



# Future Facing Disputes

## Emergence of Climate Change Litigation

There is growing concern that personal, property and commercial damage caused by climate change is increasingly giving rise to disputes. Rising costs of improving and installing flood protection infrastructure, damage from extensive wildfires, impacts on agriculture and fisheries, alleged misleading corporate or investment reporting and greenwashing are just a few examples of the types of disputes arising in connection with climate change. At the start of 2020, actions had been filed in over 30 countries, including at least 58 in the UK<sup>1</sup>. This article provides an overview of this developing area of disputes and what we can expect from it in the future.



### Who are the claimants and defendants?

NGOs, public authorities, corporates and individuals are using both high-profile civil litigation and administrative dispute mechanisms to influence public and corporate climate policy. A noticeable feature of many of the recent highest profile actions has been the emergence of highly committed NGOs made up of environment lawyers (often crowd, or donation, funded). The highest profile cases seek court decisions aimed, directly or indirectly, at forcing a reduction in greenhouse gas (GHG) emissions, or providing redress for harm caused, or anticipated to be caused, by such emissions. However it is also to be noted that some cases are brought by corporates against governments or public authorities to prevent, or slow, the increased regulation of GHG emissions. The spectrum of defendants is broad – covering governments, public authorities, financial institutions and private companies (depending on the nature of the claim).



### Types of claims

#### *Public law claims*

Claims against governments and public authorities largely take the form of human rights, constitutional or administrative law claims. For example, the ground breaking case of *Urgenda Foundation v The Netherlands* involved a lawyer NGO successfully bringing a human rights claim against the Dutch Government for its failure to pursue more ambitious GHG emission reductions. In December 2019, the Supreme Court of the Netherlands confirmed that by not complying with Articles 2 and 8 (right to life and to family life) of the European Convention on Human Rights the Government was acting unlawfully and that it must reduce emissions in the Netherlands by at least 25% by the end of 2020. This has led already to legislative change.

Administrative law claims largely take the form of challenging applications for (or extensions of) planning permissions, or licencing and permitting, of high greenhouse gas emitting infrastructure. For instance, the UK Government's recent approval of Europe's largest gas fired generation plant was challenged by judicial review and in Cumbria last year, the first coal field in England for several decades was granted planning permission, but this is now subject to judicial review.

<sup>1</sup> Sabin Centre for Climate Change Law 2020, Climate Change Litigation Databases, accessed 3 June 2020  
<http://climatecasechart.com/?cn-reloaded=1>

### *Private law claims*

Private law claims which seek damages are largely based on negligence, or public or private nuisance. However, other claims are brought for alleged fraud, misrepresentation, breach of directors' duties and other company law obligations. Disputes have been brought by activist shareholders demanding better climate risk disclosure. Boards have faced action for alleged failure to adequately factor climate change risk into investment decisions, and for allegedly misleading investors as to the climate risks to the businesses. There are already cases seeking to extend the principles in *Urgenda*, in respect of government policy, to private companies. For example, a group has commenced proceedings in the Netherlands against a large oil and gas provider which it alleges has breached human rights obligations in failing to take adequate action to curb emissions.

### *Insurance related claims*

From the wildfires in Australia and California, to flooding in the UK, more frequent and more extreme weather events are causing a sharp shock to the insurance sector. Claims relating to policy coverage are to be expected but professional indemnity claims will likely arise against professionals who fail to appropriately advise (or appropriately exclude from their scope of work) climate change related risks. The list of professionals potentially at risk is long, including lawyers, accountants, finance and other consultants, engineers, asset and project managers, valuers etc. However, since the mid-1980s, most public liability/comprehensive general liability policies have included a pollution exclusion which might serve to exclude insurance for negligence or nuisance type liability claims.



## Challenges and developments

In case law to date, the science of climate change has not been successfully challenged in the courts. GHG emissions are a global issue, and one cannot prove a causal link between the emission of a GHG at point A by person X, and climate change damage caused at point B to person Y. However, attribution science is developing quickly and could serve to cover this causation gap. If so and a case is successful, person X may bear his proportion of the damage to person Y, relative to X's proportion of relevant GHG emissions.

All actors may want to take note of the increasing likelihood of climate change based litigation. Mitigation steps include properly assessing climate change risk (and, indeed, opportunity), integrating meaningful climate change policies into strategy, operating systems and future plans, being robust in any justifications about the action being taken and keeping abreast of related legal and policy developments.



## What can we expect to see in relation to climate change disputes?

We are undoubtedly heading to low greenhouse gas economies globally and can expect a very significant mass of new law and regulation to support this transition. This may include many (dis)incentives to encourage/force movement away from harmful contemporary business activities. We will see many climate related disputes in absolute numbers and in breadth and geographical reach. Businesses will need to be alive to the changing landscape and focus on climate change related risk mitigation and adaptation, including:

- implementing a climate change risk and opportunity strategy which spans all elements of the business and value chain, with evidence of how the strategy is followed in practice;
- ensuring climate related laws are tracked and implications considered on an ongoing basis, and disclosure obligations complied with;
- evidencing appropriate conduct in line with fiduciary duties; and
- managing the expectations of shareholders and contractual partners through a coherent risk strategy.

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