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Belgium: Trends & Developments

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Trends and Developments

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Environmental Law in Belgium: Climate and Energy Litigation

Introduction

The number of climate-related norms and standards incorporated in domestic laws and policies has been increasing exponentially, alongside a developing climate change law and governance regime at the regional and international levels, as well as numerous local private and public regulatory initiatives at the sub-state level.

However, despite the proliferation of norms, climate change actors have not yet successfully scaled up the necessary efforts in order to tackle climate change and energy challenges effectively. These evolutions motivate civil society actors to co-operate transnationally in bringing governments and corporations to court as a legal strategy, termed "climate litigation", thereby increasing the effectiveness of climate governance.

Climate litigation has its roots in the US, and has grown into a global movement with around 600 proceedings in more than 40 other countries. Accordingly, in its Sixth Assessment Report, the Intergovernmental Panel on Climate Change (IPCC) recognised that "climate litigation is growing and can affect the outcome and ambition of climate governance".

Following several judgments in which courts ordered governments to increase mitigation or adaptation efforts, civil society actors are increasingly targeting the private sector, increasing the pressure on companies from multiple directions and raising various liability risks for corporations and their directors and officers. When focusing on the energy sector, successive (COVID-19 and Ukraine) crises have underlined the importance for market operators (both public and private) to use adapted dispute resolution mechanisms.

The following analysis serves as an overview of some of the most critical trends in corporate climate and energy litigation, to guide corporate actors in identifying and anticipating liability risks in the current climate and geopolitical context.

Trends in climate litigation

In May 2021, corporate climate litigation made global headlines in the wake of an unprecedented judgment issued by the Dutch District Court in Milieudefensie et al v Royal Dutch Shell. The Dutch court ordered Royal Dutch Shell to reduce its CO2 emissions by 45% compared to 2019 levels. It established an obligation of result for the Shell group and a compelling obligation of conduct to reach this reduction goal through their network of suppliers and customers.

The court reasoned that Shell has a duty of care, which it substantiated on the basis of facts, widely supported insights and international standards of corporate responsibility (including human rights). It considered imposing an order necessary as Shell risked violating this duty of care, as its climate policy was deemed insufficiently concrete, dependent on too many res-

ervations and overly reliant on global society's transition towards carbon neutrality.

An important question is to what extent this case could affect other corporations within and outside the Netherlands. Civil society actors have announced the use of similar strategies against other carbon-intensive businesses in the Netherlands and other jurisdictions. For instance, on 13 January 2022, Milieudefensie requested 30 "large emitting companies" to provide a climate action plan that supports the Paris Agreement goal to keep global temperature rise below 1.5°C by 2050. While a foreign precedent does not formally bind courts outside the Netherlands, research shows that some courts consider external climate litigation through a "judicial dialogue" process. Courts may do so, amongst other things, for learning, strengthening argumentation, and/or displaying co-ordination in the process of incremental law development through judicial interpretation.

In some specific contexts, transnational judicial dialogue has contributed to the judicial co-development of nascent narratives regarding essential aspects of climate cases. For example, in Neubauer v Germany, the German Constitutional Court found that, although a single state cannot solve the climate crisis on its own, each state must do its part in climate mitigation. To support its reasoning, it explicitly relied on similar findings in climate lawsuits in the Netherlands, New Zealand and the US. Depending on the jurisdiction, constitutional framework, legal culture and tradition, courts might similarly rely on aspects of the Milieudefensie et al v Royal Dutch Shell decision in future climate lawsuits against corporations.

Furthermore, climate litigation networks are attempting to pierce the corporate veil by pursuing individual liability for directors and officers. For example, on 15 March 2022, ClientEarth announced it had started legal action as a shareholder against Shell's board of directors under Sections 172 and 174 of the UK Companies Act. In so doing, it seeks to hold these directors personally liable for breaching their fiduciary duties, which include adopting and implementing a climate strategy that truly aligns with the Paris Agreement.

On a related note, new legal requirements are also on the horizon. For instance, on 23 February 2022, the European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence (CSDD), which introduces a corporate due diligence duty for covered entities and specific duties for directors. Company obligations will be enforced through administrative supervision and civil liability, and director duties will be enforced by means of existing member states' laws.

The European Parliament and Council will now need to scrutinise the proposal and likely make amendments. The new rules are expected to be in place after mid-2023; when adopted, member states will have to transpose the Directive into national law.

In addition, on 10 November 2022, the European Parliament adopted the Corporate Sustainability Reporting Directive (CSRD) with a roadmap to include information on the management reporting of companies on their development, performance, position and impact on the environment, social rights, human rights and anti-corruption.

Against this background, corporations generally do well in designing a rigorous and sufficiently ambitious climate action plan. However, companies may also face increased regulatory scrutiny

regarding the accuracy of their commitments, and, when not living up to them, may receive claims that they have misled customers, shareholders and investors. For instance, a group of NGOs sued Total Energies, alleging that a series of adverts championing its climate policies led to misinformation in breach of European consumer law.

In sum, the global climate litigation movement seeks to push corporations, including directors and officers, towards developing ambitious climate plans and performing accordingly.

Spillover effect into other sectors

While fossil fuel energy firms are the first target, companies in other sectors could also be at risk. Recently, an increasing number of individuals, activists and regulatory agencies have applied strategies similar to those of climate litigants to other specific environmental contexts, such as plastics. For example, individuals and environmental NGOs led by the marine conservation group Oceana Philippines brought the government of the Philippines to court, alleging that it failed to tackle the "unabated production, use and disposal of plastic" over the past two decades. In this pending case, the petitioners claim the government's inaction violates their right to a healthy environment, as this alleged omission would lead to the petitioners catching fewer fish and being affected by worsening floods due to climate change.

Some plaintiffs have also effectively targeted plastic-intensive corporations. For instance, California-based environmental group Earth Island Institute has filed three separate lawsuits against producers of plastic goods. In 2020, it sued Coca-Cola, Pepsi, Nestlé and other large corporations, alleging they had caused plastic pollution nuisance. The following year, it brought another lawsuit against multinational corporations, claiming the companies falsely portrayed themselves as environmentally friendly while causing plastic pollution.

Some companies have faced claims following regulatory supervision. For example, the coffee company Keurig Green Mountain recently agreed to a USD10 million settlement in both the US and Canada with a consumer and regulator, respectively, after being challenged on claims about the recyclability of its disposable coffee pods.

Similar approaches could be used against companies operating in other sectors, such as the financial sector facilitating carbon-intensive projects. For instance, on 26 October 2022, NGOs that had previously won a climate case against the French government approached BNP Paribas to set an ultimatum of three months for transitioning away from financing the fossil fuel industry. If there is an unsatisfactory reaction from BNP, the NGOs plan to sue the commercial bank for allegedly breaching its duty of care by financing "climate chaos".

Climate disputes in the M&A context

Meanwhile, investors are increasingly shifting climate change considerations from the margins to the core when choosing between and negotiating investment possibilities in different sectors. The increased impact of corporations on social and environmental well-being drives home the weighty consequences, obligations and liability risks associated with such corporate decisions. Accordingly, different aspects related to climate change can be captured in the context of M&A before, during and after the contractual phase, which can lead to a range of disputes to be settled through arbitration, as well as unique

procedural challenges to resolve those disputes effectively.

The growth of climate change litigation is already impacting the M&A process. As well as affecting the choice of price and target, due diligence is now beginning to assess an organisation's understanding of climate risk in terms of physical, investment, market and litigation risk, as well as considering the climate change impact of the proposed transaction. For example, in Law No 2017-399 of 27 March 2017, French law provides a duty of vigilance (a predecessor to the EU's proposed CSDD), which is now part of the French M&A deal process.

In addition, on 21 March 2022, the US Securities and Exchange Commission (SEC) published proposed rule changes that require US public companies to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are "reasonably likely" to have a material impact on their business. This evolution will certainly translate into representations and warranties, indemnities, force majeure clauses, change of law clauses, material adverse change clauses and deferred payment terms subject to climate-related factors in M&A contracts.

To help with these changes, organisations such as Chancery Lane Project are providing model climate clauses, standard climate-related definitions and tools for introducing climate clauses into contracts. Inevitably, the increasing impact of climate-related terms in the M&A process will lead to a greater number of climate change-related disputes.

Direct climate change-related disputes are obviously increasing, where climate change is at the core of the issue in dispute (eg, in transactions involving renewable energy projects or climate change mitigation technologies). The same is expected to happen in relation to indirect climate change-related disputes, where M&A transactions give rise to claims that, for example, a company has failed to observe its obligations regarding climate change pursuant to its corporate policy or other substantive instruments of climate policy. The latter indirect category is expected to give rise to international commercial arbitrations.

Arbitration is well designed to accommodate post-M&A disputes involving climate change. First, it offers a uniform international forum for disputes, which may be particularly valuable in matters involving international agreements such as the Paris Agreement, as well as the ability to use party-appointed experts who can be integrated into the proceedings at an early stage and help the tribunal focus on the relevant climate items. Second, it allows for the efficient resolution of urgent disputes, which may be necessary for preventing irreversible consequences of climate-damaging actions through emergency proceedings.

Furthermore, the provision of arbitration-specific tools such as sample wording and case management techniques will be helpful in resolving complex disputes. Arbitration is well equipped to cater for multiparty aspects of renewable energy projects, which typically involve a variety of agreements. Last but not least, the efficient enforcement of international arbitral awards will definitely help to ensure implementation.

This said, one should not forget that the climate change theme will also require some adaptation in the way commercial arbitration is traditionally organised. Arbitrators will need to familiar-

ise themselves with the background of climate change issues and the regulatory and public policy environment of the contract in dispute. Arbitrators and counsels will need to acquire sufficient scientific literacy to understand the terminology, assess accuracy and spot greenwashing language.

A scientific understanding of the issues is important when there is disagreement between party-appointed experts, since arbitrators will need to confidently navigate scientific evidence and opinions. All these concerns will have to be reconciled with the legitimate expectation that arbitration is able to deal with disputes in a professional and efficient way. Therefore, there is a need on the corporate side for arbitration to develop attractive resolution channels in order to avoid lengthy and expensive litigation.

Energy-specific litigation

Whether at international level, amongst others in the context of the now largely criticised Energy Charter Treaty, or at regional and domestic levels, the energy sectors have traditionally been characterised by specific modes of dispute resolution. Many national regulatory frameworks have developed specific chambers or courts to address sector-specific matters such as tariff disputes or litigation around access to regulated networks. A recent and general trend in practice, however, is that market operators tend, when possible, to prefer (institutional or ad hoc) arbitration, considering its advantages in terms of confidentiality and timing.

It is too early to assess whether this trend will continue and whether this will affect the functioning of the sector-specific courts and tribunals, but there is a chance (or risk depending on the angle) that, considering amongst others the increasing complexity of disputes arising from the crisis currently being faced by the energy markets, this shift from judicial to arbitral dispute resolution bodies will continue.

Conclusion

All in all, the emerging role of courts and arbitral tribunals in global climate governance brings about opportunities for civil society to augment pressure on corporate actors, increasing the incentive for enterprises within and outside the energy sector to carry out a detailed climate action plan and take appropriate measures to achieve the targets put forward in their strategies. While companies can anticipate climate-related claims in different contexts, climate litigation and arbitration are here to stay and will continue to expand in depth, variety and complexity.

Fieldfisher is a European law firm with market-leading practices in many of the world's most dynamic sectors. It is a forward-thinking organisation with a particular focus on technology, financial services and energy and natural resources. The firm has more than 1,450 professional advisers spread over 25 locations, all providing highly commercial advice based on in-depth understanding of clients' needs. It has different energy and utilities departments in Belgium, France, Germany, Ireland, Italy, the Netherlands, Spain and the UK. The team handles work that can have a huge impact on clients' business or organisation, helping them with advisory and regulatory work, energy-specific contract drafting, dispute resolution and litigation. Recent projects have mainly related to the ever-changing European energy framework and the implementation of the Clean Energy Package, such as advising on local energy communities and corporate power purchase agreements.

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