ESG and Disputes

Flash in the Pan or Game Changer?

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CHAPTER 4

Commercial Dispute Resolution: ESG *Ante Portas*?—Observations from the Board of Directors' Perspective

Isabelle Romy[*]

§4.01 INTRODUCTION

The acronym ESG stands for Environment, Social and Governance and refers to the criteria used to evaluate companies and assess their sustainability impact beyond a sole focus on shareholders' return. While ESG issues are not particularly new, in recent years, they have become a key concern for all companies, whether listed or not, in all sectors of the economy. The pressure on corporations to integrate ESG criteria into their business strategy, to act in a more socially responsible manner and to be more transparent about their actions is coming from all sides: employees, investors, shareholders, the general public, nongovernmental organizations (NGOs), regulators and legislators.

In particular, there is a growing expectation that companies will align their strategies and operations with the goals of the Paris Agreement on climate change, even if national legislators have not yet set mandatory and binding targets for them to reduce their greenhouse gas emissions.[1]

It is the responsibility of a company's board and management to decide which ESG issues are most relevant to the company's business, to consider and balance the opportunities and risks, and to integrate these ESG issues into the business strategy,

* I would like to thank Mr. Gaétan Girard, MLaw and attorney-at-law, assistant to the Chair of Law at the EPFL, for his precious help in preparing and finalizing this contribution.

1. Isabelle Romy, *Aperçu et portée des exigences légales en matière de durabilité environnementale pour les entreprises suisses*, in: DEP 2023 747, p. 750.

including emerging and potentially disruptive trends. In addition, proper risk management requires consideration of ESG-related legal risks. The extent and nature of these risks can be inferred and illustrated by analyzing the current wave of ESG litigation against governments, companies, and directors.

This chapter therefore provides an overview of the current litigation landscape based on a few landmark cases related to climate change in order to illustrate some of the legal issues at stake and their implications from the perspective of the board of directors of a Swiss company.

§4.02 BRIEF OVERVIEW OF THE BOARD OF DIRECTORS' ROLE AND OBLIGATIONS UNDER SWISS LAW

[A] In General

In a company limited by shares, the most common legal form in Switzerland, the board of directors plays a crucial role in the implementation and management of ESG issues.

Under Swiss law, the board of directors of a limited company manages the company's business unless it has delegated this responsibility (Article 716 paragraph 2 of the Swiss Code of Obligations (CO)[2]). Even in the event of delegation, the Board of Directors retains the nontransferable and inalienable duties set forth in Article 716*a* CO, including the power to conduct the business of the company, to issue the necessary directives, to determine the organization of the company and to supervise the persons entrusted with the management of the company to ensure compliance with the law, the articles of association, the internal regulations and the directives. The members of the Board of Directors also owe a duty of care and loyalty; they must perform their duties with due diligence and faithfully safeguard the interests of the company and its various stakeholders (Article 717 CO).[3]

[B] With Respect to ESG Issues Specifically

The scope of the board's duty of care with respect to ESG issues is not precisely defined in the above-mentioned provisions and essentially depends on the nature of the company's activities and business. However, good governance practices and new transparency and due diligence duties imposed on certain companies are clarifying these contours.

2. Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of March 30, 1911 (RS 220; CO).
3. Christoph B. Bühler, in: Lukas Handschin (ed.), *Zürcher Kommentar, Obligationenrecht, Art. 698-726 und 731b OR*, 3d ed. 2018, Article 717 CO no. 4; Jean-Luc Chenaux & Mathieu Blanc, *§ 15 Corporate Governance*, in: *Berner Kommentar, Das Aktienrecht, Kommentar der ersten Stunde*, 2023, Nos. 101 et seq.; Henry Peter & Francesca Cavadini, in: Pierre Tercier, Marc Amstutz & Rita Trigo Trindade (ed.), *Commentaire romand—Code des obligations II*, 2d ed. 2017, Article 717 CO Nos. 1 et 3.

The inalienable duty to exercise overall management of the company includes ensuring that ESG issues relevant to the company's operations, both in terms of opportunities and risks, are properly considered and integrated into the company's business strategy.[4] However, defining an ESG strategy and embedding it into a company's business strategy is a complex endeavor with many challenges. One major challenge is the rapidly changing regulatory environment, both internationally and domestically. As a result, practices that are voluntary today may become mandatory tomorrow and recommended or common practices turn into greenwashing. In addition, there is currently no universally applicable ESG regulatory framework, either hard or soft law, that companies can refer to when defining, managing and reporting on their ESG commitments and engagement, but rather a wide range and variety of guidelines, principles and recommendations issued by governmental bodies, private associations or NGOs.[5]

The board of directors is responsible for ensuring that the company complies with the law (Article 716*a* paragraph 1 nos 2 and 5 CO). In the area of environmental protection, in particular, Swiss companies are directly affected by numerous environmental standards. For example, the Federal Law on Environmental Protection (EPA)[6] imposes various obligations on companies, including the obligation to prevent pollution and to reduce it at source to an acceptable economic level, taking into account the state-of-the-art and operating conditions (Article 11 paragraph 2 of the Law on the Protection of the Environment). These regulations are well known, but the legal framework for sustainability, especially with regard to climate change, is developing rapidly in Switzerland and abroad. For companies with international operations, identifying and updating a comprehensive inventory of applicable regulations becomes a real challenge. Depending on the size and activities of the company, entire teams are dedicated to regulatory monitoring to identify the entry into force of new mandatory standards and to anticipate legislative changes that may affect the company.

In addition, the board must ensure that an appropriate system is in place to assess, manage and mitigate risks, including ESG risks.[7] Despite the lack of a coherent and stable regulatory framework, ESG risks can generally be grouped into six categories:

- physical risks related to climate change that impact the production of goods;
- reputational risks for companies that do not adapt their business model quickly enough or which sell green products and services without ensuring or demonstrating the veracity of their claims;

4. Chenaux & Blanc, *supra* n. 3, Nos 127 et seq.; Rolf H. Weber & Andreas Hösli, *Corporate Climate Responsibility – aktienrechtliche Haftungsrisiken für den Verwaltungsrat?*, RSJ 116/2020 605, p. 608.
5. Among the most prominent are those of the Global Reporting Initiative, the Task Force on Climate-Related Financial Disclosures, and the UN Sustainable Development Goals, which serve as guidelines for states and regional governments, but are also widely used by private companies to define and implement their sustainability strategy.
6. Federal Act of October 7, 1983 on the Protection of the Environment (RS 814.01; EPA).
7. Chenaux & Blanc, *supra* n. 3, Nos. 129 et seq.; Henry Peter & Aurélien Rocher, *The Normative Effects of ESG Expectations on Companies and their Directors*, RSDA 4/2023 453, p. 468; Weber & Hösli, *supra* n. 4, pp. 608 and 611.

- transition risks, i.e. financial risks arising from policy adaptation measures or the costs of technological adaptation;
- regulatory risks, such as greenwashing,[8] consumer protection, stranded assets and the impact on capital requirements;
- financial risks, particularly access to capital markets and credit;
- legal risks, including the risk of being sued or the target of a regulatory enforcement action.

The Swiss Financial Market Supervisory Authority (FINMA) has clarified the nature of these risks for financial institutions in its Supervisory Communication 05/2021,[9] stating that:

> For financial institutions, the consequences of climate change may lead to significant financial risks in the long term. For market participants, climate change poses physical risks, such as climate-related natural disasters and their associated costs. On the other hand, financial institutions may be indirectly affected by so-called transition risks resulting from, among other things, climate policy measures. For example, illiquid assets in affected sectors could be exposed to increased valuation risks on the balance sheets of financial institutions.

The definition of these risks can also be applied to companies in the real economy, which face similar physical, transitional, and financial risks.

After identifying the relevant risks according to the company's business model, the board of directors must ensure that these risks are properly assessed, in particular regarding their impact on the business strategy and that they are appropriately mitigated (*see* Article 961*c* paragraph 2 CO). More specifically, Articles 964*a* et seq. CO, which came into force on January 1, 2022, require public interest companies to describe in their nonfinancial report their main environmental and climate risks and how they are managed.

Failure to comply with these obligations may expose the company and/or its board of directors to civil liability actions[10] or criminal sanctions,[11] in addition to damaging the company's reputation and that of its directors and undermining consumer and employee confidence.

8. Recommendations have been issued notably by Swiss Banking and the Swiss Financial Market Supervisory Authority (FINMA) to enhance the transparency of ESG products and services. A proposal for a plan and measures to prevent greenwashing is expected from the Federal Department of Finance (FDF) by the end of August 2024, unless the financial sector implements effective self-regulation embodying the position of the Federal Council expressed in December 2022 before that time. In Europe, the Commission adopted a proposal for a directive on the substantiation and communication of explicit environmental claims ("Green claims" directive) in March 2023, which envisages detailed requirements regarding the substantiation and communication of environmental claims. This directive is likely to come into force by the end of 2024 and apply to third countries from 2027.
9. FINMA Guidance 05/2021 of November 3, 2021, *Preventing and combating greenwashing*, n. 3.
10. *See, e.g.*, Marie-Christine Kaptan, *Klimawandel – Haftungsrisiken und Handlungsbedarf für Schweizer Unternehmen*, RSDA 2022 586; Andreas Hösli & Rolf H. Weber, *Klimaklagen gegen Unternehmen, Internationale Entwicklungen und deren Bedeutung für die Schweiz*, Jusletter May 25, 2020, Nos. 18 et seq. et 41 et seq.
11. Article 325ter of the Swiss Criminal Code of December 21, 1937 (RS 311.0; SCC).

§4.03 ESG LITIGATION RISKS

[A] ESG Strategic Litigation on the Rise

As reported in other contributions, litigation is increasingly being used around the world by NGOs, activists, and individuals as a strategic tool to advance or challenge public policy, raise public awareness, create social change, and change government and corporate behavior.[12] The number of strategic climate cases has increased significantly since the signing of the Paris Agreement on climate change in 2015,[13] and so far, there are no signs that this trend will stop or change.

Furthermore, other ESG issues, such as human rights, access to water and deforestation, are also gaining prominence and prompting litigation.

Companies and their boards should monitor the ESG litigation landscape, even if they are not in an industry or sector at risk, for the following non-exhaustive reasons:

- Courts around the world are shaping public policy on climate change and accelerating the transition to net zero carbon emissions by forcing their governments to take stronger action to address climate change. While not directed at private entities, climate change lawsuits against governments are relevant to companies because they have the potential to accelerate the transition to a carbon-neutral economy and lead to the adoption of more detailed and stringent CO_2 emission targets at the national level, which will have a ripple effect throughout the economy.
- Actions against companies that seek to enforce faster reductions in CO_2 emissions can also change corporate behavior and accelerate the energy transition, particularly by defining the scope and extent of the duty of care that companies must exercise. This, in turn, will allow companies to better anticipate and assess their own reputational, compliance, legal and financial risks.
- Understanding the evolution of case law can help companies and their boards take appropriate compliance measures to avoid litigation, which can be detrimental to the value of the company.[14]

12. United Nations Environment Programme (2023); Global Climate Litigation Report: 2023 Status Review, p. 7; Joana Setzer et al., *Climate Change Litigation and Central Banks*, in: Legal Working Paper Series (ed. European Central Bank), No. 21, December 2021, pp. 9 et seq.; Félise Rouiller, *Le contentieux climatique contre l'Etat: Aspects procéduraux de droit public suisse et américain*, 2023, Nos. 201 et seq.; Isabelle Romy, *Impact of ESG on Legal Risks: ESG Litigation on the Rise*, in: Purpose in Corporate Governance, CEDIDAC, 2024, p. 45 (to be published).
13. Joana Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2023 Snapshot, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023, p. 2. The total number of cases was over 2,300 in May 2023. Outside the United States, Australia, the UK and the EU remain the jurisdictions with the highest volume of cases.
14. *See* Misato Sato et al., *Impacts of Climate Litigation on Firm Value*, Centre for Climate Change Economics and Policy, Working Paper No. 421, 2023, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf (accessed on February 21, 2024).

- Monitoring ESG litigation hence enables companies and their boards of directors to better understand and mitigate their own reputational, compliance, legal and financial risks.[15]

In the following, we will review some landmark cases against governments (*infra* section §4.03[B]) and companies (*infra* §4.03[C]) to identify some trends and developments and formulate some observations in the form of lessons learned to date (*infra* §4.04).

[B] Strategic Actions Against Governments

Others have described the main climate lawsuits against governments and corporations, and I refer to them and other reports to avoid repetition.[16] Suffice it to say here that several courts in different countries have ordered their own governments to accelerate the reduction of CO_2 emissions in order to better protect their citizens. Examples of such rulings include *Urgenda* **Foundation** *v. State of* ***the Netherlands***,[17] *Friends of the Irish Environment CLG v. The* ***Government*** *of Ireland*[18] and ***Neubauer*** *et al. v. Germany*.[19]

At the supranational level, the European Court of Human Rights (ECtHR) is due to rule on several cases, including the case brought by the association KlimaSeniorinnen Schweiz against Switzerland for violation of Articles 2 and 8 of the European Convention on Human Rights (ECHR).[20] This case deserves more attention, not only because Switzerland is directly involved but also because it could become a landmark case, as the Court will determine whether the applicants can be regarded as actual or potential victims, within the meaning of Article 34 of the Convention, of a breach of Articles 2 and 8 ECHR by reason of the alleged failure of the Swiss authorities to protect them effectively against the effects of global warming.

15. Romy, *supra* n. 12, p. 44-45.
16. *See* references in nn. 12 and 13 and the other contributions in this volume.
17. The judgment of the Court of First Instance of June 24, 2015 as well as the decision on appeal by the Hague Court of Appeal of October 9, 2018 and the judgment of the Dutch Supreme Court of December 20, 2019 are published in English under https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ (accessed on February 21, 2024). For a detailed analysis of the judgment of the Dutch Supreme Court, *see* Romy, *supra* n. 12, pp. 15 et seq.
18. Judgment of the Irish Supreme Court of July 31, 2020, available at http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/ (accessed on February 21, 2024). For a short summary of the judgment of the Irish Supreme Court, *see* Romy, *supra* n. 12, pp. 19 et seq., and for a detailed analysis of the judgment *see* Charlotte Renglet, *The Decision of the Irish Supreme Court in Friends of the Irish Environment v. Ireland: A Significant Step Towards Government Accountability for Climate Change?*, Carbon & Climate Law Review, Vol. 14, No. 3 (2020), pp. 163-176, available at https://www.jstor.org/stable/27076686 (accessed on February 21, 2024) DOI: 10.21552/cclr/2020/3/5.
19. Judgment of the Bundesverfassungsgericht of March 24, 2021, BVerfG, Beschluss des Ersten Senats vom 24. März 2021 – 1BvR 2656/18, available in German and English at https://www.bverfg.de/e/rs20210324_1bvr265618.html (accessed on February 21, 2024). For an analysis of the judgment of the Bundesverfassungsgericht, *see* Romy, *supra* n. 12, pp. 17 et seq.
20. ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (App. No. 53600/20).

The applicants are, on the one hand, an association under Swiss law for the prevention of climate change whose members are women with an average age of 73; among them, 650 are over 75, and, on the other hand, four elderly women aged between 78 and 89 who complain of health problems, worsening during heatwaves, which undermine their living conditions and general health.[21]

In 2016, they submitted a request to the Federal Council, the Federal Office for the Environment (FOEN) and the Federal Department of the Environment, Transport, Energy and Communications (DETEC), pointing to various flaws in the area of climate protection and requesting the authorities to take the necessary measures to meet the 2030 goal set by the 2015 Paris Agreement on climate change (COP21), signed and ratified by Switzerland.[22]

In a decision of April 25, 2017, the DETEC declared the request inadmissible, finding that the applicants were not individually affected in terms of their rights and could not be regarded as victims.[23] On November 27, 2018, the Federal Administrative Court dismissed an appeal filed by the applicants, finding that women over 75 were not the only population group affected by climate change.[24] The applicants filed an appeal to the Federal Supreme Court against the decision of the Federal Administrative Court, alleging a violation of the constitutional guarantees of the rights to life and protection of private and family life (Article 10 paragraph 1 and Article 13 paragraph 1 of the Swiss Federal Constitution[25] and Article 8 ECHR).[26]

In a judgment of May 5, 2020, the Swiss Federal Supreme Court dismissed the appeal, considering that at the current stage of warming and in view of the objective set by the Paris Agreement on climate change, the plaintiffs were not affected with sufficient intensity required by Article 25*a* of the Federal Act on Administrative Procedure[27] and did not have standing to appeal.[28] The Federal Supreme Court further emphasized that proposals for the implementation of a specific public policy in an area currently under discussion can, in principle, be introduced through the democratic participation of Swiss constitutional law.[29]

On November 26, 2020, the applicants lodged a complaint against Switzerland with the ECtHR, submitting that Switzerland has failed to fulfil its positive obligations to protect life effectively (Article 2 ECHR) and to ensure respect for their private and family life, including their home (Article 8 ECHR).[30] They allege, in particular, that the

21. Press release ECHR 142 (2022) issued by the Registrar of the Court on April 29, 2022, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13649%22]} (accessed on February 21, 2024).
22. Judgment of the Swiss Federal Administrative Court of November 27, 2018, A-2992/2017 para. A; Judgment of the Swiss Federal Supreme Court of May 5, 2020, ATF 146 I 145, para. A.
23. Press release ECHR 142 (2022), *supra* n. 21.
24. *Ibid.*; Judgment of the Swiss Federal Administrative Court, *supra* n. 22, consid. 6 and 7.
25. Federal Constitution of the Swiss Confederation of April 18, 1999 (RS 101; Cst.).
26. Press release ECHR 142 (2022), *supra* n. 21; Judgment of the Swiss Federal Supreme Court, *supra* n. 22.
27. Federal Act of December 20, 1968 on Administrative Procedure (RS 172.021; APA).
28. ATF 146 I 145 para. 5.
29. ATF 146 I 145 paras. 4.3 and 5.5.
30. ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (App. No. 53600/20); Press release ECHR 142 (2022), *supra* n. 21.

positive obligations under the Convention provisions should be considered in the light of the principles of precaution and intergenerational fairness provided for under international environmental law. In this context they complain that Switzerland has failed to introduce suitable legislation and to put appropriate and sufficient measures in place to reach the targets for combating climate change.[31] They further complain that they have not had access to a court within the meaning of Article 6 ECHR, alleging that the domestic courts have not properly responded to their requests and have given arbitrary decisions affecting their civil rights, particularly by totally rejecting their specific situation of vulnerability in relation to heatwaves.[32] Lastly, the applicants complain of a violation of Article 13 ECHR that protects the right to an effective remedy, arguing that no effective domestic remedy is available to them for the purpose of submitting their complaints under Articles 2 and 8 ECHR.[33]

On April 26, 2022, the Chamber to which the case had been allocated relinquished jurisdiction in favor of the Grand Chamber of the ECtHR,[34] which heard the case on March 29, 2023.[35]

Together with *Duarte Agostinho and Others v. Portugal and Others*,[36] *KlimaSeniorinnen Schweiz and Others v. Switzerland* is one of the first climate change cases before the ECtHR. These cases deserve special attention as, for the first time in the context of climate change, the ECtHR is asked to rule, *inter alia*, on the standing to bring a complaint (who is a victim of climate change?), the protection offered by Article 2 ECHR (right to life) and what positive obligations the states must fulfill to protect human rights in relation with climate change. The ECtHR may, hence, play a decisive role in shaping the protection offered by human rights in climate change and, consequently, the future of climate litigation against states.

[C] Strategic Actions Against Corporations

The number of strategic ESG lawsuits against companies has also increased in recent years.[37] The cases are diverse and include civil actions for liability (damages) and/or for injunction.[38]

[1] Milieudefensie et al. v. Royal Dutch Shell PLC

On May 26, 2021, the Hague District Court issued a groundbreaking ruling by which it directed the Shell Group to reduce its net direct and indirect greenhouse gas emissions

31. Press release ECHR 142 (2022), *supra* n. 21.
32. *Ibid.*
33. *Ibid.*
34. *Ibid.*
35. Press release ECHR 094 (2023) issued by the Registrar of the Court on March 29, 2023, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13649%22]} (accessed on February 21, 2024).
36. ECtHR, *Duarte Agostinho and Others v. Portugal and Others* (App. No. 39371/20).
37. Setzer & Higham, *supra* n. 13, pp. 2 and 35 et seq.
38. Romy, *supra* n. 12, p. 55.

by 45% in 2030 (compared to 2019) worldwide, in line with the Paris Agreement and the imperatives of climate science.[39] The reduction obligation covers the entire energy portfolio of the Shell Group worldwide and the aggregate volume of all its emissions (scopes 1 to 3), regardless of the regulations of the states in which the subsidiaries are located and the energy demand. Shell has appealed the judgment of first instance, and the case is pending.

One of the interests of this judgment lies in the Court's definition of the duty of care expected of Shell in relation to the fight against climate change.[40] The injunction requiring Shell to reduce its net direct and indirect greenhouse gas emissions worldwide by 45% by 2030 (compared to 2019) is based on general principles of Dutch tort law, embodied in the unwritten and flexible standard of the "prudent and reasonable person." According to the Hague District Court, this unwritten duty of care must be interpreted on the basis of fourteen elements,[41] which include Articles 2 and 8 ECHR. The Court stated that although human rights are not directly applicable against Shell, they can be taken into account when interpreting Shell's unwritten standard of care.[42] The Court found that it is certain that the Netherlands is threatened by climate change, and it referred to the case of *Urgenda Foundation v. State of* the *Netherlands* to find that the protection of human rights includes the dangers of climate change.[43] Articles 2 and 8 ECHR protect Dutch residents from the consequences of dangerous climate change caused by CO_2 emissions, which pose potentially serious and irreversible risks to the human rights of Dutch residents and the inhabitants of the Wadden Sea region.[44]

The Court stated further that the duty of care of Shell must be interpreted in the light of international "soft-law" instruments, such as the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights (UNGP), which impose a (nonbinding) responsibility on companies to respect human rights and formulate policies accordingly.[45]

Although the decision is not final, the court's ruling on the scope and extent of the duty of care expected of Shell is likely to set a precedent and pave the way for further decisions of this kind, especially as legislators around the world are tightening up the duty of care owed by companies.[46]

39. Judgment of the Hague District Court C/09/571932/HA ZA 19-379, ECLI:NL:RBDHA:2021:5339, of 26 May 2021, *Milieudefensie et al. v. Royal Dutch Shell PLC*. The Hague District Court issued an unofficial English translation of the judgment available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf (accessed on February 21, 2024).
40. *See* Esmeralda Colombo, Unpacking Corporate Due Diligence in Transnational Climate Litigation: A Planetary Perspective, ex/ante S1/2023 35, pp. 42 et seq.
41. Judgment of the Hague District Court of 26 May 2021, *supra* n. 40, paras. 4.4.1 et seq.
42. *Ibid.*, para. 4.4.9.
43. *Ibid.*, para. 4.4.10.
44. *Ibid.*, paras. 4.4.6 and 4.4.10.
45. *Ibid.*, paras. 4.4.11 et seq.
46. *See* the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, which must be formally approved by the Council and the European Parliament.

[2] Asmania et al. v. Holcim AG

In Switzerland, four inhabitants of the Indonesian island of Pari supported by three NGOs (HEKS/EPER [Switzerland], the European Center for Constitutional and European Human Rights [ECCHR] and WALHI [Indonesia]) sued Holcim AG in July 2022 by filing a request for conciliation before the Justice of the Peace of the Canton of Zug. The statement of claim was filed in November 2023, and the case is pending.[47]

The plaintiffs argue that Holcim is the largest cement producer in the world, that cement production worldwide contributes to 17% of the direct industrial greenhouse gas emissions, that Holcim contributes its part to 0.42% of the global CO_2 emissions and that according to Holcim's own sustainability report, its CO_2 emissions have increased. They allege further that climate change contributes to sea level rise that threatens their existence and economic prosperity. Based on Article 28 CC[48] (protection of personality rights) and Articles 41 CO and 49 CO (liability for tort), the plaintiffs request Holcim to pay a proportional compensation for climate change-related damages on Pari to reduce its CO_2 emissions by 43% by 2030, and by 69% until 2040, compared to 2019 levels (or according to findings of climate science in order to limit global warming to 1.5°C) and to pay a financial contribution to adaptation measures on Pari.[49]

The claim against Holcim is seen as novel and unprecedented as it combines two approaches, i.e., the reduction of greenhouse gases and compensation.[50]

[3] FossielVrij NL v. KLM Royal Dutch Airlines

In December 2021, KLM launched its advertising campaign "Fly Responsibly," which focuses on aviation and sustainability. In this campaign, KLM claimed that its and the industry's path to the "net-zero ambition" consisted of fleet renewal, operational improvements, CO_2 offsets and "sustainable aviation fuels" (SAF).[51] The advertising campaign included the following slogans:[52]

> With Fly Responsibly, KLM is taking the lead in creating a more sustainable future for aviation.
>
> The aviation industry has the ambition to achieve just zero CO_2 emissions by 2050 and to underline this promise, we are developing our own path.

47. https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/ (accessed on February 21, 2024).
48. Swiss Civil Code of December 10, 1907 (RS 210; CC).
49. https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/ (accessed on February 21, 2024).
50. *Ibid.*
51. Petition filed on July 7, 2022 by FossielVrij NL against KLM with the Amsterdam District Court, No. 175, p. 58, an unofficial English translation of which is available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220707_17244_petition.pdf (accessed on February 21, 2024).
52. Petition filed on 7 July 2022 by FossielVrij NL against KLM with the Amsterdam District Court, *supra* n. 51, No. 176, p. 59.

On April 8, 2022, the Dutch National Advertisement Code Commission ruled that elements of the KLM "Fly Responsibly" campaign violated the code's provisions on misleading advertising, especially those elements referring to "climate neutrality" or "CO_2ZERO."[53] The Commission noted, *inter alia*, that whilst the reforestation program in which KLM invests meets certain recognized theoretical standards (e.g., Gold Standard certification), there exist doubts in practice and amongst experts that emission reduction certificates purchased by KLM result in the full and permanent compensation "down to zero" of personal flight footprints in practice, as suggested by the campaign. Therefore, the absolute environmental claims of "CO_2-neutrality" and "CO_2ZERO" must be accompanied by sound, independent, verifiable and generally recognized evidence that, in practice, there is also guaranteed full compensation.[54]

On July 6, 2022, FossielVrij NL filed a lawsuit against KLM in the Amsterdam District Court seeking: (i) a declaration that the advertising statements made by KLM suggesting that flying can be or become sustainable are misleading and unlawful; (ii) 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; and (iii) a rectification of the advertisements, for example as follows: "The only way to meaningfully reduce the impact of flying on the climate and contribute to achieving the climate targets is by not flying."[55] As of today, the case is still pending.

[4] *Climate Alliance Against FIFA*

In November 2022, Climate Alliance Switzerland and four foreign organizations and NGOs filed five independent complaints with the Swiss Commission for Fairness against FIFA. They alleged that the claims according to which the 2022 FIFA World Cup in Qatar was the first carbon-neutral World Cup were false and misleading.[56] In its decision dated June 5, 2023, the Commission approved the complaints. It advised FIFA to refrain from making unsubstantiated claims in the future, in particular, that the 2022 World Cup in Qatar would be neutral for the climate, unless it can provide, at the time of communication, full proof of the calculation, using generally accepted methods, of all CO_2 emissions caused by the tournament and, second, proof that these CO_2 emissions have been fully offset.[57]

53. Romy, *supra* n. 12, p. 25 s.; https://climatecasechart.com/non-us-case/fossielvrij-nl-v-klm/ (accessed on February 21, 2024).
54. https://climatecasechart.com/non-us-case/fossielvrij-nl-v-klm/ (accessed on February 1, 2024).
55. Petition filed on July 7, 2022 by FossielVrij NL against KLM with the Amsterdam District Court, *supra* n. 51, p. 139 ss; Romy, *supra* n. 12, p. 26.
56. https://www.faire-werbung.ch/de/swiss-commission-for-fairness-upholds-complaints-against-fifa/ (accessed on February 21, 2024).
57. https://www.faire-werbung.ch/de/swiss-commission-for-fairness-upholds-complaints-against-fifa/ (accessed on February 21, 2024). The full text of the decision is available in French at https://www.faire-werbung.ch/wp-content/uploads/2023/08/No_188_22.pdf (accessed on February 21, 2024).

Although the Commission has no power to impose sanctions, the "name and shame" effect of its decisions cannot be underestimated.

At the beginning of September 2023, Climate Alliance Switzerland asked the State Secretariat for Economic Affairs (SECO) to publicly condemn FIFA's behavior or even file a criminal complaint against it. The SECO refused to do so, as FIFA had withdrawn its allegations of climate neutrality.[58]

In addition, on July 6, 2023, the Consumer Protection Foundation filed eleven complaints, eight with the SECO and three with the Swiss Commission for Fairness, against eight companies, including Coca-Cola Switzerland, Hipp, Swisscom and Elite-flights, for misleading "green" claims in advertisements in violation of Article 3 of the Unfair Competition Act (UCA).[59,60]

[5] ClientEarth, Surfrider Foundation Europe and Zero Waste France v. Danone

ESG litigation is not only about climate warming but also expands to other environment-related issues. For instance, in January 2023, three environmental groups filed a lawsuit in the Paris Tribunal Judiciaire against Danone, the producer of Evian water and Activia yoghurts, regarding the use of plastic packaging. The plaintiffs argue that Danone is not doing enough to reduce its plastic footprint and that its "vigilance plan" is completely silent on plastics despite Danone being one of the world's top ten plastic polluters.[61]

The case is pending and likely to become an important milestone in plastics-related litigation since it differs from most ESG cases insofar as the plaintiffs do not seek damages for harm done or for misleading claims on sustainability but want to demonstrate that the company's overall strategy on plastic is not sufficient given the global risks to health and the environment posed by plastic waste.

§4.04 SOME LESSONS LEARNED (TO DATE)

These few examples illustrate a global phenomenon—the use of litigation as a strategic tool—that is growing in the face of the climate emergency and the responses of governments and businesses, which are deemed insufficient. A review of recent court rulings in Europe and of lawsuits against states and companies allows us to make the following observations in the form of lessons learned to date, with the caveat that they may not be definitive in this rapidly evolving context.

58. https://avocatclimat.ch/greenwashing-de-la-fifa-la-frilosite-de-la-confederation/#pll_switcher (accessed on February 21, 2024).
59. Federal Act of December 19, 1986 on Unfair Competition (RS 241; UCA).
60. https://www.konsumentenschutz.ch/medienmitteilungen/zwoelf-beschwerden-wegen-greenwashing/ (accessed on February 21, 2024).
61. Romy, *supra* n. 12, p. 25; https://www.zerowastefrance.org/zero-waste-france-et-2-autres-ongs-assignent-danone-en-justice-pour-son-utilisation-de-plastique/ (accessed on February 21, 2024).

[A] Compliance with Mandatory Public Law Is Necessary but Not Sufficient

Compliance with the law and regulation is not sufficient to shield a company from liability or injunction claims, as liability can be based on unspecified duty of diligence, voluntary commitments and expectations that exceed existing mandatory duties.

This was exemplified in the judgment of May 26, 2021, in the case *Milieudefensie et al. v. Royal Dutch Shell PLC:* for the first time, a parent company was obliged to decarbonize all the companies it controls, regardless of the regulations of the states in which the subsidiaries are located and regardless of the energy demand.[62] Although Shell has no direct legal human rights obligations, its human rights responsibilities influenced the court's interpretation of the company's duty of care. In particular, the court referred to the UNGP, a global standard consolidating existing international human rights law, which requires companies to identify, prevent and address human rights impacts related to their activities.[63]

Expectations, voluntary commitments, and soft law are therefore becoming increasingly important in that they shape the scope and extent of the indeterminate duty of care or due diligence imposed on companies and supplement the lack of clear substantive obligations in national legislation.

[B] Voluntary or Mandatory Disclosures Fuels Litigation

Transparency of information, particularly in companies' sustainability reports, fuels litigation, as the companies' strategy and disclosures are scrutinized by NGOs, activists and regulators, who verify that companies' actions are consistent with ESG goals and targets that they have voluntarily set for themselves. Plaintiffs often rely on these reports to sue companies over alleged failure to address climate change or over missed targets.[64] In this respect, the new nonfinancial reporting obligations enacted in Switzerland (Articles 964a seq. CO) and in the European Union (Corporate Sustainability Reporting Directive (CSRD)[65]) are likely to sustain this trend and provide new arguments for further ESG lawsuits against companies.

Although strategic ESG litigation predominantly focused on climate change so far, the scope of new reporting and diligence obligations is much broader. Transparency and access to companies' data might lead to the filing of strategic actions for alleged violations of due diligence in the supply chain, human rights, and deforestation. It is therefore crucial that claims made in sustainability reports are accurate and verifiable.

62. Judgment of the Hague District Court of May 26, 2021, *supra* n. 39, para. 5.3 in association with paras. 4.4.22 et seq.; Romy, *supra* n. 2, pp. 56.
63. Judgment of the Hague District Court of May 26, 2021, *supra* n. 39, consid. 4.4.11 et seq.; Romy, *supra* n. 12, p. 57.
64. Romy, *supra* n. 12, pp. 46.
65. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, L 322/15.

[C] Board Members Can Be Held Personally Liable

Board members are being challenged and could be held personally liable for alleged failure to prepare for net zero transition. In the United Kingdom (UK), for instance, ClientEarth, which held shares in Shell Plc, lodged a derivative claim on February 9, 2023, against the board of directors of Shell with the High Court of Justice in London, alleging that Shell's board of directors had failed to prepare for the energy transition and to implement a climate strategy that is in-keeping with the Paris Agreement goal.[66] In substance, the plaintiff argued that Shell's board of directors is legally required by UK company law to manage risks to the company that could harm its future success, climate risk being the biggest of them all. Despite Shell committing to being a net-zero company by 2050, its interim targets and strategy to reach this objective do not align, and Shell's strategy would in fact result in a reduction of just 5% in net emissions by the end of the decade. Additionally, the board of directors' plans fall short of the 2021 Dutch judgment in the case *Milieudefensie v. Shell*, which ordered the company to cut its overall emissions by 45% by 2030.[67]

ClientEarth relied on two statutory general duties owed by the Directors, namely the duty to promote the success of the company and the duty to exercise reasonable care, skill and diligence.[68]

On May 12, 2023, the High Court considered that ClientEarth's application and the evidence adduced in support of it did not disclose a prima facie case for giving permission to continue the claim,[69] and ClientEarth was refused permission to appeal by the Court of Appeal in November 2023, bringing the litigation to an end.[70]

In its reasoning, the High Court recognized that the impact of Shell's operations on the community and the environment is a matter for the directors to balance.[71] However, their response to the business risks to Shell associated with climate change is part of the decision-making process by which the directors manage Shell's business. While there are fundamental disagreements between ClientEarth and Shell's directors as to the right way to achieve the net zero 2050 targets that Shell has set itself, the law respects the autonomy of the directors to make decisions on commercial matters and their judgement as to how best to achieve outcomes that are in the best interests of their members as a whole. According to the Court, the evidence falls far short of establishing

66. https://www.clientearth.org/latest/press-office/press/court-fails-to-engage-with-key-climate-risk-arguments-in-shell-directors-case-dismissal/ (accessed on 21 February 2024).
67. https://www.clientearth.org/latest/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/ (accessed on February 21, 2024).
68. https://www.clientearth.org/latest/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/ > 4 (accessed on February 2, 2024) (accessed on February 21, 2024).
69. The court is required to dismiss the application if it appears to the court that the application itself and the evidence filed in support of it, do not disclose a prima facie case for giving permission: *see* Judgment of the High Court of Justice of London of May 12, 2023, *ClientEarth v. Shell Plc and others*, para. 4, available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230512_2023-EWHC-1137-Ch-2023-EWHC-1897-Ch-2023-EWHC-2182-Ch-_judgment-1.pdf (accessed on 21 February 2024).
70. https://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/ (accessed on February 21, 2024).
71. Judgment of the High Court of Justice of London of 12 May 2023, *supra* n. 69, para. 48.

a prima facie case that the way in which Shell's business is being managed by the directors could not reasonably be regarded by them as being in the best interests of Shell's members as a whole.[72]

The court also stated that ClientEarth's case completely ignored the fact that the management of a business of Shell's size and complexity requires the directors to take into account a range of competing considerations, the proper balancing of which is a classic management decision with which the court is ill-equipped to interfere.[73]

Although this particular claim failed, it is likely that directors will be increasingly exposed to liability litigation as transparency and reporting requirements are implemented around the world. As of January 1, 2024, Swiss law requires companies to disclose, among other things, their environmental impacts and transition plans towards net zero, as well as the associated financial risks and how they are managed and mitigated (*see* Article 964*b* paragraphs 1 and 2 CO). It is the duty of the board of directors to prepare and approve this report and then submit it to the shareholders' meeting for approval (Article 964*c* CO).[74] False statements in the reports, failure to prepare a report and breach of the duty to keep the reports are punishable under Article 325ter SCC (fine of up to CHF 100,000 in the case of a wilful breach and up to CHF 50,000 in the case of negligence).

In the EU, the new CSRD is based on the principle of "double materiality," according to which companies are required to report both on their impact on people and the environment and on how social and environmental issues create financial opportunities and risks for the company.[75]

These reports will provide valuable insights to shareholders and the public in general into the diligence with which boards manage ESG risks.

[D] ESG Litigation Will Continue to Grow

The cases mentioned in this contribution are just a few examples of a global phenomenon that is growing in the face of the climate emergency.

Litigation has become a tool used by NGOs and others to remedy the inadequate responses of governments and the private sector to climate change and other environmental harms. Courts have become instrumental in shaping political and societal developments around sustainability topics in general and climate change in particular. The role of litigation in affecting "the outcome and ambition of climate governance" was recognized by the Intergovernmental Panel on Climate Change (IPCC) Working Group III in 2022, in a document approved by representatives of every Member State.[76]

72. *Ibid.*, paras. 47 et seq.
73. *Ibid.*, para. 48.
74. Romy, *supra* n. 1, pp. 759 et seq.
75. Corporate Sustainability Reporting Directive, *supra* n. 65, preamble Ch. 29.
76. IPCC, Climate Change 2022: Mitigation of Climate Change, Working Group III contribution to the Sixth Assessment Report of the IPCC, 2022, E.3.3, p. 46, available at https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf (accessed on February 21, 2024).

ESG strategic litigation against Swiss global companies is also likely to increase, both in Switzerland and abroad, as a means to raise awareness and shape public policy.

As already mentioned above (*supra* §4.04[B]), although strategic litigation predominantly focuses on climate change, the scope of new reporting and diligence obligations is much broader, and transparency and access to companies' data might lead to the filing of strategic actions for alleged violations of due diligence in the supply chain, human rights, and deforestation.

This trend raises fundamental questions about the separation of powers and the role of the courts, whose activism sometimes bypasses, corrects or replaces the legislative process. In addition, judicial activism can potentially lead to greater unpredictability of the law, making it more difficult for companies and their boards to effectively assess and mitigate legal risk.

§4.05 FINAL OBSERVATIONS

Regardless of the chances of success of similar lawsuits in Switzerland, companies, as well as their directors and legal advisors, should not ignore the developments occurring abroad and the decisions rendered by foreign courts. These cases and decisions are indeed relevant to Swiss companies and their boards, especially global companies, as they shape the expected duty of diligence and outline the legal risks that should be taken into account regardless of the company's place of incorporation.

As a result, proper risk management and good corporate governance require companies to monitor the litigation landscape to detect trends and reflect on the lessons learned, even though the outcome of many strategic cases is still outstanding and the regulatory context extremely dynamic. Changes in public policy affect the entire economy and the entire supply chain, not just the defendant's business, and may increase related financial transition costs.

In this context, the introduction of an arbitration clause in the articles of incorporation might offer protection against some strategic ESG litigation. According to the revised Swiss corporate law, which came into force on January 1, 2023, the articles of association of corporations may now provide that corporate law disputes be settled by arbitration proceedings in Switzerland (Article 697*n* CO). The same applies to partnerships limited by shares (Article 764 paragraph 2 CO in connection with Article 697*n* CO) and limited liability companies (Article 797*a* CO).

Arbitration clauses in articles of incorporation are, in principle, binding on all persons subject to the articles of association, i.e., specifically the company, the company's board of directors, the board members and the shareholders, as well as the participation certificate holders. As a result, if drafted properly, arbitration clauses may provide a useful tool to mitigate the risk of ESG lawsuits filed by persons subject to the articles of association, specifically by shareholders and participation certificate holders.