicating forced labor in Xinjiang remains a top priority for leaders of the world's most advanced economies. But what does this mean for international businesses with supply chains extending to the region? In this analysis, we sketch the political landscape and consider how UK and US businesses should mitigate any legal exposure.

Political landscape

At the close of the G7 summit in June, the leaders issued a joint communique committing to ensure that global supply chains are free from the use of forced labor. Ostensibly, this is a general commitment that extends to all cases of forced labor, irrespective of geographical location. As such, it is little more than a restatement of the state duty to protect under the UN Guiding Principles on Business and Human Rights ("UNGPs").

However, context suggests that the G7 leaders (at least from certain States) had something more specific in mind. The communique specifically expresses concern about "state-sponsored forced labor of vulnerable groups and minorities, including in the agricultural, solar and garment sectors". The communique does not mention Xinjiang, but, in a separate statement issued by the White House, these same sectors were identified as "the main supply chains of concern in Xinjiang". Previously, the UK's foreign secretary, Dominic Raab, committed to take action to



“make sure that UK businesses are not part of the supply chains that lead to the gates of the internment camps in Xinjiang”.

What should businesses, particularly in the UK and US, who are concerned about reputational and legal risk associated with supply chains in Xinjiang read into these statements?

Existing sources of legal risk for businesses with links to any forced labor in Xinjiang

UK

In the UK, the Modern Slavery Act requires businesses “carrying on a business” in the UK with a turnover of over £36 million to publish an annual statement setting out the steps which they have taken to prevent modern slavery in their supply chains and business. Amongst other things, Government guidance to the Act states that the annual statement “should aim to include” information about the parts of its business and supply chains where there is a risk of slavery, including forced labor, taking place and the steps the business has taken to assess and manage the risk.

In light of the UK Government’s multiple public statements about the risk of forced labor in Xinjiang (see the [Foreign Secretary’s Statement to Parliament in January](#) and the updated [guidance in March on overseas business risk in China](#)), as well as expressions of concern by UN experts, any business with supply chain links to Xinjiang that must report under the Modern Slavery Act should specifically acknowledge the risk in its statement and set out the steps it is taking to prevent or mitigate the risk through its human rights due diligence.

The Act does not prescribe any legal sanction for a failure to reflect such issues in its Modern Slavery statement. Although the UK Government recently announced its intention to introduce financial penalties for businesses who fail to meet their statutory reporting requirements, such penalties have not yet come into force (as noted in June in a highly critical report by the relevant Parliamentary Select Committee). In any event, it is anticipated that penalties will apply in circumstances where a qualifying business fails to issue any statement at all, rather than where they issue a statement which fails adequately to address a salient risk.

Despite the UK Government’s tough public stance, then, the existing legislative regime regulating supply chain impacts in Xinjiang lacks teeth and there is no sign that the Government plans to do anything imminently to address this. However, it would be an error for UK businesses to conclude that they are insulated from legal liability for any forced labor in their supply chains in Xinjiang.

Recent developments in the common law open the door to civil claims against UK companies for forced labor impacts which take place in their international supply chains. There is recent authority from the UK Supreme Court ([e.g., Vedanta Resources v. Lungowe](#) [2019] UKSC 20) that UK companies may, in certain circumstances, be held liable in British courts for human rights torts committed by their overseas subsidiaries and other third parties. One factor relevant to the UK company’s common law duty of care to the affected persons is whether, in published materials, a business holds itself out as exercising a degree of supervision and control over a third party. Although it would be unprecedented, this could give rise to a claim by victims of alleged forced labor in Xinjiang against a purchaser company in the UK for a failure adequately to implement measures set out in its Modern Slavery Statement.

Alternatively, there may be scope for the alleged victim of forced labor to bring a claim in tort against a purchaser company on the basis that they were responsible for a state of danger which may be exploited by a third party. Indeed, in a recent appeal on the duty of care, the Court of Appeal refused to strike out a case brought on this basis against an English ship owner by the widow of a Bangladeshi shipbreaker ([Begum v. Maran \(UK\) Ltd](#) [2021] EWCA 326). This raises the prospect of claims in negligence against purchaser companies based in the UK for alleged labor rights abuses caused by third parties in their supply chains, including in Xinjiang.



In light of this jurisprudence, particularly in circumstances where a business holds itself out (for example in its Modern Slavery Statement) as having systems and processes in place to prevent forced labor, there is real legal risk under the common law (not to mention considerable reputational risk) where the business fails adequately to implement them.

To address this risk, there are certain, basic steps which a business can take. First, public statements on Modern Slavery and human rights more generally should be realistic and focussed on process as opposed to outcome. Rather than saying that there is zero tolerance of forced labor in a business's supply chain (a statement which, given the prevalence of forced labor in global supply chains, may often prove to be demonstrably false), the better approach is to acknowledge the existence of a risk and set out the practical steps which the business is taking to address it. Second, the business should ensure that it fully implements these systems and processes in accordance with international standards. By doing so, a business will maximise its chances of demonstrating that it has discharged its legal duty to the relevant standard of care.

USA

In the USA, the normative standard – banning forced labor in supply chains – is essentially the same as in the UK. However, the enforcement means differ, and hence the nature of the legal risk for companies. Whereas the UK has a transparency law and jurisprudence suggesting a risk of potential liability in tort, the main risk for companies in the USA arises from restrictions on imports from or exports to entities possibly using forced labor in Xinjiang.

A July 2020 advisory from the Departments of State, Treasury, Commerce, and Homeland Security warned businesses about the “reputational, financial, and legal risks” of supply chain links to forced labor in Xinjiang, or to products made outside Xinjiang but which use labor or goods from Xinjiang. Legal risks, cautioned the Departments, “could include Withhold Release Orders ..., civil or criminal investigations, and export controls.” To mitigate risks, the Departments advised that “businesses should apply appropriate industry due diligence policies and procedures.”

A US law in effect since 1930 (19 U.S.C. § 1307) bans the importation of merchandise produced, wholly or in part, by forced labor. “Forced labor” broadly includes “all work or service ... exacted ... under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.”

The forced labor import ban is administered by the US Customs and Border Protection (“CBP”) service. CBP may subject merchandise produced by forced labor to exclusion, seizure or both. Where information “reasonably but not conclusively” indicates that items were produced by forced labor, CBP may issue a “withhold release order” (“WRO”). The item is then held at the border and cannot be sold in the USA pending further determination. By itself, this order can result in costly delays, even if later lifted, as well as reputational damage, since the order is published on CBP's web page. Moreover, if CBP then obtains sufficient information to make a finding of forced labor, the item cannot enter or be sold in the USA.

The CBP looks closely at imports from Xinjiang. In 2019 and 2020, it issued WROs against several Chinese companies producing garments and hair products in Xinjiang. In January 2021, CBP issued a “region-wide” WRO against all cotton and tomato products from Xinjiang, as well as derivative products such as apparel or tomato sauce, including such products produced outside Xinjiang which use cotton or tomatoes sourced from Xinjiang. In June 2021, CBP issued a WRO against a Xinjiang company making silica-based products.

CBP's investigation reported the following “forced labor indicators” in Xinjiang: “debt bondage, restriction of movement, isolation, intimidation and threats, withholding of wages, and abusive living and working conditions.”

A bill now pending in Congress, H.R. 1155, would elevate the risks even further. Under the bill, goods from Xinjiang would be presumed to be made using forced labor and their import would be banned. Sanctions for violations would include expanded civil and criminal monetary penalties.



How should businesses with exposure to supply chain risk in Xinjiang respond?

The mechanisms by which a business can be held legally accountable for involvement in any forced labor identified in Xinjiang vary according to where it does business and where it is domiciled. However, there is consistency in the international definition of forced labor and the standards which are expected of businesses in relation thereto. This provides a measure of clarity for businesses in the UK, US and beyond who are concerned about links to any forced labor in Xinjiang: acknowledge the existence of a significant risk; and take steps, in accordance with the UNGPs, to address it through human rights due diligence. In a shifting legal landscape, this approach offers the best protection against legal as well as financial and reputational risk.

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