

Commercial dispute resolution: ESG *ante portas*?

Observations from the BoD's perspective

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ESG topics are key issues for all businesses

- Increased interest of investors, employees, regulators / legislators and public in ESG issues
- Activists and NGOs target corporates
- Growing expectations that companies will adapt their business activities to goals of Paris Climate Agreement
- Boards are responsible for strategy: they define relevant ESG areas and integrate them into the business strategy
- All companies and sectors are impacted

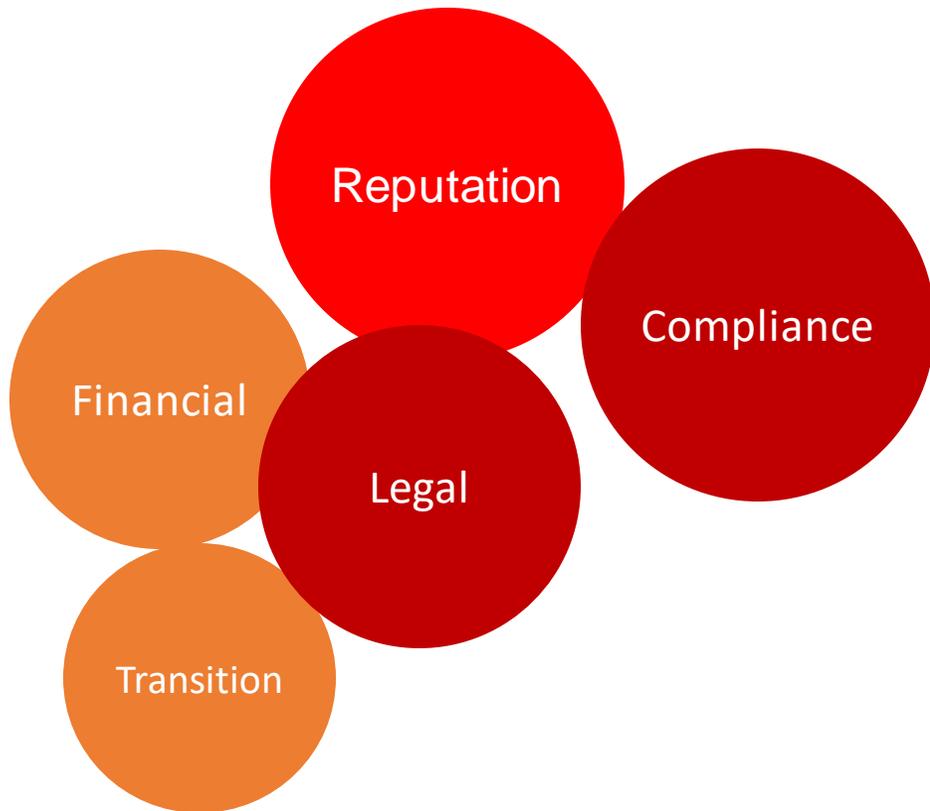


ESG topics are key issues ...

- ... that present numerous challenges:
 - Lack of uniform standards and norms for setting ESG objectives
 - Countless recommendations, expectations and initiatives
 - Lack of consistent ESG metrics to assess, measure and report ESG objectives
 - Rapid development of the regulatory framework, hard law v. soft law
 - Assessment and mitigation of ESG legal risks



Assessment and mitigation of ESG legal risks



Three key reasons for companies and their boards to monitor ESG litigation:

- Indicator of possible developments (outcome of litigation may shape public policy & regulation)
- Enhanced understanding and assessment of reputational, compliance and legal risks
- Improved assessment of financial risks



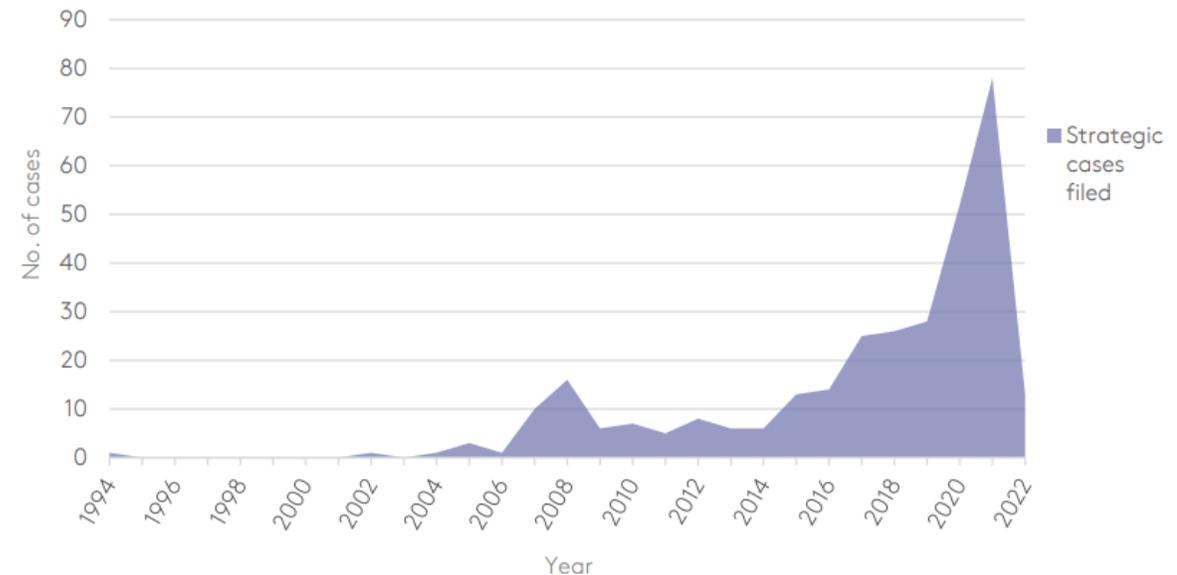
better mitigation of risks.

First lessons learned

Lesson 1: Litigation is a strategic tool

- Aims at creating public awareness and bringing about social change
- Advancing climate policies
- Changing behavior of Governments and companies
- Strong focus on global warming, but other themes are gaining importance (human rights, access to water, deforestation)

Figure 1.6. Number of strategic climate case numbers over time, outside the US (up to 31 May 2022)



Source: Authors based on CCLW data

Strategic cases against governments

Courts have ordered governments to accelerate the reduction of CO2 emissions to better protect citizens:

- **Urgenda Foundation** vs State of the Netherlands (12/2/2019)
- **Friends of the Irish Environment** CLG vs the Government of Ireland (6/31/2020)
- **Neubauer** et al. vs Germany, German Constitutional Court (3/24/2021)

ECHR to rule on complaint against Switzerland for violation of Articles 2, 6 and 8 ECHR (**Verein KlimaSeniorinnen Schweiz** et al. v. Switzerland)

Strategic cases against companies

- **Four Islanders of Pari vs Holcim**

Reduction of CO2 emissions by 43 % by 2030, compared to 2019 levels (or according to findings of climate science in order to limit global warming to 1.5°C) (and proportional compensation for climate change-related damages on Pari and financial contribution to adaptation measures on Pari.)
- **Milieudéfensie et al. vs Royal Dutch Shell PLC**

1st instance judgment of May 26, 2021, appeal pending; injunction to reduce net direct and indirect greenhouse gas emissions by 45% in 2030 (compared to 2019), worldwide.
- **Notre affaire à Tous et autres c. Total SA**

Total SA is required to take measures to reduce direct and indirect emissions, to publish its objectives and to prevent environmental damage.

Strategic cases against companies

- **FossielVrij NL vs KLM**

Plaintiffs petition the court for:

- a declaration that the advertising statements made by KLM, and suggesting that flying can be or become sustainable, are misleading and unlawful;
- a prohibition to advertise or suggest that flying, whether with KLM or not, can be done in a way that is "sustainable" or "responsible" from a climate change perspective, in any form or manner, to be made public,
- a rectification of the advertisements (extract): *The only way to meaningfully reduce the impact of flying on the climate and contribute to achieving the climate targets is by not flying.*

It is not only about climate warming

Opinion **Inside Business**

18 January 2023

Danone lawsuit could be test case for new war on plastics

Three environmental groups are suing the producer of Evian water and Activia yoghurt

PEGGY HOLLINGER

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Whether Danone wins or loses, this is an important milestone in plastics-related litigation. The NGOs are not seeking damages for harm done or for misleading claims on sustainability as in most other cases. Instead, they want to demonstrate that the company's overall strategy on plastic is not sufficient given the global risks to health and the environment of plastic waste. This argument was key to the case against Shell's decarbonisation plan two years ago.

Lessons learned

- Lesson 2** Compliance with public law is not sufficient; liability is based on unspecified duty of diligence, voluntary commitments, references made to international treaties, expectations
- Lesson 3** Transparency of information (in companies sustainability reports) fuels litigation as company strategy and disclosures are scrutinized; new non-financial reporting obligations likely to sustain this trend
- Lesson 4** Board members are challenged and held personally liable for alleged failure to prepare for net zero transition
- Lesson 5** Greenwashing claims are on the rise and are not limited to financial sector
- Lesson 6** ESG litigation will continue to grow

Consequences

- **Acceleration** of the transition towards net zero
- **Change** of public policy impacts the economy at large
- **Impact** on transition and financial risks (internalization of costs)
- Role of courts vs legislative process: more judicial **activism**, more **unpredictability** of the law?

Risk Mitigation

- Statements and disclosures in **sustainability reports** and public communications must be correct, measurable and verifiable
- **Anticipation** of regulatory developments is crucial
- **Strategy** must be embedded in the supply chain (due diligence) and entire value chain
- Does an arbitration clause in the articles of incorporation offer a **protection** against strategic litigation?