EMEA Contracts Expert Circle 2023

Shaping Contracts for a Resilient Future

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Climate change litigation - [Re]thinking our approach based on the latest developments

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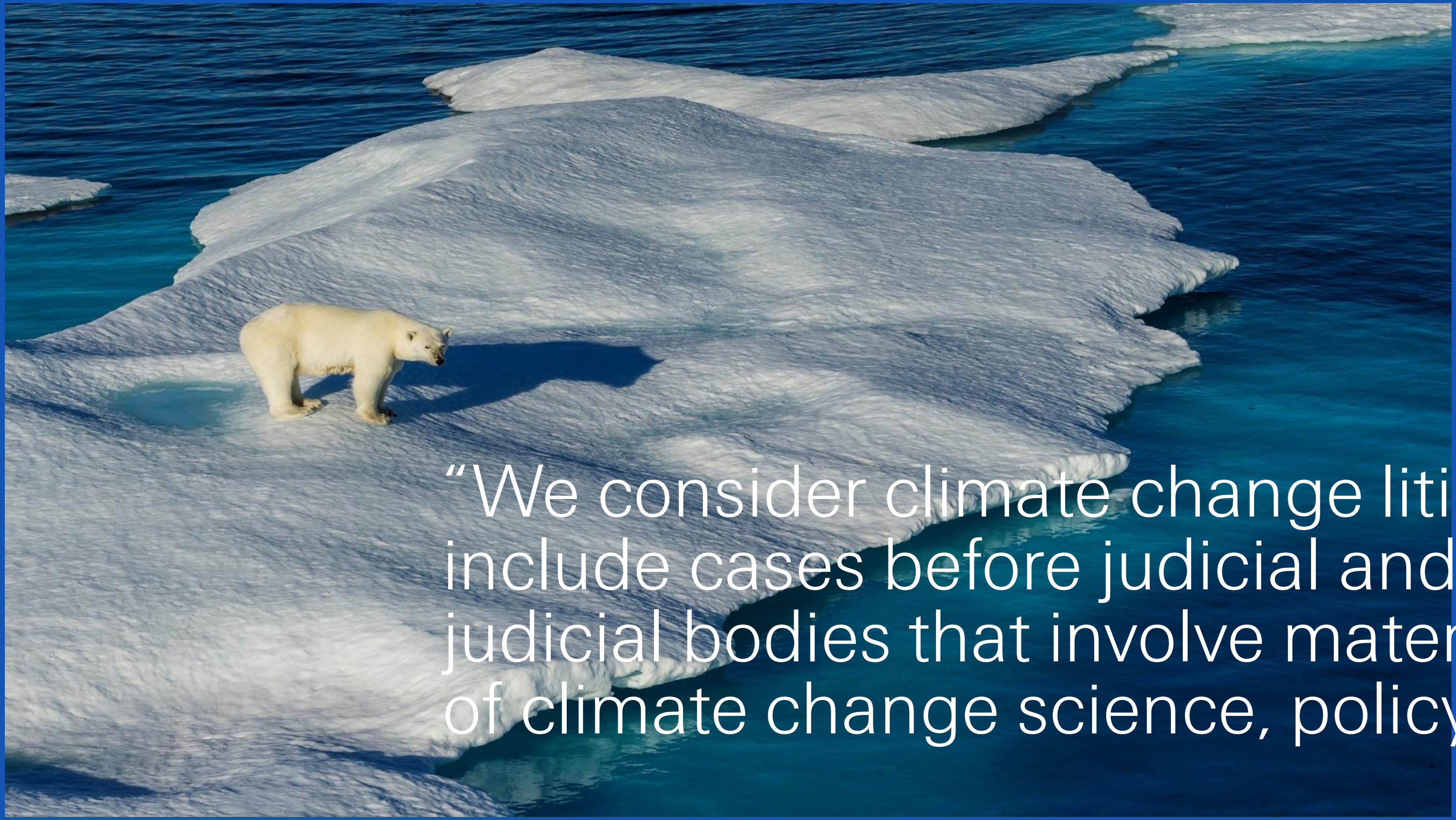
Table of Contents

What constitutes climate change litigation?



"We consider climate change litigation to include cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy, or law."

(Grantham Research Institute definition)

How many cases are there?

- As of May 31, 2022, 2,002 cases had been identified
- Majority have been filed in the US
- Other popular jurisdictions include Australia, the EU and the UK
- Starting to see more cases in the Global South (Latin America and the Caribbean, Asia Pacific, Africa)

- Source: Global Trends in Climate Change Litigation: 2022 Snapshot, published by the Grantham Research Institute on Climate Change and the Environment

Who is being sued?

Large GHG emitters – traditionally oil and gas companies, now seeing other industries targeted such as cement, energy, food and transportation

Banks, investment firms, pension funds, insurers - who finance or invest in the above

What are defendants being sued for?

- Contributing to climate change
- Violation of rights to safe environment
- Concealment/ Deception
- Mismanage-ment
- Failure to Adapt
- Providing financial support to emitters
- Climate washing

Outlook

- New reporting requirements will lead to an increase in litigation
- Wave of carbon offset litigation may be coming
- Likely increase in claims against professionals such as auditors, lawyers, accountants, insurance brokers
- Environmental justice movement may impact approvals of large GHG emission projects

Are climate change claims covered by insurance?

CGL Coverage Issues

- Was there an occurrence?
- How many occurrences were there?
- Was this a known loss? Was injury expected or intended?
- Was there bodily injury or property damage?
- What is the trigger of coverage?
- How should damages be allocated?
- Does the pollution exclusion preclude coverage?

CGL Coverage Litigation

AES v Steadfast

→ decided in favor of insurer

Aloha Petroleum Ltd. v. National Union Fire Insurance Co.

→ pending

Everest Premier Insurance Co. v. Gulf Oil Ltd. Partnership

→ dismissed

The Bank of England's Climate Biennial Exploratory Scenario exercise

D&O policies were the type of insurance **most likely to be exposed** and **to respond to climate litigation**, in particular to greenwashing claims and claims based on breach of fiduciary duties

The claim is not going to be that a company's D&Os contributed to climate change, but a claim that they ***failed to address, or adequately disclose the impact of climate change****.*

D&O Coverage Issues

- Conduct exclusion – coverage excluded for intentional, willful, deliberate misconduct
- Pollution exclusion
- BI exclusion
- Relief sought does not constitute loss under policy

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Insurer responses to climate change

Try to avoid underwriting entities who might face exposure

In October of 2022 the alliance Insure Our Future said last year that 62% of reinsurance companies have plans to stop covering coal projects, while 38% are now excluding some oil and natural gas projects.

Exclude climate change claims

LMA5570 – Climate Change Exclusion

Notwithstanding any other provision in this Policy or any endorsement hereto, this Policy excludes any loss, liability, cost or expense arising out of any allegation or claim that the (Re)Insured caused or contributed to Climate Change or its consequences.

For the purposes of this clause Climate Change means a change of climate which is attributed directly or indirectly to human activity.

Chancery Lane Project Clauses

The Chancery Lane Project (TCLP) is a collaborative initiative of international legal and industry professionals who work together to create new, practical contractual clauses ready to incorporate into law firm precedents and commercial agreements to deliver climate solutions.

https://chancerylaneproject.org/practice-areas/insurance/

Provide incentives for insureds to minimize exposure

Archie's Clause:

[The/ the] Policyholder may avail itself of a pro-rata return of premium of [10%], provided that during the relevant Policy Period:

a. the Policyholder has publicly reported and accurately disclosed to the Insurer all climate-related risks and opportunities relevant to its business in the areas of:

(i) governance; (ii) strategy; (iii) risk management; and (iv) metrics and targets,

in line with the TCFD Recommendations, and any additional environmental standards agreed between the Policyholder and Insurer (the Disclosures)...

The Policyholder confirms that the Annual Accounts for this policy year evidence that the following agreed targets have been met...

Cover it with conditions

Connor's Clause:

“It is a condition precedent to any liability of the Insurer under Section ● of this Policy, that the Insured has in place a Net Zero Transition Plan.”

Provide affirmative coverage

Seb & Abby's clause:

[Subject to the terms and conditions of this policy of insurance] The Insurer will indemnify the Insured against legal liability to pay compensation and claimants' costs and expenses in respect of Climate-related Injury or Climate-related Damage occurring within the Territorial Limits during the Period of Insurance in connection with the Business.

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Insurers might want to consider the following:

- Be informed
- Be proactive
- Know the risk as relevant to your portfolio
- Know what your insureds are doing to manage climate risks and educate them as to best practices

Any questions?

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Thank you!

Contact us

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