

Newsletter

# ESG Update

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## The Rise of Climate Change Litigation – What Risks for Swiss Companies?

Businesses in all sectors are increasingly affected by the growing international trend of climate change-related litigation. This newsletter examines this development and its potential impact on Swiss companies.

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# Climate Change Disputes: Navigating Treacherous Waters



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The trend of climate change-related litigation against companies and their directors and officers is steadily growing and has recently reached Switzerland. Swiss companies are well advised to assess their exposure and keep abreast of the rapid developments in climate change litigation.

## Climate Change Litigation Against Companies

Over the past decade, lawsuits blaming Governments of insufficient action on climate change have been filed in many jurisdictions, recently with increasing success (e.g., in the Netherlands and Germany). High-profile complaints against various European States are currently pending before the European Court of Human Rights, notably including the landmark case of *KlimaSeniorinnen et al. v. Switzerland*. In recent years, however, a new trend of climate change-related legal actions **against corporations** has emerged. This trend, referred to here as 'private climate litigation', was initially concentrated in the United States, the United Kingdom and Australia, but later it has spread to a larger number of jurisdictions across the globe. While several high-profile cases have been filed in countries such as France, Germany, and the Netherlands, the first climate lawsuit against a Swiss-based company was recently filed with a Swiss Court.

Together with i) fast-paced regulatory developments at multiple levels, ii) increasing attention from financial supervisory authorities, iii) growing shareholder activism ('Say on Climate') and iv) the goal of achieving net-zero greenhouse gas emissions by about mid-century (in order to meet the temperature target of the Paris Agreement), private climate litigation has transformed climate change

from a perceived reputational to a potential **legal risk** for Swiss companies. Climate litigation risks affect businesses in all major industries (including energy, manufacturing, IT, agriculture/food, transportation, as well as finance and insurance) but they vary from company to company. Notably, directors and officers are increasingly being targeted by plaintiffs and shareholders concerned about companies' exposure to climate risks.

## A Multi-Faceted Phenomenon

In the past, most climate cases (both those against Governments as well as those against private actors) have been dismissed by the courts for a variety of reasons including non-justiciability and lack of standing, but recent developments suggest that climate litigation risks are increasing. In addition to first (interim) successes for plaintiffs (discussed below), the sheer increase in the number of lawsuits filed and the growing interest of third-party litigation funders are putting pressure on companies.

There are three main types of private climate litigation: **actions in tort**, **lawsuits brought by shareholders** and **greenwashing cases**. Most of these cases are brought by individual plaintiffs (in some cases by thousands of citizens in a class action or even on behalf of future generations), NGOs, shareholders, or beneficiaries of pension funds. In some instances, public actors such as municipalities,

supervisory authorities, and prosecutors have initiated or joined legal actions. Cases are brought not only before courts but also before non-judicial dispute resolution bodies such as advertising standards boards or National Contact Points established under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

The legal basis relied upon in private climate litigation varies from case to case but is commonly found in tort law or its civil law equivalents (negligence, nuisance, duty of care), corporate law, financial market law, or consumer protection law. In corporate law-based disputes, plaintiffs typically allege that directors breached their fiduciary duties (duty of care, duty of loyalty) by failing to adequately manage and/or report on climate change risks. In addition, in some cases, plaintiffs invoke sources of law that are not normally considered as being directly applicable to companies including i) international or national climate change law (e.g., the Paris Agreement), ii) fundamental human rights (e.g., the right to life under the European Convention on Human Rights), iii) international standards on responsible business conduct (in particular, the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct), or iv) industry standards such as the Recommendations of the Task Force for Climate-Related Financial Disclosures (TCFD).

### Key Cases in Europe

Several high-profile cases are currently pending in various European jurisdictions. In May 2021, the District Court of The Hague ordered Royal Dutch Shell to reduce the CO<sub>2</sub> emissions of the entire Shell group by at least 45% by 2030, compared to 2019 levels (*Milieudefensie et al v. Shell*). Although this decision has been appealed, it marked the first time that a Court directly ordered

a company to (drastically) reduce its greenhouse gas emissions. This strategic case was brought in the wake of *Urgenda v. The Netherlands*, where the Dutch Supreme Court upheld a judgment ordering the Dutch Government to reduce its GHG emissions to 25% below 1990 levels by 2020. In the matter of *Lliuya v. RWE*, an action for damages pending before the Higher Regional Court of Hamm (North Rhine-Westphalia) against major German energy company RWE, a Peruvian farmer is seeking partial compensation to fund flood protection measures near his home in the Andes, which is threatened by glacial melting due to climate change. In addition, following the German Constitutional Court's landmark decision in March 2021 (*Neubauer et al v. Germany*), several climate lawsuits were filed in Germany against various major car manufacturers and a fossil fuel energy company. In France, several NGOs together with more than a dozen French municipalities (including Paris) and the City of New York pursue a lawsuit against energy company Total (*Notre Affaire à Tous et al v. Total*). The plaintiffs seek to enforce the French *Loi de Vigilance* of 2017, asking the Court to order Total to publish a *plan de vigilance* in which the company announces greenhouse gas emissions reductions targets in line with the Paris Agreement. In the UK, in February 2023, the NGO ClientEarth as a shareholder, supported by several institutional investors (in particular, pension funds), filed a derivative action against the directors of Shell alleging breaches of fiduciary duties under the UK Companies Act for failing to adopt and implement an energy transition strategy aligned with the Paris Agreement.

### Recent Actions in Switzerland

The above-mentioned cases are key examples of the growing climate litigation risks – risks which increasingly affect Swiss companies as well. Inspired by cli-

mate litigation abroad, the first Swiss climate lawsuit against a corporation was filed with a Swiss Court (the *Kantonsgericht Zug*) in February 2023 against a building materials company. The plaintiffs (four inhabitants of the Indonesian island of Pari) are seeking compensation for alleged climate-related damages to their livelihoods as well as a significant reduction in the company's CO<sub>2</sub> emissions in line with scientific greenhouse gas reduction pathways. In November 2022, Klima-Allianz Schweiz, an alliance of various civil society organisations, lodged a complaint with the Swiss Fair Advertising Commission against a Swiss-based International Sports Association for alleged 'climate-washing' in its advertising. In June 2023, the Swiss Fair Advertising Commission decided in favour of the complainants and recommended that the International Sports Association refrain from certain advertising practices. In addition to the mentioned proceedings, the outcome of *KlimaSeniorinnen et al. v. Switzerland*, which in March 2023 became the first-ever climate-related case heard by the European Court of Human Rights, is awaited with much interest: as the above-mentioned examples of the Netherlands and Germany show, precedents in climate litigation in the public sphere can increase the likelihood of 'follow-up' cases against corporations.

### Outlook for Swiss Companies and Boards

In light of the developments discussed above, companies and their boards are well-advised to take growing climate litigation risks seriously as a matter of **risk management** as part of **corporate governance**. In practical terms, this may involve a number of measures including

- i) **monitoring** developments in climate change litigation (both internationally and in Switzerland),
- ii) **assessing** the company-specific climate change litigation risk profile (which may vary significantly depending on the

business model and sector),

iii) taking appropriate steps to **mitigate** climate litigation risks (e.g., establishing specific climate change due diligence processes, ensuring state-of-the-art reporting on climate change-related matters, insurance, etc), and

iv) ensuring sufficient **knowledge** of climate change-related matters at board level, including by seeking expert advice where necessary.

As the risks associated with climate change continue to grow, so too will the risks of climate litigation. This calls for targeted action in the best interest of the planet *and* the company.

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