



Potential liabilities arising from climate change

DO COMPANIES FACE A WAVE OF COMPENSATION CLAIMS?

The insurance industry has noted a sharp increase in claims based on the consequences of climate change. The industry predicts that both the number and cost of such claims will continue to rise in the future. Whether individual businesses should be held liable for the consequences of their greenhouse gas emissions is a question increasingly being debated in the courts. This briefing explores the extent to which businesses should be concerned, especially in light of two recent high-profile decisions of the appellate courts in the US.

In 2006, a report commissioned by the British government estimated that climate change could shrink global economic capacity by as much as 20 per cent by the year 2100. The conclusions of the Stern Report have brought the question of individual responsibility and liability for greenhouse gas emissions to the fore. Efforts have been made to bring damages claims against individual businesses for the consequences of climate change.

For the international insurance industry, these developments acted as an impetus to examine more closely the liabilities that companies may face as a result of climate change. The conclusion reached was that there is expected to be a massive increase in compensation claims brought against emitters of greenhouse gases. In this regard, the insurance industry sees businesses such as car manufacturers and airlines as being as equally threatened as power stations, chemical works and steel plants. One estimate suggests that insurance losses related to weather could rise by 75 per cent over the next 30 years. Indeed, the industry has already seen a 15-fold rise in weather-related claims over the past 30 years¹. Class actions originating in the US are particularly feared. In many ways, this potential wave of litigation is reminiscent of the damages claims brought against the tobacco industry.

Developments in the US

Recent developments in the US have added credence to the insurance industry's concerns. The courts are increasingly dealing with climate change suits that have been brought against individual companies. In 2004, several US states brought a claim against six electric utility companies, each being one of the largest producers of carbon dioxide in the country (*State of Connecticut v American Electric Power Company*). One of the claimants' aims in bringing these proceedings is to force the power companies into observing emissions limits. The action was initially thrown out by the District Court on account of a lack of jurisdiction, owing to the so-called 'political doctrine question'. Under this doctrine, federal courts refuse to decide on certain matters when they believe that the issue raises questions of policy and therefore properly belongs to the decision-making authority of elected officials. However, matters in these proceedings have recently taken a dramatic turn. Following an appeal by the claimants, the United States Court of Appeals for the Second Circuit decided on 23 September 2009 that the federal courts do in fact have the power and an obligation to decide upon responsibility for climate change damage. It remains to be seen whether this case is accepted for review by the Supreme Court, although it seems highly likely.

A second notable global warming case was initiated in the courts in 2005 by several victims of Hurricane Katrina (*Ned Comer v Murphy Oil USA*). The claim has been brought against several members of the oil,

¹ www.ft.com/cms/s/0/c24c8c6a-be65-11de-b4ab-00144feab49a.html

coal, power and chemical industries. The claimants were seeking, among other things, damages for the destruction of their houses, as well as punitive damages. The complaint was thrown out at first instance, the district court arguing that the claimants lacked standing, and that the claim raised non-justiciable questions. On 16 October 2009, however, the United States Court of Appeals for the Fifth Circuit unanimously reversed that decision. Noting the claimants' argument that the defendants' operation of energy, fossil fuels and chemical industries in the United States caused the emission of greenhouse gases, which contributed to global warming, which in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which had resulted in 'sustained actual, concrete injury in fact to their particular lands and property', the Court ruled that the claimants do have standing to assert their claims. Secondly, the Court ruled that this particular aspect of the claim does 'not present any specific question that is exclusively committed by law to the discretion of the legislative or executive branch'. In this respect, the Court noted the consistency of the reasoning of the appellate court in the American Electric Power Company case. The case has now been remanded back to the district court for further proceedings. It remains to be seen, therefore, whether the applicants can overcome the next hurdle of having to successfully satisfy the proximate cause requirement under Mississippi state common law.

In early 2008, another global warming case was brought by a self-governing tribe from the coastal town of Kivalina in Northwest Alaska, together with the village of Kivalina (*Native Village of Kivalina v Exxon Mobil Corporation*). Due to the melting of icecaps, Kivalina is threatened with being submerged into the sea. The suit, which has attracted a significant degree of attention, has been brought against 24 companies in the coal-mining, oil and energy industries. The claimants demanded that the defendants be held liable for the damage that they allege they have caused to date, as well as an assessment of liability for foreseeable future damage. In September of this year, however, the United States District Court for the Northern District of California dismissed the claim. In contrast to the previous two decisions, the Court ruled that the complaint must be dismissed as a non-justiciable claim under the political question doctrine, noting, inter alia, that to decide otherwise would have

required the Court to make a policy decision about who should bear the cost of global warming. Furthermore, the Court held that the claimants failed to establish that they have standing to pursue these claims, failing to show that there was any connection between their alleged damages and the conduct of the defendants (which the Court also remarked were arbitrarily selected). The Court sought to distinguish this case from other climate litigation cases, such as the American Electric Power Company case, which the Court noted involve 'a discrete number of polluters... identified as causing a specific injury to a specific area.' It remains to be seen whether this decision will be appealed.

However, it is not just companies that are threatened by climate change suits; entire countries are threatened too. This is demonstrated by the island state of Tuvalu, which is threatened with being submerged under the Pacific Ocean as a result of climate change. The government of Tuvalu had considered suing both the US and Australia in the International Court of Justice, as well as in national courts, on account of their contributions to greenhouse gas emissions.

These cases, as well as a number of other pending cases, demonstrate that there are currently increasing attempts in the US to hold those companies emitting greenhouse gases and contributing to climate change liable for the damage caused. The risks faced by affected companies must also be seen in the context of attempts made in the US to force companies to make so-called 'climate risk disclosures'. In September 2007, 22 leading international investors and public office holders lodged a petition with the US Securities and Exchange Commission requesting that in future, climate risks should be disclosed as business risk factors. Beyond this, the Carbon Disclosure Project, an organisation sponsored by institutional investors with a total capital of \$41bn, requested that the 2,400 largest companies in the world publish their climate risks. These developments are clearly relevant to European businesses that are listed on American stock exchanges.

The current position in Germany and Europe

In contrast to the US, climate change liability risks posed to businesses in Europe are currently limited. In Germany, there are in principle a number of bases upon

which claims against emitters of harmful greenhouse gases could be brought. These are contained within (among others) civil rights (*Deliktsrechts*) under the German Civil Code, the Federal Emissions Control Act (*Bundes-Immissionsschutzgesetz*) and the strict liability principles of the Environmental Liability Act (*Umwelthaftungsgesetz*). That said, certain of these rights only provide limited assistance so far as actions based upon climate change are concerned. The civil rights rules, for instance, only deal with unlawful and culpable behaviour. In this respect, they are of no assistance to claimants if emissions of harmful greenhouse gases are within authorised limits. The environmental liability legislation does contain strict liability provisions, which are still applicable even if the permit conditions have been met. However, ascribing liability for climate change damage to one particular individual emitter is currently impossible. Damage caused by climate change raises difficult questions of causation. Climate change is caused by the emissions of both domestic and international emitters who cannot be identified on an individual basis. Furthermore, the emissions that companies produce become inseparably mixed with emissions produced from other smaller sources (eg motor vehicles). Because of the consequential lack of any identifiable relationship between emitters and victims, responsibility for climate change cannot be easily ascribed to any individual emitter.

Although German procedural law does recognise concepts such as *Streitsgenossenschaft* and *Prozessverbindung*, there is no specific concept of class action. A class action, in which questions of law and fact are decided upon in respect of all of the members of a certain class, is an alien concept within German procedural law.

In other big EU member states, claims against emitting businesses are unlikely to fare any better. As is the case in Germany, the proof of causation requirement in English and Welsh law acts as an almost insurmountable hurdle for those bringing damages claims. Indeed, up until now such claims have not been brought in the courts of England and Wales. Increasingly, however, there are calls being made for the burden of proof rules to be changed where climate change damage is concerned. These arguments have been lent weight by a recent decision of one of the criminal courts in England.

In September 2008, climate change protestors trespassed onto the site of the Kingsnorth coal power station and scaled a 200-metre chimney in order to draw attention to their contribution to climate change. The activists admitted trying to shut down the station by occupying the chimney and painting the word 'Gordon' on it, but successfully argued that they were legally justified in doing so because they were trying to prevent climate change causing greater damage to property around the world. It was the first case in which preventing property damage caused by climate change had been used as part of a 'lawful excuse' defence in court.

The position is similar in France and Spain, where, because of the causation requirements, claims would also fail against individual businesses. Class actions are likewise not possible in these countries.

Conclusions

At present, there is no need to overstate the risks that companies face as regards incurring liability for contributions to climate change. The proof of causation requirements have to date acted as a block to claims being successfully made against those responsible for damaging emissions. This is not to say, however, that firms have a *carte blanche* to continue emitting unchecked. The decisions of the US appellate courts in the American Electric Power Company case and the Ned Comer case will provide further impetus to climate change actions. Indeed, if either of these cases or any of the other outstanding cases set a precedent in the US for allowing damages claims to be successfully brought against individual companies, this could very quickly impact European business, not least because of the global consequences of emissions.

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