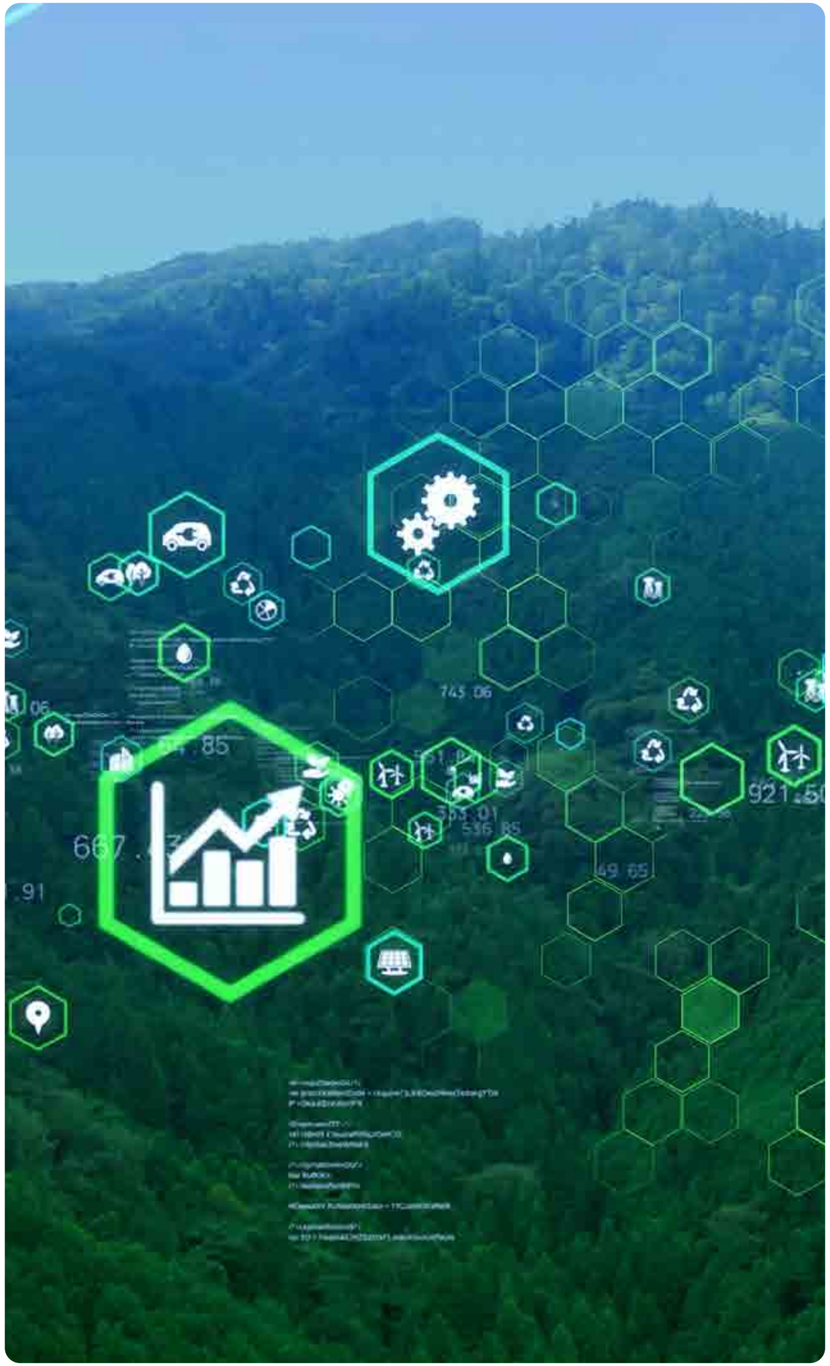

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LEXOLOGY
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Market Intelligence

ESG ENGAGEMENT & LITIGATION 2023

Global interview panel led by Woodsford

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Woodsford, this *ESG Engagement & Litigation* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide

Minority shareholders
Greenwashing
Dispute resolution
2023 outlook

START READING

About the editor

Steven Friel
Woodsford

Steven Friel is a leader in the law and business of ESG. He is particularly expert in helping to organise large groups of shareholders, bondholders and other stakeholders to collaborate in the face of catastrophic breakdowns in ESG at publicly listed companies. He has repeatedly been ranked by independent legal directories. *Chambers and Partners* has ranked him for many years, with comments including: 'Steven deploys strong problem-solving abilities with the finesse only available to people of unusually high intelligence ... praised for his hands-on approach and ability to work constructively on even the biggest and most complicated matters ... Clients highlight his enthusiastic demeanour ... He has a razor-sharp legal mind, is intellectually curious, and has strong business sense.'

Steven is a graduate of Cambridge University, and graduated top of his class with a Master of Laws degree in international dispute resolution from the University of London. He was listed as one of the 'PwC – Top 10 Inspirational leaders 2020' by the British LGBT Awards, and as one of the 'Top 100 Gamechangers 2022', in partnership with Citi, which recognises 100 inspiring people who are helping to change the game for LGBT+ diversity, equity and inclusion (DE&I) across the global financial services industry.

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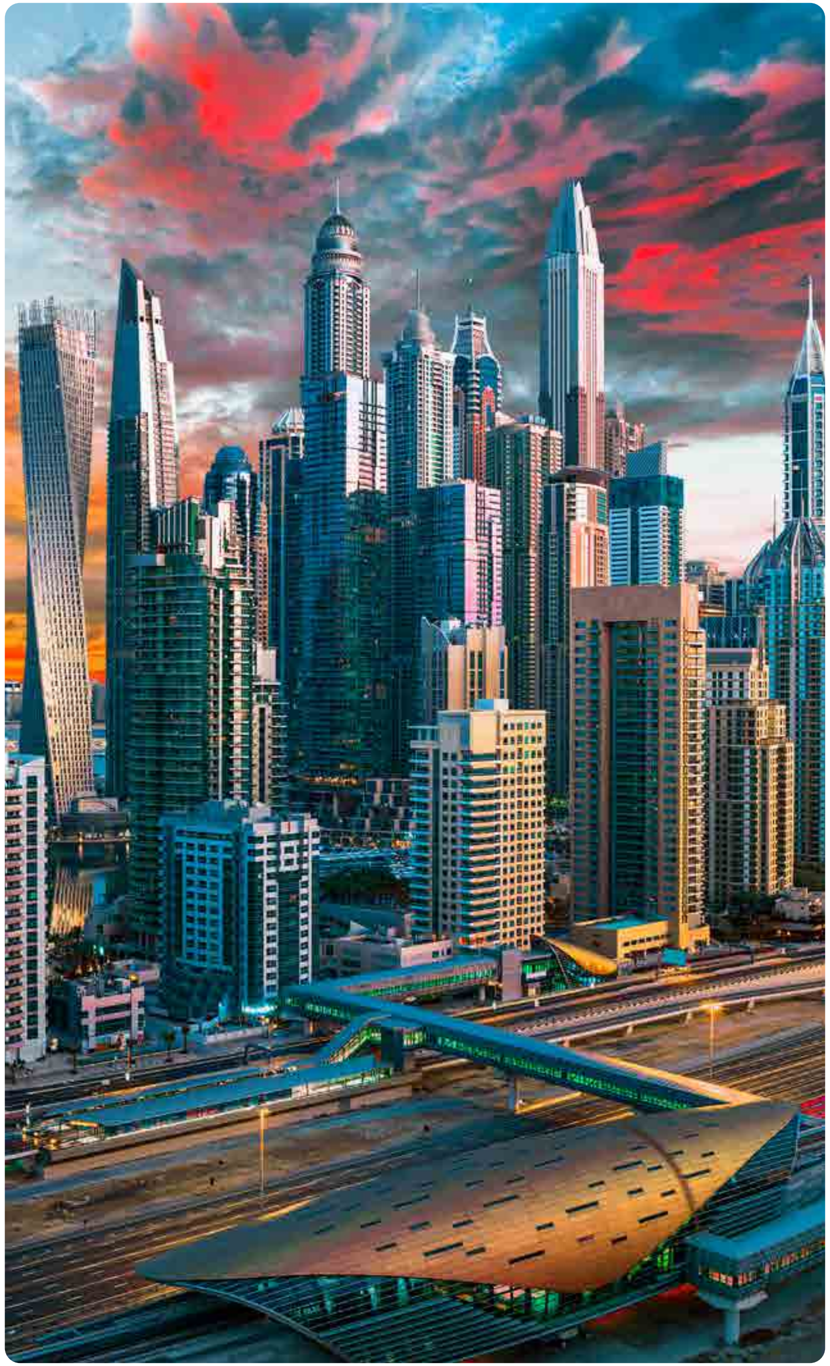

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United Arab Emirates

Mohammed R Alsuwaidi is the founding and managing partner of Alsuwaidi & Company. Mohammed served as the head of legal at Emirates General Petroleum Corporation before founding Alsuwaidi & Company in 1997. Throughout the past two decades, Mohammed has built an enviable arbitration practice, assisting reputable names throughout the GCC and beyond. He is a long-standing disputes lawyer in Dubai and a highly regarded presence before the local courts. He is a regular adviser to banks on issues such as the enforcement of arbitral awards and has noteworthy expertise in real estate disputes.

Suneer Kumar leads the corporate and commercial team at Alsuwaidi & Company. He is active across sectors, including government and quasi-government, real estate, employment, information technology and oil and gas. He advises national and international organisations, multinational corporations and high net worth individuals on licensing, restructuring, M&A, employment, real estate, agency, distributorship and franchise. Suneer has incorporated over 250 different entities in free zones, onshore and offshore for individuals, multinational corporations and juridical persons.

1 Which companies have ESG obligations in your jurisdiction, and to whom do they owe these obligations? What is the source and nature of these obligations?

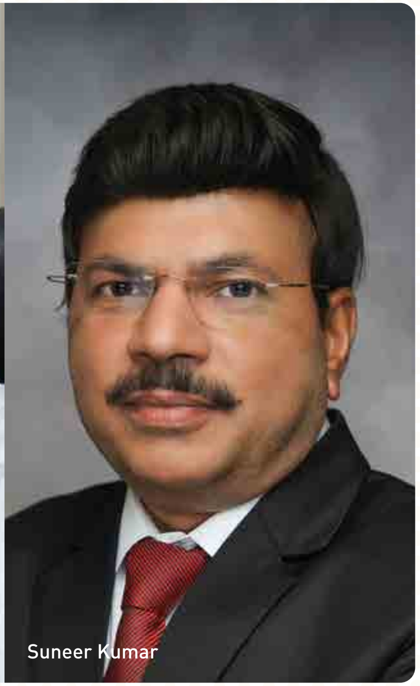
ESG stands for environmental, social and governance. In business terms, it is a hot topic and at the top of the agenda for every business strategy meeting and discussion. It refers to non-financial factors that can impact the success of a business. ESG factors help investors to identify risks and opportunities to ensure that their investments are both responsible and sustainable. It is often used as an index of good corporate performance and governance. As it moves from being a voluntary standard to an enforceable regulation, the firms involved must comply or face regulatory risk.

Federal Decree Law No. 32 of 2021 (the New Commercial Companies Law) came into force on 2 January 2022 and strengthened the corporate governance of UAE companies. This transformation eventually led to more robust corporate governance rules in public joint stock companies (PJSCs) issued by the Securities and Commodities Authority (SCA) in Decision No. (03 R.M.) of 2020 - adopting the Corporate Governance Guide for Public Joint Stock Companies (the Governance Code).

Article 76 of the Governance Code requires the entities listed on the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market (DFM) in the UAE (the listed PJSCs) to prepare and publish annually a sustainability report addressing the following areas:

- the environment: the impact of the company's operations and decisions on the environment and the company's communities;
- society: how the company's policies and operations contribute or could contribute to social justice, the well-being of workers and employees and the surrounding community; and

Mohammed R Alsuwaidi



Suneer Kumar

- the economy and governance: how the company contributes to society's economic benefit and the impact of the company's operations on the local economy.

Further, listed PJSCs are required to comply with Global Reporting Initiative standards and any sustainability requirements set forth by the ADX or the DFM, depending on which market said listed PJSC is listed on.

For financial year 2020, the Governance Code required listed PJSCs to submit their annual sustainability report no later than six months following the end that financial year. For subsequent financial years, listed PJSCs should submit their sustainability report to the SCA within 90 days of each financial year end or before the date of the annual general assembly meeting, whichever is earlier.

"Recently, the ADGM has focused on developing standards for green-labelled financial products and services, aiming to help investors to identify investments with a sustainability objective and ensuring that financial institutions incorporate climate change risk into their risk management practices."

Adopting an ESG framework and reporting is also encouraged to be employed by all entities in the UAE, whether they are private or state-owned. More UAE companies now recognise ESG as a tool to communicate their strategies, and around which to market the green initiatives that they owe to customers, investors and other stakeholders.

2 Which regulators and other public bodies in your jurisdiction take an interest in ESG and related collective engagement and litigation? What is the extent of their involvement in ESG issues?

Regulators throughout the UAE have placed ESG as a top priority. Key regulators in Dubai and Abu Dhabi continue to enhance their respective approaches, frameworks, policies and requirements for ESG. For example, the Dubai Financial Services Authority (DFSA) is actively working to introduce a supervisory approach and regulatory framework for the development of sustainable finance within the Dubai International Financial Centre (DIFC). In 2020, the DFSA, along with other UAE financial regulators and exchanges, published the Guiding Principles on Sustainable Finance in the UAE, pledging to encourage and support financial services companies in the DIFC. The Guiding Principles underscore the need to develop strategies and incorporate sustainable practices for risk management and decision-making across companies' business activities. Regulators in the UAE are also building their own internal capacity with the objectives of integrity and efficiency of public and private markets and the soundness of the financial system in the UAE.

In Abu Dhabi, the Abu Dhabi Global Market (ADGM) has been implementing several sustainable finance initiatives to preserve the UAE's economy and environment. The ADGM aims to develop a vibrant sustainable finance hub that supports capital formation as well as the creation and issuance of products to achieve positive economic, social and environmental objectives. The ADGM is working with its peer regulatory authorities in the UAE to develop a taxonomy for sustainable projects and is also enhancing its regulatory framework to include clear ESG and sustainable finance requirements in its regulatory framework. Recently, the ADGM has focused on developing standards for green-labelled financial products and services, aiming to help investors to identify investments with a sustainability objective and ensuring that financial institutions incorporate climate change risk into their risk management practices.

3 How do minority shareholders engage with public companies to ensure that they comply with their ESG obligations?

The Securities and Commodities Authority (SCA) aims to promote good corporate governance and to protect minority investors by defining internal control frameworks that hold the board of directors accountable to the company's shareholders and hold the company accountable for its practices. The SCA identified the following rules and regulations to protect minority shareholders of listed PJSCs.

Access to deals concluded with related parties

If the company concludes any deals with related parties, shareholders owning 5 per cent or more of the shares of that company have the right to:

- demand access to the company's books, records and any other documentation relating to these deals;
- bring a lawsuit before the competent court involving deals concluded with related parties to oblige the parties to the deal to provide all information and documentation related to the deal and show whether such information and documentation directly establish the facts of the lawsuit, are related to these facts or lead to the discovery of information that helps to uncover the true facts; and
- if it is established that the deal is unfair or involves conflict of interest and harms the rest of the shareholders, the competent civil court may rule to call off the deal and oblige the related parties to pay to the company any profits or benefits generated plus the reparations, if damage to the company is proved.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Calling a general meeting of shareholders

The board of directors of the company shall invite the general assembly to convene at the request of one or more shareholders holding at least 10 per cent of the company's shares, provided that the invitation is addressed within five days of the date of the request. The general assembly shall be convened within a period not exceeding 30 days from the date of the invitation.

"The near future should see the full implementation of regulators' regulatory framework, strategies and execution capabilities. ESG compliance will be the primary focus of collective engagement, and potentially litigation."

Adding items to the agenda of the general meeting

Shareholders owning 5 per cent of the shares of a company may direct a request to the SCA to place an additional item or more on the agenda of the general meeting within five days of the date the company calls the meeting.

Stay of execution of resolution or decision of the general assembly

At the request of shareholders who hold at least 5 per cent of the shares of the company, the SCA may issue a decision to stay the execution of decisions passed by the general assembly of the company to the detriment of the shareholders or in favour of a certain class of the shareholders, or that bring a special benefit to the board or others, whenever it is established that the grounds of the request are serious.

Request to stay the execution of the decisions of the general assembly shall not be acceptable upon the expiry of three working days from the date of those decisions.

Corporate governance carries within its realm a more quantitative measure of sustainability as it considers environmental, social and investment factors. Minority shareholders may deploy ESG concepts by exercising their right to take an active part in the discussion with the board of directors and demanding ESG integration into the company's investment platforms to increase the performance of the company. Proponents of ESG can focus on elaborating on the best practices related to corporate governance and discussing whether a dedicated committee that has sufficient expertise in environmental and social issues will be required to oversee ESG-related disclosures and requirements of the UAE jurisdiction.

4 When significant breakdowns in ESG cause loss to a company's investors, what regulatory, litigation and other mechanisms are available to the investors to hold the company to account?

ESG litigation matters vary widely, given the broad range of factors that are included under the ESG big umbrella. The UAE laws and regulations provide for litigation mechanisms whereby any customer or investor can approach the relevant court having jurisdiction with a grievance against a company that has caused loss by virtue of not fulfilling the norms of ESG. Most of the governing norms have been provided for under the Governance Code of the SCA, which have been discussed in the answers to the preceding questions, including the Global Reporting Initiatives, which a company is required to follow with regard to its sustainability requirements. Each authority on jurisdictions has its own rules and regulations governing the environment, safety and health, in addition to corporate governance. Business owners should comply with these regulations or the authority will take necessary action in the event of non-compliance, which may also lead to business loss. However, to make a claim, any such loss should be clearly shown to be a direct result of the breakdown of ESG norms.

5 When significant breakdowns in ESG cause loss to a company's customers, what regulatory, litigation and other mechanisms are available to the customers to hold the company to account?

See the previous answer, which provides details of the mechanisms that are available.

6 What developments are there likely to be in ESG collective engagement and litigation in your jurisdiction in the next five years?

The next five years should see significant progress in the UAE's ESG agenda. The near future should see the full implementation of regulators' regulatory framework, strategies and execution capabilities. ESG compliance will be the primary focus of collective engagement, and potentially litigation. Companies that do not comply with the UAE's ESG regulatory framework, laws and regulations should expect action from the regulators of their respective jurisdictions. On top of compliance, shareholders, investors and customers should expect the rollout of ESG practices and sustainable business activities to be implemented by their respective boards and management teams. Shortfalls in expectations may translate into particular actions being brought to the respective authorities or courts for decisions and enforcement in line with the UAE's ESG framework.

In recognition of its remarkable global efforts to fight climate change and enhance sustainable economy, the UAE will host the UN Climate Change Conference (COP28) in November 2023 in Abu Dhabi. This is a milestone in the UAE's commitment to accelerating the government and country's adoption of more responsible and sustainable finance, working toward its goal of net zero by 2050.

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The Inside Track

How has your work in relation to ESG, collective engagement and litigation developed over the past five years?

Although our firm has not been involved in many matters involving ESG violations directly, we can see the positive trends emerging in this field.

To date, the trends indicate that ESG litigation has rarely focused on matters beyond climate change litigation or disastrous environmental events. However, we see that climate change will continue to have a significant impact in relation to ESG litigation, while the scope of ESG litigation is much broader.

The impact of covid-19, has sharpened the focus on environmental and related social issues, specifically workforce health and safety, diversity issues, job redundancy and supply chain disruption. We have increasingly seen claims being directed at a high level across businesses and industries, resulting in tremendous distress on finances. This leads to high demand on an organisation's 'look-through' performance and capabilities, including enhanced governance and systems to provide timely information and data across the business.

Furthermore, acquisitions, mergers and restructures also give rise to many legal considerations that need to take ESG factors into account where related data is salient for both the sell- and buy-side due diligence.

The incorporation of ESG in companies' business strategies will create more challenges and new types of cutting-edge claims. Our firm is committed to joining efforts and creating more awareness, and to providing the necessary legal consultancy and assistance required to successfully onboard our clients and community to collectively evolve and expand in readiness for better ESG implementation, validation and practice, having a strong belief that COP28 will make the difference.

What was the most noteworthy ESG matter that you have worked on recently and what features were of key interest?

A commercial contract–contractual agreement claim for a sustainable smart construction where the client's expectations were not met.

The construction is a cutting-edge and innovative facility that is unique in the MENA region. It is an icon of sustainability. The building is expected to use the latest technologies including AI, the latest smart management technologies, IoT, Big Data and Open Data. This will help to reduce the use of water to almost half of that for a similar huge building, and will maximise and optimise the usage of natural light and renewable energy, resulting in a significant reduction in heat. It will provide a balance between development, technology and the environment for more green, safe and healthy conditions.

The main challenges were building in more predictability (time and cost); and achieving the specifications required by the client to meet the purpose. However, such issues can also be seen as opportunities if, when approving a contractor, the scope of choice can be expanded to include more ESG-qualified contractors.