COP28: what lies ahead for in-house counsel?

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ESG legal risk management will be a greater priority in 2024 and beyond

As the 28th session of the Conference of the Parties of the United Nations Framework Convention on Climate Change (COP28) comes to a close in the UAE. Dentons' Stephen Shergold, global ESG leadership group chair, and Aragon St-Charles, global ESG officer, explore legal risk and opportunity considerations for in-house counsel.

The COP28 Summit shows global leaders to advantage. An event heralded by many as essential for governments to re-connect and align on how to tackle climate change, the COP28 summit shows global leaders to advantage. An estimated 70,000 politicians, royalty, business leaders, scientists and others descended into Dubai for this year's gathering. While basic consensus gets established and goals are agreed upon, how does the summit's impact move beyond theory (and photo ops) and into addressing increased emissions with practical implementation?

Against a landscape of diplomatic relations, varying

degrees of allegiance, and different tipping points across countries and sectors, solid policy application can seem an impossible outcome. With an increasingly bloated guest list (attendance has tripled since 2019) flying long distances on planes into a top oil-producing country, coupled with mounting concerns over 'greenwashing', it is easy to see why 'The Green Davos' faces increased scrutiny into its true purpose and influence with regards to combatting climate change.

As the UN climate secretary Simon Stiell said during the conference: "We need COP to deliver a bullet train to speed up climate action. We currently have an old caboose chugging over rickety tracks."

So, what should general counsel and in-house legal teams make of another year of modest progress, and lack of regulatory clarity?

Litigation risk looms. The absence of progress at COP does not reflect the 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. The 'Global Stocktake' is the main accountability mechanism built into the 2015 Paris Agreement. COP28 saw countries offer a response to the Global Stocktake synthesis report.

Failure to demonstrate material progress on phasing out fossil fuels will result in litigation risk which will weigh heavily on companies that do not follow transparent and proactive decarbonisation strategies. As investors continue to challenge companies' decarbonisation and climate adaptation strategies, businesses can expect more class actions for loss and damage arising from adverse weather events, global warming or rising sea levels. Furthermore, competition and markets authorities can be expected to investigate unfair advantage based on unsubstantiated sustainability claims.

Ratings agencies are watching. 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.

Supply chain pressure is mounting. 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). However, around the world, general counsel need not have kept their eyes on Dubai to see whether they will need to record more data on GHG (greenhouse gases) 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 not just in the EU. It matters little that COP28 makes slow progress when the largest customers are requiring businesses to measure and reduce GHG emissions. Strategy teams will look to their legal departments to understand where this pressure is coming from.

Stranded assets and spikey transitions are 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 the tragic experiences of adverse weather events, they are likely to focus on removing the social licence to operate for certain activities. This will be felt through the rising costs of external finance, a reducing pool of investors and possibly a declining customer base. For general counsel though, it will be the delays caused to deliverability of projects or exiting from undesirable positions that require attention. As the human impact of climate change increases pressure, 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 should expect a spikey transition. The spikes will be fought with legal responses and questions will be asked about whether they could have seen this coming.

Double-materiality is the new barometer. 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 or the CSRD, but because when a deal is valued or investing in a project, businesses 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. It is worth remembering that although COP28 is about climate, climate is only one topic that companies must manage, as stakeholders hold business to account for a range of impacts on people and the planet.

Stiell from the UN summed up the progress made at COP by saying: "All governments must give their negotiators clear marching orders – we need highest ambition, not point-scoring or lowest common denominator politics. Good intentions won't halve emissions this decade or save lives right now."

General counsel may be right to think that COP28 delivered little of substance in terms of their day-to-day role and responsibilities, but they must remain vigilant of the potential for a weak global governmental response to what is fundamentally a global societal crisis. ESG legal risk management will be a greater priority in 2024 and beyond. Mediocre outcomes from the summit will make anticipating and managing that legal risk even harder - but will remain a critical area of focus for general counsel and their organisations.