



cutting through complexity

Over the horizon:

How corporate counsel are crossing frontiers to address new challenges

KPMG INTERNATIONAL



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some of the challenges
GC face as a result of
their **broadening roles**.



Foreword

KPMG has been offering insights into the role of General Counsel for many years.



Kathryn Britten
Global Head of
Legal Services Sector



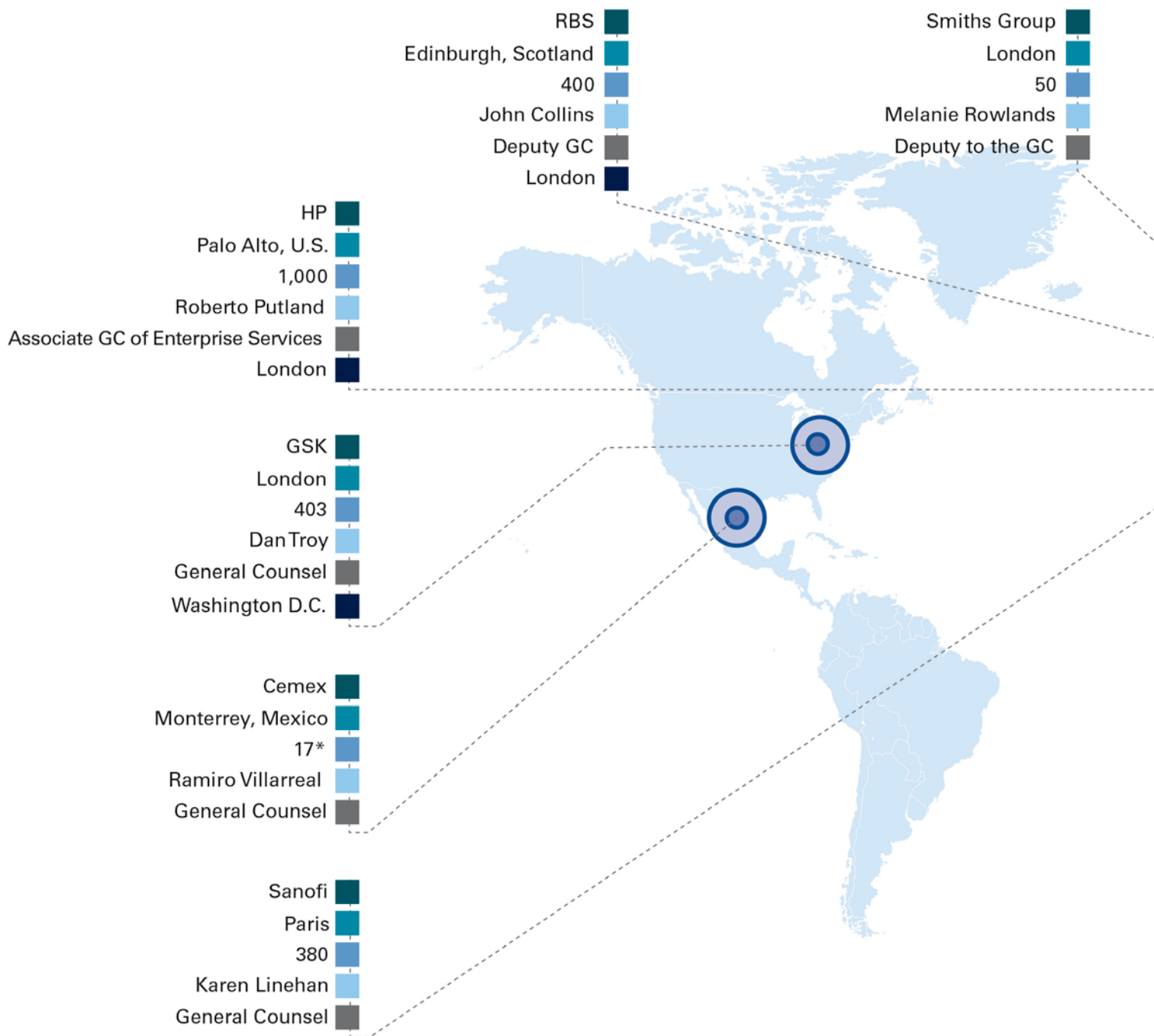
David Eastwood
Global Head of
Contract Compliance

In 2012, we published *Beyond the Law*, a global study of how General Counsel (GC) are turning risk to advantage, which was based on a telephone survey of GCs around the world. The 2014 analysis explores more fully some of the findings of the previous study and consists of in-depth interviews with GC and other senior counsel in Europe, North America and Asia-Pacific (see page-2).

The 2012 analysis found that GC were being called upon to play a more important role in how businesses operate and to move from being a pure legal counsellor to a business advisor. The study highlighted some of the

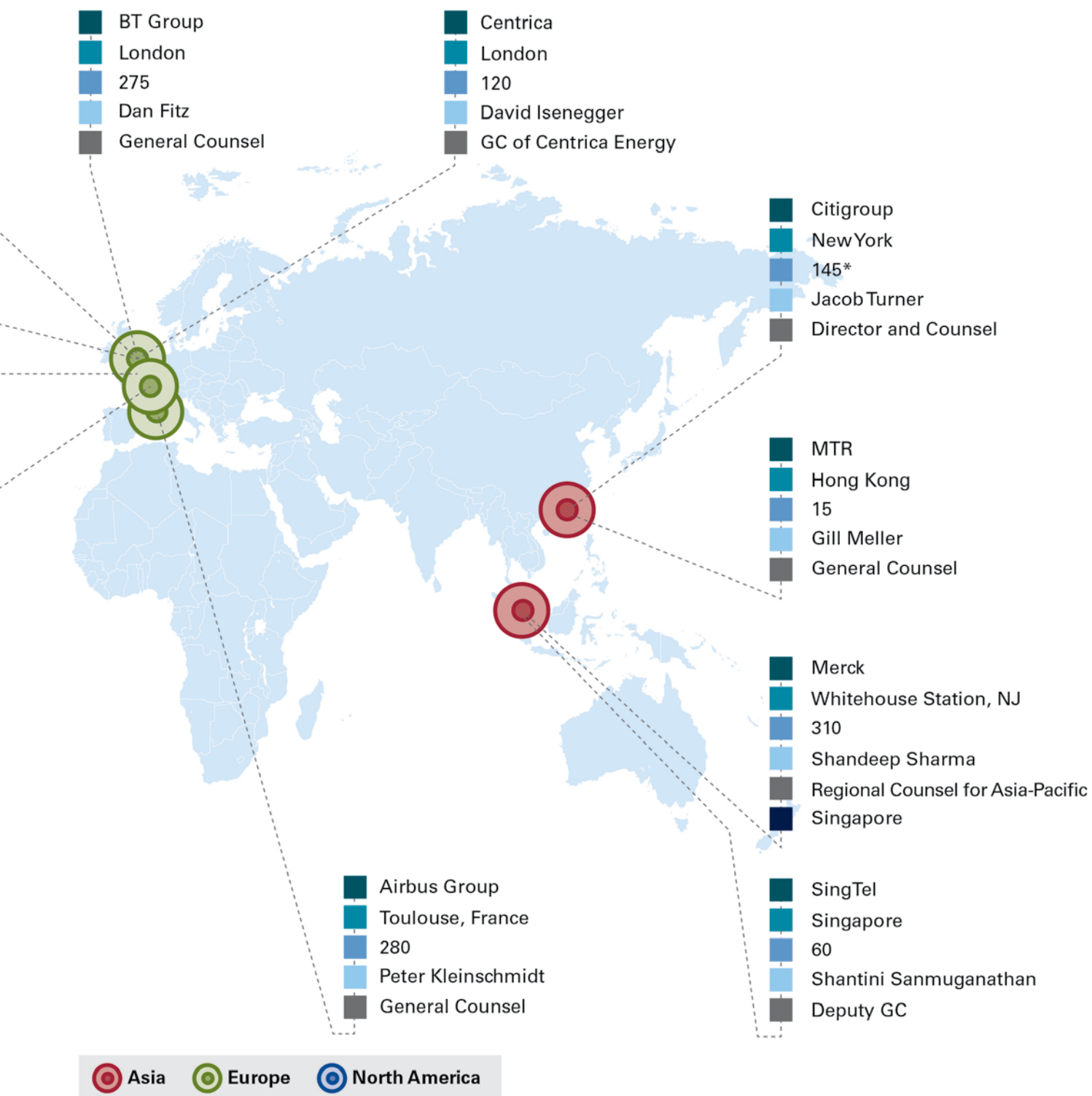
challenges GC were facing as a result of their broadening roles. The 2014 analysis explores some of the themes that emerged from the 2012 survey to show how GC are managing different kinds of risk and guiding corporate conduct. The evidence gathered from these new interviews demonstrates how many GC are becoming increasingly involved in matters that are not strictly legal, such as risk management and business strategy. As they continue this transition to a broader role, it is likely that even more will be expected from GC by the Board and senior management. GC will continue to rise to the challenge.

► General Counsel interviewed for this report



■ Company
 ■ Headquarters
 ■ Number of lawyers
 ■ Name
 ■ Title
 ■ Interviewee's location if different from headquarters

*lawyers in the corporate legal department
 **in Asia-Pacific





A growing **proportion** of **GC's** work is not strictly involved in **legal matters** but in commercial decision making, **especially** in the area of **risk management**.

► A world of complexity

GC operate at the nerve center of an organization. Their role is to anticipate, advise, control and communicate to different parts of the corporation.

They are paid to discern the company's strengths and vulnerabilities and to try, as best they can, to forestall crises before they occur. Effective GC have always managed this role well, but in recent years, it has broadened far beyond narrowly defined legal matters to encompass such things as risk, compliance, finance, regulation, HR, and business issues.

In 2012, KPMG International conducted a survey of 320 GC in 32 countries which showed how the role of the GC is changing and the ways in which they are managing the transition. The survey identified that the main challenge was the transformation of GC into business decision-makers. "This transition requires a shift in mindset and behavior from the GC as well as the wider organization, if the value that GC can bring to the top table is to be maximized," the report said. Its main findings included:

- There was a gap between the impact GC could make in the business and their actual involvement in strategic decision making.
- Where GC have gained influence over Board decisions, they have learned to present their legal knowledge in commercial terms.
- The increase in volume and complexity of regulation was deemed by many GC to be the single largest risk that their companies face, and responsibility for compliance fell on the GC in most cases.

- The complexity and type of disputes that legal departments handle was changing and this required a different approach.
- The increasingly cross-border nature of laws and regulations was adding new layers of risk.
- Few legal departments had the kind of devolved structure that would facilitate GC and their teams understanding their business environment.

The 2014 analysis delves more deeply into the difficulties and opportunities GC face, by interviewing leading in-house lawyers of large corporations around the world about the main concerns that were highlighted in the 2012 survey. It finds that a growing proportion of their work is not strictly involved in legal matters but in commercial decision making, especially in the area of risk management. As corporate Boards and senior executives ask for more from their GC — usually with fewer resources — they are likely to require greater numeracy skills and more business acumen. Finance and accounting professionals tend to face a similar trajectory in the opposite direction: as they climb the corporate ladder, they are expected to apply their number-crunching abilities to more strategic decisions, probably picking up some legal knowledge along the way. For both lawyers and accountants, companies are becoming so intricate and elaborate that these professionals have to broaden their expertise to keep up.

The GC in this study are from nine industries (pharmaceuticals, energy, telecoms, technology, aerospace, construction, transport, banking and manufacturing) and are located in Europe, Asia-Pacific and North America. They operate in legal departments that range in size from less than 20 to several hundred (see pages 2 and 3). All of the interviewees spoke about the way they try to balance risk and opportunity. Many felt confident in their ability to be an enabler of good business decisions, not just to alert the senior management and the Board to the dangers of a particular course of action. However, some admitted there were hurdles in gaining a high degree of influence over strategic decisions.

“It is never easy. You win a mandate because you deliver and deliver regularly, and you contract with the people you are giving advice to,” says John Collins, Deputy General Counsel of the Royal Bank of Scotland (RBS), a UK bank. “Frankly, I had to show my worth. You need to be patient and not wander round to people’s offices with a notepad asking them ‘how can I help you?’ because nobody has the time for it. But you must have the courage, if you think it is important, to push their door open and not take ‘no’ for an answer. And you’ll find opportunities to prove your worth. But you work on that mandate every day.”

Why has the GC’s role broadened? One reason is that technical expertise in legal matters has become valued increasingly highly for its particular perspective on business, whether it be conduct, corporate transactions, or contract law. But the key driver is complexity: as corporations grow more intricate and

finely tuned, managing them becomes harder. According to Rob Putland, Vice President and Associate General Counsel at HP, “As senior in-house lawyers, we have the ability to take on complex issues, distill them to key items and bring the different parties to align on a sensible solution.” Lawyers are trained to understand complicated areas of knowledge; they tend to excel at communicating ideas in comprehensible terms. But in the future, they are likely to have to present their thoughts in commercial language, so that they can address business issues on an equal footing with the heads of IT, marketing, procurement, and so on.

There are many factors that have made companies more complex, including globalization, regulatory expansion, rising stakeholder expectations and rapid technological change. Legal skills are at a premium in all areas of business, in particular in the field of risk management, a corporate function that has become more and more important as companies face a growing array of challenges. As David Isenegger of UK-based Centrica puts it: “There are more risks; they are getting more complicated, and they are multi-jurisdictional. We can’t just think about what we are doing in one country but how it might play across borders. We are having to adopt more sophisticated systems, processes and programs to cope with those risks.” In short, they need to connect all the dots.

All of the interviewees highlighted the importance of globalization and the interconnected way they have to deal with changes in their business. Melanie Rowlands, Deputy to the GC

at Smiths Group PLC, a diversified manufacturer headquartered in London that employs 23,000 people in more than 50 countries, makes this comment: “The globalization of risk is so important; we can’t look at things in the same old ways. Not only are the risks bigger, but there’s a cultural piece to it. The complexity of regulations and the differences are so important to manage that we lawyers have to have a global view.” She adds, “The legal issues are not country-specific. There has to be a lot of teamwork to manage these risks and a global network of legal support involving people who can get the right answer, so we use a range of external law firms and consultants to help us manage those risks.”

At BT Group, senior executives, including the Group GC, Dan Fitz, have been dealing with complex global risks for many years. “One of the assets we have is that complexity is not off-putting and people are used to dealing with it. And we in the legal department are very good at articulating the trade-offs and the risks. There’s also an appreciation that without some risk, there’s no possibility of reward.”

In the following sections, this study examines the way that GC help to manage some of those risks, starting at the broadest level with enterprise risk and then looking at specific aspects of risk: regulation, contracts, third parties, dispute resolution and cyber security. It then considers the skills that will be required in the future and, finally, discusses some pointers for the future. But first, we consider the position of GC in the inner circle of the company and what it will entail to stay there.

► The inner circle

If the growing complexity of decision-making is handled adeptly, the GC can leverage his or her position into playing an important, even crucial, role in corporate decision-making.

In most cases, there is no substitute for length of experience in a company. Ramiro Villarreal was appointed GC of Cemex of Mexico in 1987; two years after Lorenzo Zambrano became Chief Executive Officer (CEO), who remains CEO and Chairman in 2014. Peter Kleinschmidt, GC of Airbus Group, joined Airbus in 2000 as GC and Corporate Secretary of Airbus, the then civilian aerospace division of EADS, and has been involved in many of the major decisions of the company since then. "I gained a reputation at the divisional level and was accepted as an operational legal guy and that helps a lot. So I can't be accused of working in an ivory tower," says Kleinschmidt.

He adds that it is the job of the GC to guide the company to its objectives whilst following a legal and ethical route. Kleinschmidt calls it a red traffic light that has a green arrow below it. "You can't go straight, but you can turn right and then left and then left again. And you reach the objective in a legally compliant way." Every interviewee pointed out that a veto over a business decision was hardly ever exercised, because it was rarely needed. Non-legal executives usually know if a course of action will take the company outside the law, so it is the task of the GC to help to find a legal alternative.

With seniority and experience comes greater confidence and flexibility. "One thing I have observed is that junior colleagues tend to say 'no' a bit too easily while the more seasoned people are more confident to find ways to work around an issue," says Dan Troy, Senior Vice President and General Counsel at GlaxoSmithKline (GSK) of the UK. But the closer the GC is to the center of power, the more delicate the balance between facilitator and policeman. As Bismarck said, "Politics is the art of the possible." The same can be said for the way successful GC practice law. Karen Linehan, the Executive Vice President and GC of Sanofi of France, worked, while attending college and law school, for Thomas "Tip" O'Neill Jr., the legendary Speaker of the US House of Representatives. "Working in Washington helped me become a GC. I understand politics very well. We are viewed as a support function with technical expertise, and understanding what's happening around you enables you to give much better advice."

The amount of a GC's experience is one determinant of the level of influence over corporate decisions. Other factors are the achievement of consistent results, the ability to express complex ideas clearly, and a good understanding of how business works.

"I became **visible** to **Board members** and senior **executives** and this is **one reason** why they were ready to take the **risk and promote** me."

– **Karen Linehan,**
Sanofi



Most of the interviewees agreed that gaining influence tends to take years to build up but the process can accelerate at critical times for the company. As BT Group's Fitz says, "You should never waste a crisis." Before Linehan became GC for Sanofi in 2007, a critical moment for the company came in the form of a legal matter in the US and she took the lead on the case. "I became visible to Board members and senior executives and this is one reason why they were ready to take the risk and promote me." In recognition of the successful conclusion of the matter, Linehan was moved up two levels in seniority to her current position.

One of the most notable examples of crisis management among the companies studied is Merck, which withdrew Vioxx, an arthritis medication, from the market in 2004 amid allegations it made false and misleading statements about the drug. "This was a seminal moment in the history of the company," says Sandeep Sharma, the Asia-Pacific Regional Counsel. "The CEO, Kenneth Frazier, was GC at the time. The case catapulted him ultimately into the top role at the company, one of the reasons being that he led Merck through a very, very difficult time."

A crisis can make a career, but it can also ruin it. As Isenegger of Centrica says, "If as a senior lawyer you seriously want to get fired, failing to perform in the face of a crisis is the fastest way to get your wish. Crises are very difficult to prepare for, but when they hit, everyone expects the lawyer to have his act together." Less dramatically but importantly, trust can evaporate if the GC is perceived as a roadblock. "The more you say no, the less the businesses will come to you," says Sharma of Merck.

Guiding senior management to safe ground is a fundamental part of the job. The ability to do so enhances the influence of GC, especially in the area of risk management, where legal officers are playing an increasingly important role. In the remaining sections, we look at the GC's role in managing risk, starting at the level of the enterprise and then focusing on some of the key obstacles facing companies, including regulatory risk, the management of third parties and contracts, and the resolution of disputes. GC play an important part in managing all of these challenges.

▶ Managers of enterprise risk

Enterprise risk, which by definition can challenge the company in multifarious ways, is growing in breadth and complexity.



“GC are playing an increasingly pivotal role in driving the overall risk management program for their businesses,” says Michael Wilson, Head of KPMG in the UK’s Risk in the Boardroom practice. “In fact, in several cases, the GC is taking the lead role for the ERM program.”

Operations can stop unexpectedly for some reason; a rogue employee can steal company secrets; a geopolitical event can shut off access to a market. “We have a whole variety of risks: financial, technological, regulatory, public relations and governmental affairs. There’s scarcely a risk in the company that doesn’t have some legal aspect to it,” says Isenegger of Centrica.

All these are forms of enterprise risk that can proliferate as companies expand, especially when they do so geographically. SingTel, for example, is growing in Asia and internationally and entering newer markets. “We’re on a transformational journey from a traditional telco to an ICT (information and communications technologies) company, and by getting into new businesses our risk profile is going up. Plus there’s the challenge of dealing with more countries, especially in Southeast Asia, where the political and economic situation is evolving and dynamic,” says Shantini Sanmuganathan, Deputy GC.

The companies mentioned in this report tend to have an array of committees and processes to aggregate, monitor and manage enterprise risk. At Cemex, risk

is managed by the audit committee, the corporate practices committee and the risk management committee, which monitors financial risk. Villarreal is the secretary of the first two and a member of the latter.

Dan Fitz, the GC of BT Group, works closely with the Group Risk Manager, the Head of Internal Audit and the Head of Compliance within the Group Risk Panel which oversees the group’s risk program on a quarterly basis. It reviews the group risk register, consisting of the top 12 risks and what he calls “bubbling under” risks consolidated from the risk registers of the individual lines of business. Fitz also helps to formulate BT’s crisis management plan and participates in regular exercises based on different hypothetical scenarios (BT has had more than ten of these in the past three years), such as conducting a dress rehearsal in the event of a country withdrawing from the Eurozone.

When there is geographical expansion, SingTel tends to rely on outside counsel. At GSK, Troy says that compliance sets global standards, but the role of GC goes well beyond compliance, because the main challenge in this respect is the differing perceptions of business

“Future proofing is the real value we bring.”

– Roberto Putland, HP

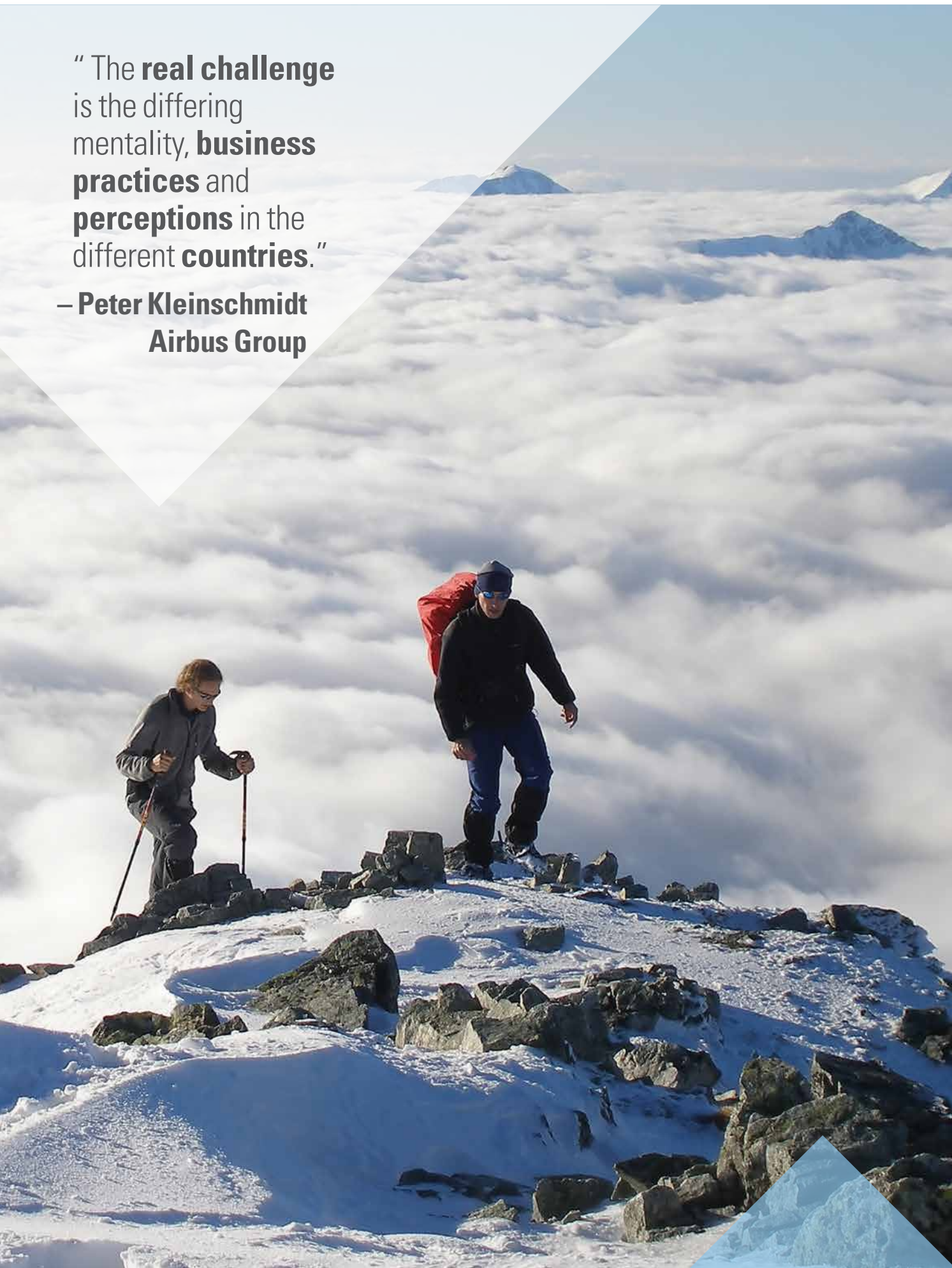
practices from one region to another – culture in addition to law. Kleinschmidt agrees, saying “I don’t think the legal part is the challenging part. We adjust our internal resources to ensure we have enough Brazilian lawyers in Brazil, Indian lawyers in India, and so on. The real challenge is the differing mentality, business practices and perceptions in the different countries. You have to know the environment; you have to understand the sensitivities and live up to regulatory standards that do not necessarily originate in the country you are operating in, due to, for example, the long arm of the jurisdiction of the US.”

All the GC interviewed have to respond to emergencies as they arise, but the aim is to gain a position where they can forestall possible future crises. According to Putland of HP, “We all have to do our fair share of firefighting, but the real value is in moving the needle to ensure the fires are reduced in number and we can focus on profitable growth. We get much more kudos for innovating, for understanding our customers and competitors.”



“ The **real challenge** is the differing mentality, **business practices** and **perceptions** in the different **countries**. ”

– **Peter Kleinschmidt**
Airbus Group



▶ Regulatory compliance

Companies around the world have to comply with a growing array of new regulations and more intrusive supervisory agencies.



“With regulatory risk being among the top exposures faced by companies across industries, even those that are traditionally viewed as ‘unregulated’, the contribution from GC to the risk agenda is critical and unavoidable,” says Wilson of KPMG. “This is particularly important where companies are expanding in emerging markets where laws and regulation may not be clearly defined or consistently interpreted and enforced”.

The rising regulatory tide flows from the corporate excesses that led to the financial crisis beginning in 2007, and the ‘new regulatory normal’ is having a profound effect on companies in almost every industry, especially in financial services. Collins of RBS says, “The amount of regulatory change for banks is relentless.”

In a survey published by KPMG International in 2013,¹ the greatest risk perceived by senior executives was the growing regulatory pressure from governments around the world (60 percent of GC agreed in the survey).

Sandeep Sharma of Merck says, “The culture of the company has been changing dramatically in the past four to five years. The importance of compliance has grown.” In response, many companies are tightening internal controls and beefing up their compliance departments. Isenegger of Centrica says that the average compliance department ten years ago was one fifth the size it is today. At Isenegger’s company, and at many of the companies interviewed, compliance and regulatory affairs sits within the legal department, but at others, such as most large banks, compliance is a very big operation and runs alongside the legal department. Often, compliance is headed by a lawyer.

Some of the interviewees were unfazed by the rising tide of regulation.

Peter Kleinschmidt of Airbus Group says there are ways to deal with new regulations. “We have to make sure that we spend enough time on training to keep up our knowledge. But apart from that, in those areas of regulation that are very specific, it is the lawyers’ job to keep up.”

Dealing with this form of risk is a matter of partly staying ahead of the curve and partly running to catch up. Collins at RBS says he and his colleagues regularly scan the horizon to try to guess where the regulators will focus next. They expected anti-money laundering regulations would gain in importance in the early 2000s and then guessed that attention would shift to anti-bribery and corruption. Now the focus is moving to consumer banking, especially in the U.S., he says. Regulations are often exported from one jurisdiction to the other.

Shantini Sanmuganathan of SingTel, points out an added complication: “The regulations are growing but they are continually running behind business trends and so it’s difficult to bridge the gap.” Melanie Rowlands of Smiths Group adds that “changes in rules happen quickly and regulators are under pressure to be seen to be effective. This means it can be tough to call how the regulators are going to implement the rules. I think regulators are even less predictable than ever.”

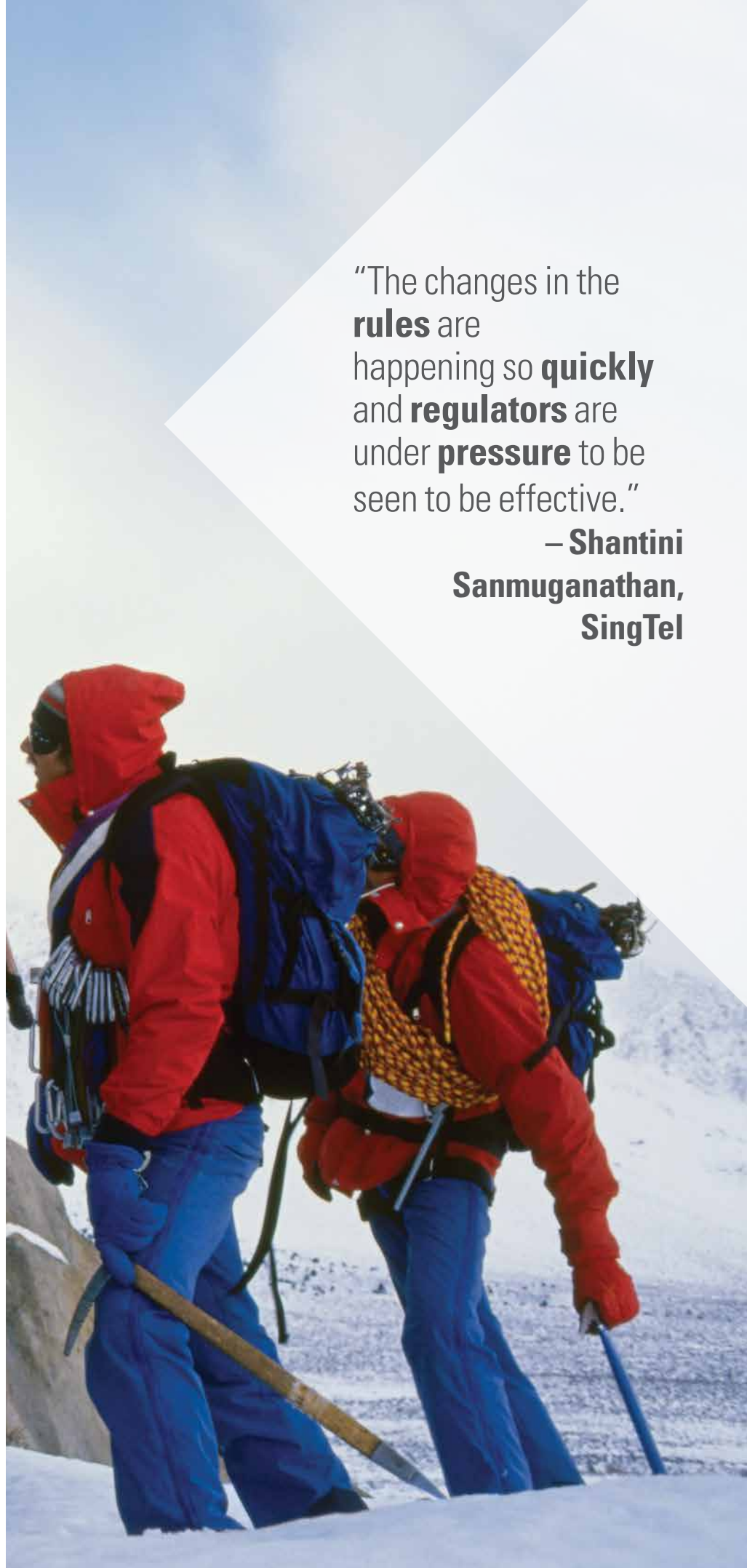
¹ Expectations of Risk Management Outpacing Capabilities—It’s Time for Action, KPMG, May 2013 p.5

The ability to keep ahead of the regulatory tide tends to depend on whether the particular regulation is central to the company's industry or not. Villarreal of Cemex says his company was able to forecast Mexico's energy reforms (the cement industry is a big energy consumer) and has been able to provide comments to Government officials and Congressional representatives. "But the big tax reforms in Mexico came as a surprise. The government drastically changed the tax system in 2010 and the law eliminated group taxation. The effect is very important and the Company has filed an 'amparo' proceeding challenging the constitutionality of the reforms."

Some regulations are too complex to stay ahead of. Jacob Turner, Director and Counsel, Citigroup Global Markets Asia, says, "For sweeping new legislation such as FATCA (the Foreign Account Tax Compliance Act), we and other financial institutions are working hard to meet challenging deadlines. For other regulations around the region, sometimes they are codifying what we're doing anyway. Being a US financial institution is an advantage because we certainly are in compliance with the strictest policies. Asian regulations are often modeled after European or North American rules and policies that we already have in place."

"The changes in the **rules** are happening so **quickly** and **regulators** are under **pressure** to be seen to be effective."

– **Shantini Sanmuganathan, SingTel**



► Third-party risk

The corporate risk of doing business with external parties is a deepening problem,² especially as companies globalize and supply chains lengthen.



The risks of non-compliance are considerable, not just in terms of the fines that can be levied for regulatory breaches undertaken by third parties acting on your behalf but, in the case of anti-bribery legislation, the company can be forced to pay back any profits arising from the corrupt behavior. As explained by Charlie Patrick, KPMG in the UK and EMA Head of Anti-Bribery and Corruption, “GC need to demonstrate what has been done by their companies to prevent bribery, not only by employees but also associated persons, and this applies to all industries. This entails identifying the complete population of third parties, ranking them according to the level of bribery risk, and performing due diligence on them according to their risk category. Anti-bribery procedures should be built around a strong and appropriate corporate governance framework which extends to third parties acting on behalf of the company.” GC play an important role in the oversight and management of this corporate governance framework.

Legislation in the US, the UK and elsewhere to combat money laundering and corruption have heightened the awareness among GC of the risks of not conducting sufficient due diligence of suppliers, customers and other kinds of business partners. Global regulators are calling out companies for not adequately understanding the risks of who you do business with and who conducts business on your behalf sending a clear signal that regulatory fines and penalties will be handed down to those companies who do not take action. Both the UK Bribery Act (UK Act) and the US Foreign Corrupt Practices Act (FCPA) impose liability on companies for the actions of third parties acting on their behalf.

Corporate liability for the conduct of third parties, therefore, has pushed supply chains into the spotlight. But this is not the only third-party risk organizations face; the financial crisis caused many customers and suppliers to cease operations, so solvency risk is another challenge for GC. For banks, the turmoil in the financial markets showed how vulnerable they were to the excessive

concentration of their exposure to particular institutions, industries or regions, says Collins of RBS.

Some companies have highly developed processes and systems to manage third-party risk. Kleinschmidt of Airbus Group says, “We have a sophisticated compliance organization that works with our business partners. It has developed over the years and is still growing.”

Dan Troy of GSK says, “We have a number of people managing third-party risk. This form of risk is very overarching; every person in the company needs to think about this.” The company’s procurement department works to manage supplier risk through a variety of initiatives including the reduction of suppliers. Performing risk based due diligence assists in managing third-party risk; Sanofi conducts vendor due diligence in all high-risk categories of their third-party relationships.

At SingTel, “Third-party risk identification and mitigation is jointly undertaken by the business with the involvement of Legal and other relevant stakeholders

² <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/third-party-risk-management.pdf>

like Tax, Finance and HR,” says Shantini Sanmuganathan. “We do see this as an important role for lawyers to proactively identify risks and discuss them with our business clients,” she adds. GC at Smiths and Cemex highlighted the important role of the insurance department in managing third-party risks. Also, government agencies can be allies in the fight against corruption. Gill Meller of MTR (the operator of the rapid transit system in Hong Kong) pointed out that her company works with the preventative arm of Hong Kong’s Independent Commission Against Corruption, particularly in the construction industry. “Annually, they will do investigations into different areas of our business and recommend to us how to improve our management of third-party risks.”

Legal departments included in this report almost always insert language into contracts with suppliers which require that those third parties must conform to company policies on such things as labour rights, health & safety and the prevention of bribery. Policing such contracts, of course, requires careful auditing and the establishment of an effective compliance program. It’s something more and more companies have to do, for example to comply with the conflict minerals provisions of the US Dodd-Frank Wall Street and Consumer Protection Act.³

³ Conflict minerals and beyond, KPMG International, 2012

A person wearing a red jacket, black pants, and a large black backpack is climbing a metal ladder on a snowy mountain peak. The person is seen from behind, looking up the ladder. The background is a vast, snowy landscape under a clear sky.

“Third-party risk is very overarching; every **person** in the **company** needs to think about this.”
– **Dan Troy, GSK**

► Contract management

The negotiation, drafting and execution of contracts has always been a central part of the corporate legal function, but the GC's role is changing in response to the growing complexity of formal business agreements.



“Aside from the internal aspects of contract management, it is critical that the other party sees that steps are being taken to keep the written contract abreast of the evolution of the business context and relationships after signature. Without effective contract management, the document and the subject matter are likely to diverge, creating the risk of misunderstandings and disputes. This requires making sure all the tools and rights in the contract are leveraged as intended. If companies give the impression they are unconcerned about how their contracts are complied with, they can hardly expect their counterparties to be punctilious about their responsibilities. GC will play a crucial role in determining how to manage contracts in this way.” – David Eastwood, Global Head of Contract Compliance, KPMG in the UK.

As the 2012 study of GC, *Beyond the Law*, showed,⁴ GC walk a fine line between letting the business manage the contract and taking an active role in the process. Traditionally once a contract was drafted, the role of the GC would end and implementation was left to the commercial side of the company. But GC are gaining a greater influence on the management of contracts, partly to avoid potential disputes but also because of the increasing complexity of contracts.

Companies have to be more flexible in the wording of contracts, which in itself tends to introduce an element of risk. Jacob Turner of Citigroup Global Markets Asia says when he joined Citigroup years ago, the Institutional Clients Group and its similarly situated counterparts at other global financial institutions rarely deviated from in-house standard form contracts. Now, however, market practice has changed so there is more pressure to compromise with clients on contract templates to ensure a bank wins the mandate.

The high volume of contracts means that GC must prioritize them, usually according to the level of risk. Low-risk,

run-of-the-mill contracts are often drafted by legal process outsourcing companies. Where medium-risk contracts are handled in-house by non-lawyers, legal executives (such as at BT and Centrica) say it is extremely important to train contract managers. Some companies take a highly systematic approach to the assessment of the level of contract risk. Rowlands of Smiths Group believes strongly in taking an active role in the management of contracts to prevent disputes arising. “We understand the appropriate risk appetite for a business area and market and this helps set the risk principles. After that we can then decide on what is an appropriate level of risk for a specific contract and this feeds into the detail on issues like indemnities, caps, insurance provisions and payment terms”

Active legal involvement in the management of contracts is seen as important if litigation is to be avoided, especially in capital-intensive industries. At Airbus, lawyers are part of the project teams from the beginning, says Kleinschmidt. MTR takes a “very proactive approach,” explains Meller, the GC, starting from the design of a

⁴ Ibid, p33

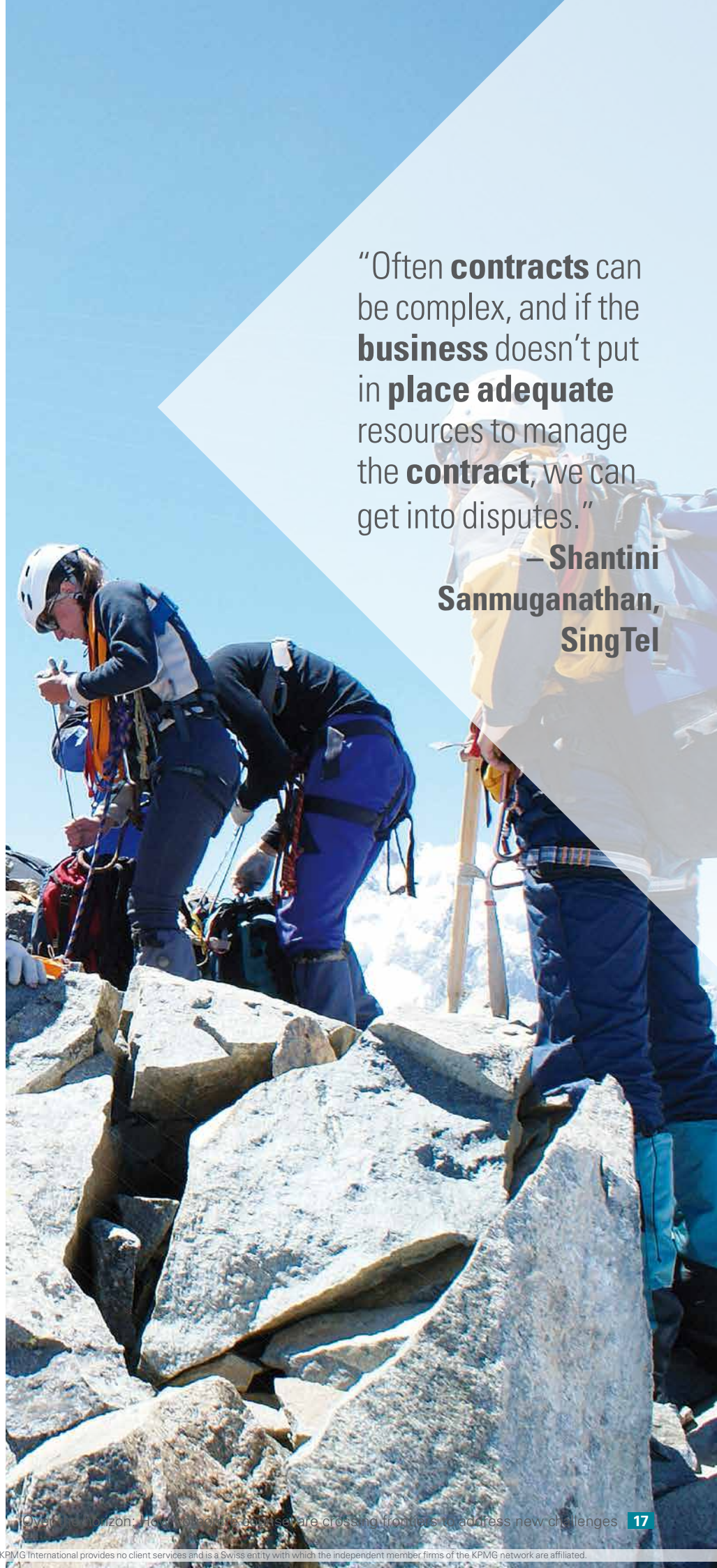
new construction project, when they will identify areas of risk and allocate these among MTR and the contractors. The company takes pride in the fact that it has had only one mediation, two arbitration cases and no litigation on its Hong Kong construction projects since its inception in 1975.

At some companies, such as Cemex, contract managers are part of the legal department. At others, contract management is done by the business lines to ensure they assume responsibility for the risks inherent in a contract. Shantini Sanmuganathan of SingTel says, "Often contracts can be complex, and if the business doesn't put in place adequate resources to manage the contract, we can get into disputes. The challenge sometimes is getting the business to acknowledge and appreciate that this is a resource they need to have."

At HP, contract management is part of the legal department and is accorded a high priority by the GC, especially when it comes to managing contracts with customers. "We look at how we balance the priorities between HP and its customers in contract management and ensure there is a smooth-functioning relationship with customers," says Putland. "We understand the nuances of a contract; that's where we in the legal department have value to offer."

"Often **contracts** can be complex, and if the **business** doesn't put in **place adequate** resources to manage the **contract**, we can get into disputes."

— **Shantini Sanmuganathan,**
SingTel



► Dispute resolution

All the legal executives interviewed agreed that resolving disagreements with suppliers, customers and other business partners is best done through negotiation – and if this fails, they tend to take a flexible approach to dispute resolution.



“KPMG in the UK’s Disputes team is seeing more and more upfront investment in resolving disputes as organizations seek to avoid costly litigation, or arbitration which can often be just as expensive and take just as long as litigation. If a sensible settlement is to be reached quickly and for minimum cost, it makes sense to get the right advice on the merits, and an understanding of how much the claim is worth, at an early stage. That puts you in a really powerful position to negotiate. In our experience those organizations that go into settlement meetings, whether in mediation or less formally, are destined to fail if they don’t have a firm grasp of the merits, critical arguments and value of the claim,” says Kathryn Britten, Global Head of Legal Services Sector, KPMG in the UK.

Many of the companies in this study, including GSK, Centrica, Airbus, MTR and Citigroup, favour alternative forms of dispute resolution to litigation in many jurisdictions. Isenegger of Centrica explained that his company is doing more alternative dispute resolution, because it is less slow, and “often a bad settlement is better than a good fight. You can move on, save cost and avoid a huge distraction for the organization.”

Dan Troy of GSK says, “We are a huge believer in early dispute resolution and alternative dispute resolution.” The company tries very hard, he says, to prevent problems becoming disputes, but beyond this point, disputes tend to take one course (litigation) in the US or alternative forms of resolution outside the US. Our contracts have clauses about alternative dispute mechanisms and we tend to use these mechanisms outside the US.


Rowland of Smiths Group tends to take a similar approach inside and outside the US, whereas Collins of RBS says, “We use a full menu of dispute resolution mechanisms, depending on the facts and the location, all over the world. Sometimes it’s possible to have a commercial conversation to resolve matters. Sometimes it has to be court mandated. Sometimes it is arbitration.” Ramiro Villarreal of Cemex stated that he has had success with international arbitration, such as in the Venezuela case⁵ which went to arbitration before the International Centre for Settlement of Investment Disputes. Matters that result from business operations fall under the jurisdiction of the respective countries; in major transactions concerning acquisitions or a service, arbitration is always preferred, says Villarreal. Meller of MTR notes that mediation is becoming more widely used in Hong Kong. “But even for

⁵ In 2008, Cemex publicly rejected a Venezuelan government bid for its assets in the country, saying the amount offered was too low. <http://online.wsj.com/news/articles/SB121912914668252587>

mediation, you have to be just as well prepared as for formal court proceedings.” Fitz of BT says mediation works well for employment disputes, but not for patent disputes, which tend to be a ‘zero-sum game.’ In the latter case, litigation may be the only viable option through which to get a settlement.

Several GC agree with Troy that the earlier matters are resolved the better. One is Kleinschmidt of Airbus Group: “I am always a believer in assessing the risk and possible outcome of litigation and to do this at the beginning of litigation, because the longer you wait, the more difficult it is to resolve.” The cost of hiring external counsel for litigation is extremely high, he added. “Hourly rates have risen — £1,000 as a normal hourly rate in London is ridiculous; my budget has decreased by 30 percent in the past five years.”

Sharma of Merck says “If we can’t resolve the dispute at a senior level in the respective companies, then there is only a limited range of options. The arbitrator isn’t going to have a better solution than we could have got internally and so then it’s a dispute based on law.”

A full-page background image showing two rock climbers on a steep, craggy cliff face. One climber, wearing a red helmet and red pants, is higher up and reaching for a hold. The other climber, wearing a green helmet and dark clothing, is lower down. Ropes are visible, and the sky is clear blue. The bottom right corner of the image is partially obscured by a white diagonal graphic element.

“It is better to assess the **risk and possible** outcome of a litigation at the **beginning**, because the longer you wait, the more **difficult** it is to **resolve**.”

— **Peter Kleinschmidt**
Airbus Group

► The cyber challenge

The risk that seems to be growing fastest on GC's radar screens is cyber security.



“Cyber security should be embraced by the whole company, including the GC, and not sit within the IT department alone. The company needs to focus on four key risks: hactivists, organized criminals, government spying, and the threat from corporate insiders. GC have a particularly important role in dealing with the last of these (disgruntled employees, staff exits, third parties, M&A, governance policies, and so on). But GC should be at the table when discussing all kinds of cyber security issues and should provide advice about policies, educational programs, awareness and vigilance. When companies plan how they would deal with a possible cyber attack, GC need to be part of the cross-functional group that makes the preparations. The legal ramifications of a data breach, for example, are wide and would include how to communicate to external stakeholders, as well as deciding on the legal steps to investigate the incident and how to respond if and when the perpetrators are caught. KPMG's cyber team is taking a positive view of managing cyber risk. We believe that cyber security is all about what you can do, not what you can't,” says Stephen Bonner, Head of Cyber for Financial Services, KPMG in the UK.

At Citigroup, the main risk is in protecting the data privacy of customers. Jacob Turner of Citigroup confirms that data security is checked “constantly.”

All the GC interviewed say they are worried about data security, but responses to the problem differ. When asked what steps Airbus Group is taking to combat cybercrime, Kleinschmidt says: “This is a question that is inaccessible to legal remedies; you would have to ask the chief technical officer.” At some technology companies, by contrast, efforts to promote cybersecurity are an investment opportunity as well as a cost of doing business.

For BT, data security is a central part of the operation. It has a business advising clients on data security and the GC is closely involved in data-risk governance.

Cyber security might seem too technical an issue for legal counsel to deal with, but there is an important dimension in which lawyers can play a role. Merck, Sanofi and Cemex agree that the biggest data risk arises due to human error or intentional wrongdoing. Sharma of Merck stated that redundancies increase dramatically the risk of data theft. Sanofi's Linehan points out, “People can get on the network and then walk out the door with a USB key, and it's very difficult to police if it is inappropriate, particularly when we encourage folks to work from home. There is a need for periodic review to ensure that excessive downloading isn't happening.” At Cemex, Villarreal notes that there is a danger when employees create their own back-up files; “we need to prevent that,” he added.

► Future talents

Given the widening role of the legal department, it is logical that GC will want to hire and develop lawyers with a broad range of skills.

Business expertise and numeracy, as well as legal skills will become the basic foundations for a successful role in the GCs department. GC at both SingTel and MTR mentioned the need for lawyers with business skills. SingTel's Shantini says: "GC will need to be more involved in understanding business drivers and operations, and will continue to do more in terms of risk identification and risk management with the business leaders." Meller of MTR comments "they will need to be more of a business partner, to be able to step back and see the business perspective on legal issues."

GC at Centrica, Airbus, Sanofi and Smiths Group say that a wide array of talents will be needed, including numeracy, collaboration and, in some cases as noted by Villarreal of Cemex, international skills such as an ability to speak several languages. According to Linehan of Sanofi, "We now have more experts and fewer generalists. In future it will be important for lawyers to have multiple experiences to gain the judgment and confidence to counsel on difficult and complex issues. We feel that working previously in a law firm

could give you that broader experience." Isenegger of Centrica talks about the need for lawyers to be able to work in cross-functional teams; "the days of the priesthood are long gone."

Interviewees at Merck, BT and MTR mentioned the growing importance of compliance skills. Meller of MTR says that society's expectations are rising, so lawyers will need to be able to help their companies to meet these expectations, which are often higher than simply legal compliance. Troy of GSK, a former GC of the US Food and Drug Administration, says lawyers who have served in government would be increasingly sought after by companies, due to the growing importance of regulatory risk. He added, "The changes will be evolutionary. CEOs want people who can manage complexity and risk. There will be a demand for GC who have worked in government posts. You get opportunities in public service to manage an organization, and the regulations are becoming more and more important for companies." GSK and Sanofi predicted that technological expertise would rise in importance.

► Over the horizon

More is being demanded of GC, at the same time as they are being provided with fewer resources.



“As GC roles become weightier, they face significant opportunity to become even more indispensable. Companies are growing more complex and face a diverse array of risks; any executive who can master the intricacy while managing the risk will see their star rise in the corporate firmament. GC are in an ideal position to play this part, but they must first gain an even tighter grasp of the way the business works – and fails to work. This will be difficult, but if anybody can do it, the best of the GC will be able to become the master of their growing domain,” says Eric Holt, Global Head of Internal Audit and Risk Consulting Services.

If there is one skill a GC needs in order to achieve more with less, it would be resourcefulness, and this is something they tend to have in abundance. They are in an ideal position to understand how the pieces of the organization fit together and how to make the most of their influence at every level of the company. The very fact that they have fingers in so many pies often works to their advantage.

GC of the future will require an even more judicious blend of legal and business savviness. When you are working in the nerve centre, perhaps what is needed most is discernment, and this is something GC are trained to provide. “Much of what we do is in the grey areas,” says Linehan of Sanofi. “When decisions are easy, everybody knows we go this way or that way. It’s when you are dealing in ambiguity that good judgment is needed, that’s fundamentally what the GC should have,” she added.

As we have demonstrated in the preceding sections, GC are growing in value to their companies. They are trained to tackle complex issues and explain the risks of a course of action, without oversimplifying. They tend to be valued as honest brokers that can dispense unbiased advice to resolve internal (as well as external) disputes, especially if they are perceived as having no axe to grind. Their stock is rising, but the expectations of internal and external stakeholders are rising, too. Regulators, customers, consumers, pressure groups and investors are demanding better risk management and higher ethical standards from companies. Internally, Boards, senior

executives and internal auditors expect more from their in-house counsel, but the very nature of what counsel do makes it hard to quantify their return on investment.

If GC don’t sell themselves internally, their opinion will likely carry less weight. One company that is being proactive is Sanofi. All of its lawyers are trained in communication skills designed for greater impact (such as reducing verbiage on PowerPoint slides). Sanofi celebrated “legal and compliance day” at the end of 2013 and invited (actually summoned) all key stakeholders to the headquarters atrium to “discover” the team’s roles throughout the life of a drug. It is also creating the position of departmental Chief Operating Officer to handle topics such as intranet communications to help the department gain and maintain recognition, increased respect and visibility in the eyes of the broader company.

By operating at the nerve centre of the company, GC have a crucial role to play in guiding it along an ethical and legally compliant path, as well as increasingly advising on risk and strategy. In terms of GC actions for the future, two main conclusions arise from the evidence collected in this study:

The first is that GC must help their companies transform their culture to make it more compliant without being risk averse. The regulatory onslaught can breed cynical box-ticking, unless employee attitudes change. Legal counsel can play an important part in creating the right culture in which compliance is a competitive advantage. This requires training, communications, team-building

and ability to design an environment where seniority does not override good sense. This may seem like a job for human resources, but it's a multi-functional task, and GC can play a significant role in this endeavour.

The second conclusion, is that the legal function must strive to align itself with the strategic objectives of the company. If the overriding aim is to be more customer focused, then GC must play their part by understanding the needs of the customer and translating them into controls, processes and contracts that further this objective. To ensure this kind of strategic alignment, GC must develop their business skills still further. Much of this occupational development occurs over years of involvement in business decisions. But in the future, more formal training (such as the acquisition of a master's degree in business administration) would provide GC with a better grounding in business and accounting principles. An alternative method is to transfer up-and-coming lawyers from the GC office to work in, or run, a business unit for a few years.

Whichever is the preferred method of acquiring these skills, the result is likely to be a more effective GC. The successful ones are already on their way there. It is striking that at the most senior level, the GC interviewed for this study already spend less time on strictly legal matters and more time on business decisions. As the company's chief legal executive, they have become "a jack of all trades and master of one." Now many are adding a mastery of business to their portfolio.



GC of the future will require an even more **judicious blend** of **legal** and **business** savviness.

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