

CLIMATE CHANGE LITIGATION: WHERE ARE WE NOW?

1 AUGUST 2022 • ARTICLE



The Grantham Institute's *Global Trends in Climate Change Litigation: 2022 Snapshot* offers us a window into global trends in climate litigation over 12 months from May 2021 to May 2022. Analysis of the Institute's database demonstrates the continuing rise of climate change litigation, in particular in the Global South. The majority of cases are still being brought against governments, but both fossil fuel companies and companies in other sectors with significant emissions associated with their value chains are also firmly in the frame.

"Analysis of the Institute's database demonstrates the continuing rise of climate change litigation, in particular in the Global South."

Both in legal terms and in terms of what these trends mean for businesses, it is of note that the main focus of most such litigation is forward-looking, seeking to change policies and board behaviours, as well as prevent permissions being given for new projects which have not been demonstrated to align with climate goals. This appears largely to be due to the difficulties of proving causation for specific harms, as well as the increasing prevalence of "systemic lawyering" (focussing on legal interventions which are adjudged to have the highest impact) and "movement lawyering" (use of litigation as a form of public advocacy). The NGOs responsible for bringing the majority of claims are focussed on how to achieve future targets and prompt behavioural change. There are notable exceptions however, such as the

claim made by Luciano Lliuya against RWE AG in Germany, alleging a proportionate responsibility for estimated repair costs in the case of flooding to his home in Peru as a result of melting glaciers.

Many of the headline climate change cases remain ongoing and/or are subject to appeals, meaning that there is still little certainty around future legal risks for businesses. However, this has not stopped both the initial decisions and the threat of further litigation being used as advocacy tools. The IPCC's 2022 Summary for Policymakers has recognised litigation as affecting "the outcome and ambition of climate governance". The report also cites some examples of companies deciding to pull or postpone projects citing legal risks as a factor.

WHAT'S NEXT?

Case law developments to watch out for

The next 12 months will likely see further court decisions (at first instance and those on appeal) clarifying relevant duties on the following issues (amongst others):

- adequacy of group policy on climate change (*Mildefensie v Shell*, Netherlands);
- directors' duties on climate change (threatened action by Client Earth against Shell directors in the UK);
- duties of Pension Scheme Trustees in respect of alleged overvaluation of fossil fuel companies (*Ewan McGaughey v the Universities Superannuation Trust Limited*, England); and
- claims of misleading advertising, including references to consumer and competition law (claim by Client Earth and others against KLM in the Netherlands).

Potential effect of geopolitical issues

Business-related cases could also grow in importance as advocacy tools, where governments continue to dilute climate ambition in the face of increasing geopolitical unrest. The English courts have recently reminded those using litigation to question the validity of government decisions that the role of courts is simply to enforce the law. In *Client Earth v BEIS [2022] EWHC 1841*, the Administrative Court said that:

"It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

"The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices."

If governments change law and regulation to deal with issues such as the energy crisis, there will be little that the courts (at least in many common law jurisdictions) can do to act as an effective route to challenge government decision making.

Increased availability of information has the potential to generate new claims

New and planned regulatory regimes (particularly in Europe) also have the potential to drive further claims, in particular in the investment sphere. On 21 June 2022, the EU Council and the European Parliament reached a provisional political agreement on the corporate sustainability reporting directive ("CSRD") which will mean that both asset managers and customers should have better access to sustainability information, and boards will be required to both pay further attention to, and be more transparent about, climate-related and other sustainability risks.

Increasing need to understand the full spectrum of ESG risks arising as a result of climate change

"Many businesses may well be ill-prepared for proper consideration of 'cascading climate risks'."

As highlighted in Verisk Maplecroft's *Environmental Risk Outlook 2022*, however, many businesses may well be ill-prepared for proper consideration of "cascading climate risks" (including issues of civil unrest, political instability, food insecurity, mass migration and worsening human rights). This could well provide fertile ground for legal actions challenging a board's risk assessment, including both its adequacy in providing an accurate financial picture and whether specific harms might have been avoided if the exercise was properly carried out. Verisk Maplecroft also argues that those risks are increased by the fact that the need for businesses to diversify and

switch to new technologies in circumstances where resources are in short supply will lead to companies sourcing materials from lesser known markets, with an attendant increase in other ESG-related risks.

More scrutiny by and of auditors

Both CSRD and the proposed Corporate Sustainability Due Diligence Directive ("CSDDD") provide for auditors to have a central role. Whilst CSRD recognises the need for auditors who will review companies' sustainability reporting to have relevant expertise, it is not yet clear how that expertise will be developed on the necessary scale (both at board and auditor level) by the time of implementation. A gap in knowledge could also lead to claims against auditors. Whilst in England & Wales at least, it has historically been difficult to show liability of auditors against third parties, this is theoretically possible and may be perceived as a promising advocacy strategy with the growing role of the auditor.

Greater scrutiny of advertising

Since the Grantham Institute's report was published in June 2022, Client Earth and others have also issued a further claim against KLM. They allege misleading advertising and breach of consumer and competition law standards, including an allegation that "with a view to climate change, there is no such thing as "more sustainable" or "responsible" flying, and that the only sustainable thing KLM can do is to fly fewer planes". This focus on advertising follows a number of recent complaints to the UK Advertising Standards Agency ("ASA") about sustainability claims, including in relation to the effect of following a vegan diet (claims made by Sainsbury's were not considered to be misleading, where they related to generic suggestions to swap out food groups, but claims made by Tesco were considered misleading where claims in relation to specific products could not be effectively substantiated). The ASA is expected to publish the outcome of its research into the public's understanding of terms such as "carbon neutral" and "net zero" in summer 2022. This may become another resource to fuel further claims by NGOs in relation to alleged greenwashing, including under competition law and other regulation designed to protect consumers.

WHAT SHOULD BUSINESSES DO?

The growing prevalence of climate litigation risk, either directly against businesses or affecting businesses' ability to implement planned projects, as well as the increased requirements on boards to consider risks to external stakeholders (including nature and the environment) mean that analysis of these risks needs to be incorporated into early decision making.

"Businesses at risk of climate change litigation need to integrate mitigating actions into business strategy."

WATSON FARLEY & WILLIAMS

Businesses at risk of climate change litigation (including some of the planned effects, such as a desire to make high emitting activities economically unviable due to restrictions on the availability of funding) need to integrate mitigating actions into business strategy. This may include extra consultation with affected groups and negotiation around acceptable mitigation strategies, as well as putting in place strategies for continued engagement.

Contact the author or your usual WFW contact to discuss how we can help you identify risks, and devise and implement mitigation strategies.

KEY CONTACTS



SARAH ELLINGTON

PARTNER • LONDON

T: +44 20 3314 6317

SEllington@wfw.com

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.