DAC BEACHCROFT

LEGALIGN GLOBAL

CLIMATE CHANGE
PREDICTIONS 2023

For further information or enquiries, please contact:

Toby Vallance
Partner
tvallance@dacbeachcroft.com
+44 (0) 207 894 6257

Sarah Crowther
Partner
scrowther@dacbeachcroft.com
+44 (0) 207 894 6254

AVIATION

1. Jet Zero: the flightpath to UK zero aviation emissions

The push to achieving zero aviation emissions is set to continue apace in the UK during 2023. On a global level, over 290 airlines have committed to goals aimed at achieving net zero emissions by 2050. The UK government continues to support technology, fuel and market-based measures to address aviation emissions as part of its wider commitment to 'Jet Zero' (the government's vision for the UK to become a global trailblazer in zero emission flight and to build a world-leading Sustainable Aviation Fuel (SAF) industry). £180mn of additional funding is earmarked to support the development of SAF plants in the UK, further bolstering a UK ambition to see 10% SAF blended into the UK fuel mix by 2030. At present the percentage in the UK is lower than 0.1%. A planned £1bn waste-to-SAF plant in Teeside is due online in 2027. The government has committed to have at least five commercial-scale SAF plants under construction in the UK by 2025. If that goal is to be realised, we expect further announcements of SAF plant development in the course of 2023.

CASUALTY

2. Will air pollution claims become toxic?

We anticipate that claimant representatives will continue to test the waters for occupational and environmental air pollution exposure claims, particularly where illness and/or injury can be clearly evidenced. Research and reporting around the physiological impact of exposure to diesel emissions continues at pace, with recent reports highlighting that toxic air particles are found even in the bodies of unborn babies. Significant hurdles remain for large scale actions, but the judiciary has shown it is prepared to be flexible in assigning responsibility for the consequences of air pollution where local and national regulators were involved. Whether such flexibility will extend to liability in negligence for exposure remains to be seen.

3. Change of infrastructure will impact cyclist and e-scooter claims

Since emerging from the COVID-19 pandemic, there has been a marked change in the profile of claims being made against highway authorities, particularly in relation to cyclist and e-scooter claims. In May 2020, the Department for Transport announced special funding to promote cycling safety schemes, which led to a wide range of activity designed to promote cycling as an alternative means of transport. With such schemes there inevitably comes a change in infrastructure such as newly installed kerbing to create cycle lanes, extended kerbs to narrow road entrances as part of traffic calming measures and newly installed speed bumps. As greater focus is given to encouraging more environmental means of travel and changes are made to the existing infrastructure, there is likely to be an increasing number of claims against highway authorities from cyclists and riders of e-scooters. While changes to infrastructure have always been commonplace, with more cyclists and riders on the highways, there is now a greater risk of accidents occurring and a higher chance of more significant injuries being sustained.

CONSTRUCTION AND ENGINEERING

4. Greenwashing claims are likely to rise in the construction sector

Building and construction accounts for more than one third of the world's carbon emissions, so the industry has a significant role to play in the drive to net zero. Unfortunately, for the unscrupulous or naïve, the opportunity for personal gain or necessity to survive is likely to result in an increase in greenwashing claims. Some designers, engineers, builders or manufacturers, intentionally or foolishly, will flaunt green credentials or make bold claims, but take shortcuts, embellish the truth or not live up to expectations. When the build does not live up to environmental assurances, claims from owners, developers or tenants will follow, particularly where their own ESG (environmental, social and governance) commitments have been compromised.

D&O AND FINANCIAL INSTITUTIONS

5. Expect more class actions against UK-domiciled parent companies for ESG harms caused by foreign subsidiaries

Growing awareness of ESG (environmental, social and governance issues) and rights to access justice is fuelling an increase in group actions against UK and EU-domiciled parent companies for alleged human rights abuse and environmental damage caused by their overseas subsidiaries and affiliates. With the English Supreme Court's confirmation that parent companies can be liable for such harm, and the EU's proposal to legislate for mandatory due diligence on human rights, the environment and good governance throughout supply chains, it is inevitable that this trend will continue. Now is an opportune time for parent companies to review their policies, procedures and corporate governance arrangements across corporate groups. Corporations with activities in higher-risk countries where allegations of environmental damage and human rights abuses are more likely to arise, need to get a real handle on risk management and governance of subsidiaries. Ignorance will not assist those at the top of the corporate chain.

6. Directors will struggle to balance profitable growth and environmentally friendly practices

Those in the energy sector engaged in the mining of fossil fuels have been called on to restore stability to the energy markets around the world. This has meant, in some cases, reversing decisions about exploration and mining, in particular where such activities had previously been curtailed due to the potential negative environmental impacts. While the decisions may yield results in terms of producing a reliable domestic source of energy, there will also be very close scrutiny from activist investors and environmental groups, in particular in circumstances where the sector has posted record profits towards the end of 2022. However, the energy crisis (significantly exacerbated by the Russian-Ukraine conflict) was, arguably, unforeseeable, and therefore statements made in reports and accounts about environmental ambitions and targets will need to be viewed with the benefit of hindsight, and will not easily form the basis of successful claims alleging, for instance, misrepresentations to the markets.

INSURANCE ADVISORY

7. ESG issues will continue to shape insurer activity

Environmental, social and governance issues will play an increasingly prominent role in shaping the strategies of the insurance sector; this is being driven at least as much by insureds and other market participants as by governments or regulators. However, many firms are still in the process of articulating a clear ESG strategy and then giving practical effect to it in different areas of their business. Regulators are increasingly focusing on issues such as how insurers identify and manage the financial risks arising from climate change, as well as the role of good governance in effectively managing risk. However, they have also highlighted the importance of diversity and inclusion as indicators of effective risk management, good conduct and innovation. We can only see this trend continuing, and firms who lag behind in this area or are unable to articulate a convincing narrative can expect increasing regulatory attention.

8. Gender diversity linked to greater action on climate change

Gender inclusivity and opportunity is critical in both modernising the workplace, attracting talent and generating the positive effects in addressing climate change for businesses and wider society. The European Central Bank published a working paper in February 2022 with the eye-catching statement that a 1 percentage point increase in the proportion of female managers within a firm is linked to a 0.5% decrease in CO_2 emissions. Further, firms with greater gender diversity reduced CO_2 emissions by about 5% more than those with more male managers. Businesses must focus on representation and engaging women in leadership pipelines, particularly intensifying efforts to get more women into STEM education and roles. This therefore starts earlier in the employment life cycle with the need for government and organisations to engage women (girls) in the green economy and climate change challenge from school age to develop the pipeline for gender equity in the workplace for the future.

INTERNATIONAL CASUALTY

9. Climate change litigation will diversify

In the wake of COP27, we expect to see renewed vigour on the part of climate activists in bringing litigation against both private companies and also governmental agencies and bodies. As the emphasis on green credentials becomes ever more important in marketing, there will be increasing pressure placed on both governments and corporates to comply with any agreed and legally binding targets. Failures will be challenged. An increasingly wide variety of climate litigation is underway, from greenwashing challenges to publicised decarbonisation plans in Australia to applications to the European Court of Human Rights regarding factory farming and consequential impacts. The action by ClientEarth against the board of directors of Shell emphasises the prospect of individual directors being the subject of climate related litigation. The outcome of this action in particular will create an important precedent in the coming years.

MARINE, ENERGY AND TRANSPORT

10. The conundrum of insuring the energy transition

2023 will continue to see oil and gas underwriters grapple with the challenge of balancing the competing demands of climate change commitments, energy security and profitable underwriting. Joining other insurers and reinsurers, Munich Re Syndicate announced in October 2022 that it will cease to insure new oil and gas-field projects that are not under construction or operation as at 31 December 2022. While it was relatively easy for insurers to disengage from coal-based risks, moving away from oil and gas is a much more complex proposition. Careful thought needs be given to the timeframe and carve outs that will be required in order to support the global energy transition.

11. Climate activist litigation will move focus from causation to policy coverage issues

We expect an increase in coverage disputes arising out of the burgeoning climate activist litigation. The first cases of this nature have already begun in the US with Aloha Petroleum bringing a claim against its insurers. Aloha seeks to recover its defence costs (which currently stand at around £750,000) in handling claims from local governments alleging that big oil firms engaged in a co-ordinated effort to deny the threat of global warming, to discredit the science of the climate crisis and to deceive the public about the reality and consequences of the impacts of their fossil fuel pollution. Insurers deny coverage based on a general pollution exclusion. Key to this assertion is whether carbon dioxide and other greenhouse gases fall within the definition of pollution. We anticipate the market will respond with new products and wordings aimed at the risk of climate activist litigation. In the meantime, coverage disputes will appear with different policy wordings being tested in different jurisdictions.

PRODUCT SAFETY, LIABILITY AND RECALL

12. Greenwashing risk will spill into the product liability arena

With manufacturers and retailers under ever-increasing pressure to emphasise their environmental credentials, insurers will need to be mindful of potential risks arising from those efforts. Producers and manufacturers who want to persuade consumers to purchase their products (rather than those of a competitor) by stating they have been responsibly sourced, manufactured and packaged, risk liabilities relating to unfair trade practices or breaches of competition law and consumer protection laws. There have already been class actions in the US in respect of sustainability claims on labels, in-store signage and marketing online. In Australia, there has been a clampdown on false advertising with activewear brand Lorna Jane fined $5mn for claims that its products protected against COVID-19. We expect that similar misleading, false or exaggerated information on environmental credentials could lead to insurers seeing an increase in claims under commercial general liability policies and advertising liability extensions as ESG concerns spill into the product liability arena.

PROFESSIONAL LIABILITY

13. Surveyors and Valuers: The sustainability of values will be the most important issue

The sustainability of values will undoubtedly be the single most important issue the surveying and valuation profession will have to grapple with in the short, medium and longer term. The pandemic has brought about a seismic change to working patterns but will the surge in demand for more rural locations be maintained? Will the pressure on those in the High Street serving commuter needs remain? How will current office repurposing play out in terms of space needs going forward? With many economies now heading into recession and inflationary pressures unlikely to ease anytime soon, matters are compounded by the risk that real estate values may fall as businesses and consumers alike struggle to fund borrowing costs after a decade of ultra-low interest rates and the retail/leisure sectors find themselves squeezed as belts tighten. Finally, and perhaps most significant of all, is the impact that the current energy crisis, coupled with the crucial need to address climate change, will have on the entire sector in terms of attributing a value to any particular building's energy efficiency capabilities. Never has the phrase 'valuation uncertainty' appeared more appropriate.

PROPERTY

14. COP27 deal on loss and damage opens up a new front on climate change response

The inevitable last-ditch compromises as COP27 concluded contained one significant step forward in the world's response to climate change: the agreement to create a fund to recompense 'vulnerable' countries for the loss and damage caused by global warming. This was seen as a breakthrough by developing countries and those most under threat from rising ocean levels and dramatically changing weather patterns. There is a long way to go before the fund becomes a reality, however. There will be tricky negotiations around who qualifies for help and who contributes before the fund becomes a reality. This is likely to be hammered out next year at COP28 in the United Arab Emirates.

TRANSACTIONAL LIABILITY

15. ESG factors will become a greater focus in M&A deals

Corporations recognise that tackling environmental, social and governance (ESG) issues can give them a competitive advantage and provide opportunities for growth. With greater scrutiny of ESG targets by consumers, employees, investors and now regulators, ESG considerations are increasingly an important focus in M&A deals. Buyers are critically assessing sellers' commitments to energy savings, operational efficiencies, diversity and inclusion targets, and corporate governance as part of the acquisition process, to ensure ESG statements stack up and their merging corporate cultures will align. Significant differences in ESG ideology and performance criteria could be an obstacle to integration post-merger and may result in claims if mismanaged. ESG scoring - which uses quantitative measurements to independently verify ESG factors – is a growing market and it is expected to become more common place in the M&A due diligence process.

ASIA PACIFIC

16. Australia: Watershed year ahead for climate change legislation

2023 will be a watershed year for climate change legislation at both a state and federal level. Focus will be on compulsory disclosure of climate risk by public companies, carbon credit regulation and budgetary commitments to renewable energy and environmental sustainability initiatives. Corporate Australia will continue to be challenged by public interest groups and corporate regulators over environmental risk disclosure, with greenwashing litigation likely to increase exponentially. Net zero commitments will come under the greatest scrutiny. Superannuation funds and institutional investors will also continue to be challenged over their green credentials, their due diligence into environmental disclosures by portfolio companies and how they are balancing the long term interests of members in creating a sustainable future while meeting short term objectives regarding return on investment.

17. Australia: Green hydrogen will fuel a new energy insurance market

Analysts have estimated the green hydrogen market could be worth US$10trillion by 2050. Given the market potential and the many green hydrogen projects already planned, including the US$32bn Asian Renewable Energy Hub in Australia's Pilbara region, energy insurers should expect to see a significant increase in global demand associated with constructing and operating green hydrogen plants and pipelines. Green hydrogen developments are a positive news story for the world. However, the new technology comes with risks that underwriters will need to consider carefully. For example, green hydrogen is highly flammable and is difficult to store and transport. While these issues are being addressed through extensive global research and development, insurers will need to stay on top of these developments. This includes monitoring how the marine industry embraces ammonia, a fuel derived from green hydrogen, as a potential transportation solution.

18. Australia: There will be positives and negatives to battery technology

Efficient power storage is a key element of a low-carbon economy. Lithium-ion batteries are proving a popular solution as they are rechargeable, have a high energy density, no memory effect and low levels of self-discharge. However, they are also risky as they contain flammable electrolytes. Manufacturing defects, physical damage/abuse and incorrect charging have been linked to uncontrolled thermal venting/runaway of cells. Lithium-ion batteries have been linked to many fires, including a significant fire incident involving a Tesla battery project in Australia. These fires are intense and difficult to bring under control, so determining causation can also be complex. Lithium-ion battery storage and transportation, including issues associated with dangerous goods classifications for sea carriage, and disposal are other issues that are causing concern for insurers. While the search continues for ways to make battery technology more stable, risks are being managed with quality products, active maintenance and fire prevention strategies.

EUROPE

19. France: Will we see the end of coal power plants?

Again the world is united to fight against climate change. France, who led COP21 in 2015 to the landmark Paris Agreement, now calls on China and Russia to play its part. Will the world get a last chance? It is obvious we need bold action as soon as possible. We need to see the end of coal power plants as soon as possible. When will that happen? Of the planned shutdowns of the four French coal power plants, only two have been completed. The third was reopened in October 2022 in order to weather the energy crisis, while the fourth is being extended until at least 2024 (if not 2026).

20. Germany: ESG claims will threaten product liability and recall insurers

While some may assume ESG is just a D&O risk, 'Dieselgate' has shown that violations of environmental law may need to be re-thought from a liability perspective. German liability law has been reluctant to recognise claimants' subjective rights in environmental claims. But that could be re-thought in the coming years, after systematic violations of environmental law in the 'Dieselgate' litigation were a vehicle to argue in favour of warranty claims, granting individuals litigable rights. Just like the upcoming mechanisms of mass litigation, the re-framing of traditional legal views is hands-down the biggest threat to product liability and recall insurers in the years ahead.

dacbeachcroft.com insurance.dacbeachcroft.com @DACBeachcroft DAC Beachcroft LLP