

# LMA Committee Circular

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Committee **Environment & Climate Litigation Committee**

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The Environment and Climate Litigation Committee met on 08 May 2024, continuing the discussion on global climate litigation and recent developments in litigation funding. Following the widely publicised case of *KlimaSeniorinnen v Switzerland*, the Committee was joined by Lukas Rusch of Pestalozzi Attorneys at Law Ltd, who provided a comprehensive overview of climate litigation in Switzerland.

## **Climate litigation in Switzerland**

According to Mr Rusch, Switzerland is not a leading jurisdiction for climate litigation and litigation funding, especially when compared to the US, which is an area of focus for climate litigation. This is mainly because the prerequisites for commencing climate litigation in Switzerland are quite high. Much like various other jurisdictions, Switzerland has not adopted a single definition for climate litigation.

Mr Rusch classified climate litigation cases in Switzerland into two categories:

### **Private climate lawsuits:**

These lawsuits are usually brought by individuals or associations (NGOs) against private parties. The main goal behind these lawsuits is to hold companies accountable for the effects of climate change. Most cases in private law are brought on standard liability grounds in tort and corporate law, applied to the specific climate context.

### **Public climate lawsuits:**

These lawsuits are again brought by individuals or NGOs but against state actors instead of private parties. So far, the aim behind these lawsuits has been to push the state to reduce greenhouse gas emissions. The primary legal basis of these lawsuits under public law is fundamental and human rights.

## **Swiss climate litigation framework**

### **Class action**

The existing legal framework in Switzerland does not address class actions. What the law does permit, according to Mr Rusch, is a joinder of parties if claims are based on the same facts and legal grounds and the same procedure is applicable, but each party still has to bring its claim. While class actions are not included in the current revision of the Swiss Code of Civil Procedure, Mr Rusch mentioned that there is an ongoing debate in the Swiss Parliament to extend collective legal protection, for instance, through means of representative action, similar to certain provisions of the German Code of Civil Procedure.

## Litigation funding

On the other hand, third-party litigation funding is permitted in Switzerland. However, it is still relatively uncommon, particularly in climate litigation cases. What tends to occur more frequently is NGOs funding climate litigation, primarily because the claims brought are not monetary but are instead focused on changing public policy.

## Recent cases to note

### Private law:

Mr Rusch identified two categories of cases in Switzerland and other European countries:

1. **External cases** are cases where the claimant has no corporate or legal connection to the defendant. Notable external cases include:

### *Asmania et al v Holcim:*

Inhabitants of Indonesia's Pari island have filed a lawsuit against Holcim, a major Swiss-based building materials company, for climate change-related damages on the island. The plaintiffs are backed by NGOs HEKS/EPER, ECCHR, and WALHI, seeking compensation and CO2 emissions reduction of 43% by 2030 and funding for adaptation measures on Pari. After a failed conciliation, a lawsuit was lodged with the Cantonal Court of Zug, which granted free legal aid to the plaintiffs. The legal basis on which the plaintiffs rely is the infringement of personal rights under the Swiss Civil Code and redress for unjust harm under the Code of Obligations. The case has been pending since 2022.

He also referred to a non-Swiss case.

### *Milieudéfensie et al. v. Royal Dutch Shell plc.:*

The environmental group Milieudéfensie and co-plaintiffs sued Shell, alleging its contributions to climate change violate Dutch law and human rights obligations. The Hague District Court ordered Shell to reduce its CO2 emissions by 45% by 2030 compared to 2010 levels, which aligns with the Paris Climate Agreement. The case builds on the *Urgenda* decision, extending the duty of care to private companies and emphasising human rights and international legal obligations. In July 2022, Shell appealed the decision, which is still pending.

2. **Internal cases** are cases where the claimant is affiliated with the defendant, such as shareholder, creditor, or insurer. Notable internal cases include:

### *Church of England Pensions Board et al. v Volkswagen:*

The Church of England Pensions Board and Swedish and Danish pension funds initiated legal proceedings in Germany in 2022 against Volkswagen AG over the company's refusal to disclose information on its climate lobbying activities. This marks the first European litigation initiated by investors on a climate-related matter. Investors are pressing VW to demonstrate that its industry association memberships and lobbying efforts align with its climate goals.

The key challenges faced by plaintiffs bringing claims in European jurisdictions have been the high prerequisites for climate litigation and the thresholds for damages and causality.

#### Public law:

##### *KlimaSeniorinnen v Switzerland:*

Whilst class actions are not permitted in Switzerland, special interest groups can sometimes bring claims on behalf of members if they have a common complaint.

The case was brought by an association of senior women in Switzerland (KlimaSeniorinnen), claiming that Swiss climate legislation is insufficient, unconstitutional, and contrary to conventions. They brought the case on behalf of a limited number of individuals. The claimants requested the Department of Environment to take specific measures for climate protection. However, the DoE rejected the request and refrained from intervening. The DoE's decision was subsequently appealed. The Federal Administrative Court dismissed the appeal because the appellants were not affected beyond the impact on the general public. Therefore, there was no sufficient interest worthy of protection.

The case was then brought to the European Court of Human Rights (ECHR). The applicants argued that Switzerland violated their rights to life and health under Articles 2 and 8 of the European Convention on Human Rights, their right to a fair trial under Article 6, and their right to an effective remedy under Article 13. The ECHR gave the case priority status and went through various stages, including third-party interventions and hearings, before being examined by the Grand Chamber of 17 judges.

On April 9, 2024, the ECHR found Switzerland in violation of Article 8 (right to respect for private and family life) and Article 6 § 1 (access to court) due to Switzerland's failure to protect against the adverse effects of climate change and to meet GHG emission reduction targets.

Mr Rusch pointed out that as a consequence of the ECHR decision, KlimaSeniorinnen can request the revision of the judgement of the Federal Supreme Court. This is possible under the Federal Constitution of the Swiss Confederation on the grounds of a violation of the European Convention of Human Rights since the ECHR has determined in a final judgment that the Convention has been violated. Mr Rusch expressed his view that the decision may boost climate private litigation as claims can expect broader protection from ECHR.

Furthermore, it is not clear what impact the ECHR decision will ultimately have on Swiss policy, as the ECHR found that it could not be detailed or prescriptive regarding any measures to be implemented by Switzerland to effectively comply with the present judgment. The ECHR left it to the Committee of Ministers to supervise, based on the information provided by the State, the adoption of measures aimed at ensuring that the national authorities comply with Convention requirements, as clarified in this judgment. On May 21 2024, a Swiss legal affairs committee of the upper house of parliament voted to reject the ECHR judgement because the country was taking enough action. Switzerland's newly revised CO2 Act 2024 will ensure that the existing instruments for reducing Switzerland's CO<sub>2</sub> emissions remain in place. However, as referendums regularly test the limits of Swiss policymaking and the referendum deadline has not yet lapsed for the CO2 Act, the outcome is yet to be seen.

## **Key takeaways**

Climate litigation is still rare in Switzerland. Few cases are taking off as the Swiss courts are generally reluctant to accept them, and the threshold to enforce damages claims is very high. Class actions are equally rare, with none yet being brought to court.

Nevertheless, the ECHR decision in *KlimaSeniorinnen* could lead to more individuals or climate organisations enforcing human rights laws in Switzerland and abroad. As pointed out by Mr Rusch, there is an increasing risk that the ECHR could override judgments of national courts concerning public climate litigation.

While the ECHR decision (as well as most other European decisions) has limited direct effects on insurers, it is important to note the potential indirect impacts, especially on those insuring government agencies and agencies subject to human rights legislation. If further cases are brought to the ECHR, more interventionist policies may ultimately emerge that impact the legal frameworks of individual states.

## **A note on litigation funding regulation**

In March 2024, the UK government introduced the Litigation Funding Agreements (Enforceability) Bill (“the Bill”) into Parliament. The Bill addresses the implications of the UK Supreme Court judgment in *R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors* [2023] UKSC 28.

The *PACCAR* case concerned two collective actions brought on behalf of truckers against a truck manufacturing group. The case turned on whether Litigation Funding Agreements (LFAs) involved the provision of “claims management services” (defined as “advice or other services in relation to the making of a claim”, and “other services” includes “the provision of financial services or assistance”). In *PACCAR*, as the return on investment was contingent on the damages the action procured, the funding agreement constituted a Damages Based Agreement (DBA). The LFAs, under English law, must comply with the regulatory regime for DBAs. Otherwise, they are unenforceable and cannot be used to fund certain collective proceedings before the Competition Appeal Tribunal.

The Bill effectively reverses the *PACCAR* decision, taking LFAs out of the scope of DBAs to promote access to justice for more claimants. The Bill is currently making its way through Parliament.

The government recognises the important role that litigation funding can play in facilitating access to justice. However, as stated in a House of Lords debate on 11 March 2024, the government is not “blind to some of the challenges and opportunities to reform and improve the funding system”. The Lord Chancellor has written to the Civil Justice Council, inviting it to undertake a review of the sector. This work aims to ensure that claimants can get the best deal and to consider the need for further regulation or safeguards.

Following the discussion of the Bill in the meeting, Jason Reeves of Zelle LLP, one of our standing lawyer members, shared his view of litigation funding regulation in the US. Mr Reeves explained that there is currently no effective regulation in the US in relation to litigation funding and that it may be challenging to implement any clear regulation in the UK. However, it was highlighted that the US is a more mature market, and LFAs generally involve lower percentages of damages being retained, ranging from 25-40%, making litigation funding increasingly more accessible. In contrast, in the UK, percentages of damages retained could reach 50% in civil litigation, or even 80%, as was the case in the Post Office scandal.

