SLAUGHTER AND MAY/

PATH TO COP26: NET ZERO DISPUTES - KEY RISKS

Governance, Sustainability & Society – Part of the Horizon Scanning series

Against the backdrop of the Climate Change Act 2008, the 2015 Paris Agreement Goals and the upcoming 2021 UN Climate Change Conference (COP26), there is an increasing focus on a target of net zero carbon emissions by 2050, with states and businesses beginning to set often ambitious targets to reduce carbon emissions by 2030. The changes facing companies operating in the energy sector are therefore significant (and likely to be more so going forward) and while the regulatory and technological backdrop is evolving and uncertain, what is clear is the significant scope for disputes associated with energy transition.

Contractual claims	Tort claims	Public law actions	Shareholder actions

Contractual claims

Much of the civil litigation risk associated with energy transition is likely to arise in what is a relatively familiar format for most commercial enterprises - commercial contract disputes.

That is perhaps not surprising given the ground-breaking energy projects needed to help with energy transition are likely to be in the technological vanguard and involve complex equipment and supply chains (consider for example the ambitious arrangements being put in place for some of the leading bioenergy and carbon capture and storage systems (BECCS)). These are likely to result in additional risk, as companies venture into unchartered waters - some more literally than others, such as those using remote sea-beds for offshore wind farms - with projects that often require significant upfront capital commitments. The resulting potential for construction, cost and time issues may well lead to, not only greater potential for breach of contract, but potentially greater scrutiny of contractual warranties and indemnities in the associated legal documentation (and the associated likelihood of disputes regarding construction of the relevant provisions or breaches of the same).

Equally, managing the transition away from existing technologies to be phased out or down also carries with it the risk for potential contractual disputes. Such risks can arise from not only deal documentation regarding such assets (where liabilities in relation to such technologies may come under scrutiny) but also existing / legacy contracts - in respect of which care needs to be taken in assessing whether any amendments or terminations might be appropriate.

Finally, it is worth noting that the energy sector in general is perhaps marked out by the prevalence of joint ventures, in one form or another. Given the state of flux in the sector, companies that have previously worked well in partnership with each other may find themselves focussing on different goals (something that may be particularly exacerbated if there are volatile and / or depressed

oil prices that might occur as we depart from "peak oil"). This may result in joint venture agreements and associated management agreements (particularly those dealing with issues such as capital commitments, budgets and workplans) coming under increased scrutiny and being subject to potential challenge.

Tort claims

Even where there is no, or limited, potential for contractual liability, there is (as ever) a significant potential risk of tortious claims, such as negligence, and in a growing number of cases, fraudulent misrepresentation / deceit actions. These risks arise not only from commercial relationships but more generally with interested third parties.

In addition to the more usual commercial risks (for example potential liability for issues connected to supply chain / value chain due diligence), claims in this area may also arise from developing areas of the law.

In particular, recent cases like *Vedanta*[1] and *Okpabi*[2] have highlighted the potential for large groups of claimants trying to seek to establish parent company liability in relation to sustainability and environmental issues, which might previously have been regarded by many as issues that could have been potentially isolated within a corporate structure.[3] While this area of the law appears to still be developing, the increasing availability and prominence of third party litigation funding suggests that the risk of such claims may well increase.

Looking further into the future, while claims for damages based on a theory of tort done to the climate or planet, potentially as a public nuisance or breach of statutory duty claim, may develop over time, such claims are not yet well established under English law. Similar types of actions are, however, being brought in other jurisdictions, albeit with varying success. Examples include the proceedings brought in the French High Court by Friends of the Earth against Total[4] for alleged human rights violations relating to an oil project in Uganda and Tanzania, and those brought in Poland by Greenpeace against PGE GiEK[5], demanding that PGE GiEK halt investment in fossil fuels and achieve net zero from its existing coal plants by 2030. Most recently, in a group action brought by both NGOs and individuals, a Dutch court ruled that Royal Dutch Shell must cut its CO_2 emissions by 45% compared to 2019 levels.[6]

Public law actions

Public, as opposed to private, law actions are also an issue that companies need to have on their radar. While potentially of less direct impact (in terms of damages for example), successful public law challenges to relevant legislative provisions / government actions (such as targeting the government and its requirement to achieve net zero by 2050) can still have a significant impact on businesses operating in the relevant space.

One recent action of this type has been brought in the UK High Court by three individuals[7] against the Oil and Gas Authority (OGA) and the Business Secretary, in which the applicants are seeking judicial review of the OGA's updated strategy to maximise economic recovery of oil and gas, required under the Petroleum Act 1998. The applicants argue

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[1] *Vedanta Resources PLC and another (Defendants/Appellants) v Lungowe and others (Claimants/Respondents)* [2019] UKSC.

[2] *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3.

[3] The full impact of these cases is beyond the scope of this note, but please see our article on these decisions and parent company liability.

[4] Nanterre High Court of Justice, *Les Amis de la Terre v. Total* [2020]. Note that on 30 January 2020 the Nanterre High Court of Justice ruled that it was not competent to hear the case, and held that the case should be brought before the commercial court.

[5] Regional Court of Lodz, *Greenpeace Poland v. PGE GiEK*, (filed on 11 March 2020).

[6] Hague District Court, the Netherlands, *Milieudefensie et al. v. Royal Dutch Shell plc*. 26 May 2021.

[7] The three applicants are being supported by Uplift, which is coordinating Paid to Pollute, a new campaign supported by a coalition of environmental groups including Greenpeace UK, Friends of the Earth Scotland and 350.org. https://paidtopollute.org.uk/news/campaigners-launch-legal-challenge/#_ftn1

that the strategy is only achievable due to government subsidies, and therefore does not maximise the revenue from oil and gas extraction. They also argue that it will lead to greater oil and gas production, in conflict with achieving net zero emissions by 2050.

Shareholder actions

Shareholder actions, despite the relatively high thresholds involved, have gained prominence in England in recent years. Looking forward, it is possible that such actions might be brought in relation to energy transition disputes, particularly, with increased concerns over "greenwashing", and growing expectations around climate action and ESG issues more generally (often concerning calls for forward looking, proactive statements and policies). Despite the lack of successful actions to date, companies should keep in mind section 90 and 90A Financial Service and Markets Act 2020 (FSMA) claims for damages relating to misleading statements by listed companies in prospectuses, financial statements, circulars or other announcements. Scrutinising public disclosures and ensuring transparent, but precise, communications with stakeholders therefore remains as important as ever.

Equally, there remains the prospect of claims for breaches of directors' duties, whether that be by the company itself or via a derivative action (in the company's name) – although, as mentioned above, very high hurdles are likely to be faced by anyone seeking to bring a derivative action on behalf of a company.

Looking forward…

As we move towards 2050, and any interim goals that might be set for 2030, expectations around action towards net zero are likely to harden. Energy companies should be more aware than ever of the rising risk of civil litigation, shareholder actions and the potential for further regulation in this area.

In an atmosphere where government and stakeholders are placing greater focus on carbon emissions, businesses should remain vigilant, engage in detailed planning and risk management strategies to reduce uncertainty, and be aware that with change comes a heightened risk of energy transition disputes.

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