



Maritime decarbonisation and climate litigation risks. Key points from the Stephenson Harwood seminar, 2 November 2022

Stephenson Harwood's decarbonisation team consisting of Partners, Haris Zografakis and Marta Isabel Garcia, Managing Associate, Cathal Leigh-Doyle and Marine Director, Rod Johnson, hosted a hybrid seminar to discuss topics surrounding maritime decarbonisation and climate litigation risks.

It was a privilege to host eminent experts: Catherine Higham, Grantham Research Institute on Climate Change & the Environment Policy Analyst; Charles Haskell, Lloyd's Register Maritime Decarbonisation Hub Program Manager; Nicholas Brown, Bureau Veritas, Brand & Communications Director, Marine & Offshore; and Duncan McGregor, Smartestenergy, Senior Legal Counsel and Champion for Lawyers for Net Zero.

The maritime decarbonisation debate focuses on policies, technology and regulations. The impact of decarbonisation on contracts, and their necessary corollary, disputes is often ignored. Contracts for the sale, purchase and carriage of goods by sea is the lifeblood of maritime trade, and maritime law has evolved – predominantly through the judgments of the English courts – over two hundred years to accommodate the needs of trade in a changing world. Maritime decarbonisation will be shaped by litigation and by the courts.

We set out below a number of the key points from the seminar.

The general climate litigation context:

- Since 2003, there has been a year on year increase in the number of climate litigation cases worldwide.
- About 58% were "favourable" to climate action.
- Some were "strategic litigation" cases, where the court system is used by claimants to challenge corporations and governmental climate policy.
- In the last year, approximately 50% of all climate change litigation cases were against corporations.
- Types of climate litigation cases include:
 - Corporate framework litigation: claims against corporations based on a responsibility to align company policy with international climate agreements and a



general duty of care towards national citizens;

- Value chain litigation: claims which aim to reduce emissions across a supply chain;
- Financial market litigation: claims based on investment portfolio emissions;
- Greenwashing litigation: claims based on statements made by corporations relating to "net zero", "carbon capture", "negative emissions", current "green assets" or similar phrases. These have often been brought under investor and/or consumer protection laws; and
- Failure to adapt litigation: related to a corporation's failure to consider physical and energy transitional risks to the business.
- Corporations which remain hesitant in decarbonising do not only risk reputational damage, but also breach of regulations, breach of contract, potential restriction of funding and access to insurance, as well as becoming a target for climate change litigation, including, but not limited to "greenwashing" allegations.
- Derivative actions are now being brought by minority shareholders against specific directors on behalf of corporations for a corporation's failure to adopt a business strategy which aligns with the Paris Agreement.
- Climate litigation already has impact on insurance decisions.
- There is often a tension between antitrust rules and measures aimed at achieving decarbonisation targets. This raises the important question of how companies can mitigate risk in practice by ensuring collaborations are defensible and businesses are in compliance with any relevant State aid/subsidy rules.
- Climate change litigation and decarbonisation will continue to have a significant impact on business reputation and related stakeholders.

In relation to maritime trade in particular:

- When compared to the previous energy transitions in the maritime industry, the current energy transition will be more challenging; alternative energy sources are not as abundant, inexpensive, safe or accessible.
- CII ratings will in practice be difficult to determine and enforce, leading to contractual disputes.
- For decades, the fleet fuelled by conventional fuels will need to retrofit and/or adopt different operational practices, in order to improve their efficiency. The same applies to the zero-carbon-fuelled ships, in view of the lower energy density and cost of those. For example, about 30% of vessels in the Silk Alliance green corridor will require retrofitting. A number of contracts will be impacted in ways that may not be capable of resolution without recourse to litigation.
- The shipping industry will face challenges relating to the definitions, standards and stages of "readiness" of vessels to consume new fuels, and the fitness for purpose of those fuels.
- The safety issues involved with the use of ammonia as a marine fuel will give rise to operational, technical and bunker supply disputes.
- Courts could develop notions of "greenworthiness", or introduce a third pillar, alongside Owners' safety obligations and Charterers' right to issue commercial orders, which would override the latter and yield to the former.
- The off-shore nature of maritime trade, until now seen as shielding assets, could become a weakness if vessel presence in jurisdictions worldwide provide grounds, as well as forum-shopping opportunities, for local court action in climate-related claims, including through a wide interpretation of the arrest conventions. The shipping industry is familiar with contractual, personal injury and pollution claims around the world, but it has had no experience of the type of climate litigation seen in the oil & gas industry.



- The maritime industry is not immune from reputational scrutiny, and there are some lessons to be learned from earlier decades that saw many oil spills and marine pollution reputational issues and disputes.
- Climate litigation disputes in the maritime industry will take place along a spectrum comprising;
 - Operational disputes, including contractual issues arising out of operational efficiency clauses – either specific to IMO/EU ETS, or related to carbon adjustment structures;
 - Technical disputes, including retrofit performance, bunker disputes, shipbuilding warranties;
 - Financial disputes, including interpretation of standards, KPI compliance;
 - Collaboration disputes, including anti-trust, intellectual property, information sharing disputes and pool disputes;
 - VCM disputes with regard to projects, the secondary market, offsets and insets – especially in the context of the absence of regulation and standardisation; and/or
 - Greenwashing disputes, which will be comparable to the general types of climate litigation, outlined above, including strategic litigation.

Key contacts



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