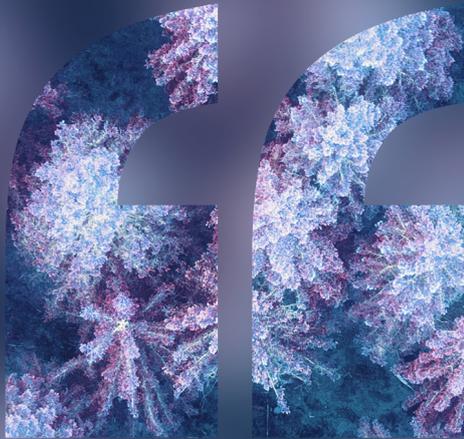
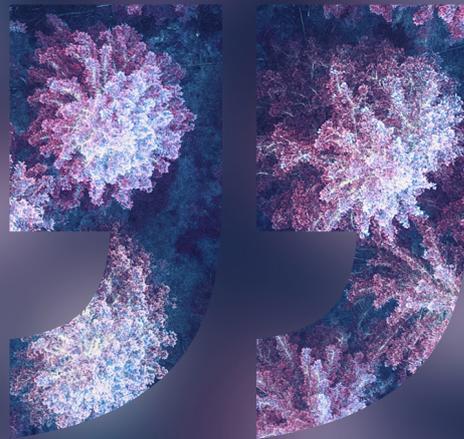


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C H A N C E



**ESG TRENDS: THE
RISE OF CLIMATE
LITIGATION AND
THE CHALLENGES
FOR BUSINESS**



— THOUGHT LEADERSHIP

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ESG TRENDS: THE RISE OF CLIMATE LITIGATION AND THE CHALLENGES FOR BUSINESS

Activist shareholders and NGOs targeting governments and businesses in relation to climate change are increasingly turning to litigation.

In a recent landmark judgment, the District Court of The Hague ordered Royal Dutch Shell (RDS) to reduce its CO₂ emissions by 45% by 2030, as compared with 2019 levels. The ruling sets a precedent for other companies that could face similar lawsuits. The case was brought by the Dutch branch of Friends of the Earth (Milieudefensie), a number of other NGOs, and over 17,000 individual claimants (**see our briefing**). This is the first time that any court has ordered a company to reduce its CO₂ emissions, and the judgment may have significant consequences for other companies with a link to the Netherlands who have significant CO₂ emissions.

Clifford Chance Counsel, Juliette Luycks, who is based in Amsterdam says: "The success of Milieudefensie will increase the likelihood of similar proceedings being brought against other large emitters of CO₂, especially if they are headquartered in the Netherlands. We may also see attempts to bring similar cases against non-Dutch headquartered companies, arguing that the Dutch Courts have jurisdiction based on other connections of the company or case to the jurisdiction."

A growing risk for businesses

The rise in climate change litigation and shareholder activism is a growing risk for businesses across all sectors; it is no longer confined to the carbon majors. "This is due, in part, to sophisticated litigation-focused NGOs using litigation as a campaigning tool, and a growing recognition of the power of reputational risk to influence corporate behaviour," says Roger Leese, a London-based Partner in Clifford Chance's Litigation & Dispute Resolution Group, and co-head of the firm's business and human rights group. "Tackling climate change is now very much on the boardroom agenda, as is a recognition that failing to address this

risk proactively and appropriately might substantially harm shareholder value," he adds.

Shareholder activism in this area has taken many forms – from proposing or supporting emission reduction targets at a company's AGM to pursuing litigation, often based on variants of established legal theories. For instance, around the world shareholders have brought cases arguing that companies are failing to analyse and disclose properly the risks climate change poses to their business; or that directors are in breach of their fiduciary duties by not taking sufficient account of climate change risks in their decision-making. This is in addition to litigation brought by public bodies and/or NGOs seeking to establish corporate liability for harm caused by emissions.

The role of NGOs and National Contact Points

These actions are often led or supported by NGOs, for whom litigation is increasingly becoming an important weapon in their arsenal. NGOs are supporting claims by alleged victims of climate change against businesses, and bringing complaints before the Organisation of Economic Co-operation and Development (OECD) National Contact Points (NCPs) for breach of the OECD Guidelines for multinational enterprises. NCPs provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines. "This process does not lead to binding judgments, but can generate a good deal of bad publicity. It's also attractive because it's cheap," says Leese.

Following the devastating bushfires in Australia (discussed below), in January 2020 victims (supported by Friends of the Earth Australia) filed an NCP complaint against Australia New Zealand Bank

(ANZ) at the Australian NCP. The complaint alleges that ANZ, Australia's largest financier of fossil fuel industries, has failed to adhere meaningfully to the Paris Agreement reduction targets across its lending portfolio, or to disclose the full extent of its emissions, in breach of the OECD Guidelines. This follows a similar complaint brought by Greenpeace and other NGOs against ING in 2017-2019 concerning its involvement in fossil fuels. The ING complaint resulted in an undertaking by ING to bring its loan portfolio in line with the Paris Agreement, including an agreement to exit from thermal coal by 2025. Discussions continue with ANZ.

Growing numbers of claims against companies globally

There are currently hundreds of cases worldwide, and some are expected to shape the development of the law and the debate on climate change more broadly. A recent report produced by Columbia Law School and the United Nations Environment Programme found that as of June 2021 there were over 2,000 climate change related cases in 41 countries.

Amongst these is the case of Saúl Luciano Lluyia, a Peruvian farmer who brought a claim against the German energy company RWE AG in Germany. Mr Lluyia owns some land in a valley in the Peruvian Andes, located just below a melting glacier. He argues that RWE should contribute to the cost of protective measures necessary to safeguard his property against flooding, commensurate with RWE's proportionate share of global greenhouse gas emissions. "The interesting question at stake is one of causation," says Moritz Keller, a Frankfurt-based partner in Clifford Chance's Litigation & Dispute Resolution Group. "Is it possible to prove that RWE's emissions in Germany have caused the glacier in Peru – that is some 10,000 kilometres away – to melt?"

In November 2017, the Higher Regional Court of Hamm determined that Mr Lluyia has a *prima facie* case against RWE, ordering that the claim progress to the evidentiary stage. As part of this process,

and once circumstances allow, the court will travel to Huaraz to gather evidence; the first time that a German civil court will conduct an on-site visit on another continent to assess climate damage allegedly caused by a major European corporation.

"Climate change disputes are being used as a policy-making tool. NGOs are supporting and financing cases with the explicit aim of influencing corporate behaviour and strategies. So, the goal is not to obtain a favourable decision and to be paid: it is rather about driving the public debate forward and raising public awareness for this cause. Mr Lluyia's case, for example, is largely driven by NGOs – the actual compensation claimed is only a few thousand Euros. The litigation costs, however, are assumed to be in the millions," says Keller.

Challenges to governments

Governments are also increasingly finding themselves in the cross-hairs where climate change issues are concerned. Cases have been brought across the globe from the US to Australia, with Belgium and Poland most recently joining the ranks along with countries such as France, Germany, Ireland, Italy and Norway. These claims, if successful, are paving the way for more sweeping and stringent obligations on businesses, both through the consequential passing of national laws and regulations, and the resultant development of judicial precedent and case theory.

Germany

Recently a group of German citizens, activists from the global movement "Fridays for Future" and islanders in fear of the direct effects of climate change through rising sea levels, as well as Bangladeshi and Nepalese citizens, challenged the German Federal Climate Change Act (*Bundes-Klimaschutzgesetz* - Climate Change Act). Backed by NGOs including Greenpeace and Germanwatch, the plaintiffs invoked the "Right to a Future", arguing that Germany's climate change targets to reduce CO₂ emissions by 55% by 2030, are too low.

In another landmark ruling (published on 29 April 2021), the Federal Constitutional Court held that provisions of the Climate Change Act governing national climate change targets and annual emission budgets until 2030 are incompatible with fundamental constitutional rights, since they lack sufficient specifications for further emission reductions from 2031 onwards. The Court found that reduction targets provided for in the Climate Change Act are imbalanced, as they shift major reduction burdens to the future, which could result in a considerable limitation on the freedom of coming generations. In response, the German cabinet has approved a reform of the Climate Change Act, setting a new target of a 65% cut to CO₂ emissions and describing it as a "fair offer to the younger generation."

Thomas Volland, a Clifford Chance Partner based in Düsseldorf says: "The ruling might necessitate that business sectors adapt their processes to these stricter requirements and accelerate the transition process. In addition to the financial consequences, the ruling will have far-reaching legal implications. It confirms that climate protection and mitigation of the long-term effects of climate change are of high constitutional importance. This finding is expected to further increase the risk of climate change-related lawsuits against companies."

Australia

The Australian Government and Federal Minister for the Environment are facing increased pressure to take further action on climate change following the devastating bushfire emergency during the summer of 2019-2020, in which 33 people were killed, 3,094 homes destroyed, a total of 17 million hectares of land was burned and over a billion animals were lost. Most recently, on 27 May 2021, the Federal Court of Australia issued a landmark judgment in *Sharma (by her litigation representative) v Minister for the Environment* [2021] FCA 560. This Judgment recognises, for the first time, that the Minister for the Environment owes a duty of care to protect Australian children from the harmful impacts of climate change when considering

approvals relating to coal mining projects which could make a reasonably foreseeable contribution to climate change under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). In this case, the Vickery Coal Project (owned by Whitehaven Coal) was expected to extract 33 MT of coal, with consequent emissions of 100 Mt of CO₂. Detailed expert evidence relating to the cause and impacts of climate change was considered by the Court, with Bromberg J noting that "[i]t is not disputed that these [climate change induced] events will have impacts on the Australian economy, Australia's natural and managed terrestrial and marine ecosystems, and on the health and wellbeing of individuals, communities and society". His Honour was satisfied that injury-inducing events such as heatwaves, bushfires and other flow-on effects "expose each of the Children to a real risk of harm from extreme weather events brought about by climate change."

This ground-breaking decision follows a number of recent climate change-related cases in Australia, including the class action filed by Melbourne law student Kathleen O'Donnell in *O'Donnell v Commonwealth* in July 2020. In a Statement of Claim filed on 23 December 2020, the applicant alleges that the Commonwealth Government failed in its duty to disclose climate change impacts on the value of government bonds. The case promises to further clarify how climate risk should be managed and disclosed by government entities looking to raise funds in public markets.

Amanda Murphy, a Counsel in Clifford Chance's Perth office, who specialises in international law, including climate change law, says: "The decision in the Sharma Case has established a novel duty of care in Australian law, while also affirming the causes and probable generational harm which will be caused by climate change. With the scars of the devastating bushfire season still raw in the Australian psyche, this decision will no doubt open the door for similar claims based on breach of this novel duty of care against both Government and private entities."

France

Both governments and corporates have been targeted in several landmark cases this year before the administrative and civil courts in France.

On 1 July this year, the *Conseil d'Etat* (the highest French administrative court) ordered the French government to take additional measures by 31 March 2022 to reduce greenhouse gas emissions by 40% by 2030. This case was originally commenced by the city of Grande-Synthe in northern France, and environmental groups including Greenpeace, Oxfam, Notre Affaire A Tous and the Nicolas Hulot Foundation. This direct action resulted in an historical decision last November, by which the administrative courts gave the French government three months to prove that current greenhouse gas emissions targets for 2030 could be met without additional measures. Having disclosed this additional information, the court rejected the Government's claims that no further measures were required, resulting in the injunction ordered on 1 July.

Meanwhile, in February 2021, a Paris administrative court found the French state guilty of failing to address climate change, and for not adhering to its promises to tackle CO₂ emissions. Dubbed the "case of the century", this case was brought by environmental groups, including Greenpeace and Oxfam, following a petition signed by 2.3 million people. Whilst the case only resulted in an award of one euro to each NGO (for non-material harm and prejudice moral), resolving the question of pecuniary compensation in such instances, the court did recognise the concept of "ecological damage" and established a duty on the State to its citizens to comply with the Paris Agreement. The court has not yet ruled on the measures needed to stop the future aggravation of damage and ensure that the State complies with its international engagements, but did order the State to undertake further investigative measures over a two-month period. Another hearing should be scheduled in the near future to rule on such measures.

On 1 April 2021, another administrative court partially admitted a request from six environmental NGOs seeking to revoke Total Refining France's operating permit to continue to operate a refinery in South-Eastern France. Total intended to transform the refinery in question from crude oil to biofuels. Whilst the NGOs did not succeed in invalidating the permit, the court did order Total to review its impact study on the use of palm oil imported from Asia. This decision demonstrates the French court's sensitivity to environmental issues and its increasing tendency to require corporates to undertake more impact or risk studies.

In this respect, NGOs tend to rely increasingly on the *Loi de vigilance*, enacted in 2017, to file claims against corporates regarding an insufficient awareness and lack of effective measures to mitigate social and environmental risks. An unsolved debate on jurisdiction is currently ongoing as NGOs tend to seize civil courts while corporates claim commercial courts should have jurisdiction. In this respect, on 11 February 2021, the Nanterre Civil Court ruled that it did have jurisdiction to hear the complaint filed by NGOs and local authorities in climate litigation cases. This decision came as a surprise, as it contradicts the decision of the Court of Appeal of 10 December 2020, which confirmed the lack of jurisdiction of civil courts in favour of commercial courts to rule on the compliance of vigilance plans. The judge ruled that even if a dispute "relates to commercial companies" once the vigilance plan and the internal management of the company are directly linked, it does not prevent civil courts from having jurisdiction in cases brought by non-business claimants. The oil company involved in the Nanterre case announced that it will appeal the decision, so a new decision from the Court of Appeal of Versailles is expected.

The Netherlands

Perhaps the case that started it all took place in the Netherlands. Urgenda, a foundation that wants to achieve, in its own words, "a sustainable Netherlands," took the Dutch state to court in 2013 over its alleged failure to take effective

action on climate change. The case made headlines globally in 2015 when the court found in favour of Urgenda, ruling that the government must cut greenhouse gas emissions by at least 25% by the end of 2020 (in comparison with 1990 levels). The case came to an end with a final judgment of the Supreme Court in late 2019 – again finding in favour of Urgenda. Urgenda is now seeking a court order that the Dutch State pay penalties for each day that it fails to take steps towards the reduction in greenhouse gas emissions.

Arguably, a line can be drawn between this 2019 decision and the recent judgment against RDS by the District Court of The Hague in May 2021. In the *Urgenda* decision the court applied articles 2 and 8 of the European Convention on Human Rights (ECHR) directly, in the RDS-case these fundamental rights were part of a wider mix of relevant rules and norms which the court applied in determining the standard of care owed by a company towards the inhabitants of The Netherlands in respect of greenhouse gas emissions.

"The outcome in Urgenda was surprising to many at the time – courts rarely dare to oblige States to take action. In many ways, this was the beginning of the global wave of climate change cases," says Luycks.

The US

In the US, although plaintiffs have imposed pressure on companies through litigation, claims for climate-related harms have to-date met with limited success in the US federal courts. In one case, *Juliana v. United States*, twenty-one young people sued the US government, alleging that its failure to act on climate change violated their rights under the US Constitution and asking the courts to require the government to develop a climate action plan. In January 2020, the US Court of Appeals for the Ninth Circuit dismissed the case for lack of standing. The court reasoned that no court order could redress the plaintiffs' injuries because it is beyond the courts' power to supervise the political branches in developing a climate plan. The Ninth Circuit refused to rehear the case *en banc*. However, plaintiffs filed a motion to

amend their complaint and, in May 2021, the district court judge ordered a settlement conference between the parties. Thus the case continues.

Over twenty state and local governments have pursued claims against energy companies in state courts under public nuisance laws for their contributions to climate change, but face roadblocks over questions of jurisdiction, in particular whether the defendants can successfully remove those cases to federal court and arguments that the claims are pre-empted by federal law. The Supreme Court recently sided with the energy companies in one such case, sending the case back to the lower court to consider the jurisdictional question further, but the ruling was one of technical procedure and did not address the substance of any claims. As this history shows, these cases often take years to resolve and involve multiple levels of appeal in both the federal and state courts.

Outside of the courts, the US regulatory landscape is only becoming more complex. At the federal level, President Biden has indicated that the federal government will increase its regulatory activity following a "whole of government" approach, most recently with his 20 May 2021 executive order directing the executive branch to develop a strategy regarding the risks that climate change poses to the US financial system. Additionally, the Chairman of the Securities and Exchange Commission has repeatedly stated that public companies could soon be expected to disclose climate-related risks in their business. Where companies have already made such disclosures, the accuracy of the disclosures has also exposed them to regulatory enforcement action and shareholder litigation, as has been the case with lawsuits brought against Exxon by the New York State Attorney General's Office, which Exxon defended successfully, and by shareholders in federal district court in Texas, which Exxon continues to defend.

At the state level, the direction is mixed, following the political leanings of the individual states. For example, Washington State enacted its Climate Commitment Act, on 17 May 2021, which

will create the country's most aggressive cap-and-trade system and will require decreasing emissions over the coming years. In contrast, Texas's Senate Bill 13 would require state entities to divest from companies that boycott high-emissions companies.

Clifford Chance Partner Steve Nickelsburg, who is based in Washington, D.C., says: "across the board, companies doing business in the United States face a changing landscape for legal risk related to climate change. Especially as federal agencies begin to implement the Biden Administration's executive orders, companies should consider their strategies to address anticipated regulatory expectations around climate change risks. In addition, businesses with cross-border operations in particular will face increasingly complex requirements, depending on the level of coordination between the United States and, for example, the European Union. Companies should prepare themselves with a comprehensive strategy for adapting."

Italy

The Italian courts are about to hear Italy's first climate-related case.

On 5 June 2021, more than 200 claimants, including 162 adults, 17 minors (represented in court by their parents) and 24 NGOs, filed a lawsuit against the Italian State, called "*The Last Judgement*", along the same lines as the Dutch Urgenda case and French *Affaire du Siècle*. The aim of the lawsuit, brought before the Court of Rome, is to sue the Italian State for "climate inaction" – an insufficient commitment to promote adequate greenhouse gas emission reduction policies; seeking a ruling ordering the Italian State to achieve a reduction of 92% in greenhouse gas emissions by 2030, in order to meet the long-term temperature goal of the Paris Agreement (aiming at limiting global warming to 1.5°C).

The claimants allege that the action taken by the Italian Government so far in this area is undoubtedly insufficient and results in the violation of numerous fundamental rights recognised by the Italian State, deriving from international

agreements (namely, the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement), European conventions and regulations (such as Article 2 and 8 of the ECHR, Article 191 of the Treaty on the Functioning of the European Union and Regulation No. 2018/1999) and Italian provisions (Articles 2 and 32 of the Italian Constitution – solidarity principle and right to health). The claimants argue that the Italian Government is in violation of the general duty of *neminem laedere* (or do harm to no one, Article 2043 of the Italian Civil Code) and of the duty to take care of goods (Article 2050 of the Italian Civil Code) to which the Government is the sole custodian (i.e. the environment).

It is expected that the case will progress to an initial procedural hearing in approximately three months, but it is unlikely that the matter will come to trial before the end of 2021. The first instance decision may be expected in approximately two years' time, depending on how long the evidentiary phase will take.

A ruling in favour of the claimants would likely lead to the Italian Government introducing new legislation setting concrete steps to meet its 2015 Paris Agreement obligations. Furthermore, as has happened in other jurisdictions such as the Netherlands, a successful outcome on the part of the claimants may also encourage environmental activists to widen their attention from the Government to include corporations whose business involves heavy emissions of greenhouse gasses.

Mounting commercial pressure

In addition to litigious and regulatory pressure, companies are also facing mounting commercial pressure to address their exposure to climate change risks. On the same day as the RDS decision (26 May 2021), significant climate change-related votes took place at the AGMs of ExxonMobil and Chevron. At ExxonMobil, a small group of investors representing only 0.002% of shares won seats on the twelve-member board, after arguing that the company's focus on fossil fuels created an "existential risk" – the first time in the company's history that



it has faced a contested shareholder vote of this nature. Meanwhile, over at Chevron, shareholders voted for a resolution calling on the company to reduce substantially its Scope 3 emissions.

Such resolutions have become a common feature in the energy sector. Banks are also being targeted by activists, with resolutions being put forward designed to phase out financing for carbon-intensive industries. Pushing for these resolutions has become a key tactic of activists such as ShareAction and has proven successful. As the Say on Climate campaign continues to gather momentum, similar actions are imminently expected at hundreds of other companies, assuming they fail voluntarily to agree to develop comprehensive climate plans, and to put them to a shareholder vote themselves.

What's next?

Climate change litigation is here to stay. Growing climate awareness, increased pressure on Governments to adopt progressive legislative and regulatory action to try to limit global warming to "well below" two degrees (if not 1.5 degrees), and to take actual concrete steps now to implement these targets in the short to medium term, combined with a judicial willingness to grapple with these thorny issues as case theories start to crystallise and a line of (global) precedent is formed, make this an efficient tool for activists to apply pressure on businesses.

"We see increasing shareholder activism and more and more litigation activity relating to ESG. And ESG requirements are triggering a fundamental change of business case across many sectors – not just energy" says Leese. "We are advising our clients to monitor this changing landscape and to work on "future proofing" their business to take account of what's coming down the track. ESG is a boardroom topic and rightly so."

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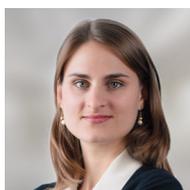
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