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ESG Litigation

ESG Litigation
Guidance





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Your trusted advisor



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Rashmi is unique in her approach to disputes. As a Lawyer with over 25 years' experience and Entrepreneur, she approaches disputes in a strategic manner that ensures overall success for the organisation or individual. Her straight talking approach is welcomed. Her mediation skills have also played a crucial role in negotiations and settlement.

Rashmi's background also includes corporate governance and as a business advisor and lawyer her unique insight has been valued by leadership teams and informs key strategic decisions and, in some cases, the organisation's future. Rashmi is a critical part of the Armour in any dispute.

Rashmi is a welcomed advisor to boards particularly when organisations face Court disputes where there can be an impact on brand. Rashmi's experience has been working with companies and directors in complex deals, negotiations and disputes.

Rashmi Advises

- Boards
- Directors
- Shareholders
- Suppliers
- Sports Personalities
- Partnerships
- CEOs, CFOs, CTOs
- Private Equity firms
- Restructuring firms
- Accountants

Memberships

- UK Governance and Policy Spokesperson for Ambassadors for the Institute of Directors
- Turnaround Management Associations (TMA) European Board Director
- Cabinet Office: Advisory SME Panel

ESG Litigation Guidance

ESG incorporates:

- **Planet (Environmental)** — includes climate change, environmental management practices (EMPs), and energy generation efficiency.
- **People (Social)** — includes issues around working conditions, supply chain, modern-day slavery, culture and inclusion.
- **The G (Governance)** — this is always assumed to just mean reporting and audit. In fact, it includes the director's duties and corporate reporting, with them compounded together when they should in fact sit very distinctly. Governance can have far reaching impact for directors in terms of personal liability and the changing landscape of directors' duties.

There is a wide range of issues where litigation can occur. In my opinion, the litigation will not be limited to the organisation, but will extend to the directors, with them being personally added to ESG litigation for the failure to perform their duties.



ESG litigation should not be underestimated. Its potential is far-reaching as it is a direct attack on the Company's purpose, values, risk management and of course, its relationship with stakeholders. These are all areas in which decisions stem from the board of directors. With the continually changing regulations and public reporting, I see no reason why stakeholders will not take up arms and litigate, not just against the Company but the Directors for their failings too.



The law around this is complex – the core questions for the Directors are:

1. Do you as a board have the correct expertise to navigate these issues?
2. Does your corporate strategy cover the Political, Environmental, Social, Technological, Legislative and Economical issues your company faces?
3. When was the last time you as a director considered your fiduciary duties? Do not fall into a false sense of safety that only shareholders can file lawsuits (which they may do in any event out of choice or if public opinion and/or circumstances leads them to doing so)
4. Have you considered the change in the landscape where ignorance or failing to act may have consequences, particularly where a person or group of people are directly impacted when you ought to have known the likely impact of failing to act or not taking full measures to protect the environment and people?

I have to make the point, however – wearing my director's good governance practice hat – that this of course can be minimised if good practices by the board of directors are in place and being communicated throughout the organisation and to stakeholders. Do a review – understand what is to come and what you are doing to minimise impact because the likelihood of this litigation is very high and the outcome for both the company and directors on a personal level is potentially catastrophic.

Introduction

ESG presents opportunities and challenges. This has a direct impact on the board of directors being able to modernise the role of Governance. To address the challenges and opportunities companies face — even if it is to ensure sustainable practices are in place — there is a need to ensure that directors understand the urgency of the situation and the necessity their roles are playing. Their responsibilities lie in guiding the organisation successfully around the issue of ESG.

Directors and officers need to take note of the changing landscape with reference to ESG — litigation. It goes to the heart of the company's purpose and strategic approach. Often any litigation around ESG results in a spotlight being shone on the organisation and its directors and officers, impacting the goodwill of the organisation and the individuals. It is often a period of crisis communications and red alert engagement with all stakeholders. Of course, the litigation around ESG can result in financial loss, fines, damages, loss of sales, and investment, but also a personal liability can be attached if the director failed to fulfil their duties around good governance practice and directors' duties, not just compliance and audit.

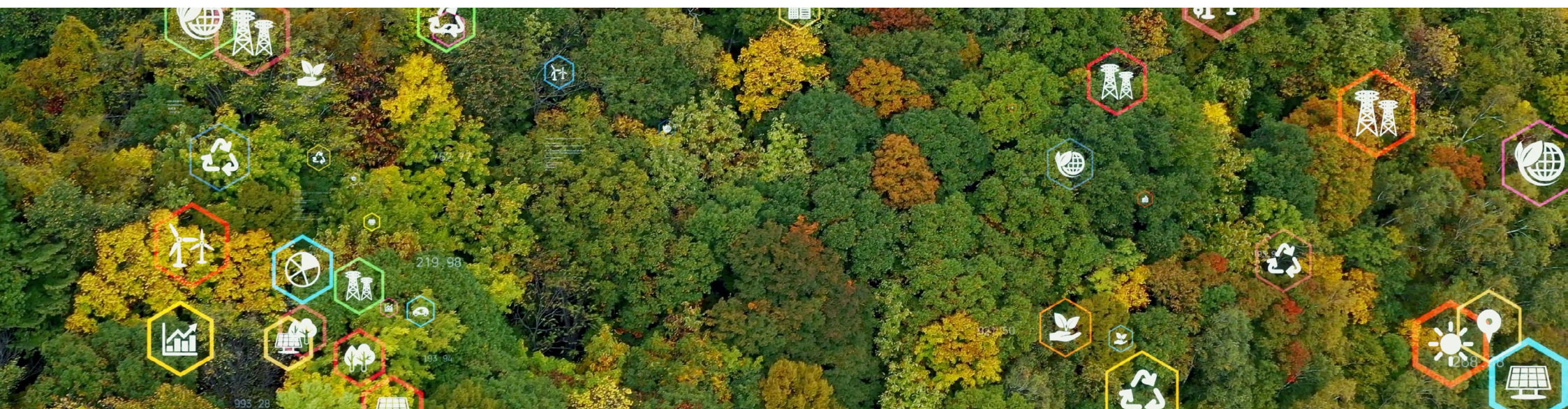
Importantly, any ESG litigation can be an indication that the company and its board of directors have been exercising poor governance with a possible consequence of triggering other market participants such as regulators to take an interest. Even if the organisation or directors and officers 'win' any litigation claim, there will be time and costs applied to the management of the communications to stakeholders and protecting any goodwill of the brand.

There should also be greater consideration in today's climate around societal movements, around inclusion and diversity practices and corporate commitment. Again, litigation is lurking around the corner.



Types of ESG Litigation

1. Government action against a Corporation around ESG issues
2. ESG related litigation around poor governance practices: action from those directly affected either on a contractual basis or as a stakeholder. Action against the
 - a. Corporation
 - b. Direct action against the directors by stakeholders for breaches on directors' duties around ESG.
3. ESG litigation around the company's operation.
4. ESG regulation breaches.



Top Issues to Watch

Regardless of jurisdiction, it does not matter where the company sits in today's world. No director or officer can say they **did not know or understand the issues surrounding ESG**. Therefore, there is a greater emphasis on good practices of directors practising good governance and the director's duties. Board performance is critical and independent reviews of it should be undertaken regularly, as well as the organisation's strategic approach as ESG sits firmly here.

There are of course some issues where we can expect to see an increase in the number of cases brought to court such as:

Climate Change: the implementation of net-zero targets is likely to result in greater litigation in particular:

- Analysis of companies' claims of their contributions/reductions in climate change
- Climate change events can lead to insurance disputes and contractual disputes with suppliers including claims around force majeure situations.

Workers' Rights/Human Rights: supply chain scrutiny and working conditions are critical:

- The company and directors can no longer hold at arm's length that they were unaware – the point here is a ticking bomb of time, as to when stakeholders will bring a claim against the company and directors.
- Revisit the definition of stakeholders. Remind yourselves – it is anyone who has been affected or can be affected by its activities.
- Increase regulatory compliance.

There should also be greater consideration in today's climate around societal movements, inclusion and diversity practices with corporate commitment. Again, litigation is lurking around the corner.



BEST PRACTICE

- **Identifying litigation risk** is the first port of call, along with a review of the general board of directors' governance practices. Carrying a **board review** of board performance from an independent is critical, as are directors' reviews. A review of the company's overall strategy should also be undertaken to ensure that ESG is sitting at the heart.
- Do you have the **right knowledge base** on the board and within the company? Who has overall strategic oversight over ESG matters and risk? Management can often play a critical role in this. There should be the right technology and data collection within the company to allow for effective decision making. Consider the pressures on audit and compliance functions and implications of resources where improvement is required.
- **Risk assessments and scenario planning** can play a critical role in the mitigation of litigation.
- **Corporate Arrangements**: If there are subsidiaries or affiliates, these should have an understanding and a handle on operations, particularly if there is limited oversight.
- **Plan Now**: start putting into practice practices for anticipated legislation/regulation such as a low-carbon/carbon-neutral economy.
- At all times **engage with all stakeholders** where possible and address crises with effective communication immediately.

About gunnercooke

At gunnercooke we are more than just a law firm. We are a full-service firm, providing operational support in addition to legal advice, ensuring that companies and directors can feel secure in having a 360 degree view on all that matters both inside and outside their business.

gunnercooke is an award-winning full service law firm, founded in 2010, to challenge, improve and evolve the way that legal services are delivered. We, at present, are more than 332 expert partners, operating nationally and internationally. We are delighted to have been recognised for 59 industry awards, including The Times' Best Law Firms 2022 and Law Company of the Year at The Lawyer Awards 2020.

We continue to evolve and support creativity and innovation in our delivery, though the key principles of our model remain unchanged:

Services delivered solely via senior lawyers. Every Partner has a minimum 10,000 hours of practising experience – they can truly call themselves 'experts'.

Certainty of pricing. We provide certainty and transparency over the cost of our services, wherever possible providing fixed fee quotes that once agreed, will not change.

Business focussed advisors. gunnercooke lawyers advise with authority. Many of our lawyers have spent time in business, learning first-hand how to work to a financial budget, and the way that legal decisions impact the wider organisation.

Our lawyers are supported by our Operating Partners, individuals with a wealth of industry operational experience. This ability to understand the business and the sectors in which our clients operate, combined with real experience of operational delivery, results in a stronger connection – we understand the pressures our clients are under and *'talk their language'*.

An Award-Winning Firm



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