

ECRI

Contractual allocation of environmental risks and liabilities

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Agenda

Policy and commercial context

Contractual arrangements

Sufficiency

Recommended areas for further work

Policy context

Climate change:	EU 20% reduction by 2020 UK CCC report (12/2010) 60% reduction by 2030 Reshaping of electricity sector in next 20 years Low Carbon Construction Final Report November 2010 Adaptation (reporting/risk management)
Water:	River basin plans. Groundwater Regulations focus on contamination sources. EA focus on water consumption, metering, footprinting. OFWAT review. Water White Paper due out in UK in 2011.
Biodiversity:	Habitats/EIA legislation may require relaxation, greater scope for offsetting. CBD COP10 global strategy, EU commitment to halt biodiversity loss by 2020.
Waste:	EU policy requires major reduction in landfilling. Shift to recovery, recycling, and incineration (waste to energy). Regulation and contractual requirements re Site waste management plans reflect this.
Contamination:	Domestic soil and water historic contamination regimes, EU Environmental Liability Directive now implemented for damage to un-owned environment
Governance:	Corporate carbon reporting, OFR consultation's emphasis on environmental and social issues; SEC guidance on climate reporting. NB "control" risk for parent companies (Buncefield judgment, now on appeal).
Regulatory:	Less money for hands-on regulatory agencies. Move to results based obligations and self regulating/reporting. Likelihood of higher fines for serious incidents, regulatory (not criminal liability for minor breaches)

Activism re-awakens:
Unprepared for the spill? Unprepared for climate change?"



Soft law sustainability initiatives



UNEP FI

Equator Principles

Carbon Disclosure Project

UN Principles for Responsible Investment

P8 (Pension Funds Initiative)

Climate Principles

Carbon Principles

ClimateWise



Commercial context

Sustainability issues back on corporate agenda

Financial institutions refocused : IFC standards and Equator Principles review

BUT soft law commitments represent an undertaking as to better performance, changing the nature of duty of care owed

Contractual mechanisms required to deliver on corporate rhetoric

Current disconnect between this, and the general business understanding of sustainability and the (non)pricing of green

Currently a low probability: high impact issue

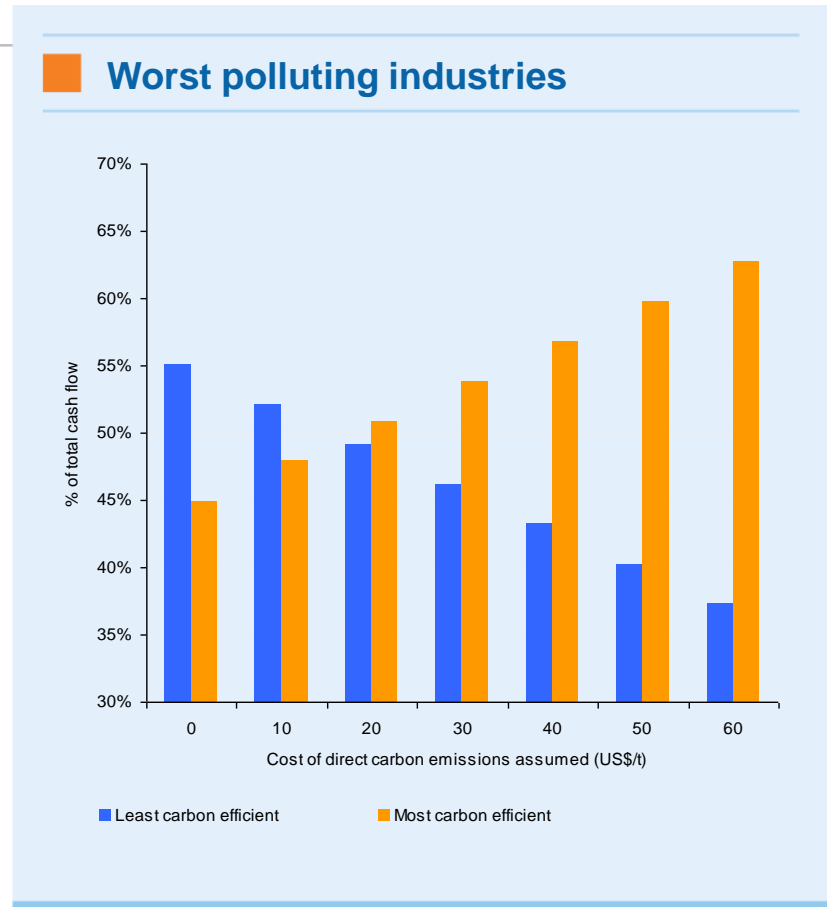
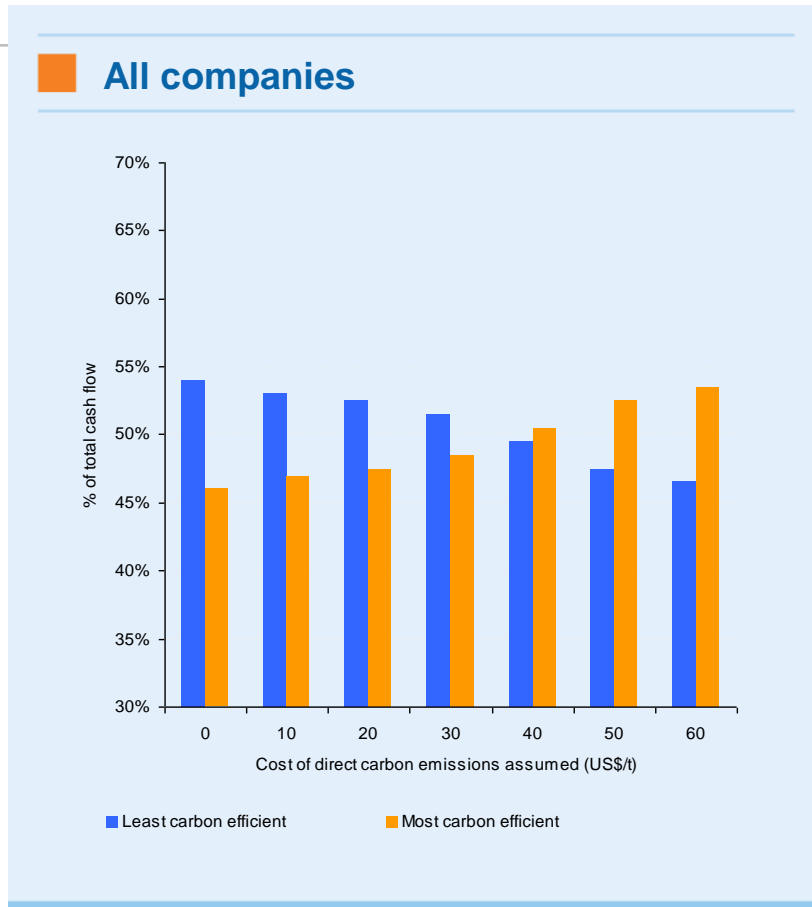
Given tight margins, it is being largely ignored

Inertia and lack of understanding of inherently complex, difficult to quantify issue

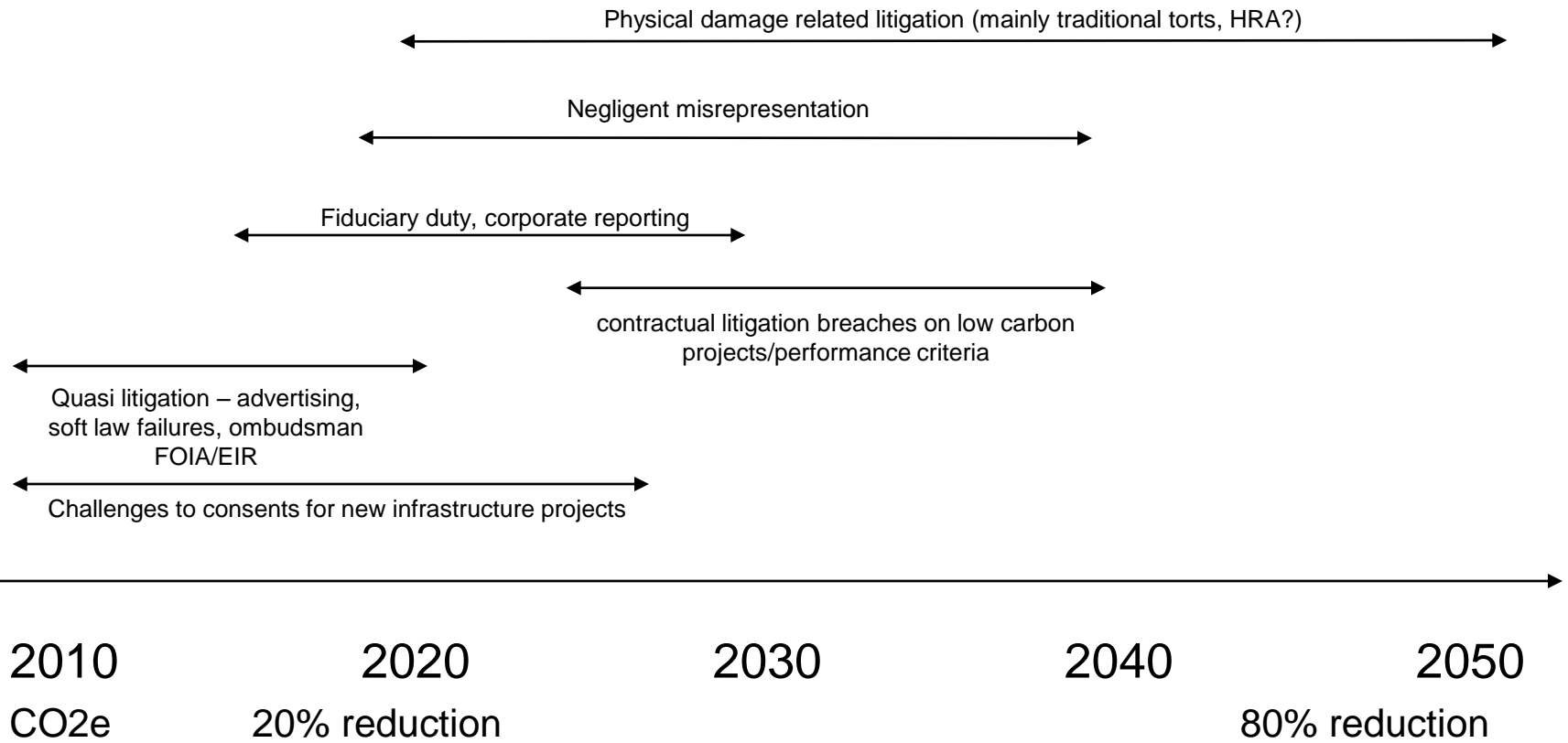
BUT position likely to change, and change quickly in climate area

Sustainability will increasingly drive profits and cashflows

Fully pricing carbon emissions may lead to large cashflow transfers from Laggards to Leaders



Future Climate Litigation: a possible scenario if adequate policy is not deployed



Contractual arrangements

Principally to be addressed in:

- employer's brief
- contract specification (detail to align with EIA and bank standards)
- impact assessment

Currently heavy reliance on general provisions

Reflects project finance documentation as of 10 years ago

Increasing importance of agenda, complexity, collaboration across supply chain means more contractual detail likely

Future likelihood of sustainability specific contract schedules

Contractual arrangements (FIDIC)

FIDIC: fossils get more detailed drafting than environmental issues!

Reasonable steps to protect environment, limit damage and nuisance and ensure emissions from its activities don't exceed prescribed limits

Reliance on general provisions, in particular obligations to:-

- > comply with laws
- > do the Works in accordance with the Contract, including Employer's Requirements and those necessary for safe and proper operation
- > right to remove workers for persistent conduct prejudicial to HSE
- > indemnity for personal injury and property damage (excl Works)

Contractual arrangements (JCT)

General JCT provisions including compliance with Contract Documents, Health and Safety Plan, and Statutory Requirements

JCT 2009 Revisions 2009 include sustainability provisions & guidance note

Applicable unless you positively opt out

- > Provider to assist Employer to explore ways to improve environmental performance/sustainability and reduce impacts
- > Unless told, supplier won't specify deleterious substances
- > Supplier to provide Employer with info he reasonably requests re environmental impact of supply and use of materials
- > Contractor encouraged to suggest economically viable amends which may result in environmental improvement to works
- > Performance indicators and monitoring (eg waste, energy consumption, onsite energy generation, mains water consumption, CO2, vehicle movements, biodiversity & habitats, whole life performance)
- > Scope for value engineering to encourage design efficiency

Sufficiency

General provisions have been felt by industry to be sufficient to date

Rarely subject to specialist input

BUT:

Vague contractor: sponsor allocation of risk and responsibility is often problematic if accident occurs

Lender requirements can be onerous, costly and time consuming, and are very often misunderstood

Low carbon agenda, focus on waste and water minimisation, embodied carbon requires much more rigour – JCT sustainability provisions are a start

There is a need for more tailored drafting – but on its own this is not sufficient

Elephant traps: HSE and climate

- > Cultural failure to buy in
- > Too complex
- > Failure to think sufficiently widely to identify issues/ requirements
- > Absence of/inadequate risk assessment
- > Failure to implement
- > Over reliance on written systems/policies
- > Over reliance on few individuals
- > Integration failures/silos across supply chain
- > False positives
- > Believing the PR
- > Delegation of responsibilities to third parties (contractors, consultants)

Recommendations for further work

Integrated approach required to manage environmental risk and drive for low carbon:

- tender, contract terms and external drivers (law, soft law etc) need to correlate
- plan for actual implementation, respective responsibilities, timings, costs and incentives
- reliance on policies and manuals on an intranet is risky
- oral/document based communication strategy, taking account of culture, avoid “nerd” instinct
- process for identifying and fixing problems
- monitoring, reporting and verification
- avoid ostrich behaviour to retain competitive advantage
- insurance solutions

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