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ESG litigation: short overview of current state of affairs

Types of ESG Litigations and main risks

The scope of ESG-related litigation is evolving rapidly. ESG litigation can broadly be understood to cover all sorts of claims aimed at compelling companies to align with various ESG objectives. ESG litigation has also been used to pursue private interests under the ESG banner, as expanding statutory obligations create legal grounds for potential claims and liabilities. ESG litigation covers all types of liability claims, including tort, contract, criminal and administrative liability.

The following examples demonstrate current trends in ESG litigation:

(i) Litigation against parent companies for actions in connection with their affiliated companies: Parent companies are at increased risk of liability related to the operations of their subsidiaries as demonstrated by the **Vedanta Resources PLC v Lungowe (2019)** case before UK courts. The UK-based parent company Vedanta was sued for damages resulting from pollution essentially to local waterways caused by its Zambian subsidiary. Vedanta found itself exposed to liability as it publicly declared its ESG commitments and issued reports with emphasis on (ESG) supervision of its subsidiaries, exercised a high level of control of its subsidiary, as well as offered a wide range of services and support to the subsidiary.

(ii) Contractual claims in connection with ESG: In **Vert Asia Limited v. G-STAR Raw C.V. (2023)** (Dutch case), G-STAR terminated a supply agreement with Vert Asia during the COVID-19 crisis. According to the court, obligations go beyond explicit contractual terms, incorporating good faith and fairness considerations. Here, such obligations were drawn from G-STAR's Corporate Social Responsibility-policy and its explicit declarations as to the Vert Asia's operations and interests. As G-STAR termination of contract contradicted such declarations, G-STAR was found to be in contractual breach toward Vert Asia.

(iii) ESG-washing litigation (and in particular greenwashing): Companies must substantiate their ESG claims to avoid misleading statements as demonstrated by cases such as **Carbon Market Watch v. FIFA** (Belgian JEP). FIFA was instructed to refrain from promoting the 2022 Qatar World Cup as climate- and CO2-neutral unless it could provide comprehensive, accepted evidence of its emissions calculations and offset measures. Similar cases concern also shareholders'/investors' claims in connection with misleading statements used e.g. in precontractual documents.

(iv) Corporate liability litigation: Companies are increasingly being brought to courts in connection with their ESG (with particular emphasis on the "E") impact. In **Asmania et al. vs Holcim (ongoing)** (Swiss courts), residents of Pari Island sued Holcim in Switzerland, claiming that the latter CO_2 emissions significantly contributed to local floodings. The residents seek CO_2 emission reductions and compensation for climate change damages. As per another example, parent companies may also be held liable for human rights violations committed by their subsidiaries. In **Nevsun Resources Ltd. v. Araya (2020)** (Canadian courts), Eritrean workers sued the Canadian parent company in connection with forced labour at its mine in Eritrea.

(v) Directors' liability litigation: Company directors face growing liability risks, especially with the existence of new laws and ESG commitments. In Belgium, new tort rules remove subcontractor immunity, increasing directors' direct exposure (save for contractual liability limitations). In **ClientEarth v. Shell plc (2023)** (Dutch courts, case withdrawn), directors were accused of breaching their duties by failing to meet emissions targets and develop strategies. In **Antuzis & Ors v. DJ Houghton (2019)** (UK courts), directors were held liable for exploiting Lithuanian workers, breaching statutory obligations, and acting in bad faith.

(vi) Post M&A claims: Under the current legal framework for M&A transactions, breaches of ESG-related representations and warranties are already an established practice, as seen in **MDW Holdings Ltd v. Norvill & others (2021)**, where MDW discovered environmental violations post-acquisition, and **Solvay Specialty Polymers Italy v. Edison S.p.A. (2021)**, where Solvay found undisclosed environmental lapses after acquiring an Italian company, both cases resulting in claims for breach of the standard representations and warranties related to environmental risks.

Trends and Risks

ESG litigation risks already exist but are on the rise as new ESG requirements (e.g. CS3D) create additional grounds for claims, beyond the existing legal framework. The shift from voluntary guidelines to enforceable obligations results in increased potential for claims against companies based on alleged violations of ESG-related norms. Trends show an increase in ESG-washing claims and regulatory scrutiny, targeting companies and their directors to influence corporate strategy and accountability, as well as challenges to governmental strategies.

Conclusion

To manage ongoing ESG litigation risks, companies should protect directors, agents, and operations through strong ongoing risk management. This includes where relevant setting up ESG supervision bodies, keeping detailed records, supervising value chains, and drafting careful statements and considering arbitration clauses to ensure confidentiality and protect reputation. Adequate insurance, including D&O, becomes a must more than ever.

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