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Protecting Yourself from U.S. Litigation: Jurisdiction over a Japanese Parent Company

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Japanese companies often worry about being dragged into U.S. litigation against a U.S. subsidiary. The good news is that it is difficult for a U.S. plaintiff to establish jurisdiction over a Japanese company based on the acts of its subsidiary. The bad news is that this happens more often than it should. In this alert, we report on *Miami Products & Chem. Co. v. Olin Corp.*, 2020 WL 1482139 (W.D.N.Y. 2020), a recent case that provides important guidance on these issues.

The *Miami Products* Case

In *Miami Products*, several purchasers of caustic soda sued the major U.S. producers of caustic soda and their parent companies. While plaintiffs contend that all of the defendants conspired to fix prices and limit supplies, their allegations focus mainly on the U.S. producers. Among other things, plaintiffs allege that, following meetings at a trade association, the U.S. producers issued price announcements at the same time and in roughly the same amounts. *See Miami Products* at *2.

This alert discusses the motion to dismiss of defendant Shin-Etsu Chemical Co., Ltd., the Japanese parent company of one of the U.S. producers, defendant Shintech Inc. In light of plaintiffs' failure to allege any "specific acts committed by Shin-Etsu," *id.* at *28, Shin-Etsu argued that the court lacked personal jurisdiction over it. In response, plaintiffs countered that, among other things, Shin-Etsu was subject to jurisdiction based on the acts of Shintech.

Piercing the Corporate Veil

Ordinarily, a parent company is not responsible for the acts of its subsidiary. As the United States Supreme Court has observed, "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal citation omitted). Thus, a "corporate relationship alone is not sufficient to bind [a parent corporation for the actions of its subsidiary]." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69 (2d Cir. 1996) (citation omitted).

In some circumstances, however, a court may disregard the separate legal status of a parent and subsidiary and "pierce the corporate veil." Under New York law, a court may pierce the veil if it finds that (1) the parent company exercised complete domination over the subsidiary with respect to the transaction at issue, and (2) such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil. *See Miami Products* at *18, *29 (citing cases).

This standard is relaxed when a plaintiff is trying to establish jurisdiction over the parent, rather than impose liability on it. In the jurisdictional context, the plaintiff needs to show only that the U.S. subsidiary is a "shell" for the foreign parent. *Id.* at *29. In determining whether this is the case, courts consider various factors, including whether the subsidiary observes corporate formalities; operates independently; has adequate capitalization; intermingles funds; has common ownership, directors, officers and personnel with the parent; or uses the office space, address or telephone number of the parent. No one factor or combination of factors is dispositive. *Id.*

The Court Finds No Basis for Jurisdiction

In *Miami Products*, plaintiffs introduced evidence that Shin-Etsu owned 100% of Shintech and that the two companies had common management. Shin-Etsu's board chairman also served as Shintech's board chairman, and Shin-Etsu's president also served as Shintech's president. Indeed, the president had worked at Shintech since 1983 and owned a house in Houston, where Shintech has its corporate headquarters. *Id.*

Plaintiffs pointed to statements on Shintech's website and in Shin-Etsu's annual reports to support its arguments. Shintech's website states: "When Shintech became a wholly owned subsidiary of Shin-Etsu, [Shin-Etsu's chairman] took full authority for the management of the subsidiary." The "Headquarters" page of Shintech's website only refers by name to the chairman and president of Shin-Etsu. Shin-Etsu's chairman routinely highlights Shintech in his messages to shareholders in annual reports. *Id.*

The court found that these facts did not warrant piercing the veil. In particular, it noted that Shin-Etsu's 100% ownership of Shintech and the overlapping leadership between the companies were not enough to make the two companies alter egos. *Id.* at *30 (citing New York cases). To establish jurisdiction over the parent company, the plaintiff must show that the parent company is using the subsidiary as a mere shell. *Id.* at *29.

The court also found the website statements unpersuasive. It noted that these statements reflected the way Shintech chose to present itself to the public, and did not show that Shin-Etsu controlled Shintech's operational or marketing activities. *Id.* at *30. The court further noted that plaintiffs failed to address whether Shintech observed corporate formalities or comingled funds with Shin-Etsu, and alleged no facts suggesting that Shintech was financially dependent on Shin-Etsu. *Id.*

The Court Orders Jurisdictional Discovery

Even though the court found no basis to exercise jurisdiction over Shin-Etsu, it refused to dismiss Shin-Etsu from the case. Instead, the court reasoned that plaintiffs might be able to establish jurisdiction if they were given an opportunity to develop a full factual record. The court therefore granted plaintiffs' request for jurisdictional discovery and denied Shin-Etsu's motion to dismiss with leave to renew once jurisdictional discovery was complete. *Id.* at *31, *32.

Best Practices

A Japanese company should be mindful that its own actions might still subject it to jurisdiction in the United States. However, our discussion of *Miami Products* focuses on a different situation – one in which a U.S. plaintiff tries to establish jurisdiction over a Japanese company not for the Japanese company's own acts, but for the acts of its U.S. subsidiary. To prevent this from happening, a Japanese company should consider the following best practices:

- The parent company should properly form the subsidiary, and the subsidiary should follow all corporate governance requirements.
- The subsidiary should keep records of all corporate activity, keep its books and accounts up to date, conduct periodic audits, and pay its taxes.
- The subsidiary should have its own procedures for authorizing the signing of contracts and otherwise doing business in its name.
- The parent should not exert complete control over the subsidiary's marketing or operational policies or its day-to-day operations.
- The subsidiary should maintain its own bank account(s) and funds should not be commingled.
- Any business dealings between the parent and subsidiary should be properly documented and conducted on an arm's-length basis.
- The subsidiary should be adequately capitalized for the activities it engages in.
- Ideally, the subsidiary should not share computer systems or email addresses with the parent.

For further information or for help with any of the issues discussed above, please contact any of the Hughes Hubbard lawyers listed below.

Seth D. Rothman | Partner
Hughes Hubbard & Reed LLP
One Battery Park Plaza | New York, NY 10004-1482
Office +1 (212) 837-6872 | Cell +1 (917) 697-8093
seth.rothman@hugheshubbard.com | bio

Paul Marston | Counsel
Hughes Hubbard & Reed LLP
Kojimachi Place, 9th Floor, 2-3 Kojimachi | Chiyoda-ku, Tokyo 102-0083, Japan
Office +81-3-6272-5831 | Cell +81-80-8432-3497
paul.marston@hugheshubbard.com | bio

Shigeki Obi | Associate
Hughes Hubbard & Reed LLP
One Battery Park Plaza | New York, NY 10004-1482
Office +1 (212) 837-6106 | Cell +1 (347) 446-7428
shigeki.obi@hugheshubbard.com | bio

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Seth D. Rothman

Paul Marston

Shigeki Obi

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