



Will climate change go up the boardroom agenda following Covid-19?

We believe that the global Covid-19 pandemic will lead to society at large taking climate change much more seriously. While parts of the business and financial community, and governments and regulators have taken action, there remain pockets of disbelievers who question whether this fits squarely into a business imperative.

However, the emerging post-pandemic world has demonstrated a number of things, one being how quickly public opinion can shift from sceptical interest to intense concentration, and in some cases fear. So if the unthinkable pandemic has occurred, why not climate change, with consequences arising from some scenarios which could make Covid and a global recession look like a walk in the park?

Another clear consequence is the need for government primed responses to recession and job losses. Vast amounts of money have been pumped into trying to preserve jobs, with more to

come, and on rebuilding certain devastated industrial sectors, such as hospitality and travel – and what better than infrastructure projects? The pressure to rebuild using a ‘green’ agenda may become overwhelming. Looking up at the empty skies, and on the empty roads, environmental benefits have been there to see and touch for everyone, so why go back?

So we conclude that there may be a step change in relation to climate change initiatives. But what could this look like, and what does it mean for business?



**This PDF
has elements
which are
interactive.**

Where are we now?

The direction of travel has been clear for some time, with the Paris Agreement and other United Nations sponsored initiatives, being embraced at government levels. The next big push in this area was to be COP26, scheduled for July 2020 in Glasgow, but now rescheduled to next year. Nevertheless, the momentum remains. This has drilled down into sector-based initiatives, such as the Task Force on Climate-related Financial Disclosures (TCFD), set up by the Financial Stability Board, chaired at the time by Mark Carney, then Governor of the Bank of England. Carney has since become the UN Special Envoy for Climate Action and Finance, and is proving to be a powerful advocate. He speaks to businesses and the financial services sector with a credible business background, and not as a scientist/expert, and is all the more persuasive for that.

The current emphasis is largely voluntary. It is often driven by disclosure, trying to force change through momentum, rather than legal or regulatory standards. But the direction of travel here is, in our view, also clear: more legislation and regulation are coming, and forward-looking organisations will try to get ahead of these changes, and shape what is coming.

We are also seeing this on the so-called 'buyside', the investor community. The world's largest asset manager, Blackrock, has said that it will take a 'harsh view' of companies that fail to provide hard data on the risks they face from climate change. Those that do not engage with the climate agenda, and what is required and heading in their direction in terms of planning, disclosure and reporting, are likely to face greater scrutiny from investors who may start to see corporates in a bifurcated manner, between those 'sinners' and 'saints', or 'green' and 'brown'.

So the question for business now is how they position themselves in that debate. Much of this will be driven by the growth of 'green' funds looking for equities that tick the box.

But there are practical legal and commercial issues that should also be considered. And the legal industry is not standing idly by. Some legal commentators are already calling climate change litigation the 21st century equivalent of tobacco litigation; we somehow doubt it, but lawyers are ingenious people and adept at making law through trials and cases, and so it remains to be seen. But climate litigation is a real risk and needs to be assessed and mitigated.

Climate litigation comes in a variety of forms, some of which might be comparable to the cases against tobacco companies. We think the biggest concern may be mis-selling claims. Funds are looking for green investments to satisfy investment criteria, but are not properly looking under the bonnet to work out whether an equity holding in company X really is 'green'. It is very fuzzy at the moment, as there is a lack of clear and consistent definition of what is 'green'.

While it is unlikely that there will be the sort of products liability claims that there were for tobacco, there have been some tort law and statutory claims already including in the Netherlands, France and Germany (see exhibit 1 for examples of climate change litigation). These sort of claims may not pose a realistic chance of success under the common law in the UK law and there is no statute on which to base them. However, we are seeing claims that are being brought against businesses by municipalities and states in the U.S. to recoup the costs of damage associated with climate change.

Similar claims were brought against tobacco companies, which were generally settled. To date, some of these climate related cases have been dismissed by judges in the U.S. who have said that the issue is for Congress to handle, but others are pending. And finally cases are also being brought for fraud. The New York attorney general recently lost such a case against a global oil and gas company, in which it was alleged that the company understood the science of global warming, predicted its catastrophic consequences, and then spent millions to promote misinformation.

“More legislation and change is coming, and forward-looking organisations will try to get ahead of these changes”

Chambers 2020



What does this mean?

For businesses generally, we can predict a continuation/acceleration of existing themes:

- For those that are listed and/or regulated, more disclosure/reporting and the governance structures and conduct issues which go with it.
- More chance of litigation, so start planning now for defence and mitigation strategies.
- Anticipating change, and getting ahead of it. For example, many companies have published their plans to go carbon zero, do that, and report/audit the plan.
- Look at your competitors. Are you ‘green’ or ‘brown’ when judged against them?
- If you are a retailer or consumer business, how do you look and engage with your customer and consumer base? Could you withstand a public campaign against you?
- How do other stakeholders: investors, regulators, suppliers, employees view your green credentials? Do you walk the walk, as well as you talk the talk?
- Put it on your risk register now.
- Get scientists and other experts into your boardroom now, when you have time, so board awareness grows.
- Who owns this? The chair, the board or the CEO? How does it impact your brand and marketing?

Lenders and investors will apply a new set of lenses in their spectacles when they look at you, with a special climate/environmental lens, sitting closely alongside the ESG lens:

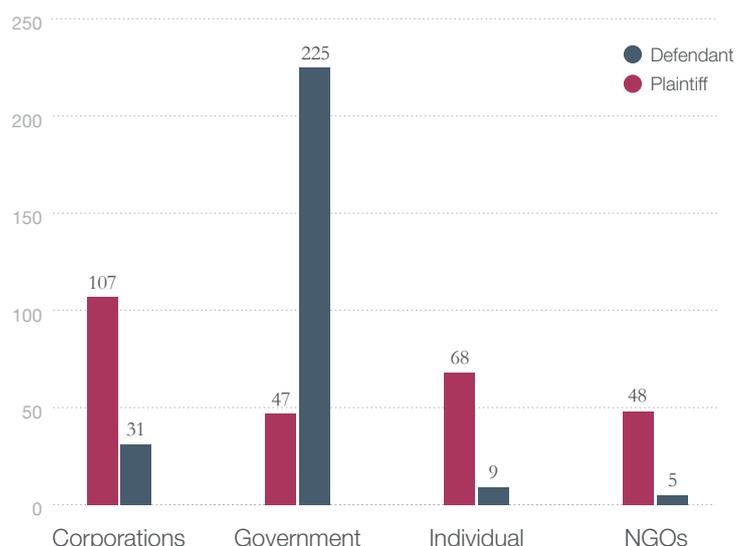
- If your assets are potentially climate affected, do you carry them at a true value in your books (for example, a power station based on a coast line, to access sea water for cooling)?
- Greater due diligence to establish how climate affected your business is, looking at regulatory/litigation exposures, sustainability, supply chains, customer reaction and brand, asset values etc.
- Are you ‘greener’/‘brownier’ than your peer group?
- Certain industries may find themselves largely unbankable, for example, coal mines, so the cost of credit rises, affecting their business model, and the same may apply to equity markets. So where do they go for capital and at what cost? Or do they die, either overnight, or slowly by a thousand cuts?
- Conversely, the pressure to invest in ‘green’ businesses may enhance access to debt/equity markets.
- Pressure on lenders’/investors’ boards and executive committees to fund more ‘green’ businesses, and to divest from ‘brown’ industries.

To identify just a few consequences.

“Those that do not engage with the climate agenda, and what is required and heading in their direction in terms of planning and reporting, are likely to face great scrutiny.”

The number of climate related law suits by category of party

Number of plaintiffs and defendants in litigation dataset by type.

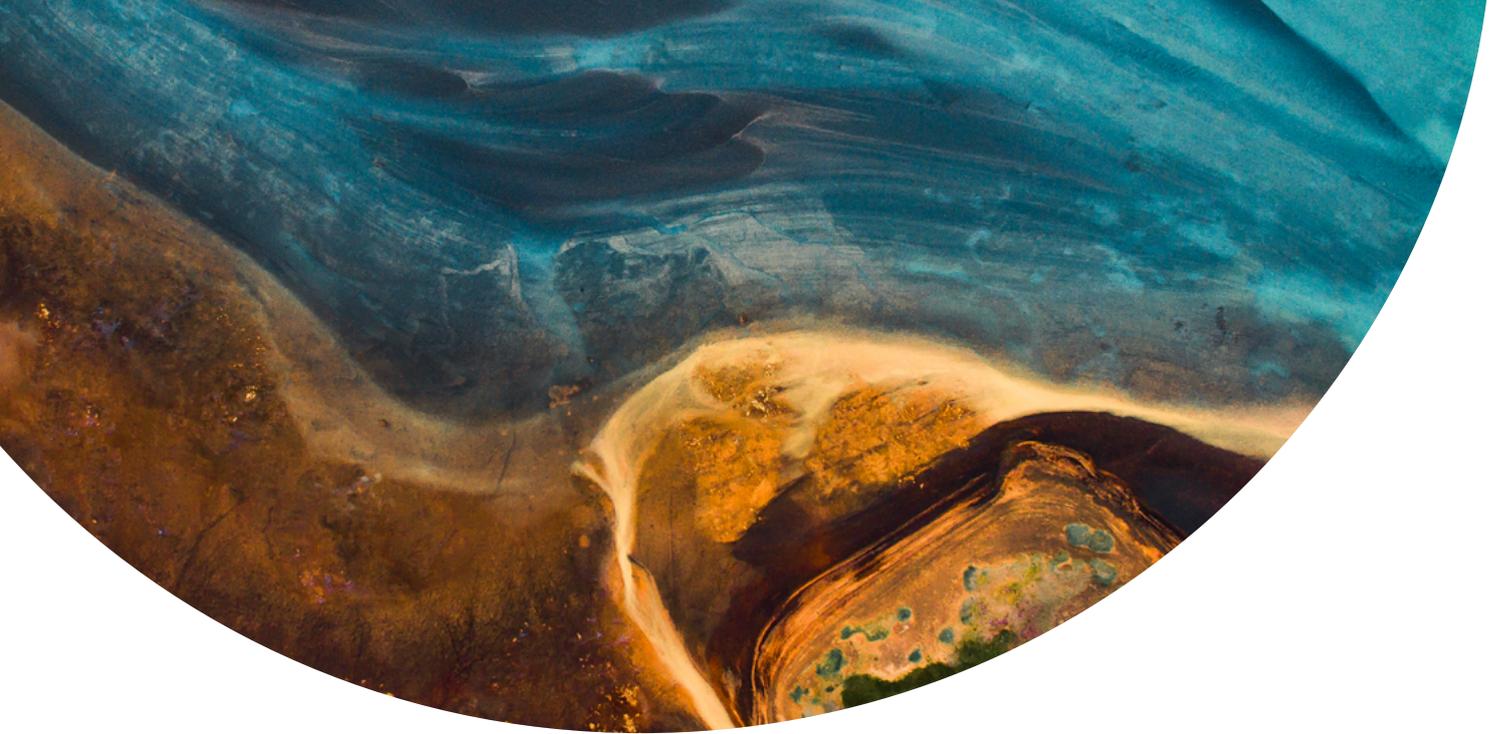


Source: Climate Change Laws of the World database, Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law

Examples of climate change litigation

1	<p>Protection/loss and damage</p> <ul style="list-style-type: none"> – cases brought by municipalities and states for public nuisance, including from climate change – compensation for damage and future impacts
2	<p>Public interest litigation against governments</p> <ul style="list-style-type: none"> – litigation calling for new laws and policies – Spurring government action
3	<p>Information/disclosure litigation</p> <ul style="list-style-type: none"> – claimants demanding disclosure or action plans – claims for misleading or incomplete disclosure – claims for “greenwashing” marketing campaigns
4	<p>Administrative cases</p> <ul style="list-style-type: none"> – challenges to decisions on basis of environmental factors – failures to conduct EIAs
5	<p>Tort actions against corporates</p> <ul style="list-style-type: none"> – individual or mass tort claims based often based on negligence or nuisance – expanding parent company liability for subsidiaries, supplier and lender liability might be next – new tort actions created by national due diligence regimes – compensation for damages

Source: Allen & Overy analysis



Getting ahead of legal and regulatory change

Like everything in business, it is best to plan for the worst, while hoping for the best. Getting ahead of legal and regulatory change makes good business sense, and also keeping an eye on the rear view mirror, and what the competitive landscape looks like. Once labelled 'brown' or a 'sinner', it's likely to be hard to restore brand value. This requires expert advice, whether scientific, regulatory, governance or legal-and now!

As businesses look to emerge stronger and more resilient in the wake of the Covid-19 crisis, now is the time for risk, compliance and legal professionals to take stock, learn and apply lessons, and ensure their functions are supporting company-wide efforts to be in better shape for next time.

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