

CLIMATE CHANGE DISPUTES: AN OVERVIEW ON DEVELOPMENTS AND DRIVERS

Climate change is a reality. It has permeated various layers of society and also reached the courts. The vast number of disputes shows that legal risks relating to climate change are increasing for respective stakeholders, particularly private companies acting in the oil, gas and energy sector. It is therefore key for companies to implement proactive risk management and have these risks on the radar before they lead to a dispute.

A. INTRODUCTION

Climate change is no longer limited to living room discussions about the weather. In the past decade, it has permeated the discourse of international civil society, corporate boardrooms, policy makers and the courts. With the 2015 Paris Agreement on Climate Change now ratified by a significant number of countries¹, those countries have changed or begun the process of changing their emission standards and environmental laws, which in turn affects the operations of emission-intensive companies.

The last decade has also already seen a rising number of climate change related disputes. A majority of these disputes have resulted in lawsuits in state courts against emission-intensive companies and governments. Greta Thunberg's most recent complaint² filed in September 2019 against five states, including Germany and France, for alleged violations of the UN Convention on the Rights of the Child due to failing to take adequate measures against climate change, shows the urgency and the relevance of this issue.

From an arbitration perspective, climate change remains highly relevant since its natural and cross-border impact can trigger a variety of different types of disputes between the arbitration parties. The stakeholders in climate change disputes can range from individuals, non-governmental organizations ("NGOs"), governments, energy-intensive companies, shareholders in those

Key Issues

- Climate Change
- Overview on Climate Change Disputes
- Relevance of Climate Change in Litigation and Arbitration
- Trends and Drivers in Climate Change Disputes
- Stakeholder and Risk Management
- Key Takeaways for Internal Risk Management

¹ There are currently 186 parties and 195 signatories to the 2015 Paris Agreement on Climate Change, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en (last accessed on 21 August 2019).

² <https://www.unicef.de/informieren/aktuelles/presse/2019/un-kinderrechtsausschuss-klimakrise-bechwerde/199924> (last accessed on 26 September 2019).

companies, as well as banks and financial institutions that are part of the funding process of such companies.

It is therefore key for companies to focus their risk management on climate change and assess at an early stage which legal challenges they could face due to its impact on society in general and business operations in particular. A proactive approach to the issue can facilitate the identification of potential legal risks and avoid cost-intensive and lengthy lawsuits which may also entail negative reputational implications.

In this update: first, we set out the systemic features of climate change disputes by summarizing important climate change related case law from multiple jurisdictions (below B). We then discuss the emerging role of arbitration in the field of climate change (below C) and based on these analyses, we summarize key takeaways for stakeholders in climate change disputes (below D).

B. CLIMATE CHANGE LITIGATION

1. Systemic Features

In the last twenty years, the majority of climate change disputes have arisen in the United States, followed by Australia and countries of the European Union.³ Different legal and political regimes dictate the specificities of a climate change lawsuit. However, common trends of climate change disputes across jurisdictions can be summarized as follows:

- **Party Roles:** Often, the plaintiffs in climate change disputes are either (i) non-state actors such as NGOs, individual citizens, shareholders in energy-intensive companies or (ii) state actors such as governments or public authorities. The most likely defendants are (i) energy-intensive companies as alleged contributors to climate change, (ii) financial institutions that invest in such companies, e.g. for their alleged failure to disclose climate change risks and (iii) governments, e.g. for their alleged failure to enforce or make laws to combat climate change.
- **Types of Action:** The claims in climate change disputes may (i) seek injunctive relief, e.g. to compel defendants to reduce greenhouse gas emissions or disclose climate change related risks, (ii) seek compensation for loss or damage caused to the plaintiff by climate change, and (iii) invoke the statutory or constitutional law of a country to compel the government to enforce existing laws or adopt stricter laws to tackle the adverse effects of climate change.
- **Legal issues:** The typical legal bases for climate change disputes can be torts such as nuisance and negligence, human rights, constitutional rights, and national environmental laws and policies. Despite these legal bases, claims in climate change disputes are susceptible to various legal obstacles on the procedural level as well as on the merits.

On the procedural level, two major issues can be identified which are (i) legal standing, which requires that there should be a link between the plaintiff and the claimed injury and (ii) justiciability of the issue, which requires that the question is not subject to legislative policy and, thus, can be resolved by the

³ United Nations Environment Programme, 'The Status of Climate Change Litigation – A Global Review' (May 2017), pp 10-13. <http://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y> (last accessed on 3 July 2019).

court. On the merits level the major issues relating to climate change disputes are (i) establishing attribution i.e., a causal link between the defendants' alleged action or inaction and the climate change impact and (ii) the quantification of damages.

2. High Profile Climate Change Disputes

Some high-profile climate change disputes have arisen in a number of jurisdictions against various respondents. A closer look at some of these climate change disputes shows the interplay of certain systemic features in practice.

2.1 Climate Change Litigation Against Energy-Intensive Companies

(a) *Lliuya v. RWE AG*⁴ (Germany 2015, outcome pending)

A Peruvian farmer, Mr Lliuya, filed an action for damages before the German courts against the German electricity producer RWE AG, alleging that RWE AG's operations were partially responsible for the melting of mountain glaciers in his hometown where his property is now at risk of flooding. He sought compensation from RWE AG as reimbursement for 0.47 percent of the flood protection costs, which he claimed equals RWE AG's annual proportion of emitted greenhouse gases. While the court of first instance dismissed the claim due to a lack of causation between RWE AG's emissions and the threat to Lliuya's property, the appellate court decided to take evidence to determine whether causation could be established.

(b) *Kivalina v. ExxonMobil Corp et al.*⁵ (United States 2008, claim rejected)

The inhabitants of the Kivalina region in Alaska filed an action for damages against several energy companies in the United States on the basis of public nuisance. They claimed that the greenhouse gas emissions of the energy-companies had resulted in the erosion of Arctic sea ice in Kivalina, which had protected the inhabitants from storms and floods. The court of first instance dismissed the claim on the grounds that the inhabitants of Kivalina lacked standing to bring the claim and held the claims to be non-justiciable and political, which fell within the realm of the executive rather than the courts.⁶ The court further held that the plaintiffs could not demonstrate a 'substantial likelihood' that the energy companies' activities had caused the climate change impact. The Kivalina inhabitants' appeal to the Ninth Circuit Court and their review petition in the US Supreme Court were also rejected.

(c) *Abrahams v. Commonwealth Bank of Australia*⁷ (Australia 2017, withdrawn)

The shareholders of the Commonwealth Bank of Australia filed a claim against the Bank for its alleged failure to disclose climate change related financial risks related to its investments, particularly in the coal mining sector. The shareholders sought an injunction preventing the Bank from continuing its

⁴ *Lliuya v. RWE AG*, District Court of Essen, Judgment of 15 December 2016 – 2 O 285/15, <http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/> (last accessed on 3 July 2019).

⁵ *Native Village of Kivalina v. ExxonMobil Corp*, 09-17490 (2012), 9th Circuit Court, <http://climatecasechart.com/case/native-village-of-kivalina-v-exxonmobil-corp/> (last accessed on 3 July 2019); also see: *City of Oakland v. BP P.I.c.* No. C 17-06011 WHA (N.D. Cal. Jul. 27, 2018), <http://climatecasechart.com/case/people-state-california-v-bp-plc-oakland/> (last accessed on 3 July 2019); *Pacific Coast Federation of Fishermen's Associations v. Chevron Corp*, 3:18-cv-07477 (2018), US District Court for the Northern District of California, <http://climatecasechart.com/case/pacific-coast-federation-of-fishermens-associations-inc-v-chevron-corp/> (last accessed on 3 July 2019).

⁶ See similarly: *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011), United States Supreme Court, <http://climatecasechart.com/case/american-electric-power-co-v-connecticut/> (last accessed on 3 July 2019).

⁷ *Abrahams v. Commonwealth Bank of Australia*, VID879/2017, Federal Court of Australia, <http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-australia/> (last accessed on 3 July 2019).

alleged failure to report. The shareholders withdrew their claim shortly after the Bank released its annual report in 2017 in which it reported on climate change related issues.

(d) *ClientEarth v. Enea*⁸ (Poland 2018, outcome pending)

ClientEarth, an NGO and a shareholder in Enea, filed a claim against Enea seeking annulment of Enea's resolution that consented to the construction of a coal-based power plant in Poland. ClientEarth alleged that Enea's actions risked a breach of the board members' fiduciary duties towards the company and its shareholders. The case is currently pending before the Polish courts.

2.2 Climate Change Litigation Against Governments

(a) *Urgenda Foundation v. Netherlands*⁹ (Netherlands 2015, claim upheld)

The Dutch NGO Urgenda Foundation filed a claim against the Dutch government seeking injunctive relief to compel the Dutch government to take action to reduce carbon dioxide emissions in the Netherlands. Urgenda Foundation based its claim on the alleged violation of their rights as guaranteed under the Dutch Constitution, EU climate change policy, provisions of the ECHR,¹⁰ and the principles of precaution, fairness and sustainability as set out in the UN Framework Convention on Climate Change.

The court of first instance allowed the claim which was confirmed by the appellate court. The court held that the Dutch government had a duty to mitigate climate change measures and found a causal link between the Dutch emissions and global climate change. The court ordered the Dutch government to reduce its emissions by at least 25 percent by the end of 2020 as compared to the levels in 1990 and provided guidelines for trade and tax measures in that regard.

(b) *German families v. German Federal Government* (Germany 2018, pending)

A case on similar grounds has been filed by "Three German families" and Greenpeace Germany against the German federal government, alleging that the government has failed to take measures to reduce greenhouse gas emissions which has in turn impacted the organic farms of the families.¹¹ The plaintiffs are seeking injunctive relief ordering the German government to implement the 2020 targets of EU climate change policy by implementing additional measures to reduce greenhouse emissions. The case is pending before the German courts.

2.3 Human Rights Related Disputes

In September 2015, citizens of the Philippines with the aid of NGOs submitted a complaint to the Commission on Human Rights of the Philippines (CHR) against 47 large fossil fuel and cement companies over their role in "human-

⁸ *ClientEarth v. Enea*, 2018, Regional Court in Poznan (Poland), <http://climatecasechart.com/non-us-case/clientearth-v-enea/> (last accessed on 3 July 2019).

⁹ *Urgenda Foundation v. State of the Netherlands*, (2015) HAZA C/09/00456689; see also *Juliana v. United States*, 18-36082 (2019), 9th Circuit Court, <http://climatecasechart.com/case/juliana-v-united-states/> (last accessed on 3 July 2019).

¹⁰ Including Articles 2 (right to life) and 8 (right to private and family life) of the ECHR.

¹¹ *Family Farmers & Greenpeace Germany v. Germany*, VG Berlin file no. 10 K 412/18 <https://www.greenpeace.de/sites/www.greenpeace.de/files/20181101-greenpeace-legal-summary-climate-case-english.pdf> (last accessed on 3 July 2019); *Leghari v. Pakistan*, (2015) W.P. No. 25501/2, <http://climatecasechart.com/non-us-case/ashqar-leghari-v-federation-of-pakistan/> (last accessed on 3 July 2019); *Ridhima Pandey v. Union of India* (Original Application No. 187 of 2017) http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-of-2017_petition-1.pdf (last accessed on 3 July 2019).

induced climate change".¹² The case aims to determine whether the accused companies negatively affected Filipinos' fundamental rights by contributing to climate change. Investigations by CHR are ongoing.

C. ROLE OF ARBITRATION IN CLIMATE CHANGE DISPUTES

1. Commercial Arbitration

As commercial arbitration proceedings and awards are typically confidential, it is difficult to gauge the increase in climate change related arbitration. However, industry indicators show that climate change arbitration may be on the rise.¹³ For instance, the International Chamber of Commerce (ICC) has already constituted a Task Force to explore the future role of arbitration in climate change related disputes.¹⁴ The link between climate change disputes and arbitration is evident from the impact of climate change on society, which will affect the contractual relationships of arbitration parties. For instance, climate change might cause unforeseen weather conditions which could in turn interrupt global supply chains.

As stricter emission standards and climate change regulations are implemented by governments around the world, changes to laws may affect the performance of contractual obligations. This is likely to be used by defendants in an arbitration as arguments of *force majeure* or supervening illegality which excuse a party from carrying out its contractual obligations, or even in the context of hardship provisions such as Section 313 of the German Civil Code, which provides for contract adaptation due to unforeseen changes to the underlying factual circumstances. Newer commercial contracts may also include express climate change related obligations for parties.

The transnationality, neutrality and scope for third-party joinders in international commercial arbitration make it apt for the multi-jurisdictional and multi-party elements of climate change disputes. Further, as climate change disputes involve technical and scientific evidence, the autonomy in commercial arbitration to choose an arbitral tribunal with the requisite technical expertise may be appealing to stakeholders.

2. Investor-State Arbitration

Unlike commercial arbitration, investment arbitration is generally non-confidential which may appeal to stakeholders of the climate change movement, given the public interest involved in climate change disputes. As states change environmental regulations in light of evolving climate change policies, foreign investments in those states may be affected which may give rise to investor claims against the host states under bilateral investment treaties ("BITs") and investment agreements. For instance, several BIT claims have been brought against Spain under the Energy Charter Treaty as a result of Spain's reform of its renewable energy policies.

New treaties, e.g. the Netherlands Model Bilateral Investment Treaty, may impose obligations on the host state to conform with international climate

¹² <https://essc.org.ph/content/wp-content/uploads/2018/09/Philippines-Climate-Change-and-Human-Rights-Petition.pdf> (last accessed on 13 September 2019); <http://www.lse.ac.uk/GranthamInstitute/event/inquiry/> (last accessed on 13 September 2019); <https://essc.org.ph/content/nicc/> (last accessed on 13 September 2019).

¹³ International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, July 2014, Page 144.

¹⁴ <https://iccwbo.org/media-wall/news-speeches/arbitration-and-meeting-the-demands-of-the-future-energy-sector/> (last accessed on 12 September 2019).

change norms and policies, and may also expressly set out states' rights to regulate environmental and human rights issues. This may increase the chances for host states to use climate change measures as an effective defense against investor claims. Investors' conduct that is adverse to climate change could also give rise to counterclaims by host states in certain instances.

D. KEY TAKEAWAYS

Climate change is a reality. It has been affecting human life for decades and will continue to cause changes in society. As the effects of climate change are only likely to increase in the future, disputes will also be on the rise. It is therefore crucial for companies to focus their risk management on risks relating to climate change:

- Companies should assess the risks of climate change for their business practices, in particular the expected strategy of their contractual partners (e.g. in global supply chains), expectations of relevant stakeholders (e.g. consumer behavior in light of rising public awareness about climate change), as well as possible regulatory changes which seek to address challenges arising out of climate change.
- Companies should actively engage in stakeholder management in order to verify whether they are exposed to an increased risk of being involved in climate change related disputes. This specifically applies to companies active in the oil, gas and energy sectors.
- Companies should verify whether their environmental activities comply with applicable laws and whether any climate change related shift in the regulatory framework which could affect risk exposure is foreseeable.
- Companies should also review their CSR reports and assess whether their business practices are compliant with voluntary environmental commitments and targets.

E. OUR EXPERIENCE

Clifford Chance regularly advises clients from the oil, energy and chemical sectors on climate change related legal issues. A major focus lies on risk mitigation and dispute resolution in state courts, arbitration and out of court proceedings, particularly in the field of civil law disputes including shareholder actions as well as regulatory and internal investigations. Clifford Chance also assists companies in establishing internal compliance systems in order to proactively address climate change related risks.

CONTACTS



Dr. Moritz Keller
Partner

T +49 69 7199 1460
E moritz.keller
@cliffordchance.com



Dr. Thomas Voland
Partner

T +49 211 4355 5642
E thomas.voland
@cliffordchance.com



Dr. Sunny Kapoor
Senior Associate

T +49 69 7199 1438
E sunny.kapoor
@cliffordchance.com



Jessica Gladstone
Partner

T +44 207 0065 953
E jessica.gladstone
@cliffordchance.com



Roger Leese
Partner

T +44 207 0068 710
E roger.leese
@cliffordchance.com



Rae Lindsay
Partner

T +44 207 0068 622
E rae.lindsay
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. If you would like to know more about the subjects covered in this publication or our services, please contact the authors or your usual contact at Clifford Chance.

www.cliffordchance.com

Clifford Chance, Mainzer Landstraße 46,
60325 Frankfurt am Main, Germany

© Clifford Chance 2019

Clifford Chance Deutschland LLP is a limited liability partnership with registered office at 10 Upper Bank Street, London E14 5JJ, registered in England and Wales under OC393460. A branch office of the firm is registered in the Partnership Register at Frankfurt am Main Local Court under PR 2189.

Regulatory information pursuant to Sec. 5 TMG and 2, 3 DL-InfoV:
www.cliffordchance.com/deuregulatory

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.