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ESG GOVERNANCE INSIGHTS INVESTOR RELATIONS

## Climate litigation: how 2022 will shape 2023



by SIMON BISHOP

This past year saw a rise in climate litigation, with a focus on the commercial sector and the exploration of claims relating to ESG issues.



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Governments, businesses and other stakeholders make efforts to organise their operations in ways that are legally and regulatorily compliant.

Litigation in ESG-related areas has increased in recent years and strategic litigation in an environmental context has seen a sharp rise. Those in charge of running businesses will need to be aware of this increased focus from a reputational, strategic, risk and compliance point of view.

At the same time, stakeholders, the public and customers will demand more transparency and accountability.

### Notable trends and cases of 2022

#### *Regulatory*

In March, the EU's Corporate Sustainability Due Diligence Directive set out mandatory **human rights and environmental due diligence obligations** for corporates, together with a civil liability regime to

enforce compliance with the obligations to prevent, mitigate and bring adverse impacts to an end.

The rebranding of the proposal is significant—it highlights the intention of the EC to harmonise legal standards and to impose a general duty on the business community and address adverse human rights and environmental impacts, rather than providing general governance rules.

The financial services industry is stepping to the forefront and, in October 2022, the UK's Financial Conduct Authority (FCA) proposed a set of new measures: [Sustainability Disclosure Requirements \(SDR\) and investment labels](#). These are designed to reduce greenwashing and improve consumer and investor confidence in products and security issuers that make sustainability claims.

### **Commercial law**

*ClientEarth v Board of Directors of Shell*: On 15 March 2022, ClientEarth notified oil company Shell that [it was starting a derivative action](#) against its board of directors, on the basis that the board was breaching their legal duties in their failure to adequately adopt and implement a strategy that truly aligns with the Paris Agreement.

The claim was made pursuant to Sections 172 and 174 of the UK Companies Act 2006 on the duties to promote the success of the company and to exercise reasonable care, skill and diligence, respectively. How will this effort to hold directors personally liable for failing to address climate risks play out?

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*Milieudéfensie et al. v Royal Dutch Shell plc*: The District Court of the Hague found on 26 May 2021 that Shell owed a duty of care to the plaintiffs to reduce emissions from its operations by 45% by 2030 relative to 2019 emission levels, which is likely to have major ramifications across the corporate community. On 22 March 2022, Shell appealed to the Dutch Court of Appeal in the Hague, and on 25 April 2022,

Milieudéfensie issued a letter <https://en.milieudéfensie.nl/news/our-letter-to-the-board-members-of-shell> to the board of directors of Shell for urgent action to comply with the 2021 judgment of the Dutch court, and warning about personal liability risks towards third parties resulting from any failure by the company to take action.

*Braskem, São Paulo*: On 21 September 2022, the District Court of Rotterdam handed down an interesting judgment on jurisdiction on a case involving environmental harm. The claimants are from communities surrounding a salt mine in Brazil and allege that they have suffered enforced evacuation and consequential losses due to earthquakes related to the mining activities.

The mine is in Brazil, operated by a Brazilian entity and the ultimate parent-company—[Braskem](#)—is Brazilian. However, the claimants have not pursued their claims in Brazil but have instead issued them in the Netherlands. They have done so on the basis of applicable Brazilian law which, they say, holds Dutch non-operational subsidiaries jointly liable under an 'indirect polluter' principle.

**The Rotterdam court agreed Dutch subsidiaries can stand as defendants for the purposes of establishing jurisdiction over the Brazilian parent company**

On this basis, the Rotterdam court has agreed those subsidiaries can stand as anchor defendants for the purposes of establishing jurisdiction over the Brazilian parent company. Where many corporate accountability claims have been strategically pursued in the forum of parent company, this case is a reminder that, depending on the applicable law, creative use of jurisdictional rules can be used to secure a favourable forum.

## **Likely trends for 2023**

### **Investor actions**

Investor activism in connection with climate and other ESG issues is likely to become more established, with institutional investors coming under increasing pressure to engage in corporate stewardship and undertake private enforcement.

There has yet to be a climate-based investor claim for damages against a company listed in the UK. However, 2023 may be the year that we see the first damages claims emerging, in light of the following: evolving regulatory framework; increasing proclivity of investors to pay greater attention to how their investments perform in relation to climate and other ESG risk; and ability to quantify the value of climate risk within companies.

### ***Personal liability***

Another expected key area of development is related to personal liability. ClientEarth's letter to Shell's board of directors is a first step along the path to holding directors personally liable for failing to meet their obligations on planning for net zero.

### ***Forests and food systems***

Another area of key focus will be forests and food systems. Legal claims have been commenced, alleging that deforestation could constitute crimes against humanity. The great forests of the world are also crucial in relation to carbon reduction and their removal is likely to become a growing target for strategic climate change litigation.

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Food security is also likely to become an increasing issue as climate breakdown continues and populations around the world face exposure to drought, flooding, crop failure and famine. This will likely only be exacerbated by the challenges of preserving grain shipments from Ukraine for the many vulnerable nations depending on that supply to avoid hunger.

Last year saw diverse litigation around the world seeking to influence climate governance and debates in all types of decision-making. Such litigation plays a vital role in policing compliance with the emerging raft of climate protective regulations internationally. In practice, its impact will depend upon the decisions of national courts opining across multiple jurisdictions internationally.

As we move into 2023, the climate emergency will impact all aspects of corporate and legal practice: businesses should remain alive to it.

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