

London International Disputes Week 2023: Pulling the Strings—Parent Company Liability and the Attack on Corporate Group Structures

On 17 May 2023, the Firm’s London Global Disputes team hosted the aforementioned panel event in London. Sarah Batley, who moderated the discussion, was joined by Rhys Thomas – Partner at Jones Day, Laura Dymott – Director of Forensic Services at FRP, Emma Wright – Head of Legal UK and Ireland at IBM, and Bobby Friedman – Barrister at Wilberforce Chambers.

THE KEY TAKEAWAYS

Parent companies of global organisations are facing increasingly inventive attempts to hold them to account before the English Courts.

- There has been significant focus on Vedanta and associated cases, where claimants are seeking to establish independent duties of care owed by parents to people affected by the acts of subsidiaries. This is an important yet nascent and developing area of law, with no reported successful cases (yet).
- However, there has also been a quieter growth in a different type of parent company attack, based on much more established principles—economic torts. In this well-developed, but still developing, area of law, claimants are frequently seeking to impose liability on parents—and others exerting control, including sponsors, managers and directors—to establish liability, seek broader disclosure and impose additional pressure for settlement.
- At the crux of economic tort claims is a set of laws that are designed to protect illegitimate interference with business by a third party, with a general focus on the use of broadly defined “unlawful means”. These include inducement or procurement of breach of contract and unlawful means conspiracy.
- Big corporates and in-house counsel face a number of challenges in light of the rise of these economic tort claims.
- Especially over the last 25 years of globalisation, large corporates have become bigger, more international and more complex. They face a real challenge in balancing the need to allow subsidiaries to operate with sensitivity to local laws and regulations, business practices and customs to enable those businesses to grow, against simultaneously maintaining a degree of centralization of “mission”, control and culture, so that the business doesn’t just become a conglomerate of independent, federal business units.

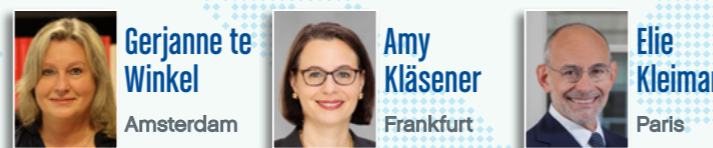
- On conspiracy claims, there will be a focus on alleging breach of directors’ fiduciary duties and conflicts of interest, particularly in the event of potential insolvency. Claimants will be looking for instances of unclear decision-making when dealing with balancing growth or profit opportunities against shareholder interests.

Key Contacts

UNITED KINGDOM



EUROPE



AUSTRALIA



UNITED STATES



ASIA



MIDDLE EAST



“WhatsApp like someone is watching.”
Bobby Friedman, Wilberforce Chambers

“Economic tort claims can carry a degree of opportunism—often they’re brought in the hope of finding that compromising or embarrassing email. That need for rigor in internal communications is critical. You can’t run a business on the basis of a constant fear of litigation, but there are particular flash points or periods of especially high risk where senior executives need to be reminded extensively of the risks.”

JONES DAY GLOBAL EXPERIENCE

- Acted for global parent entities in litigation and class actions arising from the activities of local subsidiaries, as well as counseling those parent entities on litigation risk (including advice on ESG/greenwashing risk and amenability of the parent entity to discovery and other compulsive processes).
- Acted for several parent companies in arbitration proceedings involving some of their subsidiaries where the claimant sought to (i) extend arbitration agreements to non-signatory parent companies, and (ii) obtain an order that the parent company should be jointly liable together with its subsidiary.
- Defended the Spanish parent company of a mining construction contractor against a \$1B+ claim by a Korean EPC contractor arising out of an iron ore mining project in Australia.
- Advised a Pennsylvania high-tech corporation on potential US litigation against a major shareholder for breaches of the shareholders’ agreement.
- Advised a European corporation in a multi-party, multi-contract dispute with its joint venture partners concerning the manufacture and distribution of personal protective equipment by their joint venture company.
- Handled a number of disputes for a global funds manager headquartered in Australia. These claims arose from M&A transactions and involved multiple entities within the group (parents, sponsors, fund managers, SPVs, etc). The claims run into the hundreds of millions, or billions, of dollars and they raise numerous complex liability, conflict management and insurance issues, including for directors and officers of the relevant entities.
- Acted for directors and officers who are personally named in class actions and regulatory actions, e.g. non-executive directors of an Australian software company, the former CEO of one of the world’s largest mining companies. This has included cross-jurisdictional matters involving Australian, UK and US regulators.

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