

# **Top 5 considerations for in-house counsel on COP28**

The eerie silence of  
ESG legal risk

The 28th session of the Conference of the Parties of the United Nations Framework Convention on Climate Change (COP28) will take place in Dubai, United Arab Emirates from 30 November to 12 December 2023. Stephen Shergold, Global ESG Leadership Group Chair explores the related legal risk and opportunity considerations for in-house counsel.

## The eerie silence of ESG legal risk

### Top 5 considerations for in-house counsel on COP28

COP28 coverage feels desperately light. COP29, at the time of writing, has no venue and may not take place a year from now. Yet extreme weather events caused by a changing climate continue to wreak havoc at an increasingly deadly rate. What should General Counsel and in-house legal teams make of this eerie silence and political vacuum?

#### 1. Litigation risk looms

The absence of progress at COP is not the same as status quo for legal risk. Legal risk is increasingly driven by societal expectations and key stakeholders are deeply concerned about the path to net zero. Should COP28 fail to respond to the first global stocktake and make meaningful progress on a roadmap to achieve the goals of the 2015 Paris Agreement, litigation risk will weigh heavy on companies not following transparent proactive decarbonisation strategies:

- Investors will continue to challenge companies' decarbonisation and climate adaptation strategies;
- Class action groups will sue for loss and damage arising from adverse weather events, global warming or rising sea levels; and
- Competition and Markets Authorities will investigate unfair advantage based on unsubstantiated sustainability claims.

#### 2. Rating agencies are watching

Ratings agencies are watching and so beware of controversies. Ratings agencies are increasingly sensitised to controversies arising from environmental and social impact. To manage the impact on stock valuations, a strategy based on reacting to and seeking to limit the damage from an emerging controversy will likely be considered too late. A climate controversy that

could but likely won't be addressed at COP28 is the robustness of the voluntary carbon offset markets. As companies seek to deliver on carbon neutral and net zero commitments, the rush to buy unregulated carbon offsets has left many exposed to controversies as project-based carbon impacts are challenged. Without governmental progress on voluntary markets, or more harmonised global carbon credit authentication, General Counsel will need to proactively manage the risk of exposure created through undeliverable net zero claims and voluntary carbon market weaknesses.

#### 3. Supply chain pressure mounts

Universal mechanisms are needed less when EU (and US) measures impact global supply chains. General Counsel who have large European businesses are already tuning into the heightened volume of non-financial reporting under the Corporate Sustainability Reporting Directive (CSRD) (some will start collecting performance data from January 2024), but around the world, General Counsel need not keep their eyes on Dubai to see whether they will need to record more data on GHG emissions and report Scopes 1, 2 and 3. Rather, those European based businesses further along the value chain are going to be obliged to seek that information to meet compliance obligations. For global supply chains, the reach of CSRD and other Green Deal regulations is already starting to impact competitive positions right along the supply chain, and far from the EU. It matters little that COP28 makes slow progress when your largest customers are requiring you to measure and reduce GHG emissions. Strategy teams will look to their legal departments to understand where this pressure is coming from.

#### 4. Stranded assets and spikey transitions on the horizon

As time slips by, the risk of stranded assets becomes ever more acute. The timetable of climate change has no correlation to the appetite of governments to regulate. With governments slow to act, other key stakeholders may take action sooner, based on tragic experiences of adverse weather events, to remove the social licence to operate for certain activities. This will be felt through rising costs of external finance, reducing pool of investors and possibly a declining customer base. For the General Counsel though, it will be the delays caused to deliverability of projects or exiting from undesirable positions that require attention. As the human impacts of climate change increase pressure, so the speed with which assets risk becoming stranded will hasten. In the absence of a measured and managed transition through an effective and successful COP28, companies will endure a spikey transition. The spikes will be fought with legal responses and questions will be asked about whether this could have been seen coming.

#### 5. Double-materiality: the new barometer for General Counsel

Finally, General Counsel should steady themselves for contract renegotiations. The economic foundations of deals struck will unravel as both the costs of decarbonisation and adapting to the adverse consequences of climate change are revealed. 'Double materiality' will be the phrase General Counsel learn in 2024 – not because of COP28, and not because of the CSRD, but because when you value a deal or invest in a project you will want to know the materiality of both its impact on GHG emissions and the effect of climate change on that asset or project. General Counsel will need to oversee this due diligence and ensure that the conclusions are reflected in contracting structures and valuation. And remember, COP28 is about climate, but climate is only one topic that companies must manage as stakeholders hold business to account for a range of impacts on people and planet.

##### In summary

General Counsel may be right to think that COP28 may deliver little of substance in terms of their day-to-day role and responsibilities; but they must remain vigilant of the counter-balance to a weak global governmental response to a societal crisis. ESG legal risk management will be a greater priority in 2024. A poor COP28 will make anticipating and managing that legal risk even harder but critical for General Counsel and their organizations.

# How are we supporting clients on their ESG journey?

We've listed some of the key areas we're currently providing support to our clients below.

**ESG  
global  
regulatory  
risk**

**ESG supply  
chain**

**ESG  
M&A due  
diligence**

**Sustainable  
finance**

**Greenwashing  
and litigation**

**Reporting  
and  
disclosure**

In addition to the above support, we also provide a range of advisory solutions tailored to your specific ESG journey. This includes ESG legal strategy development, materiality and agility assessments, energy transition, carbon and tax advisory. Our deep sectoral experience allows us to deliver immediate value to you and your in-house legal team.

# Meet Dentons Global ESG Leadership Group

Our Dentons Global ESG Leadership Group includes former General Counsel, leading academics and authorities and cross-practice specialists to ensure you, and we take a holistic view as we explore and advise on the challenges and opportunities facing your organization. Irrespective of where you are the world, we will leverage this experience and insight to advise on how ESG will impact your international business operations.



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## Dentons Global Advisors

Dentons Global Advisors is an independent strategic advisory firm that provides integrated, multidisciplinary counsel and support for clients facing complex challenges that span legal, reputational, financial, geopolitical, regulatory, and governance dimensions.



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## Join us over the coming weeks

Over the coming weeks and beyond, follow our coverage of COP8 as we explore the likely emerging legal risks and opportunities for General Counsel and in-house legal teams. Get in contact via [esgprogram@dentons.com](mailto:esgprogram@dentons.com) to discuss what these risks and opportunities mean for your organization. You can explore more right now at [www.dentons.com/esg](http://www.dentons.com/esg)

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