

REPRINT

CD corporate  
disputes

# RESOLVING ESG-RELATED DISPUTES

REPRINTED FROM:  
CORPORATE DISPUTES MAGAZINE  
OCT-DEC 2023 ISSUE



[www.corporatedisputesmagazine.com](http://www.corporatedisputesmagazine.com)

Visit the website to request  
a free copy of the full e-magazine

TRIVERS.  
SMITH

Published by Financier Worldwide Ltd  
[corporatedisputes@financierworldwide.com](mailto:corporatedisputes@financierworldwide.com)  
© 2023 Financier Worldwide Ltd. All rights reserved.

EXPERT FORUM

# RESOLVING ESG-RELATED DISPUTES



**PANEL EXPERTS****Heather Gagen**

Partner

Travers Smith LLP

T: +44 (0)20 7295 3276

E: [heather.gagen@traverssmith.com](mailto:heather.gagen@traverssmith.com)

**Heather Gagen** is a partner in the dispute resolution department and is co-head of Travers Smith's ESG and Impact group. She has a broad commercial litigation experience, covering the spectrum of high-value and complex disputes including environmental damage, human rights and product liability litigation. In particular, she has acted for clients in novel and large-scale tort claims, including 'parent company liability' claims, as well as in contractual disputes, competition law litigation, shareholder disputes and fraud cases.

**Doug Bryden**

Partner

Travers Smith LLP

T: +44 (0)20 7295 3205

E: [douglas.bryden@traverssmith.com](mailto:douglas.bryden@traverssmith.com)

**Doug Bryden** is head of environment & operational regulatory, specialising in UK, EU and international environment, regulatory, governance and trade law. He is also co-head of the firm's ESG and Impact group. Be it advising on regulatory licensing, 'long-tail' environmental and safety liabilities through to guiding boards and investors on corporate ESG transparency, governance, trade compliance and crisis response, he is recognised as a leader in his field.

**CD: To what extent has the focus of governments, regulators, investors and other stakeholders shifted toward greater corporate transparency and responsibility on environmental, social and governance (ESG) matters?**

**Bryden:** Corporate transparency and reporting obligations have been one of the dominant UK and European Union (EU) regulatory trends over the last 10 years. The arguments for increased transparency have merit. Not only does this wider information on a corporate's performance and risk profile allow investors, customers and other stakeholders to make informed decisions, it also promotes change and improvement – you cannot manage something you cannot measure. A wave of corporate regulation started with niche areas of reporting, such as energy efficiency and payment practices. In the last couple of years this has mushroomed into a staggeringly wide range of mandatory non-financial and environmental, social and governance (ESG) reporting obligations. These regulatory developments in part reflect and formalise longer standing stakeholder pressures around voluntary reporting and ESG accountability. The EU is very much at the forefront of mandatory reporting obligations as they lie at the heart of its

Green Deal, which seeks to redeploy capital into more sustainable investments and businesses. Of particular note are the EU's Sustainable Finance Disclosure Regulation (SFDR), Corporate Sustainability Reporting Directive (CSRD) and taxonomy regimes. In parallel to these sustainable finance regulations, the transparency playbook

**“We are now starting to see some hard edges emerge around the expectations that will be imposed on businesses, and a real focus on the mechanisms that will hold them to account.”**

*Doug Bryden,  
Travers Smith LLP*

has been used to also shine a spotlight on a range of specific corporate compliance and ethical concerns, such as ultimate beneficial ownership, gender pay gaps, modern slavery and supplier payment performance. Although the regulatory consequences of failing to comply are typically weak, the legal, commercial and reputational risks around non-compliance or misreporting are becoming increasingly clear. That said, full compliance with these regimes is generally the

easy bit; managing the consequential risks posed by these public disclosures is where it can get tricky, especially in light of developing case law and liability regimes that focus on parental company and value chain responsibilities. One of the key messages businesses need to hear when it comes to corporate transparency and ESG reporting is that these growing data banks are not only being used by investors – they are becoming fundamental source materials for activist non-governmental organisations (NGOs) and claimant lawyers.

**CD: In what ways are these rising expectations leading to calls for greater corporate accountability and liability? Which sectors and industries are being targeted on ESG-related issues?**

**Bryden:** ESG is now inescapable in political, social and commercial discourse, in a way that was hard to imagine even a couple of years ago. While what ESG means is still a dynamic debate, we are now starting to see some hard edges emerge around the expectations that will be imposed on businesses, and a real focus on the mechanisms that will hold them to account. The most immediate and clear response has come from policymakers who, particularly in the EU but also elsewhere including the UK, are imposing regulatory frameworks at lightning speed and with a breadth of ambition

which is unprecedented. One clear consequence is that businesses are rapidly being forced to identify ESG objectives and measure and disclose their performance against them. This enables businesses, if the right approach is taken, to meet, and sometimes exceed, the expectations of their consumers, commercial partners, investors and regulators. On the flip side, it also provides a more consistent way in which relative performance can be measured, and shortcomings identified. That is the whole point of the regulatory regimes which are being introduced: to ensure greater accountability.

**Gagen:** One accountability mechanism is obviously litigation. In an increasingly regulated environment, it will become easier for claimants to try to use the regulatory regimes to articulate the ESG standards which businesses should meet, and seek redress when they fail to do so – often using a defendant's corporate ESG disclosures against them in the process. While ESG-related litigation was initially focused on sectors such as the extractives and energy industries, which have obvious operational connections to the natural environment, it now affects a much broader range of industries, and its objectives are more ambitious. In particular, social impact claims and investigations are on the rise – centring around human rights and value chain issues which inevitably affect a wider range of sectors, such as food and fast-fashion retailers.

There is also a focus on the activities of regulators and social auditors themselves, underlining the scrutiny that is being applied at all levels as to whether ESG commitments are being rigorously enforced.

### **CD: What types of ESG-related disputes are coming to the fore?**

**Gagen:** The overriding theme remains that there is a significant and well-funded appetite to bring novel and innovative claims. Activist litigation is increasing, with many of the high-profile ESG claims brought in this country and abroad being pursued by environmental organisations. Litigation is seen as an end in itself in promoting action on ESG issues, and ESG-focused litigation funders are providing the financial firepower behind some of these claims. This has important implications for the types of ESG-related disputes that are emerging. They are characterised by the ambitious nature of the legal arguments they are based upon, and the types of remedy they seek – activist shareholder claims, for example, seek the courts' direct intervention in boards' commercial ESG decision making. Innovation is the first order of the day. ESG claims emerging in both the UK and globally are highly complex and an increasingly diverse range of litigation strategies are being employed. We are seeing well-established causes of action, such as derivative claims, being

used in novel ways in ESG litigation, and procedures such as the competition collective proceedings orders (CPO) regime being used to bring ESG claims for which they are not, at first blush, designed. As ever, even if such claims are not necessarily progressing very far in the courts before failing, they achieve their stated aim to some extent in ensuring a great deal of public and media attention on the ESG activities of major businesses. We continue to see claims based on novel tort-based liability, particularly where claimants are seeking redress from UK corporates for alleged harms connected to overseas operations. All this means that organisations need to have a truly global perspective on the potential litigation risk that they face, and expect the unexpected.

### **CD: Have any recent ESG-related cases caught your attention? What insights can we draw from their outcome?**

**Gagen:** Many high-profile and activist-led ESG claims are increasingly forward-looking. Strikingly, the aim of these cases is often much more to seek to control how companies address the ESG challenges and opportunities facing their business over the coming decades, rather than to obtain redress for historic harms suffered by individuals, which has traditionally been the objective of ESG-related claims. This is perhaps inevitable, given the nature of the

climate change crisis facing us. However, it brings into sharp focus the question of what litigation can and should achieve, and how willing the courts will be to intervene in highly complex business decisions when they touch on commercial issues as critical and costly as climate change and transition strategies. Recent and so far unsuccessful derivative claims brought against corporate directors and trustees in England demonstrate both the effectiveness with which litigation can promote debate on these issues, and – at least for now – the unwillingness of English courts to interpret the scope of directors’ and trustees’ duties with any exceptionalism in relation to corporate ESG activities. In addition, these cases bring into sharp relief the question of value, and how it can and should be created and preserved in the context of ESG risks and opportunities, and the intergenerational conflict of interest – value today versus value tomorrow – that inevitably has to be navigated by trustees and directors in that endeavour.

**CD: Aside from legal risk itself, what other implications for a business can ESG litigation bring and how can these be managed?**

**Gagen:** Reputational risk is a key consideration. The nature of allegations made in ESG disputes can be extremely problematic for a business, whether or not they are ultimately proved to be true. In a world dominated by social media, the impact of such allegations on consumer, investor and commercial relationships can be profound and almost immediate, especially in contrast to the inevitably

**“Businesses need to expect to be held accountable in courts in a range of jurisdictions for their ESG activities and the extent to which they are meeting their stated goals.”**

*Heather Gagen,  
Travers Smith LLP*

much slower pace at which litigation proceeds. It can be many months before misconceived allegations can be challenged in a courtroom, and meanwhile the reputational fallout of the allegations themselves continues.

**Bryden:** The potential for ESG litigation underlines the need for businesses to have best in class ESG governance. ESG litigation will test those governance

structures and an organisation is much better able to deal with a dispute if its ESG governance is strong to begin with – so that the business can answer allegations accurately and rapidly, if they emerge, and have an evidential basis on which wrongful allegations can be challenged. If, as can happen in any complex global business, problems are identified in a company's ESG activities, good governance procedures mean that boards can identify and deal with them proactively, and often before they eventuate as complex and costly litigation.

**CD: What advice would you offer to companies on enhancing their ESG practices and credentials in order to mitigate the risk of a future dispute?**

**Bryden:** Companies should be clear about their ESG objectives and be realistic about how they can be achieved and over what timescale. This will ensure that internal governance can be developed to ensure that those objectives are achieved on a solid foundation, and that the external communication of ESG activities, including through regulatory disclosures, are accurate and can be substantiated if challenged. It is important that all parts of a business, from the board down, have an integrated understanding of its ESG objectives and the steps it is taking to meet them. This ensures that commercial and strategic decisions reflect and support ESG

goals, minimising the risk that a business's behaviour is at odds with its stated ESG credentials. It is also important that ESG practices are thought about in a very holistic manner, so that efforts to achieve progress in one area, such as environmental commitments, do not inadvertently result in other problematic ESG impacts, such as non-compliance with human rights standards in supply chains. In a nutshell, litigation risk is most acute where there is a gap between what a business says it will do to further its ESG agenda and what it actually does – so taking an incremental, long-term and sustainable approach to achieving progress in this area is critical. Sustainability and ESG disclosures, statements and policies need to be treated like financial disclosures and be subject to the same level of rigour, scrutiny and verification.

**CD: Looking ahead, do you expect to see a rising number of ESG-related disputes? How should companies pre-plan their dispute strategies accordingly?**

**Gagen:** It is already clear, not only in the UK but globally, that ESG litigation is on the rise. Businesses need to expect to be held accountable in courts in a range of jurisdictions for their ESG activities and the extent to which they are meeting their stated goals. Not only is this consistent with a regulatory landscape that increasingly demands



ESG disclosures which will be scrutinised in any litigation, but it also reflects what consumers, investors and commercial partners expect. There is no 'silver bullet' strategy for avoiding ESG litigation, even though much of it is often fundamentally misconceived from a legal or factual perspective. However, the more businesses can evidence sustained and tangible adherence to the public commitments they have made in this area, the better able they will be to answer allegations put to them in court, or to avoid litigation in the first place. The starting point for all of this is proactive, thoughtful and comprehensive governance systems around ESG, which should be hardwired into a business's culture and operations. 