Debevoise London Climate Change and ESG Litigation Series: Supply Chain Litigation Risk

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The English courts have seen a rapid expansion in recent years of cases concerning the liability of UK-incorporated or UK-domiciled companies for the alleged acts or omissions of other companies located outside the jurisdiction. These cases include claims against parent companies for the alleged misconduct of subsidiaries located abroad: see *Lungowe and Others v Vedanta Resources plc and Another* [2019] UKSC 20 and *Okpabi & Others v Royal Dutch Shell and Another* [2021] UKSC 3.

An overview of supply chain litigation risk

As cross-jurisdictional claims targeting UK-incorporated companies have become more prevalent, claimants have increasingly focused on the alleged misconduct of companies or individuals within multinational supply chains. There are a number of ways in which these supply chain claims have arisen (or could conceivably arise in the future):

- Claims against multinational companies based in the United Kingdom for acquiring raw materials and other products from overseas suppliers who are said to implement unlawful working conditions*: see Josiya & Others v British American Tobacco Plc & Others* [2021] EWHC 1743 (QB). In this case, the claimants brought claims in tort and unjust enrichment, alleging that BAT sourced tobacco from tobacco farms in Malawi that mistreated workers. The High Court refused to strike out the claim on the basis of a lack of particularly as to which of the defendants acquired tobacco grown by the claimants, even though the claimants conceded that they did not know whether any of the defendants acquired tobacco grown by the claimants.

- Claims against multinational companies based in the United Kingdom for their alleged involvement in dangerous activities carried out by third parties outside the jurisdiction: *see Begum v Maran* [2021] EWCA Civ 326; [2020] EWHC 1846 (QB). In the Begum case, the claim was brought against a UK-based shipbroker by the widow of a worker who died at a shipyard in Bangladesh. The claimant alleged that the defendant had sold a ship to a demolition company in the knowledge that the ship would be demolished at a notoriously dangerous shipyard. The Court of Appeal

refused to strike out the claim, with a unanimous decision that the claim can proceed to a trial of the substantive issues in the English courts.

- Claims against multinational companies based in the United Kingdom for violence allegedly perpetrated by third parties outside the jurisdiction: *see Kadie Kalma & Others v African Minerals Ltd & Others* [2020] EWCA Civ 144 and *AAA* and *Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532. In the *Kadie Kalma* case, the claimants brought claims in tort against a mining company alleging that it should be liable for violence perpetrated in Sierra Leone by the Sierra Leone police. In the *Unilever* case, a group of Kenyan claimants argued that Unilever owed a duty of care to prevent the claimants from suffering ethnic violence at a tea plantation owned by a Unilever subsidiary. Although both cases were ultimately dismissed (the *Kadie Kalma* case was dismissed after trial and the Unilever case was dismissed at the jurisdictional stage, with both decisions subsequently upheld by the Court of Appeal), the courts' judgments leave scope for similar claims, with stronger facts, to succeed.

- Claims against multinational companies based in the United Kingdom for the alleged misconduct of companies within the supply chain, where the UK-based company exercises some level of control or intervention over those supply chain companies. The Supreme Court recently confirmed that the test for establishing that a parent company owes a duty of care in respect of its subsidiaries is fundamentally one of intervention: see the *Vedanta* case. So, for example, a duty of care could arise where the parent company promulgates group-wide policies that must be implemented by subsidiaries. It is therefore conceivable (although by no means straightforward) that a parent company could be liable for the misconduct of companies outside the group in circumstances where the parent company imposes mandatory policies and standards on those external companies. A recent international example is *E Vert al. v Casino* in which a coalition of 11 NGOs brought proceedings in France against the supermarket conglomerate, Casino, for harms associated with deforestation and human rights violations in Brazil and Colombia which form part of the supermarket's supply chain. While the claim is brought under a specific French Duty of Vigilance Law, the case is an example of the developing legal trend of imposing legal liability on a parent company for the actions taken by them and their foreign subsidiaries in the context of global supply chains.

- Complaints to the UK National Contact Point ("UK NCP") for the OECD's guidelines for multinational enterprises. On 4 May 2023, ClientEarth filed a complaint with the United States NCP against Cargill that alleges failures in Cargill's due diligence policies and procedures on its soya supply chain in Brazil. Under the OECD Guidelines, companies are expected to conduct risk-based due diligence to identify, prevent and mitigate the actual and potential adverse environmental and

human rights impacts of their operations. Failure to conduct adequate environmental due diligence in respect of indirect supply chains may be a ground for complaint.

Managing supply chain risk

The different scenarios outlined above present a dilemma for major companies that rely on overseas suppliers: insisting that supply chain companies adopt certain minimum standards may risk *Vedanta*-type liability (i.e., based on intervention), whilst doing nothing may risk liability of the sort alleged in the *BAT* or *Begum* cases (i.e., based on alleged assistance and/or encouragement of unlawful practices, or involvement in dangerous activities).

Multinational companies must also contend with the expansion of regulatory regimes, including with respect to environmental protection and other ESG initiatives.

- There is, therefore, growing pressure on multinationals to ensure that companies within their supply chains comply with minimum standards of health, safety and environmental protection.

- However, to the extent that a multinational company seeks to impose or enforce such minimum standards, there is a risk that it may be deemed to have 'intervened' in the operations of supply chain companies such that it has assumed a duty of care in respect of those operations.

It is clear that claimants and claimant-friendly lawyers are bringing increasingly innovative claims in the English courts against UK-based multinationals. That includes claims in respect of the activities of entities not even within the relevant corporate group. UK-based multinationals (or companies with a significant UK presence) should consider their exposure to these types of claims, including by assessing the level of their intervention or control over companies in their supply chain based outside the United Kingdom.

We would be happy to discuss the issues raised in this note with you in greater depth.

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Please do not hesitate to contact us with any questions.

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