

## Legal services and climate change

### Introduction

1. This is an information paper prepared by the IBA's Bar Issues Commission's International Trade in Legal Services Committee for member bars of the IBA, to alert them to the impact of climate change on issues affecting the regulation and practice of lawyers. Climate change is considered by many as one of the biggest threats facing the future of life on our planet, and its impact is beginning to be felt everywhere, including on bars and lawyers.

2. This paper draws attention to some of the areas where climate change affects the cross-border operation of legal services, and in doing so impacts on general domestic regulatory structures for lawyers. Although it has been prepared by a committee with a mandate for cross-border legal services, it is believed that the issues raised are horizontal and of interest and future concern to all lawyers and their regulators.

### The erosion of the principle that lawyers should not be identified with their clients' interests

3. There have been repeated recent incursions into the principle that lawyers should not be identified with their clients' interests, with tax avoidance being the topic where this is probably most widespread. For instance, the European Parliament published a report in December 2017 after its investigation of the Panama Papers, with a special section devoted to the behaviour of lawyers and how this could be improved.<sup>1</sup> This was followed by two recent reports released on the same day in February 2021 by two separate international bodies: first, the United Nations' High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (the FACTI panel report)<sup>2</sup> and, second, the OECD's 'Ending the Shell Game: cracking down on the professionals who enable tax and white collar crimes'.<sup>3</sup>

4. Although these two reports differed in their focus, both of them used the same terminology to describe the role of lawyers: lawyers were professional enablers. The FACTI report focused on dubious, but not clearly illegal, financial transactions. The OECD report was limited to situations in which there were tax crimes or other financial crimes. These reports illustrate the point that lawyers are increasingly associated with those actions of their clients which are considered immoral or against the interests of society, even if the lawyer's advice is not unlawful. The FACTI Panel report recommended that governments should set global standards for legal professionals, and the OECD called on governments to reflect on whether legal professional privilege poses a barrier to successful investigation and prosecution of offences.

5. But it is in the area of climate change where this link between law firms and their clients has been most pronounced. Before the pandemic struck, the UK climate campaigning group, 'Lawyers for Extinction Rebellion', singled out law firms which acted for carbon emitters and demonstrated outside the offices of Slaughter & May<sup>4</sup>. More recently, the US group, 'Law Students for Climate Accountability',

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<sup>1</sup> [http://www.europarl.europa.eu/cmsdata/135340/P8\\_TA-PROV\(2017\)0491\\_EN.pdf](http://www.europarl.europa.eu/cmsdata/135340/P8_TA-PROV(2017)0491_EN.pdf)

<sup>2</sup> <https://www.factipanel.org/>

<sup>3</sup> <https://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collar-crimes.htm>

<sup>4</sup> <https://www.lawgazette.co.uk/news/green-campaigners-lie-down-outside-slaughter-and-may/5103272.article>

wrote to the law firm, Gibson, Dunn & Crutcher to ask where their red lines lay in acting for the fossil fuel industry.<sup>5</sup> In the past, student activists staged protests at recruiting receptions held by Paul, Weiss, Rifkind & Wharton, demanding that the firm stop representing ExxonMobil in a series of climate change lawsuits, and hundreds of law students signed a pledge that they would not work for the firm as long as ExxonMobil remains on its client roster.

6. 'Law Students for Climate Accountability' also published the 'Law Firm Climate Change Scorecard'<sup>6</sup> in 2020 and 2021, which rates law firms according to the work they undertake for clients in apparently causing damage to the climate. This scorecard alleges that some of the leading law firms in the world are involved in such activities. For instance, it says that law firms play an integral role in transactions that finance fossil fuel development, the litigation that hinders climate accountability, and lobbying for the fossil fuel industry.

7. A 2020 example it gives is that in 2016, Allen & Overy, Milbank, Norton Rose Fulbright, and Shearman & Sterling advised the primary financing of the Central Java Coal-Fired Power Plant, a 2000MW plant and a \$4.3 billion dollar transaction. Over 3,500 people gathered in Jakarta, Indonesia in May 2016 to protest the project, both for its local public health impacts (including releases of neurotoxic air pollutants) and its contribution of 10.8 million tonnes of carbon dioxide into the atmosphere every year.

8. All these activities raise an issue which is becoming more prominent in international discussions on the legal profession and its accountability: the degree to which lawyers should be held accountable for the societal impact of their clients' actions, and whether lawyers should be viewed as professional enablers of undesirable ends.<sup>7</sup> The classic defence has been that lawyers should not be identified with their clients' causes, but there is more and more evidence that governments, NGOs and activists ignore this principle, and hold lawyers directly socially accountable for the damage that they are perceived to have helped achieve.

9. This is not something which is unique to international trade in legal services, but also appears as an issue in the context of such trade. At present the focus is on large law firms, a significant amount of whose profit is derived from cross-border work. It amounts to a general regulatory challenge to the traditional principle (not identifying lawyers with their clients) which has long been thought to underlie the rule of law.

10. As a result, these are the kinds of questions which bars need to address:

- Are the traditional principles (not identifying lawyers with their clients, the right of everyone to representation, the right of a client to undertake lawful transactions even if they might be considered undesirable) important ones that should be defended ?
- is it too late to save the traditional principles?

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<sup>5</sup> [https://taxprof.typepad.com/taxprof\\_blog/2021/04/law-student-climate-change-activists-target-gibson-dunn-law-firm.html](https://taxprof.typepad.com/taxprof_blog/2021/04/law-student-climate-change-activists-target-gibson-dunn-law-firm.html)

<sup>6</sup> <https://www.ls4ca.org/>

<sup>7</sup> <https://www.lawgazette.co.uk/commentary-and-opinion/the-new-slur-we-are-professional-enablers/5107611.article>

- should there be an IBA or other international initiative to educate policymakers and the public on the role of the traditional principles in helping to ensure a vibrant rule of law?
- do the principles need to be qualified or supplemented with an explanatory code, or replaced altogether?

### **Will lawyers face efforts to quantify their negative effect on climate, as a result of their work for clients?<sup>8</sup>**

11. As noted above, lawyers are increasingly described pejoratively as ‘professional enablers’ and are criticised for legal advice that is not criminal but is viewed as socially undesirable. One goal of this information paper is to make lawyers and law firms aware that, in the future, there may be efforts to quantify the negative effects of lawyers’ advice on the climate. Activists more frequently now state that, while many service businesses pollute very little themselves, they do much to aid and abet the emissions of others, as discussed above. Law firms and other professional services are cited as examples of indirect contributors, by promoting high-emissions activities through the activities of their clients. Activists observe that there is currently no way to quantify lawyers’ responsibility for the damage they therefore cause indirectly to climate change, but there is activist interest in developing such a system.

12. In the field of finance, there has been the introduction of a climate-disclosure framework. Banks have come under increased pressure in recent years for providing capital to large polluters in energy, industry, and beyond. New tools have emerged in recent months to help them evaluate and disclose their impact in underwriting pollution.

13. Activists say that if lenders and traders can come up with a formula for how their work translates into greenhouse gas emissions, then it seems reasonable to suggest that law firms should try to do the same through their client activity. Developments along these lines are not far-fetched, since they broadly fall within an existing international framework – the United Nations’ 17 Sustainable Development Goals (SDGs), which form part of the 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015.<sup>9</sup> Many of the SDGs touch on climate change, and one focuses on it alone (SDG 13).

14. Therefore, although measurement of indirect contributions is not yet a reality, bars need to be aware of such developments so that they can contribute to the debate in preparation for the future. The alternative is that, when the moment arrives, bars will have to accept frameworks for their members for measuring indirect climate impact, to which they have not contributed and which may not be suitable for the legal profession.

### **Is going digital a help or a hindrance?<sup>10</sup>**

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<sup>8</sup> <https://www.bloomberg.com/news/articles/2020-12-08/lawyers-and-publicists-need-their-own-emissions-category-call-it-scope-x>

<sup>9</sup> <https://sdgs.un.org/goals>

<sup>10</sup> <https://www.ictworks.org/digital-technologies-climate-change-problem/#.YCusxWhKiUk>; <https://ec.europa.eu/digital-single-market/en/news/why-we-need-redesign-internet-fight-climate-change-connect-university>; <https://www.resourcesmag.org/resources-radio/environmental-impacts-digital-technologies-george-kamiya/>

15. The usual wisdom is that digital services, particularly cross-border, are kinder to the climate because they do not involve physical travel (airlines, taxis). But the measurement of the impact of digital services shows that they also involve a severe impact on the climate, as a result of the following trends:

- replacement rather than repair (new models of phones or tablets with better functionality);
- software development forcing hardware upgrades (new software may mean new hardware);
- the growing e-waste problem (discarded computers, phones and other equipment);
- technology driving electricity demand (in making devices, powering them, powering data storage and streaming, bitcoin mining, digital carbon footprint currently increasing at 8% each year); and
- environmental exploitation and impact (rare minerals, size of data farms).

16. Consequently, the move to digital services, whether cross-border or otherwise, has its own impact on the climate. In the near future, and given current trends, awareness of business impact on the climate and on the environment in general will become a key factor in business success. It is probably the case that no bar has considered this issue, nor issued advice to its members about the relative merits - in terms of impact on climate - of various ways of transacting legal business. This is once more a horizontal issue, but with a greater impact on the work of international cross-border firms.

### **Potential impact of climate change on relevant areas of work**

17. This heading covers a different aspect of climate change. So far, the focus has been on the impact of law firms' work on the climate. But climate change also affects the areas of work which lawyers undertake for their clients.

18. Although climate change is not yet widely recognised as a separate discipline of law, and very few clients consult a lawyer openly and directly with what they recognise as a climate change problem, there are various areas of legal work affected. Bars need to be aware of the common theme running through them, and consider how best to train their members, and contribute sensibly to reform of the law and procedures as they affect their members' work. This has the potential to be an important – and indeed remunerative - future area of work for lawyers worldwide, as they advise clients on how to go green, on emission reductions, and on compliance..

19. Here is a list of possible work areas on which lawyers might need to offer climate advice:

- insurance - asset owners need to understand potentials risks in relation to insurability of their assets and contract terms will need to be explicit about where climate risks reside;
- real estate transfers – flooding and insurability; business interruption and rent suspension; environmental performance (e.g. gas heating, energy efficiency);
- construction – energy performance, manufacturing processes, lifecycle maintenance and the ability to repurpose and reuse materials;

- due diligence – the need to investigate aspects of environmental performance forms part of acquisitions and disposals, of assets or whole businesses;
- reporting and disclosure – e.g. Taskforce on Climate Related Financial Disclosures and corporate environmental impact reporting requirements;
- corporate practice – large businesses are required to report on their environmental performance, including through their supply chains, and smaller businesses in those supply chains will have to meet similar standards;
- investment practice – investors increasingly take environmental performance into account as standard;
- public authority procurement practice – public bodies are challenged to act in line with public declarations they have made; the need to demonstrate good environmental performance will become commonplace;
- risk management – lawyers support clients to manage risk. Direct climate risk, transition risk over the coming years and reputational risk are becoming live issues for clients (banks, insurers, advertisers and lawyers already being measured by whom they advise);
- duty of care – there are an increasing numbers of court cases globally pushing the bounds of what previously may have been regarded as the limits of the duty of care, requiring advice on risk management to pre-empt the prospect of future challenge.

## **Conclusion**

20. This is an information paper for bars. The involvement of bars with issues arising out of climate change is still in its infancy, and it is hoped that this paper will prompt an ongoing discussion which will help this paper to evolve and become more useful over time, maybe leading to recommendations to bars.

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