Climate Change and Directors' Liabilities

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Climate change is the new reality in which businesses operate. Companies have to take steps to address the direct and indirect impact of climate change on their businesses. This task invariably falls on directors who are charged with steering and safeguarding the business and interests of their companies. Against this backdrop, it is pertinent to consider the potential liabilities that a director could be exposed to.

Climate change has a tangible impact on a company's business. The direct impact could include physical damage and disruptions to the company's operations due to weather events and disruptions in global supply chains and shipping routes.

Business stakeholders and consumers are increasingly climate conscious and demanding greater climate accountability from companies, thereby compelling companies to relook at how they do business. Governments are also introducing more policies, laws and regulations aimed at addressing climate change and reducing carbon footprint, which in turn increases the regulatory and compliance needs of companies.

Among other things, banks globally have committed to progressively reducing financing for non-renewable energy projects, and even businesses that rely heavily on non-renewable energy sources. In the EU, the European Parliament is due to introduce a Corporate Sustainability Due Diligence Directive that will compel EU businesses to audit and ensure that their supply chains (regardless of whether they are within or outside of the EU) adhere to environmental and human rights protections.

Climate change is the new reality which business are operating in and companies have to take steps to address the direct and indirect impact of climate change on their businesses. This task invariably falls on directors who are charged with steering and safeguarding the business and interests of their companies. Against this backdrop, it is pertinent to consider what are the potential liabilities that a director could be exposed to.

Three areas where such liabilities could arise are in:

1. Business decision-making.
2. Disclosure and reporting.
3. Greenwashing.

Business decision-making

In 2021, the Commonwealth Climate and Law Initiative published a report titled "Legal Opinion on Directors' Responsibilities and Climate Change under Singapore Law". The report suggested that company directors in Singapore could face personal responsibility if they fail to consider or take action to address climate change risks and the impact of climate change on their companies' businesses.

In 2023, ClientEarth, an environmental law charity, sought to bring a derivative claim (as a shareholder of Shell) in the UK against Shell's board directors. It claimed that the board had breached their statutory duties under the UK Companies Act to promote the success of the company and to use care, skill and diligence in the discharge of their duties by failing to adopt a climate transition strategy, which in turn posed financial risks to Shell.

Similarly, a group of shareholders of ExxonMobil sought to bring a derivative action in the US against the board of ExxonMobil. They claimed that the board knew or was grossly negligent or reckless in not knowing that ExxonMobil's actual investment and asset valuation processes did not incorporate the proxy costs of carbon in a manner consistent with ExxonMobil's public representations and internal policies; that ExxonMobil did not incorporate these proxy costs into its valuation processes; and that certain operations and assets were therefore in fact operating at a loss or were impaired.

These are just some examples of legal action being brought against the directors of a company for failing to take into account and address climate change and its associated risks for their businesses in their decision-making processes.

In Singapore, directors are under both a statutory duty under Section 157(1) of the Companies Act

1967 and at common law to, among other things, use due care, skill, and diligence in the discharge of their duties and to act in good faith in the best interests of the company. Under the Companies Act, shareholders may, with the permission of the Court, bring a derivative action on behalf of the company against its directors and may also bring an action for minority oppression against the company and its directors.

Given this, it is not a stretch of imagination that given the right circumstances, similar legal action such as those highlighted above may be brought by shareholders and other stakeholders against the directors of a Singapore company.

Directors should, therefore, take steps to inform themselves of the risks posed by climate change to their businesses, and put in place adequate measures to address these risks. This may include, among other things, engaging a professional external adviser or establishing an in-house team with the right expertise and experience in this field to design and implement suitable governance and management processes to identify, address and monitor these risks.

Disclosure and reporting

Since 2016, the Singapore Exchange (SGX) has introduced sustainability reporting requirements for all listed issuers. In 2021, the SGX further introduced mandatory climate reporting for all listed issuers on a "comply-or-explain" basis based on the recommendations of the Task Force on Climate-Related Financial Disclosures. As with all information submitted to SGX, directors (and executive officers of the company) are under a duty to ensure that all information submitted is complete and accurate in all material respects and is not misleading. Failure to comply will result in penal sanctions being imposed.

In July 2023, the Sustainability Reporting Advisory Committee (SRAC), an industry-led committee set up by ACRA and SGX RegCo, issued a series of recommendations not only to enhance the existing climate reporting regime to align with the IFRS Sustainability Disclosure Standards but also to mandate climate reporting for large, non-listed companies with annual revenue of at least S$1 billion and total assets of S$500 million from FY2027 onwards (with certain exceptions).

In its recommendations and response to feedback from public consultations, the SRAC highlighted that the same legal requirements for financial reporting will apply to climate reporting. These include keeping proper climate records, appointing external climate auditors, circulating the climate and auditors' reports in a timely fashion to the company's shareholders and tabling these reports at the company's AGM, filing these reports, and voluntary revision of any defects in these reports.

Specifically, the SRAC further highlighted that the following legal provisions will apply:

- Section 157(1) of the Companies Act requires a director at all times to act honestly and use reasonable diligence in the discharge of his or her duties.
- Section 401(2) of the Companies Act provides that any person who wilfully makes or authorises the making of a false or misleading statement can be subjected to a fine of up to S$50,000 or to imprisonment not exceeding two years, or to both.
- Section 157C of the Companies Act allows directors to rely on information and advice given by an employee, a professional adviser or expert, or any other director or committee of directors if he or she acts in good faith, makes proper inquiry, and has no knowledge that such reliance is unwarranted.

In this regard, the SRAC noted that in the public consultation feedback to its recommendations, majority of respondents supported this recommendation, explaining that "aligning legal requirements for climate reporting with those for financial reporting is necessary for upholding accountability and promoting best practices in climate reporting governance".

Directors of a company are under an express duty to ensure the completeness and accuracy of any disclosures made in the company's sustainability and climate reports. They can also be found to be personally liable and to be in breach of their general duties as directors for any incomplete or inaccurate disclosures.

This underscores the need for directors to ensure that the company's sustainability and climate disclosures and reports are complete and accurate. Whilst a director may place suitable reliance on the company's employees, other directors, and professional advisers, it cannot be over-emphasised that the responsibility for these disclosures and reports ultimately lies with the director.

Greenwashing

Directors should also guard against the risk of greenwashing.

Globally, there have been increasing incidents of greenwashing. These include companies making climate pledges without any concrete plans or steps taken to realise these commitments; overstating the true environmental impact of their business or investments; making misleading or untrue representations that their products or services are climate-friendly; and failing to make complete or accurate disclosure of their business' climate risks to customers, investors and other stakeholders.

To this end, actions have been taken by regulators, non-governmental organisations and private stakeholders against companies to take them to task for greenwashing. For instance, in the UK, the Advertising Standards Authority, acting on 17 complaints received from the public, found that an advertisement by Shell claiming that its Shell Go+ loyalty scheme allowed customers to drive carbon-neutral was misleading, and found that Shell had breached the UK Code of Broadcast Advertising Rules on misleading advertising and environmental claims.

In Australia, a group of shareholders brought an action against the Commonwealth Bank of Australia, claiming that it violated the Corporations Act of 2001. They claimed that the bank had failed to disclose in its 2016 annual report climate change-related business risks,

As companies continue to deal with the impact of climate change on their businesses, directors must be aware of their duties and responsibilities and the potential liabilities they may face.

particularly its possible investment in controversial coal mines.

In Singapore whilst there are currently no specific laws or regulations addressing greenwashing, there are existing laws, regulations, industry codes, and causes of action that could potentially cover greenwashing. These include:

- The prohibition against making false or misleading claims in relation to goods or services under the Consumer Protection and Fair Trading Act 2003.
- Under the Securities and Futures Act 2001, the prohibition against employing manipulative or deceptive devices in connection with the sale, purchase or subscription of any capital markets product.
- Further, as mentioned above, the prohibition against making incomplete or inaccurate disclosures to SGX.
- The prohibition against false or misleading advertising under the Singapore Code of Advertising Practices (SCAP).
- Contractual claims for breach of representations and warranties given.
- Contractual or common law claims for misrepresentation.

In December 2023, the Advertising Standards Authority of Singapore (ASAS) found that a video advertisement by Prism+ claiming that using their air-conditioners was the "best tip to save the earth" breached the SCAP for greenwashing.

Specifically, the ASAS found that the claim was not substantiated by any tests conducted by independent parties and there was no evidence to support the claim and, in any case, given the energy that such appliances consume, it was not acceptable to suggest that Prism+ air-conditioners bring about energy savings. As such, the SCAP found that the advertisement flouted the requirements in the SCAP not to mislead or misrepresent any matter likely to influence consumer attitudes, and recommended that the advertisement be taken down.

Whilst most complaints of greenwashing are directed against companies, directors can also be held personally liable for the same. For example, if the complaint is in respect of environmental claims made in a prospectus for a capital market product or in disclosures made to the SGX.

Further, complaints of greenwashing against a company could also give rise to secondary claims against directors for breaches of their duties to exercise due care, skill, and diligence and to act honestly in good faith in the best interests of the company if the complaints against the company are found to be true and the company is ordered to pay damages or suffers a penalty.

To avoid this, directors should ensure that any environmental claims made by their companies are accurate, substantiated and supported by evidence, and ensure that their companies avoid overstating or exaggerating the true environmental impact of their business, products, or services.

As the stewards of a company's business and protectors of the company's interests, it falls on directors to take the necessary steps to address this impact and also to avoid personal liability. Ultimately, directors would do well to keep in mind and be guided by their overarching duty – to act with due care, skill, and diligence and in the best interests of the company.

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