LMA Committee Circular

Committee	**Environment & Climate Litigation Committee**
Date	
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The Environment and Climate Litigation Committee reconvened on 17 July 2024 to discuss recent contentious climate litigation matters across the world and to hear from Lloyd's about two climate litigation projects currently in development. Christina Goodwin presented to the Committee on behalf of Lloyd's, while Deepa Sutherland from Zelle Law and the LMA gave an update on recent case law in the US, UK and EU.

Lloyd's climate litigation projects

Lloyd's is working on developing a climate litigation heatmap and updating the existing climate litigation claims tracking codes to improve data quality and consistency of claims tracking codes for climate litigation. As part of the projects, a working group has been established to test definitions and eventually propose an all-encompassing definition of climate litigation. Christina Goodwin confirmed that Lloyd's would send out updated guidance supporting the claims tracking codes at the end of the calendar year and would have a template of the heatmap by Q2 2025.

Recent developments in the US

a) Loper Bright Enterprises v. Raimondo - US Supreme Court overturning the Chevron deference doctrine

The Chevron deference doctrine, established in a 1984 case involving the oil giant, gave federal agencies supreme power to interpret laws and decide the best ways to apply them. Therefore, courts were expected to defer to federal agencies in interpreting ambiguous statutes. In Loper Bright Enterprises v Raimondo, it was held, however, that this principle led to the courts abdicating their role as interpreters of statute as per the Administrative Procedure Act. Additionally, the judges were concerned about the inconsistency caused by agencies interpreting statutes differently after each new administration. Hence, the courts decided to overturn the Chevron deference doctrine.

By overturning the legal precedent, Ms Sutherland explained, the pace of regulation will likely slow down. Agencies such as the U.S. Department of the Treasury, the U.S. International Trade Commission and National Labor Relations Board will now have a lot greater scrutiny. Courts may find that agencies did not apply the correct interpretation to a statute and therefore render regulations void and set them aside. Ms Sutherland also considered the possibility of increased litigation after Loper Bright since parties which object to regulations now have better standing to obtain judicial review should they incur harm.

b) City of Baltimore v. BP P.L.C.

The case involved the City Council of Baltimore bringing a claim against oil and gas companies. It was argued that the defendants' activities contributed to climate change-related damage, and that they had also misrepresented their products' impact on the climate.

Ms Sutherland explained that the issue up until now was whether the case should be heard in federal or state courts. The court held that the claims brought by the claimant in tort and nuisance were beyond the limits of state law as the case concerned global emissions and the

state courts could not provide a remedy for claims arising from foreign emissions. It was also held that the Clean Air Act pre-empted state law claims based on domestic emissions. Therefore, the court concluded that federal jurisdiction applied to the case.

The decision has resulted in great uncertainty, and different states have reached different conclusions in similar cases.

c) Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh

Ms Sutherland also presented on the case of Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh, which concerned Aloha's lawsuit against its insurer for breaching its obligations to defend and indemnify the company in underlying climate change cases.

In light of the insurer's denial, Aloha, being a defendant in Honolulu's and Maui's climate change lawsuits, brought a claim against its insurer for breach of contract and declaratory relief. The policy provided cover for "occurrences" causing property damage during the policy period. "Occurrence" was held to be synonymous with "accident", but "accident" was not defined further. Aloha argued that an "accident" included recklessness and thus the insurer had a duty to defend. It was also claimed that the insurer had incorrectly applied the qualified pollution exclusion which precluded defence and indemnity coverage in the underlying actions.

The federal court found that there was not enough precedent in Hawaiian case law to make a decision. The court was also concerned about the fact that insurance is a matter of state law. Therefore, the court requested state court guidance. Two questions were put forward to the Hawaiian Supreme Court:

(1) For any insurance policy defining a covered "occurrence" as an "accident," can an "accident" include recklessness? and

(2) For an "occurrence" insurance policy excluding coverage of "pollution" damages, are greenhouse gases "pollutants"?

The defendants have argued that greenhouse gas emissions are not pollutants, and that they should be distinguished from traditional environmental pollution.

The Supreme Court has not yet delivered its judgement at the time of writing.

Recent developments in the UK

a) Weald Action Group v. Surrey County Council

The Supreme Court quashed planning permission given by Surrey County Council for an oil drilling project and ruled that the council acted unlawfully because it did not consider the end-use of products and scope 3 emissions. The court held that councils must assess the whole environmental impact of granting planning permission and cannot justify limiting the scope of such assessments solely to emissions expected to occur at the immediate site.

Following the judgement of the Supreme Court, the government is withdrawing its defence of another legal action taken against the planning permission granted for Whitehaven coal mine in Cumbria, citing that the defence was made due to an "error in law".

b) The Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No 2)

Overturning previous decisions by lower courts, the Supreme Court ruled that the Manchester Ship Canal Company was able to bring a claim in nuisance and trespass against the utility company in relation to its deliberate dumping of untreated sewage and storm runoff into the canal. The utility company's defence, that absent any allegations of negligence or misconduct,

only regulators could take legal action against them under the Water Industry Act 1991, was rejected by the Court. This ruling potentially opens the door for anyone who suffers negative consequences due to polluting discharges - such as waterways owners, fishing clubs, or even individual members of the public - to bring similar actions against water utilities companies, who can no longer rely on the Water Act as a blanket defence against private actions.

It remains to be seen however, whether this will lead to a wider impact on other industries. The Court only ruled on the procedural issue of whether the Water Act granted immunity to utilities companies. The substantive claim - whether utilising a sewer system which is designed to deliberately discharge effluent into the water system when capacity is exceeded constitutes a tort - is yet to be decided. Should the courts decide that this does constitute a tort, this may lead to similar private litigations being launched for similar activities, such as agricultural runoff or fuel leakage.

c) "Dieselgate" (Pan NOx Emissions class actions)

In a recent pre-trial costs hearing, the High Court described costs budgets submitted by both sides as 'eye-watering' with the claimants' budget considered 'frankly absurd'. The hearing was part of the procedural runup to a series of class actions against car manufacturers and finance companies for fitting diesel cars with software to subvert emissions control regulations, with a projected value of over £6 billion. The budget-setting exercise was undertaken to set the amount the winning side could claim back from the losing side. The result of the hearing, which dealt with costs for only the first third of the trial, was that the proposed budgets for both sides were slashed considerably, with the claimants' budget cut from £208 million to £52 million, and the defendants' from £212 million to £114 million. While the Court's powers did not extend to costs already incurred to that point, the Court did feel compelled to comment that the claimants' incurred costs of £132 million was 'incredible'.

Recent developments in the EU

a) Environmental Crime Directive

The 2024 Environmental Crime Directive entered into force on 20 May 2024 to support harmonised action in the EU and raise expectations around environmental criminal liabilities. The directive provides for a list of environmental offences and requires Member States to impose greater sanctions and accessory sanctions for breaches of environmental obligations.

The directive also introduced a new criminal offence of "ecocide", defined as any unlawful or negligent act that causes or contributes to widespread, long-term, or severe damage to the environment. Unlawful ship recycling and unlawful water abstraction are also among the named criminal offences.

As the Environmental Crime Directive is a harmonising directive designed to set minimum standards, individual Member States are expected to delineate the elements of each offence and set levels of penalties. However, the minimum penalties required by the directive are as follows:

- Primary sanctions
    - Personal sentences of up to 10 years.
    - 5% of the total worldwide turnover of the legal persons or 40,000,000 euros.
- Secondary sanctions

- Restore the environment within a given period/pay compensation for the damage to the environment that cannot be restored.
- Prohibition of trading/winding up/restriction on new permit or licences or funding.

b) Bloom et al v. TotalEnergies

TotalEnergies, along with its directors and major shareholders, are facing a unique climate change criminal case in France, brought by individuals affected by extreme weather events and non-profit groups. The claim alleges criminal wrongdoing, including deliberate endangerment of the lives of others, involuntary manslaughter, failure to address a disaster, and damaging biodiversity.

It is for the prosecutor of the case to decide whether an investigation will be opened and against which individuals the prosecution may be brought.