

CLIMATE CHANGE LITIGATION – WHAT DOES IT MEAN FOR BOARD DIRECTORS?

The [Commonwealth Climate and Law Initiative](#) has partnered with the [Climate Governance Initiative](#) to prepare this Quarterly Update for the CGI network. This is the first update of a series of quarterly learning materials on climate change as it relates to boards' duties and governance.

Climate change litigation is increasing, both in terms of the number of cases being brought and the routes which claimants are taking. Claims against governments can affect the policy and operating environment for companies, or result in delays or rejection of regulatory approvals. Litigation against companies is increasing, and claims are now being brought against directors and officers for their actions or perceived inaction on climate issues in their governance, disclosure and oversight of risk management and strategy.

The key trends in climate litigation and questions for boards is supported by a more detailed Climate Litigation: Briefing Note for Boards (15 minute read) accessible [here](#).

KEY TRENDS IN CLIMATE LITIGATION

Advancements in climate change attribution science are being tested in a new generation of climate damages claims, with claimants presenting scientific evidence on the causal chain between defendants' emissions and climate impacts.

Claims cover the whole range of laws and forums, from corporate to contract law, human rights to tort law, in domestic, international courts and before tribunals, seeking damages, declarations on breaches of rights, duties of care, misleading disclosures, or refusal of project approvals.

Physical and transition risks catalyse legal risk, and the litigation that arises does not respect geographic boundaries. One physical or transition risk, or set of impacts after that risk materialises, can give rise to multiple legal actions within and across different jurisdictions.

Litigation alleging "greenwashing" is on the rise. To date these cases have mainly been brought by NGOs against high-emitting companies, and are based on statements in public filings and/or advertising.

Claims that have been successful against governments are being tried against corporations, with the *Urgenda* duty of care claim against the Dutch government replicated against Shell. Similarly, **claims against corporations could be stepping stones to or inspiration for claims against directors and officers** in the near future.

Disruption to business operations and supply chains caused by the **impacts of climate change increase the likelihood of traditional compensatory litigation** for contractual default or damage to third parties.

Not all climate litigation is 'pro' climate action. There is a growing countertrend of entities seeking to challenge climate change policies and regulations, or seeking compensation for the impacts of that regulation on their operations or assets.

KEY TYPES OF LEGAL CLAIMS AND EXAMPLES

<p>Fiduciary duty claims, for which shareholders may have a renewed appetite following recent cases.</p>	<p>Boards should consider climate change to ensure they are acting in the best interests of their company and exercising their powers with care and diligence.</p> <p>A recent claim against Shell by ClientEarth (a UK NGO bringing the claim in its capacity as a shareholder of Shell) alleges Shell's board breached its duties in failing to put in place a Paris-aligned transition plan to address transition risk to the business: ClientEarth v Shell.</p> <p>Conversely, boards may take comfort that fiduciary duty claims challenging 'pro-climate' actions of boards are noted in the main climate litigation databases.</p>
<p>Greenwashing and misleading disclosure claims, which may increase in the near future as companies' sustainability commitments are scrutinised. These may lead to direct liability for directors.</p>	<p>Shareholders, NGOs and regulators are scrutinising net-zero commitments and transition plans carefully.</p> <p>Beyond public statements or shareholder votes against directors, companies and their directors may face litigation or regulatory action where they are perceived to be 'saying one thing and doing another' on climate specifically (e.g., the UK complaint ClientEarth v BP) or sustainability generally (e.g., the US securities class action Bentley v Oatly Group AB).</p>
<p>Climate damages claims; sub-national governments and citizens are using developments in climate change attribution science.</p>	<p>A claim by a Peruvian farmer Mr Lliuya against German utility company RWE seeking 0.47% of the cost of erecting flood defences to protect his town, reflecting RWE's historic contribution to emissions, serves as a bellwether for a suite of climate damages claims: Lliuya v RWE. Claims against major oil and gas companies seeking compensation for climate-related losses have been working through the US courts, with some now proceeding to trial (City & County of Honolulu and BWS v. Sunoco, LP, et al)</p>
<p>Human rights-related claims potentially offer a new risk in relation to climate change for private companies.</p>	<p>Courts are increasingly recognising failure to act on climate change as potentially breaching human rights; this may affect whether companies which have failed to consider climate change may be found to have breached legal standards of care or regulations under which they are required to consider impacts on human rights.</p> <p>In May 2021, a Dutch court ordered Royal Dutch Shell (as it was called at the time) to reduce the CO₂ emissions of its corporate group by 45% by 2030, relative to 2019 levels: Milieudefensie v Shell. The NGO has since informed 30 other multinational companies that it is willing to take them to court, using the same type of claim as used against Shell, if they do not produce transition plans.</p>
<p>Compensatory claims arise as the impacts of climate change cause damage to assets and third parties, and breaches of contract.</p>	<p>As the first climate-driven bankruptcy, Californian utility PG&E and its former directors and officers have faced a suite of compensation claims from property owners, injured citizens, shareholders and bondholders: see, e.g., Trotter, Trustee of the PG&E Fire Victim Trust v Chew et al.</p>
<p>Anti-climate litigation, as entities bring claims against governments challenging climate policies and their effects.</p>	<p>Energy utility RWE has initiated arbitration proceedings against the Dutch government under the Energy Charter Treaty seeking compensation for environmental restrictions placed on coal-fired power plants under the government's coal phase out law: RWE v Netherlands.</p>

KEY ACTIONS FOR BOARDS, AND KEY QUESTIONS TO CONSIDER

What legal risks does our company face due to climate change? (1)

What **climate litigation** has been threatened or brought **against our peers**?

Claims against companies in similar sectors could indicate that **similar claims could be forthcoming**.

Boards should **put in place systems to identify climate-related legal risks** faced by companies of similar size and operating in similar sectors.

What are our **material contractual relationships** and **regulatory compliance actions** which could be **affected by climate change impacts** and could translate into legal risk?

Climate change leads to increased risks of contractual breaches or regulatory compliance.

Boards should implement and monitor a system to **review their company's exposure to increased risks of breaching contracts or regulations** as a result of climate change, and to mitigate such exposures.

In particular, do our **existing human rights compliance obligations** increase our exposure to climate change-related claims?

Human rights-based claims are increasingly being incorporated into climate cases.

Boards should make enquiries of delegated management functions as to whether climate-related issues are considered as part of their existing human rights obligations (such as supply chain due diligence, compliance statements etc.), and the extent to which the company may be exposed to litigation or regulatory compliance risks because of this.

What are the views of our **shareholders and other key stakeholders** on climate change? Could these escalate into campaigns, engagement or litigation?

Boards should consider **views of shareholders and key stakeholders** such as financiers, insurers, customers and potentially activist stakeholders such as indigenous communities and NGOs on climate action generally and the company's climate position specifically, including **identifying potential escalations to public campaigns, shareholder engagement or litigation exposure**.

Have climate-related **legal challenges against governments** influenced, or are they likely to influence, the **business environment in which we operate**?

Claims against governments can affect the commercial context in which a business operates (for example, by impacting a government's climate policy), or can leverage similar claims against corporates themselves.

KEY ACTIONS FOR BOARDS, AND KEY QUESTIONS TO CONSIDER

What legal risks does our company face due to climate change? (2)

How are **climate litigation risks**, and our responses to them, **disclosed** in our annual reports and other disclosure documents?

Climate litigation risks may be material, and boards should make enquiries as to whether these should be included in regulatory filings. **Boilerplate statements** on the uncertainty of climate litigation risk generally or the outcome or specific litigation **may no longer be adequate** if and when relevant cases progress through key hurdles.

For boards of companies considering initiating climate litigation seeking compensation or challenging climate-related regulation: is this contrary to our publicly-stated sustainability goals or strategy to manage climate-related risks? Is bringing this litigation in the best interests of the company over the long-term?

Boards companies seeking to challenge government action on climate change should consider carefully whether they risk incurring reputational damage, or are increasing the risk of stakeholder engagement or greenwashing litigation.

Do we face legal risks for greenwashing?

Are our sustainability disclosures, targets and statements **reasonable, transparent, defensible** and **sufficiently ambitious**?

Boards should seek confirmation from delegated management teams that the company's targets and other sustainability commitments – both in regulatory filings and consumer-facing marketing – are transparent, substantiated and reasonable, and that the assumptions underlying those targets are disclosed.

Is there an actual or perceived **gap** between our **stated net-zero commitments and policies on climate change or sustainability**, and the emissions of our operations or financial activities, capital expenditure, or business model that could create **legal risks for greenwashing**?

Boards should also make enquiries of sustainability committees and management as to the extent to which the actions of the company are inconsistent with any sustainability commitments or net-zero targets.

Boards should put in place a process to reduce **material discrepancies between the two**, or, where a non-sustainable action is decided as being in the best interests of the company, ensure that this decision is properly made, recorded correctly, and, where material, discussed in the company's disclosures.

KEY ACTIONS FOR BOARDS, AND KEY QUESTIONS TO CONSIDER

Are we governing our company to best manage the risks and opportunities of climate change in a way that reduces our legal risks?

Are we **actively considering how climate change**, the energy transition and foreseeable changes in climate policy around the world **could affect the company**, its operations and value chains, and its business model?

Directors are under duties to act in the best interests of the company with due care, skill and diligence. **Given the regulatory and social focus on climate change, boards should consider climate change risks and opportunities in order to best fulfil these duties** and reduce the risk of shareholder engagement or litigation.

Have we articulated a climate-aligned corporate purpose, and are our actions consistent with this?

Stakeholder governance is increasingly being recognised as good governance. Boards should consider how their company's material stakeholders have been identified (including the environment and communities likely to be disproportionately affected by the impacts of climate change), and how to bring these voices into the boardroom. Boards should ensure that their performance metrics and compensation are aligned with the company's wider purpose and sustainability goals.

What systems are in place to report to the board and externally? Does the company have **adequate systems and skills in place to manage these risks**, and is the reporting system adequate for board and external scrutiny?

Boards should put in place management and reporting systems to ensure that relevant climate-related risks are escalated appropriately.

Have we integrated risk of climate litigation into our enterprise risk management and scenario analysis to determine how our exposure to physical and transition risks translates to legal risks over our investment and planning horizons and into the future?

The physical and transition risks of climate change may increase the legal risks faced by a company. Boards should make enquiries of management as to whether legal risk has been integrated into scenario analysis, including identifying how physical and transition risk may increase exposure to legal risk.

FOR MORE DETAIL, PLEASE SEE THE CLIMATE LITIGATION: BRIEFING NOTE FOR BOARDS [HERE](#).



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