



cutting through complexity

Beyond the Law

KPMG's global study of
how General Counsel
are turning risk to
advantage

kpmg.com



CONTENTS

FOREWORD	01
APPROACH TO THE RESEARCH AND INTERVIEWS	03
DETAILED SURVEY FINDINGS	
From legal adviser to business adviser? General Counsel's relationship with the Board	05
Regulation – the greatest challenge for General Counsel	15
Managing disputes – General Counsel's search for a smarter way	29
New frontiers, new markets, new technologies – a changing risk environment for General Counsel	39
Building the legal team for the future	49
CONCLUDING REMARKS	53
Waypoints for General Counsel along the journey	54



IN A VERY CHALLENGING BUSINESS WORLD, GENERAL COUNSEL (GC) ARE BEING CALLED UPON TO PLAY A GREATER ROLE IN THE RUNNING OF COMPANIES, PARTICULARLY IN THE MANAGEMENT OF RISK

Business models are changing and becoming more complex and more global. At the same time the more intrusive and prescriptive legal and regulatory environment which has grown from the global economic crisis is driving how businesses operate and the decisions they make. It seems inescapable therefore that a company's GC, its chief legal adviser, should have a major role in these decisions, helping the Board to shape strategy and achieve its corporate objectives.

This role has been described as being the 'barometer' for the organisation. We think this is a good analogy. Many corporate problems are likely to touch the GC's desk, enough perhaps for the GC to have a strong sense of the current 'weather' conditions facing the business. But this daily feedback coupled with the GC's broader knowledge and experience, also enables the GC to look ahead and anticipate the risks and problems that the organisation is likely to face in the future. GC can be very effective horizon scanners.

In this role the GC complements other senior officers who carry responsibility for risk, but the GC's experience of dealing with regulators, actual and potential disputes and other legal challenges provides a strong evidential basis for the GC's contribution. Boards that seek to maximise their organisations' return on investments are now looking to maximise their return on their legal function by leveraging the GC.

Nevertheless many companies still see their GC as a technical specialist, to be consulted when there is a specific legal aspect

to consider, whose input rarely extends to wider corporate strategy or operations. This view seems to be shifting however, as companies increasingly expect their GC to move into this barometer role. Business leaders increasingly look for GC who have commercial know-how who can communicate and collaborate with colleagues throughout the organisation to find solutions to address and manage their risk landscape.

With this context in mind, we were intrigued and excited to commission KPMG's first Global General Counsel Survey. We wanted to discover how GC in major businesses are developing into business decision-makers, to gauge the progress they have made so far, and to identify their greatest challenges. We were also keen to explore what support GC need from their organisations to allow them to make the transition from pure legal adviser to strategic adviser and barometer of the organisation. This transition requires a shift in mindset and behaviour from GC as well as the wider organisation, if the value that GC can bring to the top table is to be maximised.



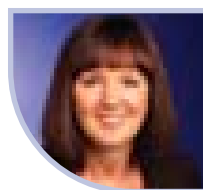
Foreword



This report sets out the most important results of our research, together with commentary on the practical implications. It is based on detailed interviews with GC in some of the world's largest institutions and with KPMG firms' professionals. There are striking variations by geographical region and between mature and high growth markets.

The results reinforce our view that today's tough business environment is forcing GC to move up the corporate ladder but that this journey is by no means complete. As we will see there is a gap between the impact GC can have and their actual involvement in strategic decision making. With this in mind, throughout this document we have identified some waypoints which we hope will help GC on the journey.

We would like to thank all those who gave us their time to contribute their perspectives and insights to our survey and report.



Kathryn Britten

Global Head of KPMG's Legal Services Sector



David Eastwood

Global Head of KPMG's Contract Compliance Team

A TOTAL OF 320 GC REPRESENTING 32 DIFFERENT COUNTRIES AND COVERING THE MAJOR INDUSTRY SECTORS TOOK PART IN A SURVEY COMMISSIONED BY KPMG INTERNATIONAL.

KPMG International commissioned Meridian West, an independent global research agency based in the United Kingdom, to conduct telephone interviews with the GC (or most senior identifiable legal adviser) for large, global companies across the major industry sectors and geographies. Interviews took place in the summer of 2012.

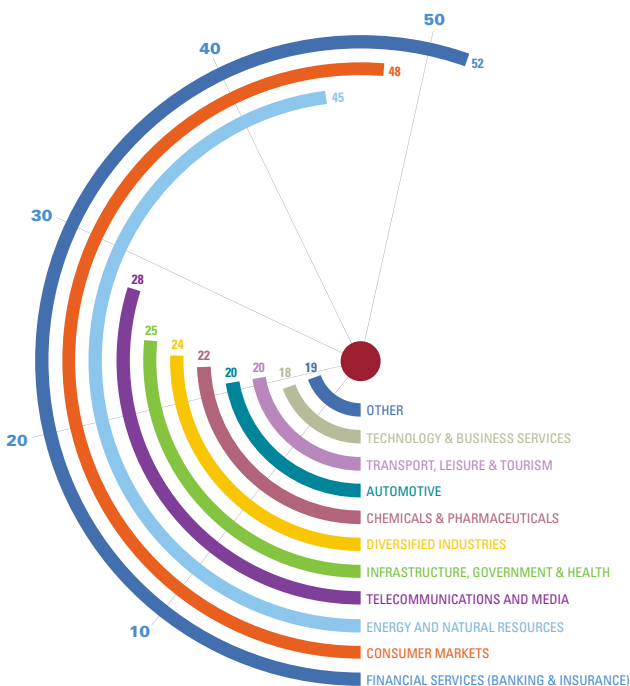
The key areas covered in the research were:

- Relationship with the Board
- Regulatory challenges
- Managing disputes
- The changing risk environment
- In-house legal team structure and budget

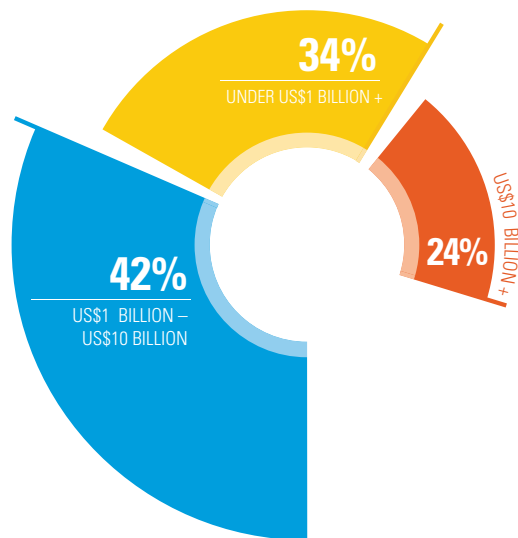
Figure 1

The following charts and map illustrate the respondent companies' country of operation, primary industry sector and size by annual turnover.

Numbers of interviews - sector



Size of organisation by annual turnover



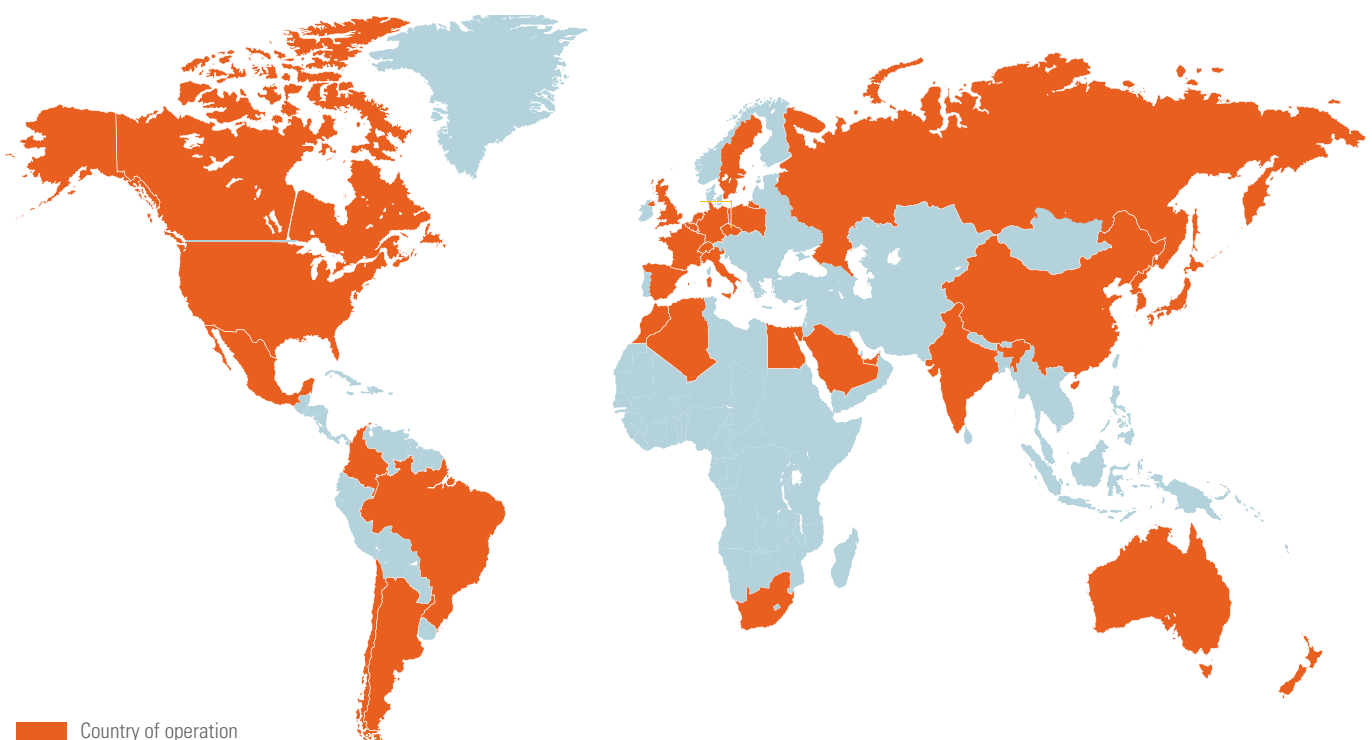
Approach to the research and interviews



As part of the survey fieldwork, we also conducted more detailed interviews with 16 GC at large global organisations based across Europe, North America, Latin America, Asia Pacific and Australasia, representing the following industries: **Communications, Construction, Consumer Markets, Diversified Industries, Energy and Natural Resources, Financial Services, Telecommunications, Technology, Transport.**

Following the completion of the survey fieldwork, we interviewed a number of KPMG specialists in the area of regulation, risk, disputes and technology about their views on the findings.

Country of operation



From legal adviser to business adviser? General Counsel's relationship with the Board

THE SURVEY RESULTS CLEARLY SHOW THE DIFFERENCES TODAY IN THE GC ROLE IN DIFFERENT PARTS OF THE WORLD. WE SEE THIS IN PART AS A REFLECTION OF THE CONTRASTING ENVIRONMENTS THAT ORGANISATIONS HAVE FACED IN RECENT YEARS FROM AN ECONOMIC AND A REGULATORY PERSPECTIVE.

We believe that this snapshot captures the GC role in the course of a journey from a traditionally narrow role of legal adviser towards a much broader position as a business adviser participating at the heart of strategic decision-making, with a clear and strong voice at Board level.

This journey is not just one of personal aspiration; it is being demanded of GC by their organisations and Boards who want more than just excellent legal advice. They are looking for their GC to advise them proactively on their business horizons, identifying impending problems and risks, while bringing together expertise from across the business to recommend the best solutions.

Acting as a barometer of the business requires some new skills and a delicate balance between becoming fully involved in decision making and remaining sufficiently independent to challenge decisions where necessary. GC can no longer just say "No" when they consider actions planned by the Board to be contrary to the legal interests of the organisation. It is now about understanding their organisations' objectives and being able to help plan the most appropriate route to achieving them.

Our survey found that where GC have already won this influence, they have learned to present their legal and regulatory knowledge in the powerful, practical, commercial terms that their Boards recognise and appreciate. Moreover, they bring a different perspective which complements the skills of other advisers to senior decision-makers.

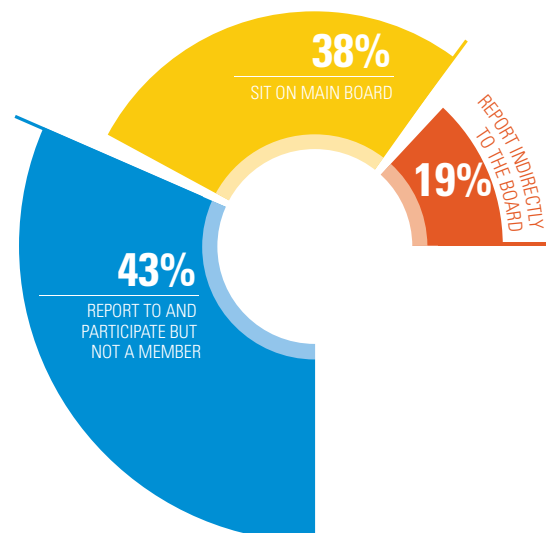
GENERAL COUNSEL'S JOURNEY SO FAR – WHAT WE FOUND

Despite an understandable presumption that in today's business world, GC would typically sit on the Board, the results of our survey pointed to significant differences among our respondents. Figure 2 shows that just over one third (38 percent) of GC are members of the main Board, with 43 percent reporting directly to or participating in the Board and a sizeable minority (19 percent) who report indirectly through other channels.

Figure 2

Question: Does the General Counsel a) sit on the Executive Committee or Main Board, b) Report to and participate in their discussions but not as a member of the main Board, c) Report indirectly to the Board via a Board member?

Relationship with the Board

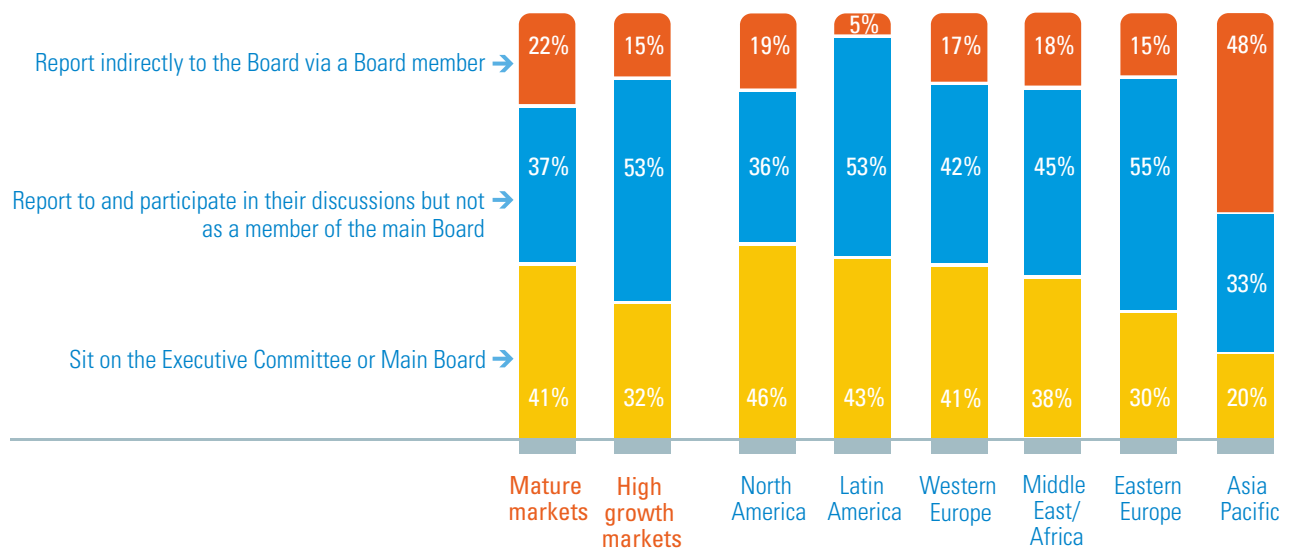


We found a clear difference between the position taken in the corporate hierarchy by GC in more mature markets and those in high growth markets. Figure 3 shows that around 40 percent of mature market GC sit on the executive committee or main Board of their companies, headed by 46 percent in North America. In high growth markets, around 30 percent of GC have the same level of responsibility, falling to only 20 percent in Asia-Pacific. Accordingly GC in high growth markets are significantly more likely than their mature market counterparts to be engaged in Board discussions from outside the Board (53 percent compared to 37 percent respectively).

Figure 3

Question: Does the General Counsel a) sit on the Executive Committee or Main Board, b) Report to and participate in their discussions but not as a member of the main Board, c) Report indirectly to the Board via a Board member?

Relationship with the Board

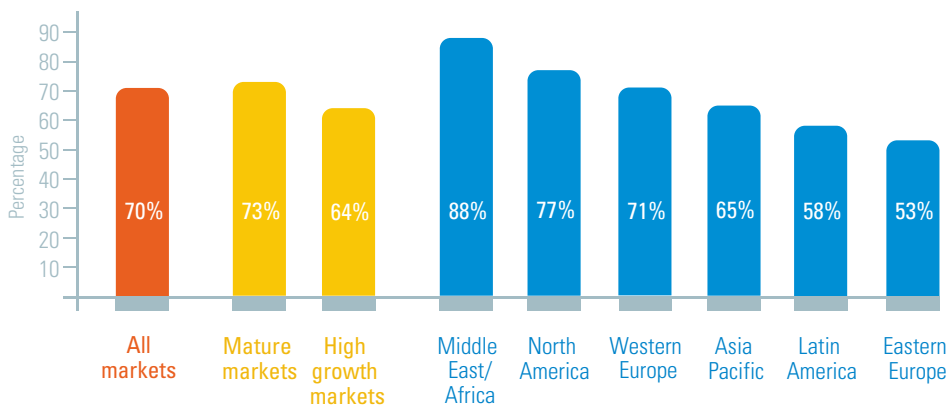


Similarly, when asked if giving commercial advice is as important as giving legal advice, 73 percent in mature markets agreed (figure 4 illustrates this) but the number in high growth markets was lower at 64 percent. Taken together, these results seem to reflect a more traditional role taken by GC in high growth markets where the GC will often brief the Board on a legal aspect of an issue but may not be involved in the final commercial decision-making process.

Figure 4

Question: Do you slightly or strongly agree that in the role of General Counsel, giving commercial advice is as important as giving legal advice?

Number of respondents who slightly or strongly agree that giving commercial advice is as important as giving legal advice



Deepankar Sanwalka, Head of Risk Consulting at KPMG in India, agrees that GC in high growth markets have a more traditional role but believes the picture is changing due to the impact of tighter regulation and tough enforcement. *“Three to four years ago, when the Indian firm was preparing due diligence reports, we would be taking the report directly to the CFO or CEO. Now we usually take it to the GC, who will have to sign it off. This is directly because the business environment has become so much more legally complex, with big fines being levied for breaching all sorts of regulations. Senior people are turning to the legal experts and asking them how they can be in compliance”.*

Grant Jamieson, Head of Forensic at KPMG in China and Asia Pacific, says that there are still a large number of family owned and run companies in the region, where the corporate decision-making process is less formal and often within a smaller circle of people, despite many being very large enterprises: *“at the moment, a lot of in-house legal people are considered ‘back-office’, but this will change as regulation and litigation increase, as they find themselves having to be more careful about contracts because they are no longer dealing with people that they know, and as their corporate governance matures”.*

While the majority of GC surveyed have reasonable visibility and influence at the senior management level, we also found an important discrepancy in their responses to a pair of related questions on this topic (shown by figure 5).

Our survey found more GC overall are involved in business strategy than they were five years ago and this reflects the changing mindset of many organisations towards the contribution GC can make. However, we also found a gap between the number of GC who want to be involved and those who are actually getting that greater involvement. When asked if the involvement of the GC in the commercial decision-making process could improve the performance of the company and reduce its risks, **79 percent of all respondents agreed** (figure 5). However, when asked if they are actually more involved in formulating business strategy now than five years ago, **only 67 percent said that they were**. While figure 6 reveals some differences in percentage terms between regions, the trend is clear; GC are not as involved in business strategy as they would like to be.

Interestingly, the GC we interviewed in depth referred to this expectation gap when describing how the legal department was viewed by the rest of the organisation. One GC described the legal department as *“a necessary evil”*, while one company president used the same phrase because *“we would all like to do away with legal formalities”*.

Others expressed a more positive outlook. One said *“we are held in high esteem and seen as a team that adds value”*. Another stated *“we’re not viewed as a necessary evil, but as integrated business partners and a valuable resource”*. The same GC attributed this change to the fact that colleagues had learnt from the mistakes of others: *“they understand why they need to have us involved as they have heard plenty of ‘horror stories’ of things going wrong when legal teams aren’t involved, or are involved too late”*.

Figure 5

Question: Please state whether you slightly or strongly, agree or disagree with the following statements.

Number of respondents agreeing with the statements

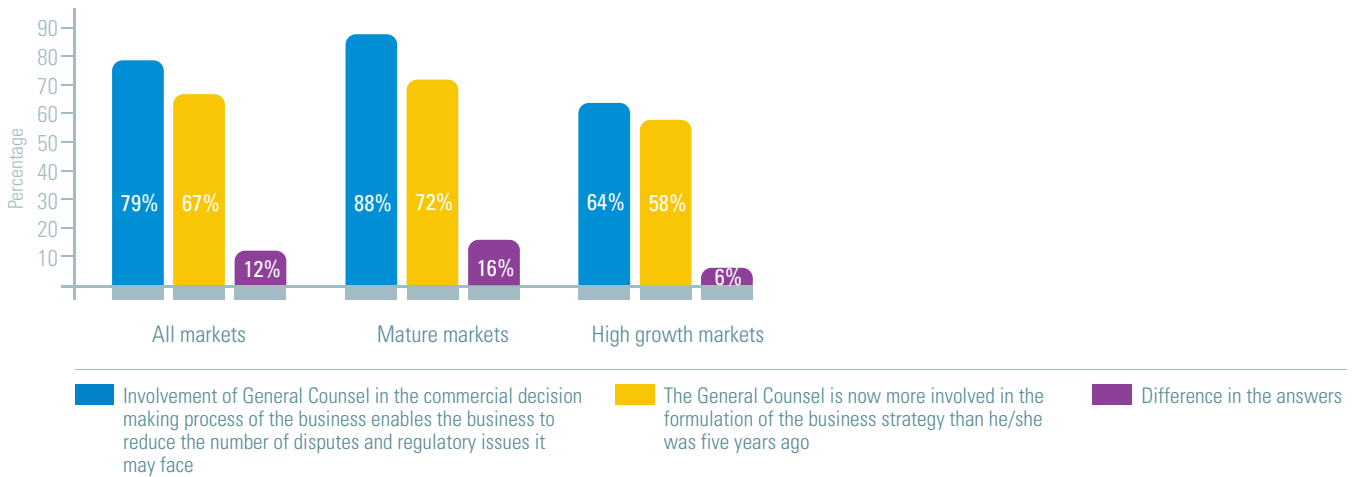
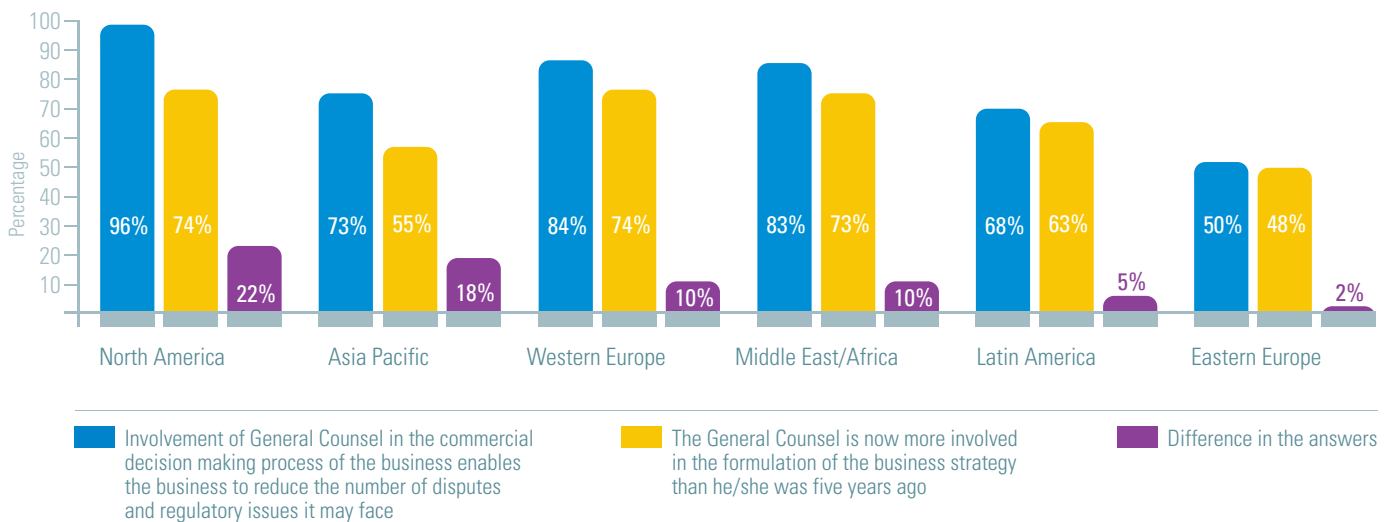


Figure 6

Question: Please state whether you slightly or strongly, agree or disagree with the following statements.

Number of respondents agreeing with the statements





WAYPOINT

Engage directly with the senior decision makers in your organisation

Others had a more neutral view. One GC commented that, *"we are on a journey from being viewed as a necessary evil to an essential part of the business and I would say that we have made progress"*. Another echoed this, saying *"there is a variety of views; for some it's a necessary evil, while for others it's somebody to provide information, legal or otherwise. Some see it as somebody else to make the difficult decisions and some see it very positively as an effective way to help manage risk"*.

Strikingly, five of the 16 GC interviewed used the phrase a "necessary evil" even when disassociating themselves from this perception. Whether or not this view of the GC role is still widely held, and we hope it is not, it suggests that many GC are not as far along the journey as they would like to be.

GC clearly believe that they are able to make a more significant contribution to their companies, especially in the management of risk. While there is progress towards sharing the influence and status of other key corporate decision-makers, most GC are still in a period of transition. One explanation for this perhaps lies in the findings of a recent cross-border KPMG survey of 3000 business leaders¹ in which managing risk in all its forms was rated as only the sixth most important issue behind cost efficiency, capital management, growth, business model change and people management. Of course GC have much to add on these topics and in making the transition to business adviser, they will need to engage with them in the language of the CEO.

A CHANGE IN MINDSET FOR GENERAL COUNSEL

We found that GC generally feel the need to be more involved in the day-to-day operations of their companies, to work closely with other departments and to understand better the way their business works. In contrast, their traditional role required GC to take a detached view of their work, encouraging them to separate themselves from the commercial requirements of the business in order to give robust, independent legal advice.

While the ability to remain objective is essential, it may be that this detached approach is no longer advisable. As one GC puts it, *"we are here to enable and protect value. It's not a question of legal says no, it's legal says 'I understand what you want to do, here's how you can approach it'"*. Another GC told us, *"We are part of the business. We need to learn to run certain risks, because any business runs risks"*.



Another agreed, saying *"you can't have perfect future vision, you have to take certain calculated risks and the company relies heavily on its lawyers in helping to evaluate and measure those risks and to see as far into the future as we can"*.

One GC felt that, going forward, GC would have to move from raising the question to also providing the solution - *"it is important for us to get 'off the fence' and, using our understanding of the business, say this is the problem that we face and then give a preferred solution"*.

There is an inherent tension in the GC role between taking an active part in the commercial decision-making process and remaining the conscience of the business, and able to take a purely legal, dispassionate, view of when it is or is not in the company's interest to pursue a particular action. One GC agreed this was a difficult balance: *"it's tricky sometimes, you have to be involved but disengaged enough to be objective"*. This is a tension that the wider organisation, especially the Board, needs to appreciate.

This tension makes the transition to business adviser more complex, but also means that GC can bring a unique viewpoint which adds value to the decision-making process. This is something that CEOs welcome, as one GC explained, *"lawyers bring a slightly different perspective to the business. We are better acquainted with those 'softer' issues about reputation"*.

¹ KPMG's 2012 Business Leaders survey, <http://www.kpmg.com/EU/en/succeeding/business-leaders-agenda-survey-2012/Pages/default.aspx>



“

we are on a journey from being viewed as a necessary evil to an essential part of the business and I would say that we have made progress

”

General Counsel in-depth interviewee

“

we are here to enable and protect value. It's not a question of legal says 'no', it's legal says 'I understand what you want to do, here's how you can approach it'

”

General Counsel in-depth interviewee

and are slightly more qualitative people than some of the finance or technical people might be. If you talk to chief executives or chairmen about what they really value [it] is this slightly different perspective”.

To help find the right balance, Deepankar Sanwalka advises his GC clients to seek out opportunities to talk to business managers on the ground and to develop a commercial problem-solving approach to their work: *“It might be that the best way from a legal view to mitigate a particular risk problem is to close a plant down,”* he says, *“but that's no good in a business context. You have to find ways of reducing the risk to an acceptable level, even if this is not a perfect, textbook answer”.*

One solution to this problem, employed by a large energy company in the US, is to insist that its lawyers spend time in local offices working alongside business managers. Bryan Jones, Global Head of Dispute Advisory Services at KPMG, observed that experiences of this kind are becoming more common for in-house lawyers. *“They might be circulated through local offices or even embedded with business units”,* he says, *“it's an increasingly important way of developing influence, knowledge and personal relationships and improving local control”.*

GENERAL COUNSEL: BECOMING A BAROMETER

Our in-depth interviews with GC highlighted some of the skills and qualities GC need to become the barometer for the business. These include being more commercially and financially aware in order to take a more proactive stance in risk identification and assessment, working in partnership with others across the organisation.

A number of GC commented that predicting problems and risks before they arose was key to success. The role is moving from one of 'fire-fighting' and reacting to events to being more strategic and proactively anticipating risks at an earlier stage. **Our research showed that less than one third (29 percent) of GC are currently focusing on this as one of their top three tasks, so there is a clear need for many to shift to this way of thinking.**

Board-level appetite for this shift was clear from a company president who told us that the strategic purpose of the legal department is to *“anticipate and protect us from potential risks because the world is changing and that creates more risk. GC should make us aware of what we should be doing and tell us this in a straightforward manner, not in complex legal language”.*



WAYPOINT

Analyse past incidents to anticipate future risks

One GC went further, stating *“fundamentally you’re there to solve problems and to anticipate problems, and sometimes those problems have legal dimensions and sometimes they don’t, or the problem has a number of dimensions one of which is legal.”*

This view of the GC as the organisation’s problem solver reflects the value Boards place on their traditional analytical skills. These skills provide as useful a structure for approaching non-legal or quasi-legal issues as they do for purely legal matters. Boards are simply looking to leverage this valuable asset.

How broad this remit can go depends on the organisation, according to one GC. He said *“it depends on whether your colleagues or chief executive recognise that there is a broader role to play. The US historically has been much better at this, people tend to be a bit more open minded about what lawyers do. A lot depends on the nature of the company and its senior management and the nature of the lawyers within it. But lawyers are getting more involved in other areas of the business where their skills have application.”*

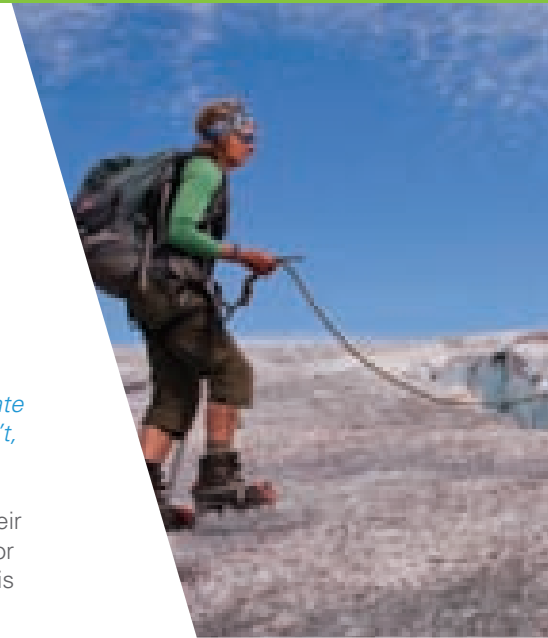
The financial services sector is one where the GC role has acquired considerable status. As one GC in a large international bank told us: *“the GC role here has been well positioned within the firm for some time. It’s a senior leadership role. The GC literally sits alongside the managing director, the finance director and the strategy director and is part of that unit. To the rest of the firm and its subsidiaries this clearly imbues that role with the qualities of a serious role at the heart of the leadership of the business.”*

Another important aspect is the ability to change, melding the ability to anticipate problems with the ability to adapt their skills to suit different issues and risks. One GC interviewed described this as being able *“to see down the road and not necessarily have perfect vision into what the legal function could be like but to be ready to adapt as the business changes, as regulations change, as governments or priorities change. You just have to adapt and help your company avoid surprises and to influence what it can; and understand and accept the things that it can’t.”*

UNDERSTANDING THE BUSINESS

In order to anticipate problems and find solutions, GC said that it was necessary to have a deep understanding of the business. Only then could they properly appreciate how new risks and issues would impact the business. As one interviewee stated, *“the more we know about our business - both the technical and financial aspects of it - the more effective we are.”*

This is something that businesses expect more and more from their GC. One GC told us that *“pure legal decision making and just managing a legal process is not going to ‘cut it’ anymore. We really need to understand the context because we have an increasingly important role in protecting the company’s reputation.”* Other GC mentioned this and emphasised that this insight cannot come from looking only within the legal team. As one GC put it: *“[it is necessary to] understand my business and how it is evolving and what’s going on outside the company in terms of the risk landscape.”*



“

You just have to adapt and help your company avoid surprises and to influence what it can; and understand and accept the things that it can’t

”

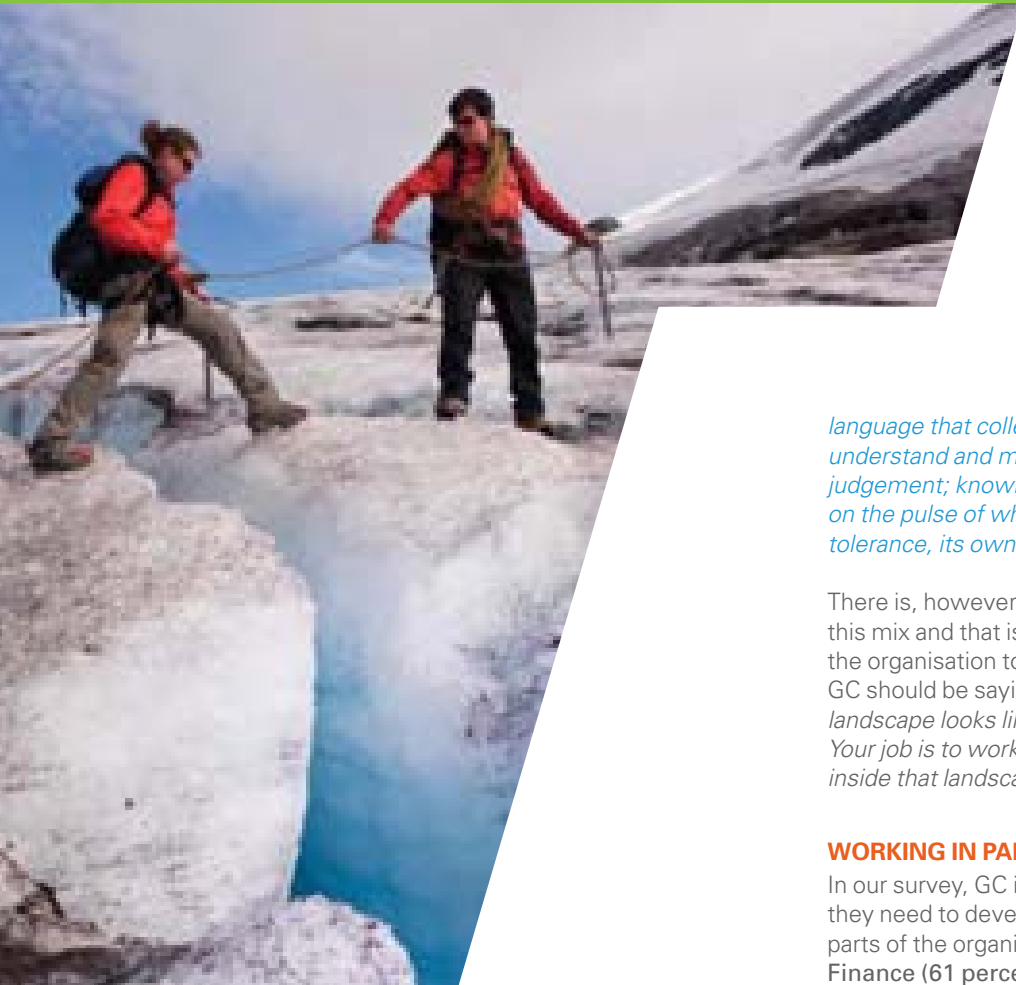
General Counsel in-depth interviewee

“

[A GC should] have good future and peripheral vision in terms of recognising what risks and opportunities are out there and translate those from legal language into crisp, business language colleagues understand

”

General Counsel in-depth interviewee



WAYPOINT

Communicate with senior decision-makers in the commercial language they use

language that colleagues who are not lawyers can readily understand and make use of. Also having really good business judgement; knowing the business well and having your finger on the pulse of where the company is at, in terms of its risk tolerance, its own commercial objectives”.

There is, however, another skill that needs to be added to this mix and that is of working collaboratively with others in the organisation to achieve these solutions. David Thomas says GC should be saying, *“My job is to chart what the regulatory landscape looks like today, and what it might look like tomorrow. Your job is to work out where we are going to take the company inside that landscape. We need to collaborate”*.

WORKING IN PARTNERSHIP

In our survey, GC indicated that to address the risks they face, they need to develop close working relationships with other parts of the organisation. **The top two areas cited were Finance (61 percent of respondents) and Internal Audit (59 percent of respondents). Sales and Marketing was a close third (55 percent of respondents).** Interestingly, when asked which parts of the organisation they currently worked most closely with, the same three areas were mentioned, with finance, sales and marketing almost equal at 59 and 58 percent but with internal audit a long way behind at 36 percent.

The difference in relation to internal audit is significant because internal audit is typically at the forefront of risk management, monitoring and auditing in large organizations. Internal audit is also often involved in the investigation and remediation of risks that have turned into problems. There is a clear link with the work of GC and developing a closer relationship with internal audit is clearly becoming much more important for GC.

Nevertheless, the appetite for developing relationships outside the legal department overall appears to remain quite narrow and concentrated around a governance role. What David Thomas referred to above is a much wider network of relationships across the whole organisation, and many of the GC interviewed in-depth agree. Much of their experience highlights the need to develop relationships across the whole organisation to ensure that when a problem does arise, or a critical key decision is to be taken, the GC will be approached as someone who can add value to the process.

SPEAKING THE SAME LANGUAGE

Understanding the business, so that the risks can be set in context, is a challenge. To be able to translate complicated legal issues into the more commercial, solutions-focused language that non-lawyer business leaders typically use is a greater challenge, but a key step in enhancing GC influence.

David Thomas, Global Head of Regulation Services at KPMG, describes this as follows: *“GC need to be able to articulate the entire value they provide and to explain matters in a suitably succinct way to a Board that may be short of time and needs to make a commercial decision, otherwise the warnings are not always heard until there is a major incident. If you ask whether incidents could have been avoided if better controls were in place and the voice calling for better controls was sufficiently compelling, the answer is probably yes”.*

Several of our interviewees agreed. One GC summarised the skill-set required for a high-performing GC: *“have good future and peripheral vision in terms of recognising what risks and opportunities are out there and then be able to translate those from legal language and ways of thinking into crisp, business*



WAYPOINT

Put your advice squarely in the commercial context

As one GC put it *“you need to build relationships so that the CEO, CFO and others feel that when they are about to make a decision they will get a view from the GC. There’s a difference between thinking ‘you have to’ and ‘you want to’ because you think that individual is going to make a difference”*.

Another GC talked about the legal department breaking out of its silo and interacting much more with other parts of the organisation, but this is not confined to the legal department: *“[it’s] something that all disciplines, [are doing] – these days you have to be networked. Everybody brings a slightly different approach and it provides you with a deeper understanding of the business and its strategy”*.

To be a broader adviser and an effective barometer GC need to broaden out their relationships. It is not only about deepening the contacts they already have, but also about extending these to other parts of the organisation and externally into the wider business environment. Only then will GC be able to step up to the role that is being demanded of them.

OVERCOMING THE BARRIERS

Some GC might agree in principle with these ideas, but argue that they are so busy dealing with the unavoidable problems that crop up every day – ‘fire-fighting’ – that there just is not the time to step away from their immediately critical tasks and think about strategic changes to their roles.

One GC we interviewed said this is all about prioritising: *“prioritise the riskier things and accept that you can’t do everything. It’s important to see people, not just to communicate by email, but to understand the business and their issues. You need to talk about what concerns them, look at what they’re trying to achieve commercially before you put the legal overlay on it”*.

Another agreed, saying that GC *“really need to invest the time in understanding what your [internal] client wants to do and then help shape the solution. When you’re working cross border, as most of us do these days, the need to be appropriately assertive actually increases”*. It is clear that by having a deeper understanding of the business and the people that they are working with, it will become easier for GC to identify and prioritise the areas of risk that will impact their organisation.

Becoming the barometer of the business is not a straightforward transition and the benefits are not as immediate or as tangible as, for example, resolving a complex dispute. A key element is to frame the benefits of a refocused GC, one able to manage and prevent problems not just resolve them, in powerful commercial terms so that a case can be made for the changes and resources needed to make this happen.

“

It’s important to see people, not just to communicate by email, but to understand the business and their issues. You need to talk about what concerns them, look at what they’re trying to achieve commercially before you put the legal overlay on it ”

”

General Counsel in-depth interviewee





“

[General Counsel] really need to invest the time in understanding what your [internal] client wants to do and then help shape the solution. When you're working cross border, as most of us do these days, the need to be appropriately assertive actually increases

”

General Counsel in-depth interviewee

Regulation – the greatest challenge for General Counsel

THE GC WHO RESPONDED TO OUR SURVEY
 CHOSE REGULATION AS THE SINGLE LARGEST
 RISK THAT THEIR COMPANIES FACE.

Figure 7 shows that for 64 percent of respondents regulation was already their top area of work but nearly 90 percent of respondents (shown in figure 8) chose a general increase in volume and complexity of regulation as the greatest risk to their companies in the next five years. A similar number thought that complying with the various different regulatory regimes that their companies encounter around the world posed a “slight to strong” risk. The top three principal areas of regulatory risk were around competition, consumer protection and anti-bribery and corruption.

Figure 7
 Question: What are the top three main areas of work performed by the in-house legal team?

Top areas of work

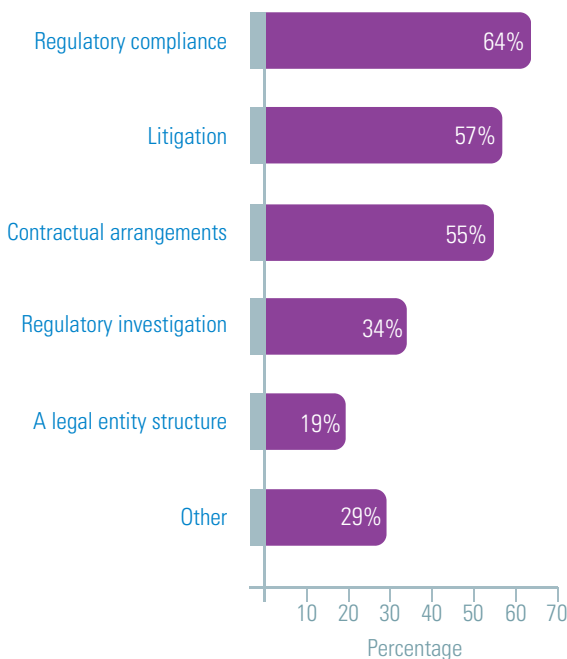
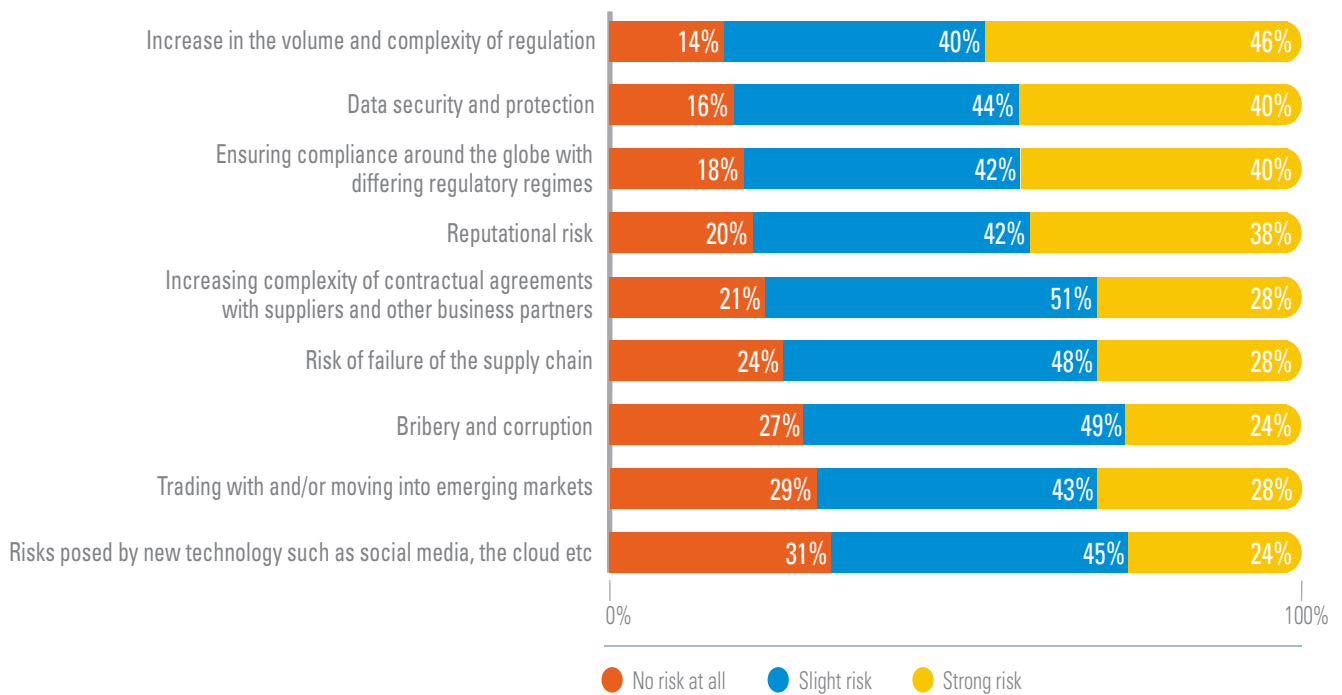


Figure 8

Question: Considering the next five years, are the following issues a slight risk, a strong risk or not a risk at all to your organisation?

Areas of risk



One GC summed up the results saying *“the increase in pace and complexity of regulation, plus the increase in extra-territoriality being asserted by various national states, means the world is more complicated and it is certainly something that exercises both myself and my peers”*.

REGULATORY COMPLIANCE, DISPUTES AND INVESTIGATION – IS THE BALANCE RIGHT?

The volume and extent of regulation means organisations are having to commit extra time to regulatory compliance, investigations and disputes. The responsibility for this work falls to the GC in most cases - nearly 70 percent of respondents said both regulatory compliance and investigations fell under the direct remit of the GC.



high growth markets have been a little further behind the curve in terms of regulatory sophistication, you do see it to some degree but development of the regulatory regime tends to come in waves



General Counsel in-depth interviewee

The balance between these different aspects of regulatory work is interesting. Globally 64 percent of GC put regulatory compliance in their top three areas of focus, but only 34 percent picked out regulatory investigations. Looked at by market, however, figure 9 shows that GC in high growth markets are proportionately much more focused on regulatory investigations than their colleagues in mature markets (53 percent putting this amongst their top three areas of work compared to 23 percent). On the other hand, as figure 10 shows, 67 percent of GC in mature markets are expecting an increase in regulatory disputes compared to only 47 percent of respondents in high growth markets. The variation in these results reflects the very different approaches that mature and high growth markets appear to be taking towards their regulatory regimes.

As we explore further below, the regulatory environments are at a somewhat different point in their evolution. As one GC put it *“high growth markets have been a little further behind the curve in terms of regulatory sophistication, you do see it to some degree but development of the regulatory regime tends to come in waves”*.

Mature markets, on the other hand, are experiencing greater regulation and more aggressive enforcement as a direct result of the global economic crisis. Many of the GC interviewed believed that regulators across industry sectors were generally becoming more pro-active and looking for examples of breaches by organisations. This is increasingly leading organisations to challenge decisions and regulations through the courts.

One interesting anomaly amongst the mature markets is North America, where less than half of GC (49 percent) put regulatory compliance in their top three areas of work and only 13 percent picked out regulatory investigations. This seems mainly to be because in North America separate compliance functions were much more likely to be involved in these areas than in other parts of the world. That regulation is nevertheless a key part of the GC role is clear from the 79 percent of North American GC who expect to see more regulatory disputes over the next five years.

REGULATORY APPROACHES

The focus on complying with regulation, and the difficulty of managing this across multiple jurisdictions, are both clearly highlighted in the survey.

During our in-depth interviews GC told us that the variety of regulatory models around the world is seen as a key difficulty. As one GC put it: *“extra-territoriality means that you can have multiple jeopardy for the same act”*. Regimes in North America are viewed as the most strict with Europe and the UK typically viewed as having a lighter touch. Regimes in the mature markets are seen as more stable and predictable, as they have been developed over a longer time period, while those in the high growth markets are seen as the most flexible and adaptable. These differences are important for GC to appreciate otherwise their companies risk losing competitive advantage when operating in less familiar markets.

Complying with many different regimes and approaches is not helped by the different roles that regulation plays in the control systems of different governments. David Thomas, points out that regulation often has a different purpose in different parts of the world. *“In the US, and in some European economies, the primary purpose of the regulator is to act relatively independently of government, to foster competition, avoid discrimination and protect consumer rights”* he says, *“but in other countries, both in Europe and in Asia-Pacific, the regulator is a much more direct enforcement arm of government”*.

These variations make a difference. *“It is quite common for economic regulators to have a specific remit to help develop indigenous companies by favoring them over foreign concerns. There is an in-built asymmetry,”* says David Thomas, *“and although it is very widespread it is just more obvious in some countries than others”*.

A GC in Mexico echoes this point, saying *“the approach in the US or in Great Britain is quite different from the approach taken in Mexico. Sometimes the views of the private sector are taken much more into account in developed countries while in what is commonly called ‘Third World’ countries, the approach is usually seeking to generate public income. Sometimes that is a short-term solution to allow the economy to grow and develop. In countries like Great Britain or the US the approach is usually more mixed as they take a longer term view of the policies and legislation they implement”*.

Figure 9

Question: What are the top three areas of work performed by the in-house legal team?

Top areas of work

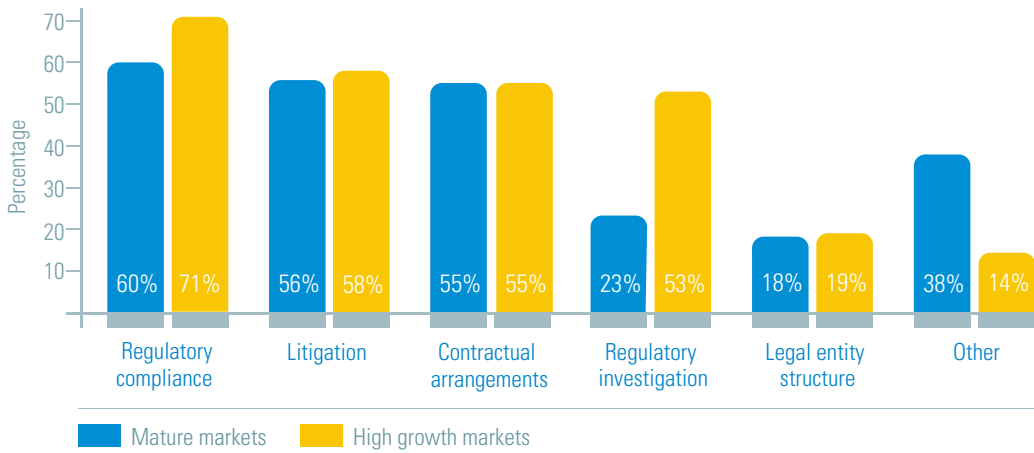
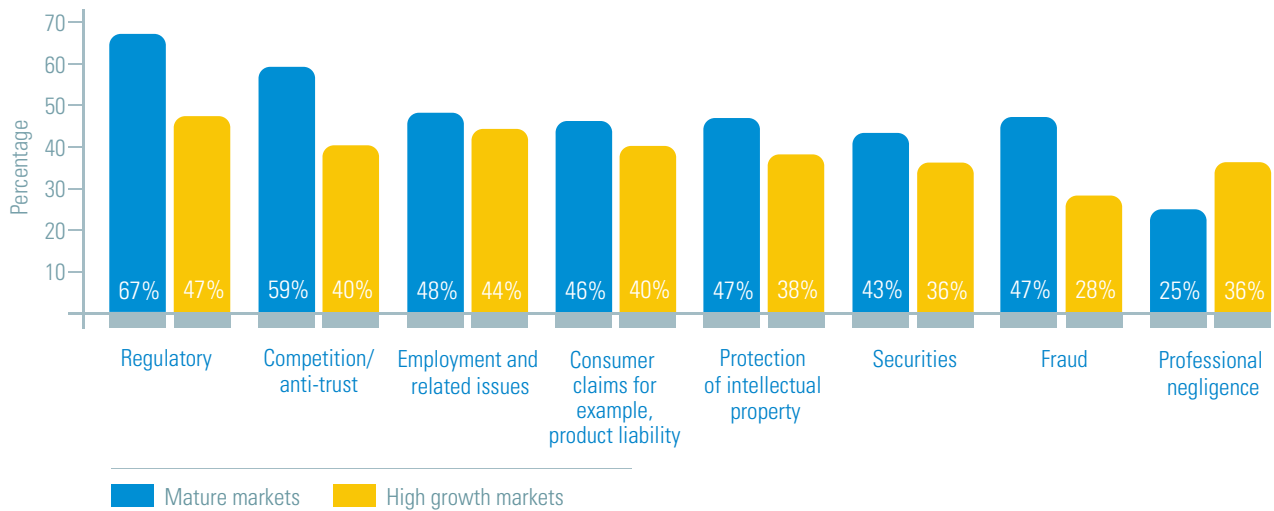


Figure 10

Question: Do you expect the numbers of disputes that your in-house legal team will handle in the following areas to slightly or strongly, increase or decrease over the next five years?

Types of disputes expected to slightly or strongly increase





WAYPOINT

Be adaptable in responding to different regulatory environments

Another GC agreed saying *“it’s a very different landscape and the distinction between what is political and what is administrative action can become much more blurred. So the independence of the regulator, and the separation of the regulator from politics, is much less clear”*.

Within the in-depth interviews there was also much praise for the quality of the regulation coming out of some high growth markets, especially those of Asia-Pacific including China, Malaysia, Indonesia and Hong Kong. Regulators in these jurisdictions are said to be smart, focused and quick to react, and the impact of their regulatory decisions is beginning to be felt in other parts of the world. One GC talking about regulation in China said *“they’re very smart regulators, much quicker to adapt and much more flexible than, for example, the US Government. They can change the law immediately while we have to fight and test the law in the court system for a year, then do a shake-up in the political system for a while, before we decide that this is, in fact, the right decision”*.

Generally speaking, regulation in high growth markets was seen as lighter, more flexible and more able to respond to changing commercial circumstances, giving domestic companies a clear competitive advantage over mature market rivals.

It is important to note that this praise was not universal. The ‘lighter touch’ is seen more by Grant Jamieson from KPMG in China as an issue of enforcement, or lack of it, rather than a policy of lighter regulation. *“The rules are there, but in a lot of Asia Pacific economies they are just not enforced in the same way that they are in mature markets. There isn’t the culture of litigation with people preferring to deal with problems behind closed doors. Looked at in the other direction, this can be a real issue for an Asia Pacific GC trying to operate in a European or US market for the first time, where scrutiny is much tougher and rules are enforced much more rigorously”*.

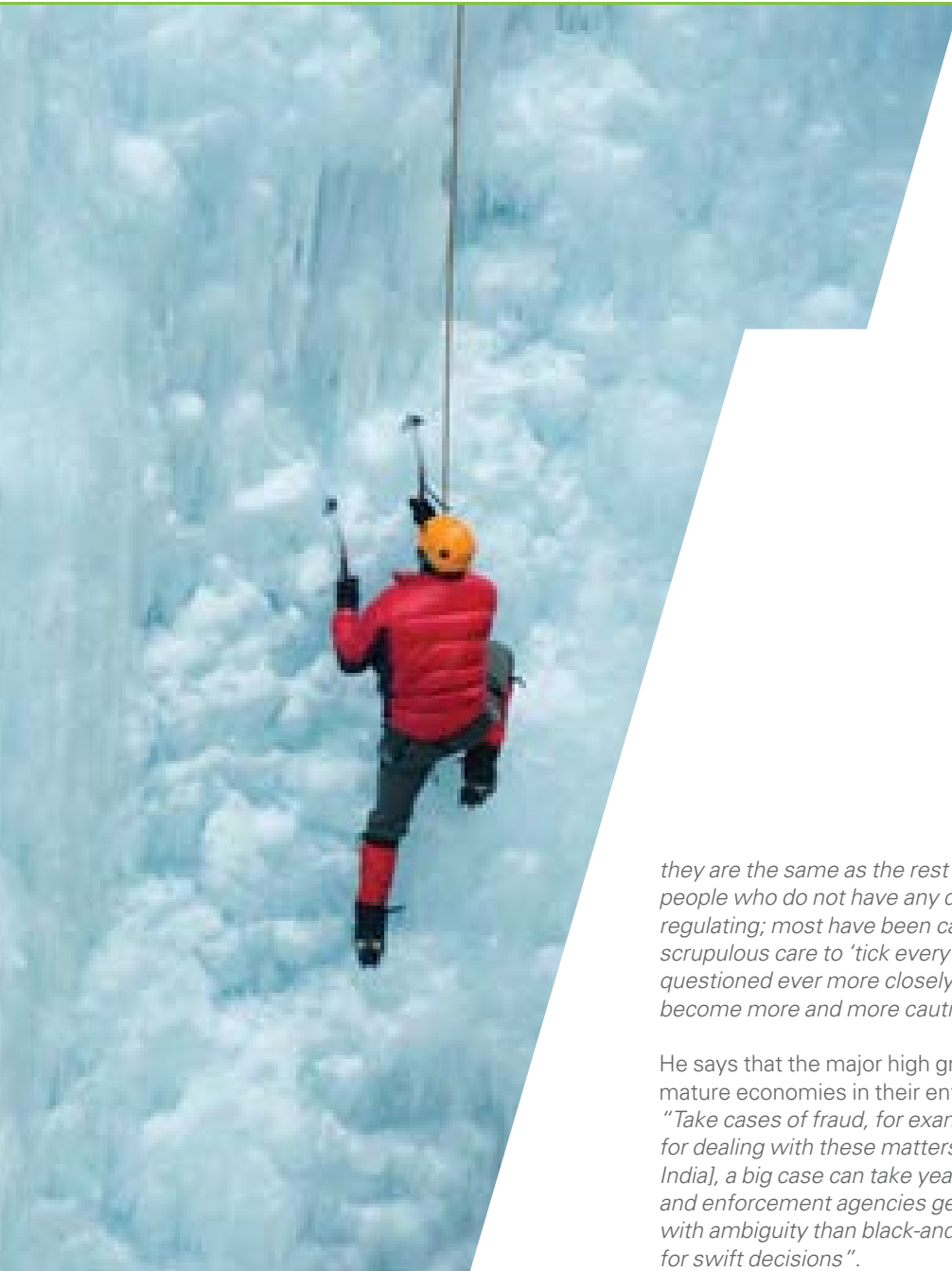
Some GC stated that regulation in high growth markets is still evolving and becoming tougher and this trend was set to continue. One GC felt that regulation in high growth markets is



smarter because regulators in the markets can push regulation through more quickly, so that it is easier to work with and more flexible. However, he went on to say, it was also *“becoming hard, tougher and tighter in those jurisdictions”*. This would suggest that the regulatory regimes in high growth markets will tend towards the increasingly intensive and intrusive path of those in mature markets. Whether these models will ultimately mirror those in mature markets is not yet clear.

What is undeniable is that implementation is a major factor in the overall effectiveness of regulation, as much in high growth as mature markets. Deepankar Sanwalka spoke of a different approach in some Asia Pacific cultures, reflected in the wording of the regulations. The perception that regulation in India and South East Asia is more flexible, arises because, *“people here are more comfortable in dealing with ‘shades of grey’ rather than ‘black and white’*. Regulators are able to adapt to different circumstances because the written word of the regulations allows them flexibilities”.

On the other hand, when the regulations have to be enforced bureaucracy can take over. Deepankar Sanwalka explains that *“this is where regulators in these jurisdictions try to show that*



“

they're very smart regulators, much quicker to adapt and much more flexible. They can change the law immediately while we have to fight and test the law in the court system

”

General Counsel in-depth interviewee

they are the same as the rest of the world,” he says, “they are generally people who do not have any direct experience in the industry they are regulating; most have been career bureaucrats. So their instinct is to take scrupulous care to ‘tick every box’, and when their decisions are being questioned ever more closely by government and the judiciary, they become more and more cautious. It leads to a real danger of paralysis”.

He says that the major high growth markets are still some way behind the mature economies in their enforcement of regulations and legal efficiency. *“Take cases of fraud, for example. In the US there is a well-oiled machine for dealing with these matters, and they can be dealt with quickly. Here [in India], a big case can take years to come to court, with multiple regulators and enforcement agencies getting involved. We may be more comfortable with ambiguity than black-and-white enforcement, but that does not make for swift decisions”.*

Of course, from the perspective of GC in global businesses, these differences – whether of law or implementation – have to be understood and accommodated: a task which is made more challenging by the pace of change.

“

[regulation in high growth markets is] becoming hard, tougher and tighter in those jurisdictions

”

General Counsel in-depth interviewee

GENERAL COUNSELS' CONCERNS ABOUT THE REGULATORY FUTURE

Our survey found that the top three areas of most concern to GC over the next five years are competition/anti-trust, consumer protection and anti-bribery and corruption regulation. These were closely followed by financial and data protection regulations, with more than a quarter of respondents rating these as a major concern (illustrated by figure 11).

Competition and anti-trust regulation was seen as particularly challenging in Western Europe (53 percent) and Middle East/Africa (53 percent). Perhaps surprisingly this was not given much emphasis in North America (26 percent) which is often thought of as the home of anti-trust law, and where GC are expecting significant increases in regulatory and anti-trust disputes. Equally surprising was the prominence given to consumer related regulation by GC in Latin America (45 percent) and Middle East/Africa (45 percent).

Anti-bribery and corruption regulation was given greatest weight by GC in Latin America (45 percent) and Middle East/Africa (48 percent) with Eastern Europe (18 percent) putting this very low down the list of priorities (in ninth place compared with second or third for most regions).

Figure 11

Question: What types of legislation are a serious concern to your business over the next five years?

Types of legislation or regulation

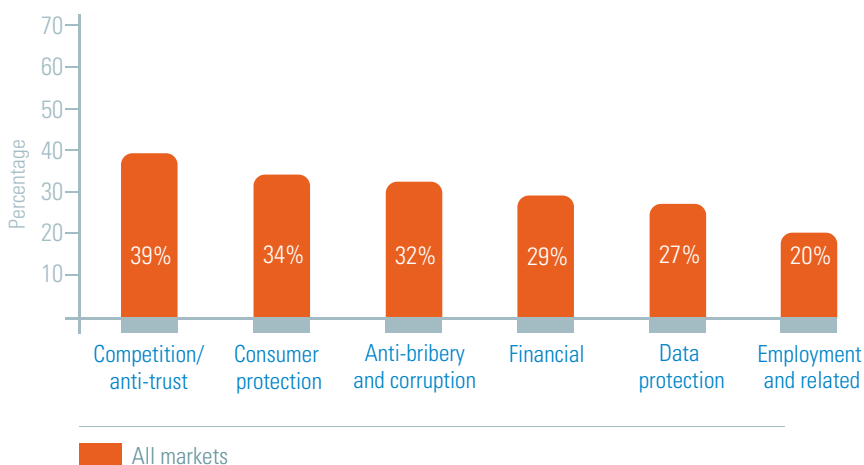


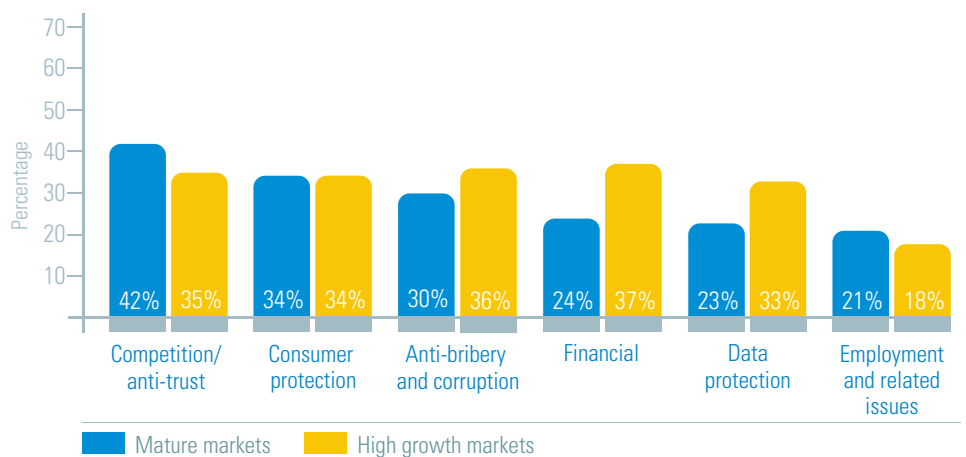


Figure 12 shows that financial regulation was seen as more of a concern by GC in high growth markets with 37 percent of respondents citing this, compared to 24 percent of respondents in mature markets. Our survey shows that financial regulation was the top concern in the high growth markets, slightly ahead of anti-bribery and corruption, competition/anti-trust and consumer protection.

Deepankar Sanwalka puts this down to the fact that high growth markets are aligning their legal frameworks governing finance with those of the international markets. He states *“although high growth markets might prefer to take a different approach in this area, it would be very difficult for them to do so while still attracting the external capital that they need. If they want to be part of the ‘international club’, which many do, then by and large they need to follow the existing rules”*.

Figure 12
 Question: What types of legislation are a serious concern to your business over the next five years?

Types of regulation





WAYPOINT

Work closely together with all those dealing with the risk and governance agenda

MEETING THE REGULATORY CHALLENGE

We can see at figure 13 that, in responding to regulatory risks, the main steps that GC are taking are, in order, training on new legislation, imposing compliance processes and researching differences in regulation between markets. Figure 14 also shows that the impact of regulation on the organisation was also, by some margin, the topic on which GC most often sought external advice.

Working closely with other parts of the organisation was also seen as an important way of managing these risks and ensuring that compliance with regulations is not just a 'tick box' exercise but embedded throughout the organisation. There are two benefits to this – understanding the daily impact on operations and creating buy-in from those who need to comply.

One GC explained it as follows: *“it’s got to be ‘operationalised’. It can’t just be a nice policy and it can’t be a bit of training. You’ve also got to work with people who are in the operations side of the business who can actually work it into the day-to-day activities”*. This collaboration is seen as helping to embed the willingness to comply, as people become involved in the process and have had an input into the solution.

Another GC agreed, stating that *“those kinds of decisions are not entirely just for the general counsel to make. If you have a group of people sitting around making a decision, you contribute more broadly... it produces quite a good result as long as you’re conscious of the fact that it’s a bit messy”*.

Figure 13

Question: What are the three main steps that you as General Counsel and your in-house team are taking to put you in a position to effectively manage the risks facing your organisation?

Steps taken to manage risks faced by the organisation



As Richard Girgenti, Head of Forensic practice in KPMG’s US member firm, points out there are benefits for GC in working with other parties within the organisation to operationalise policy, particularly with Internal Audit and Compliance. *“In many of our clients it is the role of Internal Audit and Compliance to confirm that the policy put in place at the behest of the General Counsel has actually been implemented. It is important that these functions speak a common language on corporate compliance”.*

It was clear from the in-depth interviews that many GC are also conscious of a need for a better way of predicting and managing the effect of regulations on their businesses. The survey, however, shows less than a third (**29 percent**) had proactive identification of risks at an earlier stage amongst the top three steps they were taking to manage risks.

Figure 14

Question: How often do you seek advice on the following areas, either, very often, often or not very often?

Areas on which external advice is sought often or very often





WAYPOINT

Take the time to really understand the business and its risk appetite

It is interesting to note that the percentage of respondents in North America who did have proactive identification of risks in their top three tasks rose to 41 percent (although this was still second to training). This supports the earlier observations that GC in the region are typically closer to the barometer role than others, and so more proactive measures to meet risks are to be expected.

David Thomas sees this set of priorities as directly linked to the maturity of the legal department. *“Many of the companies we work with are concentrating on getting ready for the implementation of existing regulations, but the leaders have already identified what’s on the horizon”*. It’s clearly important to understand new regulations and their implications fully, but those GC who focus only on this instead of anticipating and predicting the direction of future legislation run the risk of falling behind competitors.

THE BAROMETER AND THE REGULATORY CLIMATE

The speed and volume of regulation enable GC to come into their own as the barometer for the business. One GC said that he should never be surprised by important regulation. *“It would be a real failing on a general counsel’s part to wake up in the morning and read an unexpected headline... you’ve got to focus on the ones you think really are going to affect you and try to plan in advance”*.

This is an area where GC really have to operate at the most senior level, and especially around regulations which touch on the Board itself. One GC talked about corporate governance codes which affect the composition of Boards. He explained that being able to advise on these sort of issues, which directly affect senior members of the Board, can raise the GC profile. He said *“your ability to be completely on top of those forthcoming changes, and being able to advise on how to approach them, is something that puts you at the forefront at many of the important meetings that take place”*.



It would be a real failing on a general counsel’s part to wake up in the morning and read an unexpected headline... you’ve got to focus on the ones you think really are going to affect you and try to plan in advance



General Counsel in-depth interviewee



Having good local counsel who knows the regulations and understands the actual environment is critical. I would also seek help from our in-house team and business people on the ground. You weigh it up and draw on your experience in other countries and you make a decision



General Counsel in-depth interviewee

For most GC this means adopting a more risk-based approach to regulation as well as seeking the views of colleagues to identify and assess the regulations with the biggest future impact. One GC thought that this comes down to a question of experience and judgement and involves a number of factors: *“if you are half-way between compliance and non-compliance you have to make a decision on what to do by weighing up a number of different factors and working with others to come up with the right solution. Having good local counsel who knows the regulations and understands the actual environment is critical. I would also seek help from our in-house team and business people on the ground. You weigh it up and draw on your experience in other countries and you make a decision”*.

This demonstrates the importance of building local knowledge and information into global risk analysis. What is a problem or risk in one jurisdiction may not necessarily be a concern in another. Similarly one solution may not fit in all circumstances and cultural differences have to be taken into account. Local advice is important in gaining a full understanding of the regulatory context in each jurisdiction and finding the most effective way to embed compliance.

With GC concerned about the volume of regulation that they will be facing in the future, a dispassionate risk assessment is increasingly necessary. As one GC put it *“you need to do a risk assessment to figure out which regulations are the ones that create a particular exposure and then put some sort of organisation and structure around those to ensure compliance. Not every piece of regulation is equally risky. It’s important to comply but there are areas where they create a particular risk”*.



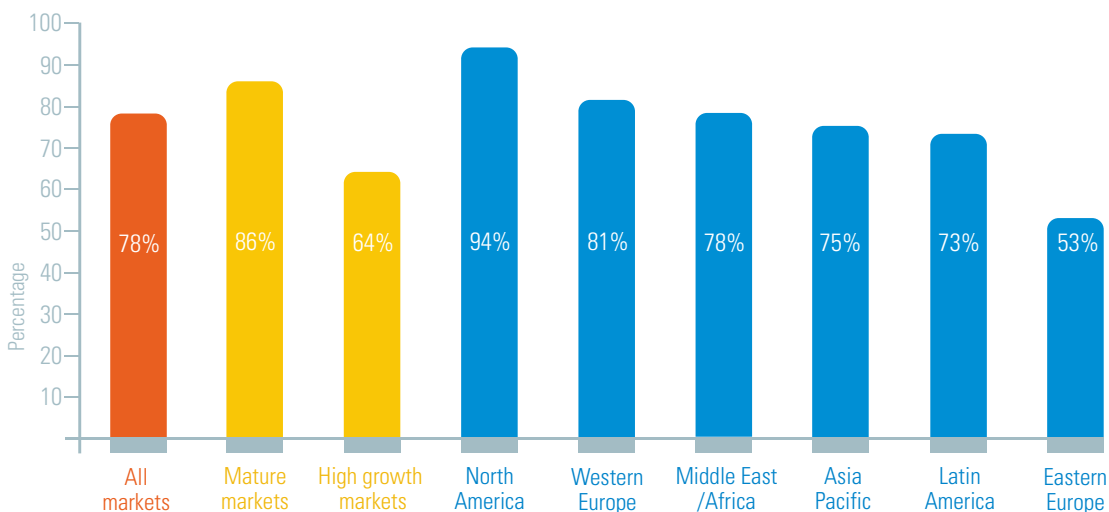
Given the growing complexity and volume of regulation, this is not just a matter for the GC alone. Nearly 80 percent of GC agreed that legal, risk, compliance and internal audit teams need to work together to manage regulatory risk. As figure 15 shows, where the regulatory burden is heaviest - mature markets - GC were keenest to share it. Where responsibility is shared best practice seems to be having a system for tracking relevant regulations and internal accountability for these.

One GC commented that it was their practice to *“track those risk areas and make sure that if there’s something new in regulation we assign responsibility and keep track of it. Establishing clear lines of responsibility and authority is important to ensure things don’t fall into some kind of unclear gap”*. In any case, it seems clear that the default position is that the GC is the focal point.

Figure 15

Question: Do you slightly or strongly agree that the legal, risk and compliance, and internal audit teams work together to manage regulatory risk?

Number of respondents who agree that the legal, risk and compliance and internal audit teams work together to manage regulatory risk

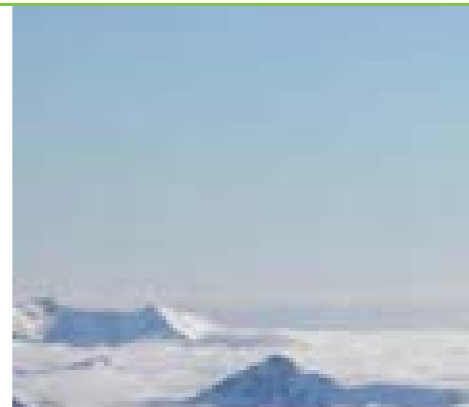


“

industry sectors and companies generally are going to have to do a better job of collaborating lawfully to try and influence both the quality and quantity of regulation and legislation

”

General Counsel in-depth interviewee



Often resources mean that GC have to look externally for help. **58 percent of respondents indicated that they sought external advice on the regulatory and compliance issues that would impact most on their organisations.**

In addition, some GC thought it important to develop relationships with regulators, government bodies and other market participants.

One put it very clearly: *“it’s very important to attempt to influence the direction of what’s coming next if it looks like it might be coming out in a way that’s adverse to our interests, or if there’s some sort of public policy argument that could be brought to bear as to why regulation might take a different direction”.*

Another GC agreed, saying, *“industry sectors and companies generally are going to have to do a better job of collaborating lawfully to try and influence both the quality and quantity of regulation and legislation”.*

Smaller companies might opt instead to work through a trade association. Either way, active participation in policymaking is increasingly acknowledged to be a good, proactive stance for GC keen to demonstrate that they are adding value to the company.

Yet some GC remain to be convinced of this. They argue that regulations almost always end up being tested in court, so that is the place to challenge them, rather than at an earlier stage in the development process. As one GC put it, *“the UK regulatory environment used to be known for sorting things out. Now it seems to be moving more to the American model of the regulator expecting everything to end up in court. A decision can cost tens of millions if not more so often you end up in court because the judge is the only person who can take this decision”.*

David Thomas acknowledges that in many countries the process of implementing regulation seems to be following a ‘US-style’ model, where new rules are immediately challenged and everyone waits for the supreme judicial authority to rule; a process that might take one or two years. *“After all,”* he says, *“if, as a GC, you are charged with protecting the interests of the shareholders, and the costs are not too high, why would you not use that route?”* However, there is an important distinction to draw between challenging a fundamental policy of government, and challenging the way that a regulation is being implemented. A court case could be an unnecessary expense if a regulator can be persuaded through argument and evidence to change the way a rule is brought in.

As one GC we interviewed told us, *“many times these rules are drafted with a broad brush so a lot of the time what we are doing is simply highlighting to the regulators the impact the proposed new rules would have and any unintended negative impacts. So while it is not easy to fundamentally change new regulation, it can be adjusted in such a way that it does not impact in an unexpected and inappropriate way”.*

This requires both delicate skill and good contacts, an important part of the toolkit of an effective GC. It is also important to be clear on those areas where regulation can be effectively challenged, and to acknowledge that there are some things that cannot be changed.

It is clear from the survey that GC expect more, and more complex, regulation, and that dealing with this across multiple jurisdictions is a major challenge. It is also clear that where the burden has fallen most heavily to date, the role of the GC has gained status. For individual GC that can meet these challenges there is a clear opportunity for advancement and to play a critical role at the top table.



“

many times these rules are drafted with a broad brush so a lot of the time what we are doing is simply highlighting to the regulators the impact the proposed new rules would have and any unintended negative impacts

”

General Counsel in-depth interviewee

Managing disputes – General Counsel's search for a smarter way

DISPUTES HAVE ALWAYS BEEN AN OCCUPATIONAL HAZARD OF DOING BUSINESS, AS WELL AS A MAJOR PART OF THE GC'S JOB DESCRIPTION BUT THE COMPLEXITY AND TYPE OF DISPUTES THAT LEGAL DEPARTMENTS ARE REQUIRED TO HANDLE IS CHANGING. THIS REQUIRES A CORRESPONDING CHANGE OF APPROACH.

Some traditional patterns remain however. Our research found that litigation is the second largest area of work undertaken by in-house legal teams around the globe (figure 16). It ranked in the top three areas of work undertaken by 57 percent of GC surveyed. This level of response is similar in both mature and high growth markets.

As figure 17 shows, over the next five years these disputes will touch on a number of core business activities, with regulatory challenges (59 percent), competition and anti-

trust matters (52 percent) and employment issues (46 percent) heading the list. This is consistent with the concerns that GC have in relation to regulatory issues.

Amongst GC in North America intellectual property disputes were also high on the list with 56 percent expecting a rise over the next five years. This perhaps reflects the current high profile of US patent disputes, especially in the technology sector.

Figure 16
Question: What are the top three areas of work performed by the in-house legal team?

Top areas of work

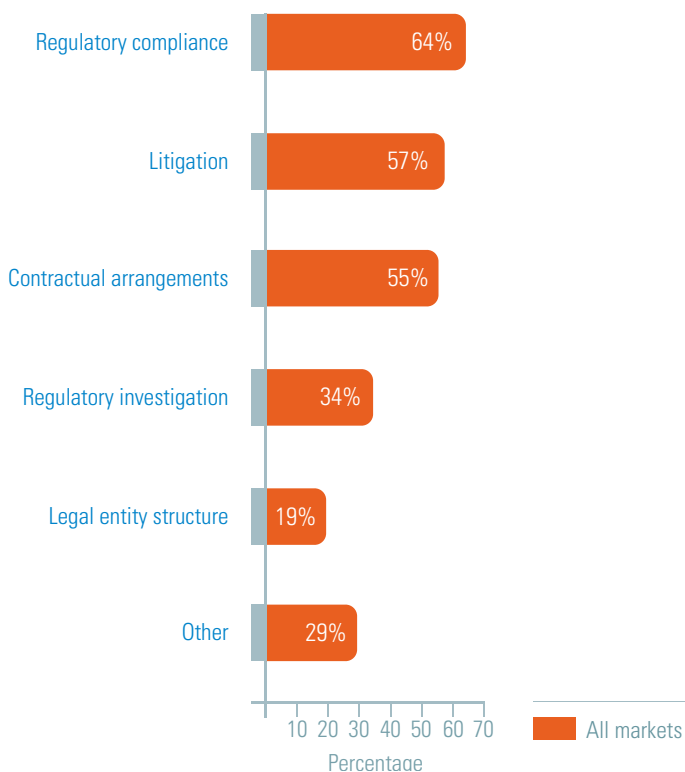


Figure 17
Question: Do you expect the number of disputes that your in-house legal team will handle in the following areas to slightly or strongly, increase or decrease over the next five years?

Types of dispute to slightly or strongly increase



Looking ahead five years, the majority of GC predicted increases in the number and complexity of the disputes they will be asked to handle, although generally speaking the increase is not expected to be significant by most GC (as shown at figure 18). **Of more concern are the two greatest challenges they will face in relation to disputes which are complexity of subject matter (61 percent predict an increase) and the volume of information needing to be disclosed (59 percent predict an increase).**

Managing the increasing volume of information being disclosed during the litigation process puts extra pressure on already restricted budgets. It also creates new risks where practical limits have to be found but may leave critical documents over-looked. The vast amount of data that businesses store makes the identification of what is relevant and disclosable increasingly onerous.

Paul Tombleson, Head of Forensic Technology at KPMG in the UK says *"we receive numerous requests for assistance when GC are facing information disclosure requests as part of large, complex litigation and regulatory investigations. The challenges involved in identifying, capturing and preserving relevant*

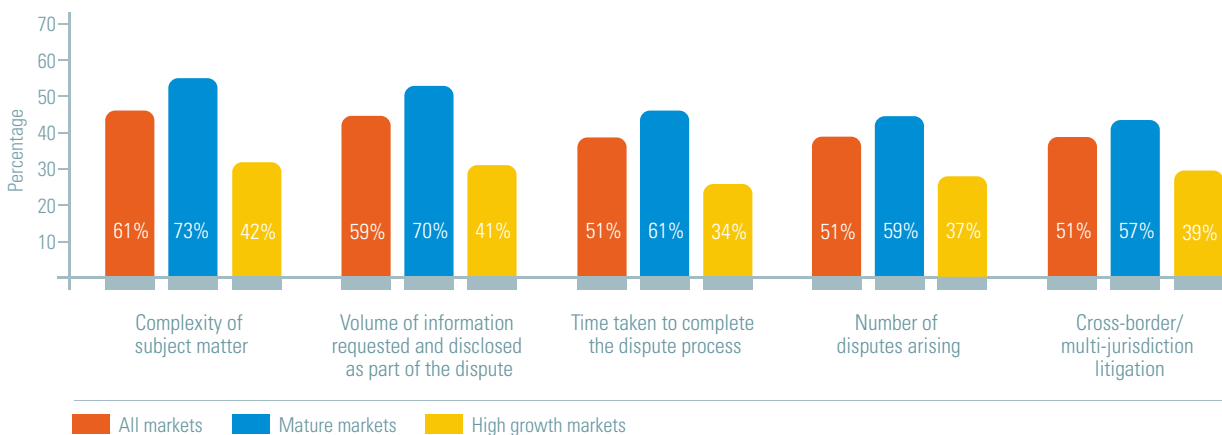
information and records are significant. Information and records in need of disclosure must be reviewed to ensure that they are both relevant to the dispute or investigation, and have been sifted to ensure data or information which is not relevant to the matter is not disclosed. By using state of the art technology, data can be identified and reviewed quickly and efficiently which saves both time and cost. It also reduces the risks GC face in this vital process. Failure to identify and disclose all relevant data in these matters can have disastrous consequences, particularly where a regulatory response is required".

The trends that GC are seeing are likely to mean slower and more expensive resolution of disputes unless businesses can find ways to avoid disputes altogether or to resolve them before lengthy and costly court proceedings become inevitable. Partly this is being addressed through greater involvement in the way contracts are managed once they have been signed, but where disputes cannot be avoided, GC are looking at alternative means of dispute resolution such as mediation and informal negotiation processes. These can help minimise costs, disruption, and damage to business relationships.

Figure 18

Question: With respect to the disputes handled by the in-house legal team do you expect to see, a significant or slight, increase or decrease in the following over the next five years? (percentage who expected a slight or significant increase)

Number of respondents expecting an increase





WAYPOINT

Put dispute avoidance before dispute resolution

“

I am a firm advocate that in the event of dispute it should be for the commercial guys to resolve it, with the legal team in the background wherever possible

”

General Counsel in-depth interviewee



AVOIDING DISPUTES – THE OPPORTUNITY FOR GENERAL COUNSEL

From a commercial and financial perspective, avoiding, rather than having to resolve, a dispute is preferable for everyone concerned. Our survey found that 79 percent of GC believed that their involvement in the commercial decision-making process reduced the number of disputes and regulatory issues. In addition 47 percent stated that they sought external advice, either often or very often, on the avoidance and early resolution of disputes.

The GC we interviewed were clear that the focus on dispute avoidance was a priority, and that it was the responsibility of the wider business as much as the in-house legal team. One GC said *“if you have a dispute some say you should bring your lawyer in at an early stage. But if you do that the matter becomes entrenched and the lawyers are trying to do the commercial job of settling it. I am a firm advocate that in the event of dispute it should be for the commercial guys to resolve it, with the legal team in the background wherever possible”*.

The desire to avoid disputes reflects the fact that entering into legal proceedings typically involves the investment of considerable time and money but the desire to preserve vital commercial relationships is an equally compelling reason. One GC told us, *“business colleagues understand the cost and inconvenience of litigation, but they also have a general desire to preserve relationships and not put what are essentially business decisions in the hands of an outsider, an arbitrator or a judge”*.

Another GC maintained that most commercial businesses focus first on avoiding getting drawn into a legal process. He said, *“litigation is contrary to what most businesses are about, they are focusing on how to develop their business in the future not dealing with problems in the past. Most companies will avoid disputes as far as possible and will seek any means of settling them as quickly as possible within reason. Sometimes one has no choice but it is an absolute last resort”*.

Another agreed that before a situation reaches anywhere near a dispute, the organisation should be taking active steps to resolve the disagreement: *“we try not to have disputes so if something's not working out then we should be talking to each other and trying to resolve it so it doesn't become a formal dispute”*.

The link to risk management was mentioned by another interviewee: *“the most important step to take in order to avoid or solve legal disputes is to manage legal risks proactively. Secondly, it is to actively partake in the initial phase of the dispute and attempt to negotiate or come to an amicable settlement and minimise the damage amount”*. Comparing this with the suggestion that early involvement in a dispute could lead to it becoming entrenched, highlights the fine line that GC have to tread when deciding how to handle each situation.

Kathryn Britten, global head of KPMG's Legal Services sector, says that *“many times KPMG firms are appointed when the dispute is at an advanced stage and the parties have taken irreconcilable positions. Agreement on the loss sustained in the dispute can become much more contentious if the parties have already incurred substantial litigation costs. Where we are appointed at the early stages of the dispute, an assessment of the extent and nature of liability, together with the extent of the loss can be made. Performing such an assessment early helps to determine whether there is merit in the claim and whether it is worth pursuing. It also means that both parties start their discussions and negotiations from a much more informed position and that each has a greater appreciation of their respective positions. This ultimately saves time and costs for the parties as it can lead to a more amicable settlement being reached rather than the dispute entering into a long and costly legal process”*.

LEARNING THE LESSONS FROM THE PAST

Of course, to avoid disputes it is essential to know what has caused them in the past. Many of the GC we interviewed stated that they use knowledge from past disputes in drafting new contracts but many of the mechanisms described to do this were informal and ad hoc, relying on the outcome of internal audit reports, or through discussions with colleagues in and outside the legal team. One GC stated that *“big litigation issues do get sent back in [to the legal department], and also the outcome of internal audit reports. If it's significant, we will work it into our terms of business, and brief our lawyers on it; if you see this factor, it's a red flag, you need to go speak to [the relevant person]”*.



“

business colleagues understand the cost and inconvenience of litigation, but they also have a general desire to preserve relationships and not put what are essentially business decisions in the hands of an outsider, an arbitrator or a judge

”

General Counsel in-depth interviewee



WAYPOINT

Work with commercial colleagues to protect relationships

Another GC we interviewed stated that being fully integrated into the business helps with dispute management, but admitted there were no formal means to capture issues which had arisen or to feed them back into the organisation. He said, *"we're pretty well integrated, so in terms of changes in the law that affect the business, those flow through the organisation and people become aware of those quite quickly. In terms of systematic knowledge sharing and having the tools to do that, that's something that we're working on at the moment"*.

The in-house legal team's database of previous cases should be a valuable source of insight into common factors that regularly lead to disputes, and what steps to take to prevent them. However, it seems doubtful that these are being used to their full potential. *"I see more and more companies with databases, but I don't see many taking full advantage of them,"* says Bryan Jones KPMG's Global Head of Dispute Advisory Services, *"GC are often aware of the opportunity they present, but I don't see companies getting their operations people and their law departments to see how they can avoid the root causes of litigation. I think this is a big chance for GC to contribute to their company's success"*.

Another increasingly popular initiative among companies with high levels of contractual disputes is to provide formal training for operations people on how to run a particular contract, so that its terms are fully complied with and disagreements can be picked up early. One GC summed this up well: *"at a practical level you can't just write the contract and then hand it over and forget about it. What we have found, particularly with our larger customer contracts, is that once it's signed, the lawyer needs to invest time in training up the team who actually operate the contract for us. As a company, we're increasingly investing in training people, this is outside of legal, on what the key issues are, on how best to manage a complex contract, not letting things fester and then become a big problem, escalating appropriately and really knowing what the contract says. That's all very, very important"*.

This might seem unnecessary if the contract is well written, but the number of contractual disputes that companies suffer show that is easy for arguments to arise over fine detail even where they have been approved by relevant legal teams. One approach to this, which has become common in merger and acquisition situations, is to use agreement-vetting experts on

“

The age when lawyers would draft a contract and then step aside are gone. There's an increasing feeling here that the creation and the defence of economic value for the company lies as much in the creation of the contract as in its administration. So there's a greater focus on making sure that we're getting what we paid for”

”

General Counsel in-depth interviewee

critical topics to ensure that the drafting is watertight. David Eastwood, Global Head of Contract Compliance Services at KPMG says, *"member firms have seen many contractual disputes arise where the ways in which accounting methods are applied have been interpreted differently by the parties. It is important to ensure when a contract is being drafted, that both parties share and agree a common understanding of the terms applied, otherwise the organisation may lose revenue or incur additional costs"*.

This sort of contract management can be a key mechanism in helping parties to avoid disputes. Traditionally once a contract was drafted, the role of the GC would end and the implementation and management of the contract was left to their commercial colleagues. However, it is evident from those GC we interviewed that this is changing and they are now becoming more involved in the management of the contract, partly to avoid potential disputes but also because of the increasing complexity of contracts, and the need to support commercial teams in day-to-day business.

MANAGING THE CONTRACT – IS THIS PART OF THE GENERAL COUNSEL'S ROLE?

A number of the GC interviewed referred to the need to stay involved with contracts throughout their lifetime. As one GC put it, *"the age when lawyers would draft a contract and then step aside are gone. There's an increasing feeling here that the creation and the defence of economic value for the company lies as much in the creation of the contract as in its administration. So there's a greater focus on making sure that we're getting what we paid for. There's an increasing sophistication and understanding that long term contracts are more likely to survive if there's a willingness to renegotiate them when circumstances change"*.

This ongoing involvement of the legal team is necessary not only because circumstances can change, but also because the practical application of a contract is rarely exactly what was envisaged when it was drafted. One GC acknowledged this fact, saying *"one of the things that is difficult for lawyers to accept is that once the contract goes over to the business people, they implement it. Implementation is never a mirror image of what was contemplated in the contract when it was drafted, it always deviates"*.



“

As a company, we're increasingly investing in training people, this is outside of legal, on what the key issues are, on how best to manage a complex contract, not letting things fester and then become a big problem, escalating appropriately and really knowing what the contract says. That's all very, very important

”

General Counsel in-depth interviewee



WAYPOINT

Be flexible in dispute resolution strategies

Contracts often provide tools which can be used to monitor performance during the life of the contract. Examples include the regular flow of information, audit and similar access rights and formal escalation channels. These provide opportunities for contract governance that, used properly, can reduce the likelihood of disputes.

David Eastwood says *“we see many instances – quite literally thousands - where revenue is lost or costs wasted because business partners fail to meet their contractual obligations precisely. This is very often not deliberate. However clear the contract, the world moves on, new people have different interpretations, estimates have to be made, shortcuts are taken or cost-cutting removes controls. Using the tools provided in the contract to keep abreast of these changes is a key element in avoiding disputes and making sure the contract delivers for both sides”*.

However, there was not universal agreement as to whether the legal department has, or should have, responsibility for tracking compliance with, and performance of, the contract. One GC said *“it’s better to think of what we do as putting the commercial relationship in a box so it addresses matters in relation to liabilities, indemnities and governing law and also what we do if there’s a dispute. Those things are important but being able to anticipate, particularly in a long term contract, how the agreement is going to be implemented is not always the work for lawyers”*.

GC and their commercial colleagues approach contracts in very different ways and with different objectives. Both perspectives are important and it often requires both legal and commercial teams to draw out and address the real risks associated with the contract. One GC said it is important to be involved, and to be so at an early stage, otherwise *“the document that is produced does not cover risk. It is the legal team’s responsibility to think about where things can go wrong, what the risks are, and what you would want to happen in those areas. The commercial guy is not looking at what the consequential losses would be if something didn’t quite go right. So you need to get a balance between the two so those risks can be flagged up and addressed or at the very least people go into the contract with their eyes*

open. In theory that should then prevent disputes happening or ensure that they’re not as great as they would otherwise be”.

Bryan Jones points out that GC can leverage the auditing and monitoring capabilities of their Internal Audit and Compliance colleagues. *“The best internal auditors and compliance officers are in the business of identifying, prioritizing and monitoring risk. By teaming with legal, they can help to see when trouble is brewing in a contractual relationship”*.

The best way forward often seems to be a combination of input between those drafting the contract and those due to implement the contract. GC have much to add to the process of how the contract is managed and in ensuring that there is compliance with the performance of that contract. While it is not usually the role of the GC to manage the contract, the GC’s ability to highlight potential problems which could arise as the contract unfolds and circumstances change will be very valuable in avoiding any disputes which might arise. This requires both a deep understanding of the business and the ability to explain to colleagues in clear business language what the legal issues mean for the day to day operation of the contract.

DISPUTE RESOLUTION METHODS – AN ALTERNATIVE FUTURE

However much care is taken, it is inevitable that some disputes will arise and some will require a legal process to resolve them. Although litigation through the courts is currently one of the three most common activities for nearly 60 percent of respondents to our survey, it is not a universally popular method of resolving disputes. The overall view from the GC interviewed was that the appropriate method of resolution very much depends on the nature of the dispute.

As one GC put it: *“if it is an issue raised by a customer it may just be a case of rectifying that and the matter is over. If it is more complicated and involves commercial partners we may need to handle it at an executive level and greater effort is required to resolve it. Other things you can tell will involve a more extended, protracted process. So each one has its own approach, depending on the facts alleged”*.



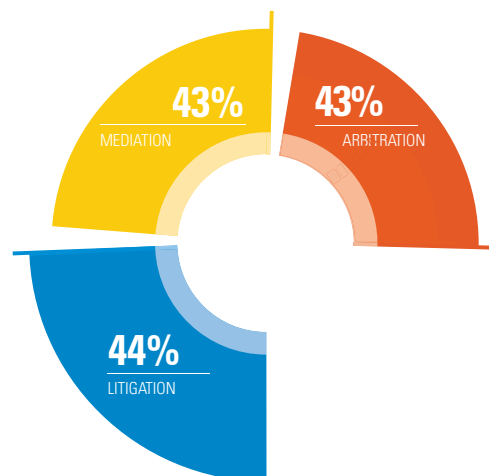


Figure 19 shows that the survey results indicated no strong views on the prospects for litigation, arbitration or mediation as approaches to dispute resolution, although perhaps slightly more GC expect mediation to become relatively more common. From a regional perspective, the only marked difference was in Asia Pacific where 48 percent expected mediation to grow significantly ahead of litigation and, to a lesser extent, ahead of arbitration. This may reflect the wish for greater privacy around disputes and the nature of the ownership of organisations in the region. This was a point alluded to earlier in this report by Grant Jamieson of KPMG in China where he explained that there is still a large number of family owned and run companies in the region, where the corporate decision-making process is less formal and within a smaller circle of people.

Figure 19

Question: In relation to the resolution of disputes, do you expect to see a significant or slight, increase or decrease in the use of the following methods over the next 5 years?

Percentage expecting slight or significant increase in method of resolution





WAYPOINT

Treat the resolution of disputes like any other strategic decision

Privacy has often been one of the most attractive elements of arbitration, along with the commercial expertise of the tribunal, speed, efficiency and low cost. However, there are signs that arbitration is beginning to lose this appeal. As Bryan Jones says, *“GC have become critical of arbitrations with US-style discovery, lawyers taking control of the process, panels becoming slow and expensive, handing down detailed decisions that GC don't want, and more and more challenges to arbitration awards being heard in the courts. If you are going to face this, why would you go to arbitration in the first place? In countries with a reliable and relatively fast-moving legal system, a bench trial with no jury may be a cheaper and more reliable method”*.

Kathryn Britten is not surprised by the uniformity of the results in figure 19. She says *“the debate as to which of these methods of resolution is best has been well documented and debated. Arbitration and mediation have not always produced the benefits expected in terms of speed and cost and no one method provides a ‘magic bullet’ for all disputes. Which method of resolution will be appropriate will depend on the facts of each individual case. What is clear is that we are now seeing much greater concentration on dispute avoidance, and putting processes in place to achieve this is becoming the main focus for the future”*. Where disputes cannot be avoided the legal team are arming their commercial colleagues with the tools they need to reach speedy settlements.

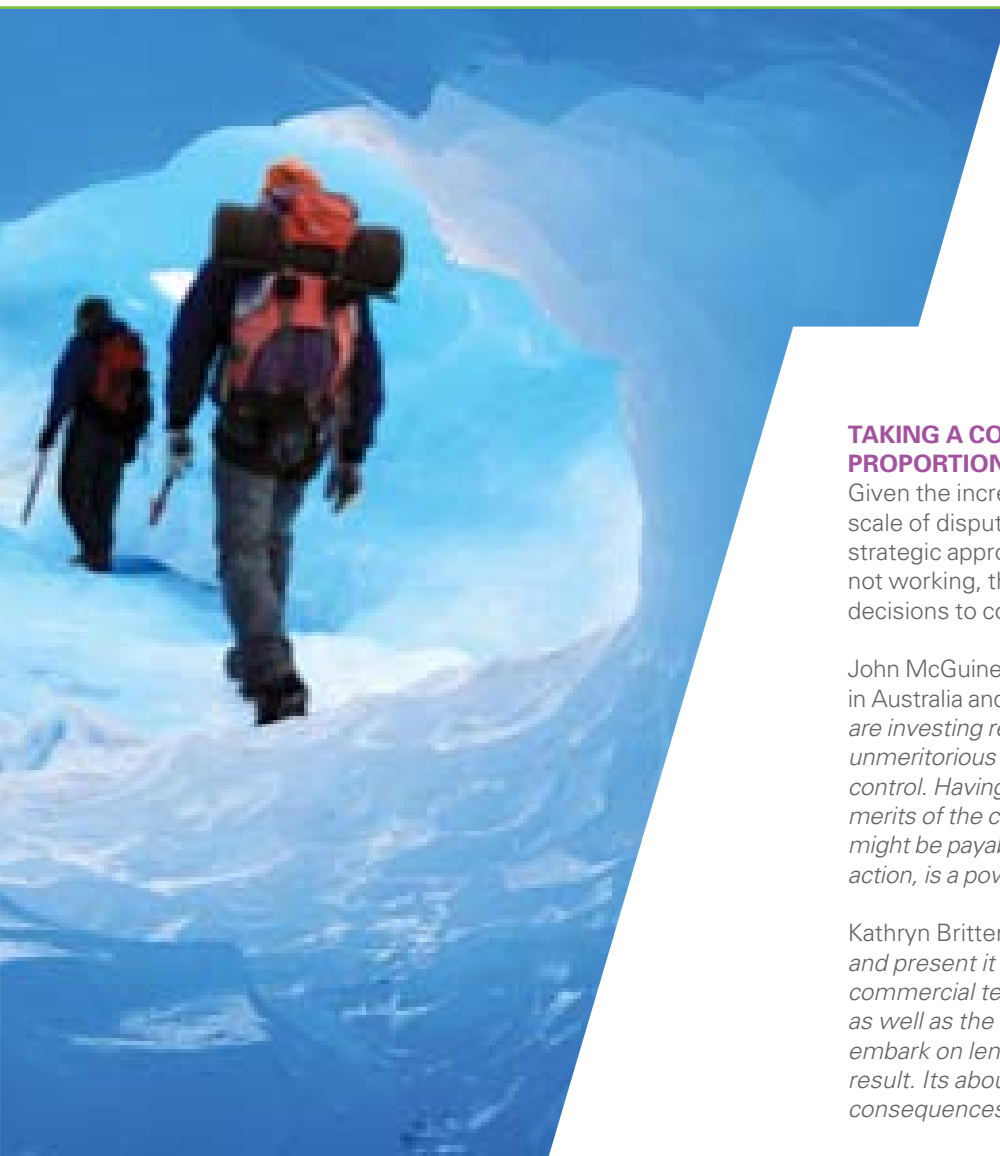
The view from those GC that we interviewed was that the more informal means of resolving disputes were preferred, whether by alternative dispute resolution (“ADR”) or simply conducting a dialogue with the other party. One stated that *“informal dispute resolution is to be welcomed. It saves time and money, and our litigation team actually invests a lot of effort in getting our business colleagues up to speed and making sure we have access to information when we need it, so that these mediations and arbitrations are meaningful and quick”*.

Another GC believed that fewer disputes now go to litigation because of the expense and inconvenience, the importance of protecting important relationships, and the increased ability to resolve issues short of litigation. He explained that when a dispute did go to formal litigation these disputes *“are generally larger and tend to be where the amount of money is such that it would be too painful for us, or the other party, to simply concede. Where there is no relationship, as would be the case with a competitor, or the relationship is less important, then we would consider litigation”*.

One GC stated that companies are seeking alternative ways to resolve disputes because they now take a much longer term view of the relationship, and will ask for independent and trusted professional help if necessary: *“people are more willing to consider alternative ways to resolve disputes so that the relationship is preserved. We are much more prepared to go and spend a day in mediation with someone but it is important to try to do that with as little heat in the proceedings as possible. You not only need to have the right people around the table from your company and business partners, but also to pay a lot more attention to the industry knowledge of the mediators that you use and your ability to trust and get along with them”*.

Similar factors drive a different form of ADR that has become much more common in recent years. This is where parties turn to an independent expert to advise them jointly on how to resolve a dispute. This may be once a dispute has become formalised – in which case the expert may behave much like an arbitrator or mediator – but it is increasingly common for an independent person to be asked to advise on ongoing projects where difficulties are emerging. This can be a good way of reviewing the underlying causes and strengthening contract governance so that relationships are brought back on track and disputes avoided. Such dispute escalation and resolution mechanisms are now often built into contracts governing long term projects, such as for construction or IT implementation.

KPMG firms have seen an increase in recent years in requests from disputing companies to accept these sorts of expert appointment, with a brief to look forward rather than backwards and to propose solutions rather than to award compensation.



“

informal dispute resolution is to be welcomed. It saves time and money, and our litigation team actually invests a lot of effort in getting our business colleagues up to speed

”

General Counsel in-depth interviewee

TAKING A COMMERCIAL, PROACTIVE AND PROPORTIONATE APPROACH TO DISPUTES

Given the increasing variety, duration, complexity and scale of disputes anticipated GC will need to take a very strategic approach to dispute risks. When negotiations are not working, there will need to be clear criteria to support decisions to continue or settle.

John McGuinness, head of KPMG's Dispute Advisory Services in Australia and Asia Pacific, explained *“increasingly companies are investing resources upfront in an effort to avoid unmeritorious claims escalating and costs running out of control. Having an accurate understanding not only of the legal merits of the claim, but also of the quantum of damages that might be payable and the costs of bringing or defending the action, is a powerful tool in deciding whether to settle or fight”*.

Kathryn Britten adds *“unless GC can gather this information and present it to the Board in a way that is easily digestible in commercial terms, huge amounts of money can be wasted, as well as the time of senior executives, as companies embark on lengthy proceedings with little chance of a positive result. Its about articulating clearly the commercial consequences of different resolution strategies”*.

One GC interviewed agreed *“the best practice is to make sure that you devote the right level of attention; first identify the disputes in the first place, make sure you do not miss things that fall through the cracks; and then secondly assign the right level of attention and resources depending upon the nature of the dispute”*.

Given the tensions that always surround disputes, and the high stakes, this is one area of GC's work where the relationships they build with their colleagues, and especially the Board, are critical to success. It is an area which uniquely “belongs” to the GC and where GC are custodians of the lessons to be learned. This is where, more than anywhere, organisations expect to see their GC looking over the horizon for the unexpected and where they can provide, in the words of one GC, a barometer of corporate health.

Kathryn Britten added *“these appointments may be anticipated in the underlying contract but are often ad hoc. This can be a quick and efficient process that saves the parties huge amounts of money and helps keep the contract and business relations on track”*.

Protecting the underlying business relationship is often critical and, as one GC commented, the existing commercial relationship may be the point of greatest leverage. *“Often companies can have in essence good commercial relationships but still be in dispute. It is thankfully rare that there is a complete breakdown in a relationship which means you can usually sit down with someone and have a conversation. It doesn't mean it'll go your way, it just means you can have a conversation. We're just as interested in the wider relationship, and the duration of the relationship, as we are in the immediate dispute, and so are they”*.

New frontiers, new markets, new technologies – a changing risk environment for General Counsel

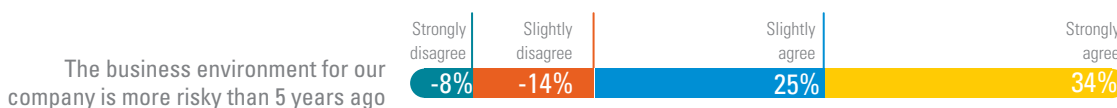
OUR SURVEY LOOKED BACKWARDS FIVE YEARS, TO BEFORE THE CURRENT ECONOMIC CRISIS, AND FORWARD FIVE YEARS TO 2017. THE RESULTS REFLECTED THE PROFOUND CHANGES THAT HAVE TAKEN PLACE SINCE 2007 IN THE ECONOMIC FORTUNES OF COMPANIES OPERATING IN DIFFERENT PARTS OF THE WORLD, THE CONTINUING GLOBALISATION OF COMMERCE AND SUPPLY CHAINS, NEW BUSINESS MODELS, SOCIAL MEDIA AND THE CLOUD.

A particular feature is the challenge to legal jurisdiction that some of these changes present, coupled with the increasingly cross-border nature of laws and regulations. It is no surprise that **59 percent of respondents thought that the wider environment in which they operate is more risky than it was five years ago** (shown by figure 20). We have already explored the particular challenges of regulatory and litigation issues, but the GC we talked to highlighted other important areas of risk.

Figure 20

Question: Do you slightly or strongly, agree or disagree that the business environment for your company is more risky than five years ago

The business environment for our company is more risky than five years ago



Note: A total of 19% of respondents neither agreed or disagreed with this statement

“ we will always worry about protection of the brand at all levels ”
General Counsel in-depth interviewee

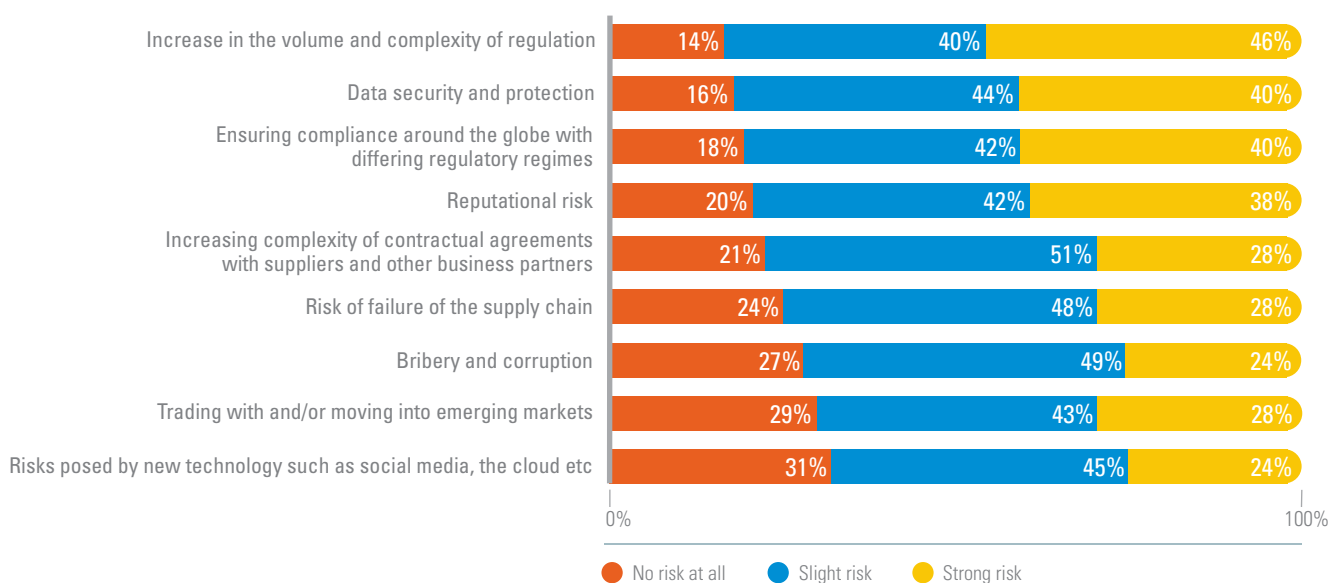
Figure 21 shows one such risk is data security and protection, which was seen as a risk by 84 percent of GC we asked. Surprisingly, 31 percent of respondents stated that there was no risk attached to new technology. We consider these results in more detail later in this section. Other areas of concern related to reputational risk (80 percent), increased complexity of third party contracts (79 percent), supply chain failure (76 percent) and anti-bribery and corruption (73 percent).

A number of the GC mentioned that risks around company reputation and brand protection were already, or were fast becoming, a key concern. One stated that, *“the possibility that our operations could have a negative impact on our reputation and more importantly our ability to do business, is a growing concern.”* While another put it even more strongly, *“we will always worry about protection of the brand at all levels”.*

Figure 21

Question: Considering the next five years, are the following issues a slight risk, a strong risk or not a risk at all to your organisation?

Areas of risk



Another interviewee, while talking about the reasons for the changing risk environment, agreed that the risks to organisational and brand reputation had increased over the last five years and put this down to international expansion and greater level of brand profile: *“the more jurisdictions you’re working in the greater the risk. The bigger the brand, the bigger the profile, the greater the risk. The fast moving pace of the business, that competitive edge increases the risk”.*

For some organisations reputation is especially bound up with public trust. This may be the case, for example, where customer affairs are involved, or the news media, or where critical business or domestic services are provided. In such organisations reputation can provide as much an impact to the GC role as the increasing impact of regulation.



WAYPOINT

Don't under-estimate the impact cultural differences can have

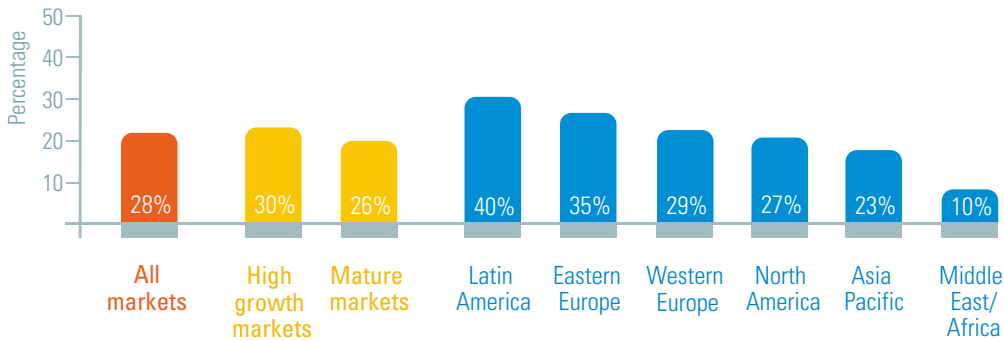
DIFFERENT PERSPECTIVES ON THE RISK ENVIRONMENT

Although 59 percent of all respondents thought the business environment riskier than five years ago, there was a marked difference between responses provided by GC in mature markets (68 percent) compared to those in high growth markets (only 44 percent). The impact of the recent global economic crisis is likely to be a major factor in the mature markets responses: the crisis created enormous uncertainty and volatility in many of the more mature markets. Many companies faced real challenges in both short term trading and longer-term prospects. In contrast the environment for many high growth markets over the last five years has been relatively benign.



Figure 22
Question: Considering the next five years, are the following issues a slight risk, a strong risk or not a risk at all to your organisation?

Respondents who considered that trading with or moving into new markets was a strong risk



The increased regulatory complexities discussed earlier in this report, and the concern many GC have with ensuring global compliance, have not apparently affected organisations' desire to enter and operate in new markets. **Figure 22 shows that 28 percent of respondents globally thought that operating in new markets presented a strong risk. A further 43 percent only saw this as a slight risk and 29 percent as no risk at all (figure 21).** Looking at the regional results, we found that a similar percentage in both mature (26 percent) and high growth markets (30 percent) considered moving into new markets to be a strong risk.

Entering high growth markets is difficult and requires persistence. GC interviewed cited a number of reasons for this including a different regulatory landscape, unstable governments, more stakeholders or simply the challenge of doing business at a distance and finding business partners whose interests align with those of the organisation.

One GC told us about working in multiple jurisdictions, *"it is quite difficult because every culture is slightly different and it's being cognisant of the fact that there are different cultural nuances as well as legal issues and you have to be careful. If you're working in a global market you have to recognise cultural differences and try and work with those. Some are easier to accommodate than others"*.



Another GC felt that persistence, patience and a deep understanding of the legal system, both in theory and reality, were all vital: *“be absolutely aware of what the laws are in the countries you are operating in and ensure you comply with and respect them. It is important not to be aggressive about your position in relation to law and foreign investment rules but to put your case about the changes that you’d like to see taking place through the right channels. One has to understand the legal, ethical and social environment of the country you’re operating in”*.

Most of the GC interviewed thought that having a good local lawyer, one who can provide an insight into the cultural differences and local legal nuances, was essential to preventing and overcoming problems. As one GC said *“if you’re working in a jurisdiction, using a good local lawyer who can speak both English and the local language, and has the appropriate contacts, will make life a lot easier. Ask the really basic questions to ensure you have a proper understanding before getting too involved in the market”*.

Despite a more positive outlook on the risk environment amongst GC in high growth markets, it would be wrong to conclude that they have overlooked the complexities, challenges and cultural nuances which arise when they invest in mature markets.

Deepankar Sanwalka confirms that the markets of Europe and North America look particularly challenging now to investors from South and South East Asia. *“It is a combination of factors. First, the US and Europe are becoming more uncompetitive by the day because of the rising cost of regulation and enforcement. Indian investors are really asking themselves whether they want to go into those markets and subject themselves to that level of scrutiny when there are attractive investment opportunities in more lightly regulated markets in Africa and Latin America”*.

“Second, the unpredictability and low growth in those markets makes them look very unattractive compared with the apparently stable growth we are seeing in Asia-Pacific. Increased risk is a function of low growth, and the economies of Europe, in particular, do not seem to offer much prospect of good growth at the moment”.

Grant Jamieson, from KPMG in China, agrees that mature market regulation is making these economies appear risky. However, he still thinks there is some advantage to the relative reliability and transparency of the legal systems in Europe and North America which makes these markets a good place to invest. *“If it’s my money, then I would want it in a place where I can be sure of getting a sensible judgement if things go wrong”.*

The idea that mature economies are losing business to other markets due to excessive regulation is nothing new, but it is clearly a high priority issue for those we interviewed in depth. One GC told us *“[potential investors] must be aware that the US, for example, is losing some of its competitive advantage and has been for years with more draconian regulations like Sarbanes Oxley. Now we have Dodds-Frank and nobody yet knows what that means”.*

Whether it is mature markets investing in high growth markets, or the other way round, different ways of working take time to understand and to learn. Earlier in this report, Bryan Jones from KPMG in the US noted that members of some legal departments spend time in the operational teams within their companies, and in the different countries in which their

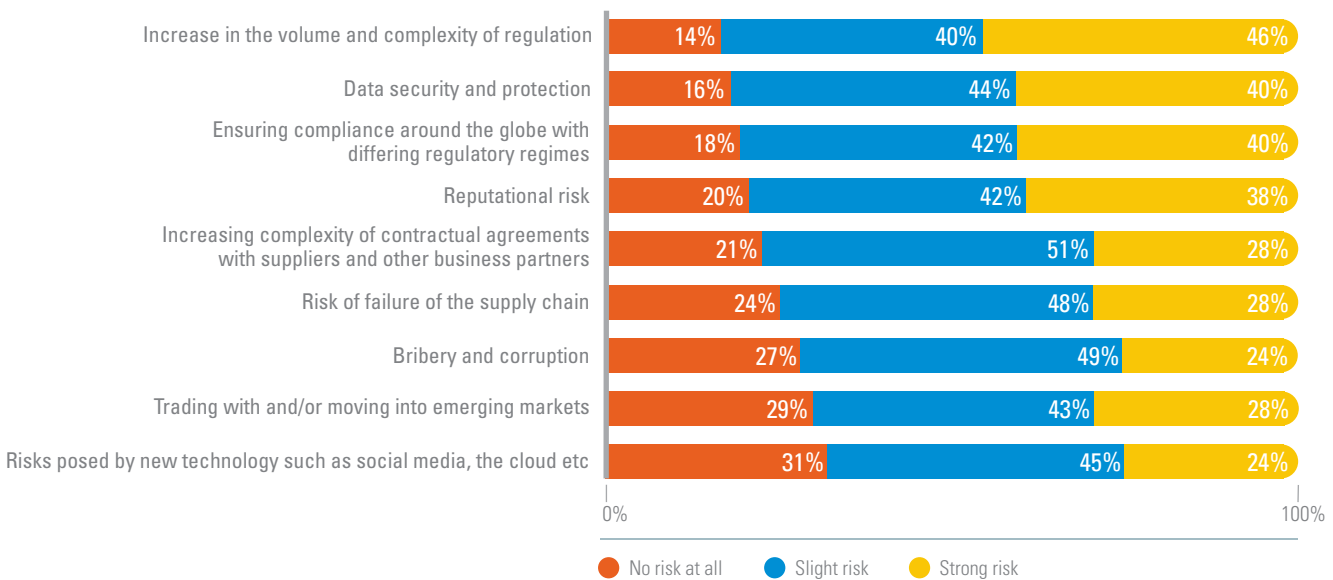
company operates to understand how things work in practice. Whether the lawyer used is local, or one who has been brought in from a central team based elsewhere, is largely a matter of tactics. The key point is that a combination of knowledge – strategic, operational and regional, in both a theoretical and practical sense is essential to making the process as smooth as possible and preventing unpleasant surprises.

TECHNOLOGY RISKS AND THE GENERAL COUNSEL – AN UNCLEAR PICTURE

Earlier in this section, we noted that 31 percent of GC respondents said that new technology, such as social media and cloud computing, posed little or no risk to their organisation. Figure 23 shows that a further 45 percent stated that such technology posed only a slight risk to their organisation. This was worrying given that the use of social media can have a direct link to an organisation’s brand and its wider reputation. Risks relating to data security and protection, on the other hand, were seen as the second biggest risk facing companies in the next five years with 84 percent of respondents treating these as a slight or strong risk. Paradoxically, legislation related to data protection was seen as a serious concern by only 27% of respondents overall.

Figure 23
Question: Considering the next five years, are the following issues a slight risk, a strong risk or not a risk at all to your organisation?

Areas of risk



We find the results in relation to new technology risks surprising. As these new technologies become part of the way business is done across the world, there will be more problems, crises and legal action linked to them. Kathryn Britten from KPMG in the UK observes, “over the last decade we have seen a rapid increase in technology-related disputes and although few of these have involved social networking or cloud computing to date, that will be a natural progression from what we are experiencing now. I am surprised that such a high proportion of GC see these as low risk issues”.

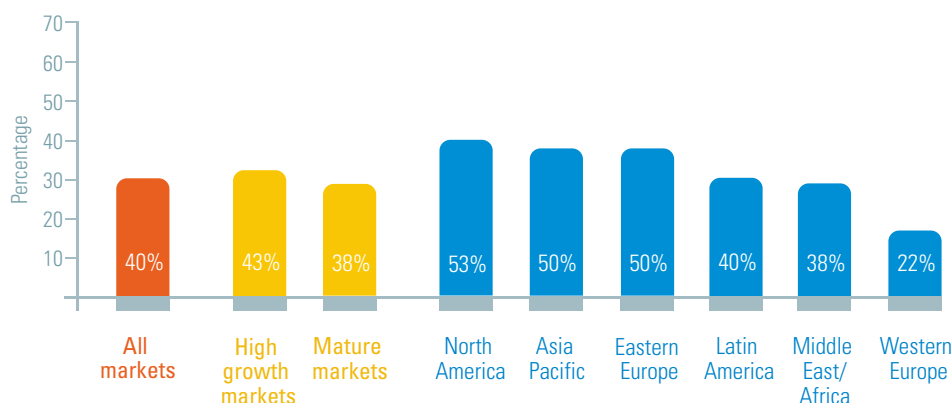
DATA PROTECTION LEGISLATION – DIFFERING VIEWS

Looking more deeply into the responses on data security and protection, figure 24 shows that high growth markets generally saw this area as more of an issue than mature markets, with Western Europe particularly relaxed – only 22 percent of respondents in that region considered it a strong risk. There was some inconsistency within the mature market responses, with North America having the highest level of concern of any market with 53 percent regarding this as a strong risk.

Figure 24

Question: Considering the next five years, are the following issues a slight risk, a strong risk or not a risk at all to your organisation?

Respondents who considered that data security and protection was a strong risk



The most likely explanation for this difference in view can be found in the different stages of relevant legislation within the regions. In Europe and North America, data protection has been the focus of successive waves of legislation, starting in the late 1990s and developing rapidly in response to a combination of technical developments and public concern.

For Western European GC, data protection legislation is an established part of their work and one they feel they understand well, which could account for their lower levels of concern. By contrast, for those in Eastern Europe and Asia Pacific, where relevant legislation is generally thought to be 5-10 years behind that in other economies, data protection is regarded as a new, complex and potentially very influential area of law. GC in these areas are still in the process of working out how this will affect their operations, so it is understandable that it is a greater area of concern. In North America, despite the fact legislation in this area is not new, GC are anticipating the next wave of rules, including requirements to report any loss of data, and large fines from the US Federal Trade Commission if companies are found to have misused the data they have been entrusted with by customers.

Stephen Bonner, a partner with KPMG in the UK who specialises in technology issues, explains that customers rapidly lose confidence in companies that do not adequately protect their data, and the markets often react with a sharp fall in share price. “This happens in Western European markets as

well as those in the US” he says, “and it is surprising to see GC in Western European companies so relaxed about the effect of future data protection legislation on their operations. The next tranche is on its way, and the time scales for implementation will be shorter than ever. This is something they should be thinking about”.

In fact, the GC interviewed appreciated the complexity of current data protection and privacy rules, and that new developments in this area would be an imminent and significant factor for them. Of particular concern was the fact that data could be held in various jurisdictions, each with its own national data protection and privacy rules. How such rules and regulations will apply to new technology such as cloud computing and social media was seen as uncertain and urgently needing to be considered in depth.

One GC provided his view on the European Union’s plan to standardise rules around data protection and privacy: “even though they are looking to harmonise, every jurisdiction will still have its own rules. The only way to be sure is to keep all the data in one country, but at the same time everyone’s pushing us to provide services over ‘the cloud’, which by definition is everywhere and anywhere. So even that’s a new area of risk and complexity that is going to be at the front of everyone’s mind in the next year or so”.



WAYPOINT

Stay up to date with the way your business uses new technologies

NEW TECHNOLOGY

Our finding that less than one quarter of respondents considered new technologies to be a strong risk was mirrored in most geographical regions, with the exception of Eastern Europe where nearly double the average (45 percent) saw new technology as a strong risk (figure 25). Michael Peer, a risk consulting partner in KPMG in Eastern Europe says *“the threat of new technology, especially social media, weighs heavily with GC in Central and Eastern Europe. The Soviet bloc era, when there was monitoring by the State of the individual, has resulted in strong attitudes to privacy of personal information and this, coupled with a high awareness of technological issues, means that local companies are generally very sensitive to issues regarding data leakage and theft”*.

One of the GC interviewed admitted that they were perhaps not as conversant with the risks posed by new technology as they could be: *“Right now we do not use new technologies but we are looking at what benefits these could bring to the business. However we are in the very early stages of understanding what risks are associated with using these technologies, so we are a little behind in this area”*.

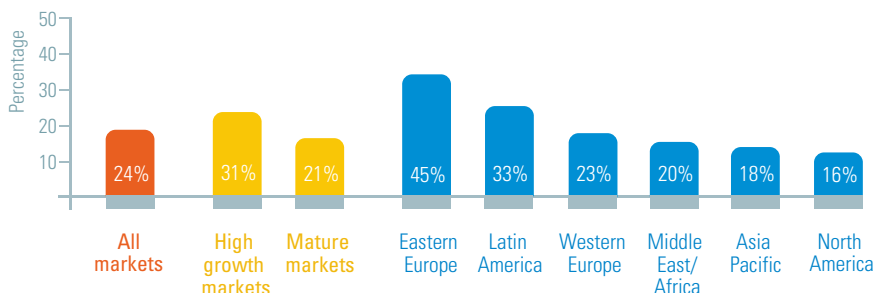
Even though legislation on use of social media and cloud computing is still in its infancy, these technologies already have major implications for all companies. New technology is a good example of an area where potential risks are high, but where the legal department may not be involved until there is a specifically legal matter to consider. By that time, the accumulated risk to the company may be substantial.

Stephen Bonner sees this often. *“There commonly seems to be a disconnect between technology leaders and the GC. Technology issues tend to start in IT, and then become the joint responsibility of an information risk team (which is usually part of the overall risk management structure) and an IT security team. It is only as these issues mature and come to be seen as more than a business or operational matter that they graduate to the level of the Chief Operations Officer. It is often at this stage that people realise that there might be a legal angle and start to ask the legal department for their help”*.

This disconnect is supported by the survey results. When asked what other parts of the organisation they considered it would be necessary to work closely with in the future to ensure the identification and management of key risks (of which data security and protection was one), none of the 320 respondents listed the IT department as one of those relationships.

Figure 25
 Question: Considering the next five years, are the following issues a slight risk, a strong risk or not a risk at all to your organisation?

Respondents who considered that new technology was a strong risk





“

Right now we do not use new technologies but we are looking at what benefits these could bring to the business. However we are in the very early stages of understanding what risks are associated with using these technologies

”

General Counsel in-depth interviewee

While GC overall may not consider that a close working relationship with their IT counterparts is required, one GC we interviewed did highlight this in relation to the risks associated with technology: *“we have an IT department and we have people within the commercial or the marketing side that have good IT backgrounds, who look at this in more detail. My knowledge is more perfunctory than some of theirs. It’s working with them, it’s looking at what the risk is, and asking the questions, and getting them to come up with the solutions”*.

While Sales and Marketing departments may well understand the use of new technology as a marketing tool, their perspective will be very different from the GC’s. Social media as a marketing tool has reached the stage where legal departments need to be involved. It is common for marketing departments to use a variety of social media networks as a way of finding out more about their customers, obtaining their feedback, and promoting goods and services. Although these might be new and more effective ways of interacting with customers, the rules applying

to traditional methods of commercial communications still apply. Advertising and terminology that would be illegal or controversial in a printed magazine is generally still illegal or controversial if it is channelled through Twitter, for example.

One GC interviewed acknowledged the uncertainty in using social media networks, saying *“it’s using them in a positive manner wherever possible, but it can also be fraught with negatives and risks, a ‘double edged sword’”*. They highlighted one of those risks as being the behaviour of staff in terms of what they were posting on such networks, and the impact – positive or negative – that could have on the business. In terms of managing the employee risk, most organisations rely on training and implementing policies and procedures which outline what people can and cannot do.

One GC says *“you can regulate that but it’s getting the right balance so people do it as part of their job. They need training to ensure that the tone is correct and it’s legal and that they are saying the correct things. There are a lot of elements to it, it is a whole branding issue”*.

Where social media and other technologies are breaking new legal ground is in the creation of 'big data', the collection and analysis of the behaviour of large communities of users. These data sources can be very valuable sources of customer information for any company, but they need to be used with great care to avoid breaching existing data protections laws, as well as new rights, such as the right to be forgotten and requirements for the portability of data. The wider risks presented are also clear; social media provides tempting targets for aggressive competitors, groups of organised criminals, people with a political or espionage agenda, and hackers.

Stephen Bonner speaks of one large organisation that had its Twitter feed taken over by fraudsters. Its customers were sent an apparently genuine message asking them to open a link, which led to a program designed to gather personal and bank account details. Stephen explains *"KPMG firms have seen campaigning groups and disgruntled employees hijacking these communities, and they are always targets for commercial rivals and even governments looking for economic or political data. The risks for the companies that create them are not only that customers will look to them for redress because of poor data security, but failures of this kind are always very public. The reputational consequences can be very large indeed"*.

It is tempting but dangerous to see cloud computing as just a technical issue and to assume that data handling and security are treated in the same way as on existing servers and networks. This is not the case and the cloud raises new technical issues in these and other areas. It also brings new contractual and regulatory risks and problems, such as jurisdiction. *"It is very easy,"* says Stephen Bonner, *"to unwittingly move data from one jurisdiction into another, bringing it under an entirely different set of regulations and involving a new set of regulators. A company that uses cloud computing may not even know it is running these risks"*.

Grant Jamieson from KPMG in China provides a good example of a country-specific risk of this sort: *"we are very careful not to transfer data outside of China, even to Hong Kong"* he says. *"Data on Chinese businesses can have the status of state secrets, and because of the quite open definition of 'state secret' it can be very difficult to work out what data would be considered inappropriate to be moved out of the country"*.

GENERAL COUNSEL ENGAGING WITH NEW TECHNOLOGY

Despite the fact that GC seem relatively unconcerned about the risks of new technology, **47 percent of those surveyed said that they seek expert advice on the impact of new technology on the organisation**, although only 38 percent of respondents stated that they did this often or very often. One GC interviewed said that *"as a company we are very actively involved in not just selling online but promoting ourselves online, so we are developing the relevant technical expertise internally and we have key external counsel that we work with"*.

This is not just about the use of new technologies like the cloud and social media. It is also an issue in relation to new technologies being developed by the organisation itself. Stephen Bonner states that GC should be involved in the process whenever new technologies are being implemented or developed. *"The amount of money that is being spent on developing new technologies suggest that GC certainly should be involved at an earlier stage than they generally are at present. GC however seem to find it difficult to make people understand the value that they can add in such situations. A lot of our work is for business and operational teams that have been told by their internal risk advisers that they can't do what they want to with a new technology. They call us in to help them show that the risks have been properly analysed and are being well managed"*.

Unless GC are involved from the beginning and have an understanding of the technologies involved they may not identify these risks until it is too late.

TURNING TECHNOLOGY TO ADVANTAGE

New technology is not all about risk. In our earlier section on managing disputes, Bryan Jones from KPMG in the US explained how new data collection and data analysis techniques can improve the way that legal departments handle their cases, and can help to pinpoint areas of operations that regularly cause disputes.

Stephen Bonner goes further. He sees the information available from internal monitoring systems, especially well-established and widely used governance, risk and compliance tools, as a valuable resource for GC wanting to establish their own risk management networks.

"Purchasing departments, for example, frequently review suppliers to ask them about their performance. The best ones then feed this information back to their legal departments, where it can be analysed to see how they are fulfilling their contracts. If, say, half of them are not complying with a particular clause, but it is not making much difference to overall performance, then perhaps the clause is not needed. Or, alternatively, perhaps it needs to be enforced more rigorously".

These are the sorts of developments that GC need to be aware of. But the survey suggests that while departments often seek outside help on regulatory issues, relatively few of them are regularly seeking advice from experts on how technology can help or threaten their organisations. Perhaps this is an area where forward-looking GC can make a difference.



“

as a company we are very actively involved in not just selling online but promoting ourselves online, so we are developing the relevant technical expertise internally and we have key external counsel that we work with

”

Building the legal team for the future

MOST GC AGREE THAT A STRONG UNDERSTANDING OF THEIR ORGANISATION'S BUSINESS AND BUSINESS ENVIRONMENT IS FUNDAMENTAL TO THEIR ROLE. ONE OF THE WAYS THIS CAN BE ENHANCED IS THROUGH CLOSE PROXIMITY BETWEEN THE LEGAL TEAM AND THEIR INTERNAL CLIENTS. OUR SURVEY SHOWED THAT FEW LEGAL DEPARTMENTS HAD THE KIND OF DEVOLVED STRUCTURE THAT WOULD FACILITATE THIS. MORE THAN 90 PERCENT OF RESPONDENTS DESCRIBED THEIR IN-HOUSE TEAMS AS PARTIALLY OR FULLY CENTRALISED, AND ONLY 34 PERCENT SAID THAT THEY WERE STRUCTURED TO MATCH THE LINES OF BUSINESS OR OPERATING UNITS OF THEIR COMPANY.



WAYPOINT

Build relationships across the business and work collaboratively

It was very apparent from the in-depth interviews with GC that the pressure is increasing on legal department budgets. The focus is very much on cost reduction and reducing external spend but with a conflicting pressure to manage an increasing volume and complexity of work. Despite the cost efficiency rationale, this can have the adverse effect of tying up experienced (and often expensive) lawyers with routine work when they could be out developing the networks and knowledge that will help prevent high-cost problems in the future.

There is no doubt that legal departments are taking a close look at how they are organised and the skills that they require. Some are bringing work back in house that they previously passed to external law firms while others are using external legal contractors to deal with their lower value, lower complexity work, so that in-house teams can concentrate on the higher value issues.

One GC we interviewed supported outsourcing as it leaves the in-house team *"able to do what they were trained to do because there is less clutter"* but also issued a note of caution that only certain types of work can be outsourced: *"you can't outsource a problem, you can only outsource something that you understand and you hope by outsourcing it you will be able to improve on your own processes at a lower cost. Outsourcing allows a greater volume of work to be performed but also means a greater consistency in the quality of that work can be more easily achieved"*.

Looking to the future, GC identified a number of key skills which will be required from the wider in-house legal team. These skills match those required of the GC themselves in moving to become the barometer for the business. As the role of senior GC moves increasingly towards strategic advice, collaboration and decision-making, so will the roles of those in the wider in-house legal team in order to support this change.

CHANGING TIMES, CHANGING SKILLS

A number of GC we interviewed explained how their legal departments have already changed and identified a number of key factors which had led to these changes. One GC talked about how members of the in-house legal team are breaking down the barriers within the organisation and developing relationships with other parts of the business: *"we are relying more on people inside legal to be the primary point of contact for designated parts of the business. Their job is to get to know people really well in the business and they help the business get things done... but they also help their legal colleagues know who to go to when they need information"*.

Another GC agreed that there is a definite falling of the barriers between legal and the rest of the organisation, and provided a similar example of this approach: *"we have lawyers who focus on [specific] areas for the whole company. Then there's an equal number of lawyers whose job it is to support all the commercial activity and disputes within a particular business unit... a lot of the time they end up being the lead representative and negotiator on behalf of the company"*.

These examples illustrate how today's business environment requires the legal department, like many other departments, to break down internal barriers. This is becoming increasingly important as the complexity of issues that organisations face requires a more collaborative approach to resolving and managing them.



Adopting such an approach helps the in-house legal team to become more integrated into the business and to develop deeper insights and understanding of the issues faced by different parts of the business. Earlier within the report we flagged this as critical for the success of the GC in acting as an effective barometer for the business and more can be achieved if the whole legal team is engaged in this process.

Some believe that this interaction should be much more robust and involve members of the legal team moving between departments to improve business knowledge and relationships. This may be difficult given the volume of work that the in-house legal team has to deal with day to day, but it is an investment that some GC believe is valuable and helpful to the organisation. Relationships are strengthened and collaboration becomes easier and more frequent.

“

we are relying more on people inside legal to be the primary point of contact for designated parts of the business. Their job is to get to know people really well in the business and they help the business get things done... but they also help their legal colleagues know who to go to when they need information”

”

General Counsel in-depth interviewee



WAYPOINT

Spend time embedded in the other parts of the business

One GC said: *“more active interaction is needed since good communication starts with understanding each other. For example, exchange of personnel between the legal department and other departments in the organisation or participation of the legal team in important projects helps to achieve this and has resulted in stronger relationships between those departments”.*

Bryan Jones has also seen the positive effect of this: *“lawyers need to be able to get to the facts of the case, and work out whether their operational people performed well or not. I know of one big energy company that is making a point of putting its lawyers into its field offices, just so they can get a better idea of what happens on the ground, and can see how disputes arise, and how they can be avoided. It is part of their dispute management strategy, and it works”.*

Developing these closer relationships will also make it easier for the legal team and the GC to anticipate where problems and issues may arise rather than having to react to potential disputes at short notice. But as we noted above, anticipating problems requires a different way of thinking. The GC interviewed agreed with this and some indicated that this is also reflected in their recruitment practices. As one of them said, *“the people that we recruit are people who have the intellectual capacity not to sit at their desk saying well I’m just law and all I do is this. We need people who engage, want to engage with the reality of the commercial world and try to find ways of creatively solving issues”.*

Another agreed, saying that they look for, *“good rigorous thinkers, independent thinkers, the people who actually are capable of making a challenging assessment of informed, long standing positions or analysing things in that sort of rigorous, cold way that is required for a really, really good lawyer. One of the things that is important is that the businesses work effectively alongside the legal teams because so much of what we do is an intricate involvement of business decisions and legal decisions taking place contemporaneously”.*

BRIDGING THE GAP

Looking to the future, GC anticipate that their role will continue to evolve and the demands placed upon them will continue to increase.

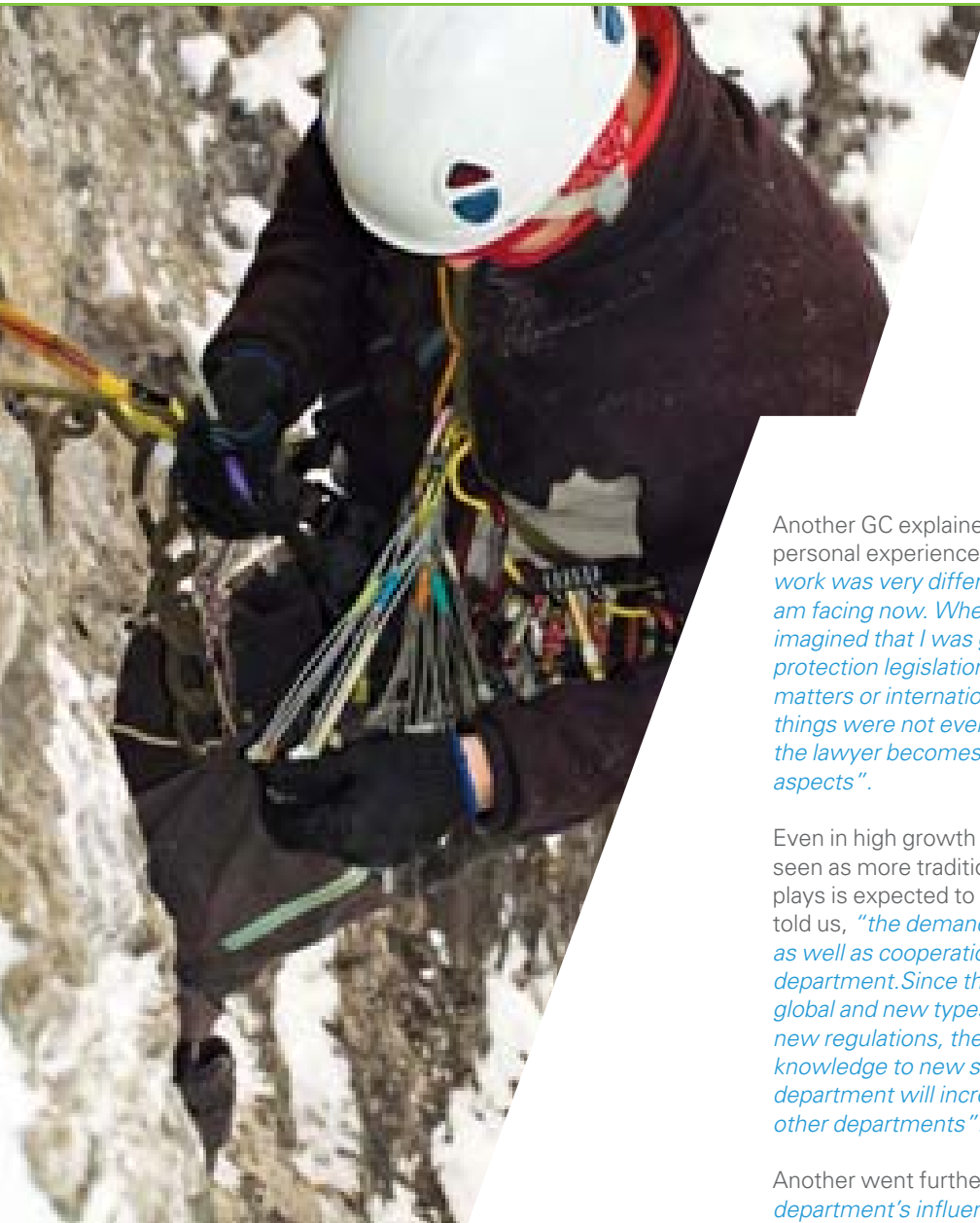
One of the interviewees thought that the role would ultimately be quite different, in particular that, *“generally it [the legal department] will be leaner and adopt a much more overtly legal risk management approach, with legal advising on the risks of various options. The legal department will be a lot more integrated into the company, make much better use of tools, and certainly for the large companies that trade globally there will be more ‘24/7’ shared service centres for the commercial work”.*

He also mentioned a point that *“in addition to legal skills, certainly [GC] will need a good understanding of numbers, numbers are the language of business and they really need to be comfortable with it”.*

These comments certainly highlight the diversity of the skill set that GC need to develop going forward.

We referred at the start of this report to our findings in another survey that cost savings remain one of the greatest priorities for business leaders currently. Many of the decisions that result from strategies to achieve these will have legal implications. If the GC can understand and connect these two perspectives, a better solution is likely to be achieved.





Another GC explained the changing role of the GC from his own personal experience: *“when I started to work as a lawyer the work was very different, as was the environment to the one I am facing now. When I studied law, for example, I never imagined that I was going to need to be familiar with data protection legislation, or privacy laws, or complicated tax matters or international arbitration, when I studied law those things were not even mentioned. So, it’s very important that the lawyer becomes familiar with business and financial aspects”*.

Even in high growth markets, where the GC role is generally seen as more traditional, the role that the in-house legal team plays is expected to change. A GC based in such an economy told us, *“the demand for legal advice and review is increasing, as well as cooperation between the ‘front office’ and legal department. Since the business is expected to become more global and new types of business relations will arise due to new regulations, the lawyers need to be prepared to apply legal knowledge to new spheres. The business spectrum of the legal department will increase along with its importance in relation to other departments”*.

Another went further, saying, *“in the next five years, the legal department’s influence over other departments is expected to grow. Lawyers will need to have more acumen around new policies or products as well as a better understanding of the industries in which the products are to be promoted. This will allow them to advise on whether certain policies or products can be introduced”*.

The survey comes at an interesting time for GC. In the mature markets, five years of hard economic times and tough regulation appear to have been good for their standing. In high growth markets the better economic environment has not yet provided this same catalyst. Nevertheless, over the next five years the call for GC to step up to the role of business advisor seems set to continue. As one GC stated, *“inevitably roles will evolve but I don’t think that’s necessarily going to be driven by any macro trend. It’s more going to be driven by the nature of businesses which the lawyers work in”*.

Concluding Remarks

OUR SURVEY HAS SHOWN HOW GC'S ROLE IS CHANGING, TO BE A MORE STRATEGIC BUSINESS ADVISER AND A BAROMETER FOR THE BUSINESS. BOARDS EXPECT GC TO BE COMMERCIALY AWARE AND TO COMBINE THIS AWARENESS WITH THEIR LEGAL KNOWLEDGE AND EXPERIENCE.

Boards expect their GC to anticipate risks and to provide and implement solutions through a collaborative approach with others in the organisation. Regardless of where GC sit in the world, the direction of travel is the same, but our survey showed GC are at different points on the journey. Few GC around the globe are yet seen by their boards as the barometer for the business. For most there is still some way to go.

Continuing the journey is essential in the complicated and multi-dimensional risk environment of today's business world with increasingly complex relationships with business partners, expansion into new markets and changes in technology. The issues faced in relation to regulatory change, business relationships, effective management of disputes, and reputational risks, are all areas where GC can add value above and beyond their legal expertise.

It is clear from the survey results that the level of perceived risk in the market is propelling GC on this journey. While our survey found that the biggest areas of concern and work for GC were around regulation and litigation, it is apparent that they are being asked to consider a much broader spectrum of risks and challenges, some of which do not necessarily have a legal angle or are quasi-legal. But it doesn't stop there. GC are increasingly seen as the problem solvers of the organisation, with their skill-sets giving them the adaptability to address a range of risks and issues.

This requires GC to adopt a different approach to finding solutions to these problems, and to work more collaboratively with colleagues in other parts of the business. Having a large and strong network both internally and externally, is becoming essential to enable such collaboration, and is expected by senior management. Many of the issues being faced by organisations cannot be handled in isolation; team working is essential both to arrive at a solution to the problems faced and to implement that solution effectively.

Businesses, and the environment in which they operate, are constantly changing. Our survey shows that the expectations of the role and contribution of the legal department are changing too. To succeed in a changing world, a barometer is just what the Board needs. GC should accept the challenge enthusiastically and decisively.

Waypoints

for General Counsel along the journey



01

Engage directly with the senior decision-makers in your organisation

02

Analyse past incidents to anticipate future risks

03

Communicate with senior decision-makers in the commercial language they use

04

Put your advice squarely in the commercial context

05

Be adaptable in responding to different regulatory environments

06

Work closely together with all those dealing with the risk and governance agenda

07

Take the time to really understand the business and its risk appetite

08

Put dispute avoidance before dispute resolution

09

Work with commercial colleagues to protect relationships

10

Be flexible in dispute resolution strategies

11

Treat the resolution of disputes like any other strategic decision

12

Don't under-estimate the impact cultural differences can have

13

Stay up to date with the ways your business uses new technologies

14

Build relationships across the business and work collaboratively

15

Spend time embedded in the other parts of the business

KPMG Contacts and Acknowledgements

Contact Us

Global

Kathryn Britten

Global Head of Legal Services Sector
+44 20 7694 5598
kathryn.britten@kpmg.co.uk

David Eastwood

Global Head of Contract Compliance
+44 20 7694 8206
david.eastwood@kpmg.co.uk

Petrus Marais

Global Head of Forensic
+27 79 515 9469
petrus.marais@kpmg.co.za

Graham Murphy

Global Head of Forensic Sectors
+1 312 665 18406
grahammurphy@kpmg.com

Jack De Raad

Head of Forensic for Europe,
Middle East and Africa
+31 206 567 774
deraad.jack@kpmg.nl

European region

Michael Peer

Head of Dispute Advisory Services,
Central and Eastern Europe
+42 022 212 3359
mpeer@kpmg.com

Carsten Schiewe

Head of Risk Consulting, Germany
+49 40 320 155 682
cschiewe@kpmg.com

Middle East and Africa region

Herman De Beer

Head of Forensic, Africa
+27 82 719 2533
herman.debeer@kpmg.co.za

Karl Hendricks

Head of Risk Consulting, Middle East
+97 144 248 900
khendricks@kpmg.com

Americas region

Richard Girgenti

Head of Forensic in the U.S.
+1 212 872 6953
rgirgenti@kpmg.com.

Bryan Jones

Head of Dispute Advisory Services
in the U.S.
+1 214 840 6414
bhjones@kpmg.com

Asia Pacific region

Grant Jamieson

Head of Forensic in China
+85 221 402 804
grant.jamieson@kpmg.com

John McGuinness

Head of Dispute Advisory Services
in Australia and ASPAC
+61 2 9335 8710
jm McGuinness@kpmg.com.au

Deepankar Sanwalka

Head of Risk Consulting in India
+91 124 3074 302
dsanwalka@kpmg.com

Acknowledgements

We would like to thank all of our contributors to the survey, in particular members of the project and editorial team:

Sandra Aitkenhead

Stephen Bonner

Kathryn Britten

David Eastwood

Richard Girgenti

Thomas Hughes

Grant Jamieson

Bryan Jones

Ben Kent

John McGuinness

James Martin

Graham Murphy

Michael Nolan

Michael Peer

Peter Rodgers

Deepankar Sanwalka

Vanessa Sharp

David Thomas

Tom Wethered

KPMG'S 2012 BUSINESS LEADERS SURVEY, HYPERLINK

<http://www.kpmg.com/EU/en/succeeding/business-leaders-agenda-survey-2012/Pages/default.aspx>

The views and opinions expressed herein are those of the survey respondents and do not necessarily represent the views and opinions of KPMG International or KPMG member firms.

© 2012 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved. Printed in the United Kingdom.

The KPMG name, logo and "cutting through complexity" are registered trademarks or trademarks of KPMG International.

RR Donnelley | RRD-274116 | November 2012 | Printed on recycled material.