LOOKING GLASS REPORT

IN PARTNERSHIP WITH

PART 2: A DEEP-DIVE INTO THE NEW RISK LANDSCAPE

Digital transformation & technology, climate change and the pandemic

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Contents

Foreword by Clyde & Co

Following the launch of the first part of our annual Looking Glass report at the end of last year, this second part takes a deep dive into three pressing risk management challenges for general counsel, their in-house legal teams and the senior board and C-suite decision makers with which they work – namely digital transformation and technology, climate change and post pandemic risk.

These three themes are common areas of focus for our clients operating at the heart of global trade and commerce, across our sectors and our geographies. While the pandemic's longer-term impacts continue to develop and crystalise, climate change and digital transformation loom large as more existential challenges. Our survey was undertaken last year, well before tensions and conflict escalated in Ukraine, and so we expect these subsequent developments to dominate next year's survey.

What emerges this year is a complex network of interconnected risks – where for instance businesses are tasked with meeting climate change targets but also managing the continuing impact the pandemic has had on their business. Or where the pandemic has supercharged digital transformation in companies across the globe but pandemic-related skills shortages mean those same companies are playing catch-up in recruiting the right talent to put in place long-term resilient digital infrastructure. It's clear that each topic should not be considered in isolation.

In this part of the report we have cast a spotlight on the impact of these themes on four core sectors – insurance, aviation, construction, and energy, marine and natural resources – as well as in our two areas of practice: corporate and advisory, and dispute resolution. What is notable is that these sectors are, by and large, coming to terms with similar challenges, although many are at different stages of their response.

What also unites these sectors is the need for stakeholders, from the C-Suite to in-house legal teams, to prepare and take the actions now that will allow them to minimise risk and put themselves in the position to grasp opportunities as they emerge with confidence – whether that is in the energy transition, the new digital world or more broadly in the post-pandemic landscape.

The third and final part of our series will be an in-depth look at how the role of the GC continues to evolve, considering whether the pandemic has helped further embed in-house counsel and the principle of risk mitigation at the heart of organisations' strategic decision making.

We remain focused on helping clients manage and mitigate the risks they face in these volatile, unpredictable and yet opportunity-rich times. We would welcome the chance to discuss how we can support you further.

Introduction

Welcome to the second part of Winmark and Clyde & Co's Looking Glass report, which examines in detail three topics currently dominating board agendas - digital transformation and technology, climate change and pandemic risk.

Since the publication of our first report, the invasion of Ukraine has created even more uncertainty and instability for leaders to grapple with.

In the short-term, leaders will need to review current action plans and ensure they are prioritised correctly and are flexible enough to respond to highly unpredictable circumstances. Supply chains that were already struggling to recover from the disruption of the pandemic will now face additional geographic hindrances and sanctions. Manufacturers will face a decrease in the availability of Russian sourced raw materials and fuel prices will rise, adding to inflationary pressures. The conflict will also have repercussions for cybersecurity and employee well-being.

In the medium to long-term, organisations will need to predict how the pandemic will change customer and employee behaviour and expectations at the same time as having to set and meet meaningful climate targets, and also meet the challenges of implementing data analytics, remote working and cloud computing technologies.

Our report helps bring into focus the views of senior leaders in major global organisations who are at the sharp end of making decisions to address these problems on a day-to-day basis. It draws on the experiences and expertise of 140 Board Directors, CEOs, General Counsel (GCs) and senior C-Suite executives to understand how they are developing strategies to cope with an uncertain and fast-changing world.

Finally, please look out for the third and last part of the Looking Glass report which will continue our tracking of how the role of the GC (and its relationship to the board and the wider organisation) is changing.

John Madden
Research Director,
Winmark

Executive summary

Digital transformation and technology risk

- The top three digital transformation and technology trends are data analytics, remote working and Cloud computing
- Business leaders are ambitious to improve and extend the capabilities of their remote working tech infrastructure, including technologies such as 3D modelling, to enable remote communication and decision making between sales staff and clients
- AI is recognised as introducing new and complex implications for risk management. GCs will play a vital role in the development of ethical codes of conduct for the safe and fair implementation of AI
- Problems recruiting technologically skilled staff have been severely exacerbated by the skills shortage resulting from the pandemic
- Cyber threats remain the top technology risk. Instigating common policies and procedures across multiple countries and departments is a great challenge

Climate change risk

- Pressure to set and meet climate change targets is strong, but so is the need to manage recovery from the pandemic without compromising profitability
- Organisations are considering whether they have a clear purpose that is compelling to employees, customers, suppliers, local communities, shareholders etc. The need to attract and retain younger staff is a key driver for this mindset
- Leaders are increasingly required to consider making decisions that could have a short-term negative impact on returns to shareholders, but may, in the long term, build a more valuable, sustainable business

Pandemic related risk

- Board, GC and C-Suite respondents all agree that the pandemic-related risk with the highest impact will be 'Changed market conditions as a result of Covid-19'. All organisations are assessing the long-term impact of the pandemic on demand for their products and services. Almost all recognise that at least some of the changes will be permanent
- The pandemic will permanently alter the property portfolios of businesses, and will lead to many service industries relocating to suburban and rural areas. The character of cities and local high streets will permanently change
- Many organisations will permanently retain digital methods of interaction with customers – meaning greater exposure to the associated cybersecurity risks and regulatory demands
- The increasing digitisation of customer interactions has instigated a shift to more iterative approaches to product and service development
- Both board and GC respondents express concern about the prospect of a high inflation economy
- The key challenges of the hybrid working model will be maintaining a positive culture and ensuring that new and younger staff are effectively integrated

Digital transformation & technology risk

Digital trends

The top three digital transformation and technology trends are **data analytics, remote working** and **Cloud computing**.

Top digital trends

	All	Board	GC	C-Suite Exec
	Top percentage in green			
Data analytics	80%	74%	79%	90%
Remote working	73%	65%	74%	83%
Cloud computing	72%	65%	76%	76%
Business process automation	66%	47%	74%	79%
Artificial intelligence (AI)/machine learning	63%	53%	61%	79%
E-commerce/mobile channels	50%	59%	39%	55%
IoT (Internet of Things)	41%	32%	39%	52%
Augmented reality/virtual reality	30%	21%	34%	34%
Blockchain/distributed ledger technology	21%	18%	13%	34%
Drones/unmanned aerial vehicles	16%	6%	18%	24%
Autonomous vehicles	14%	9%	16%	17%
3D printing	11%	9%	18%	3%

Percentage respondents identifying each technology as expected to have a high or very high impact on their organisations

Digital transformation and technology risk

Data analytics are a key component of competitive advantage. As data becomes more plentiful, exploiting its value whilst managing the associated risks is a priority for leaders across all senior roles.

We're along the journey of digital transformation, and businesses see it as being absolutely critical to their success. In the Fast-Moving Consumer Goods (FMCG) sector, we see data as being the new oil. You need to be absolutely focused on data, and how to use it from a marketing and brand perspective, but then from our process perspective.

Chief Ethics and Compliance Officer, FMCG, USA

It is no surprise to see that the top trends in digital transformation are focused on increasing business agility and competitiveness. The forced switch to remote and hybrid working for many companies since 2020 has made the adoption of certain technologies critical to ensure that organisations can continue to operate and accelerate digitalisation across most industry sectors. Companies that can successfully adopt the benefits of data analytics, artificial intelligence and other advanced tools will undoubtedly gain a competitive edge, but they must move quickly to plug any knowledge gaps to ensure they are appropriately mitigating the associated risks.

Dino Wilkinson,
Partner, Clyde & Co, Abu Dhabi

For multinational companies, data analytics and data privacy are going to be significant risk factors. It's a compliance challenge that will be interesting for legal advisors and risk managers to navigate. The next three to five years will be very busy in those areas. How do you harmonise your data obtained from different jurisdictions?

GC, Logistics, Hong Kong

There is a mass of data analytics information and how you make sense of it and pull out what's important is increasingly challenging.

Andrew Allner,
Non-Executive Chairman, SIG plc, Shepherd Building Group Limited and Fox Marble Holdings plc

Digital transformation and technology risk

Remote working

The reality of remote working, and the advantages and challenges raised by rapid implementation of the associated technology, has made business leaders even more ambitious to improve and extend the capabilities of their remote working tech infrastructure. This not only includes remote access to staff and clients, but also technologies such as 3D modelling to enable remote communication and decision making between sales staff and clients.

Covid-19 accelerated the adoption of digital technologies, but alongside the opportunities opened up by these technologies come significant risk factors, especially in relation to cybersecurity and privacy, and potential regulatory action. Leaders will be required to determine what the biggest risks are for their organisations and to work with their IT, security, risk management and legal team to address these priority risks. The costs to get to grips with these risk factors are significant. But facing down risks will enable leaders to deliver efficiency and innovation for their businesses.

Thomas Choo,
Partner, Clyde & Co, Singapore

In my sector, insurance, the pandemic has increased the urgency behind the adoption of insurtech. Suddenly there was an accelerated testing of all that had been happening in the last five to seven years, in turn enabling insurtechs to prove their case beyond what they would have been able to do under normal circumstances. The established industry saw like never before the urgent need to digitise. Insurance, like many other sectors, is starting to scrutinise every aspect of what it does and now it is ready to move forward with eyes wide open to digitise to an extent not seen before.

Vikram Sidhu,
Partner, Clyde & Co, New York

Digital transformation and technology risk

We've engaged much more with our global members. Not going into the office has actually made us more outward-looking. We're a dispersed team across many countries, and forcing us online meant that we included the team much more collectively. In London, you can forget there are team members in Canada or Sydney or Kathmandu. Now we are thinking quite hard about how we put ourselves at the front edge of communicating with technology. We haven't yet cracked the less transactional elements around replicating the face to face experience.

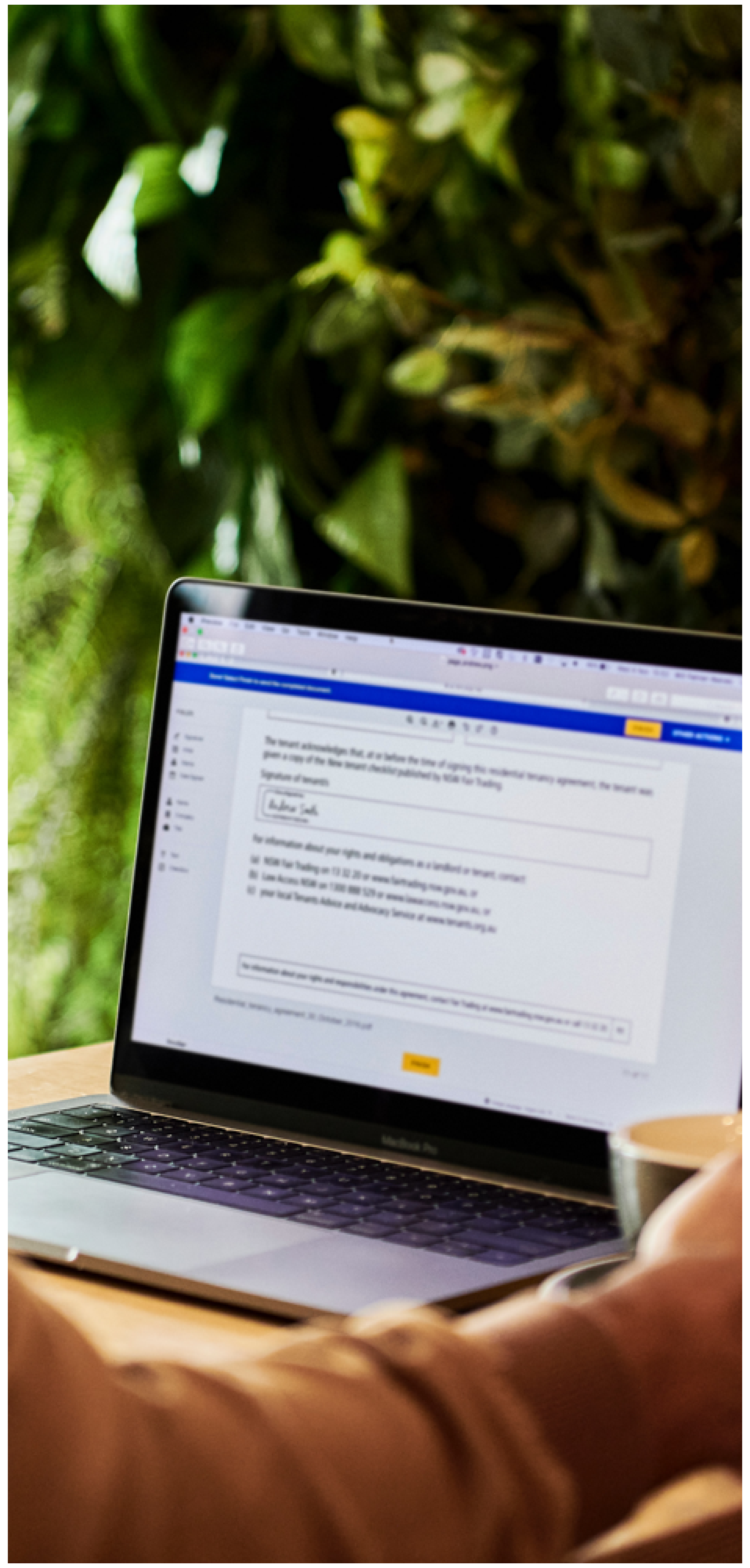
Peter Holland,
Chief Executive, International Agency for the Prevention of Blindness (IAPB)

In supply chain management, technology is absolutely essential to keep the business healthy. We want to digitalise the whole supply chain. For example we have developed a highly effective 3D sampling modelling technology with state of the art rendering capability.

GC, Logistics, Hong Kong

Video meetings are a much more egalitarian communication method making it more difficult to dominate the "virtual room". This may have changed the dynamic for many teams over the last 18 months and it'll be interesting to see if that change survives the change to hybrid working.

Graeme Trigg,
Head of Client Services, Hempsons



Digital transformation and technology risk

AI

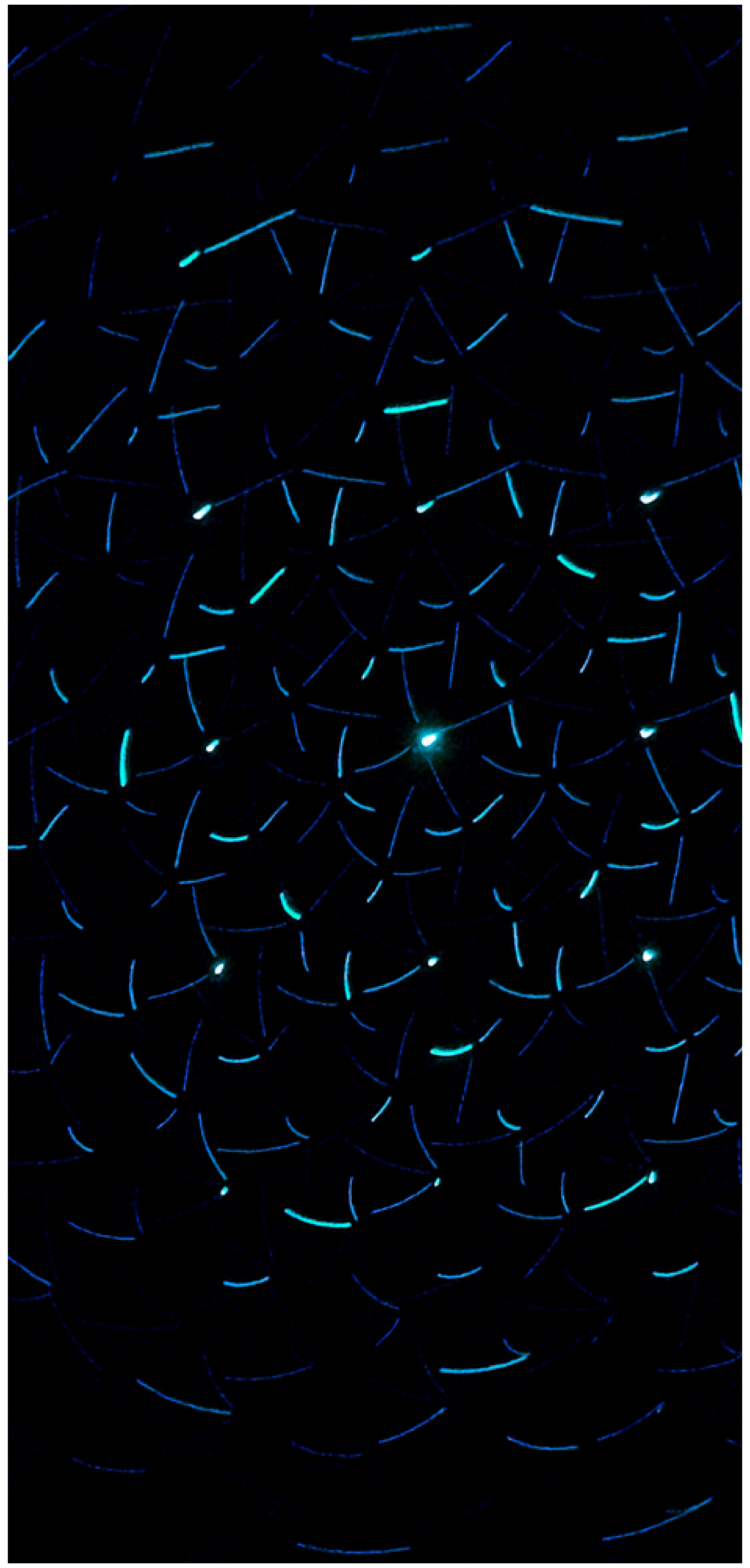
Although outside the top three trends, AI is recognised as introducing new and complex implications for risk management, and potential applications far beyond automating repetitive tasks and into creative areas such as design. GCs will play a vital role in the development of ethical codes of conduct for the safe and fair implementation of AI across multiple business operations.

All compliance and ethics people talk about is AI. How do we automate and how do we risk monitor? I don't think it's well understood by business people across the spectrum.

Chief Ethics and Compliance Officer, FMCG, USA

People are going to start using more AI – we are using AI for design – and that's going to cause a lot of problems with the job market. It is revolutionising this whole industry, as is robotics.

GC, Engineering/Construction, South Korea



Digital trends

In this section, we identify the key knowledge gaps that prevent effective implementation of technology initiatives. It is widely accepted that with tech advances being made so quickly, one of the greatest challenges facing leaders is to develop the detailed knowledge and skills required to turn aspiration into execution.

There's a whole swathe of senior leaders who are not as skilled as they need to be in terms of managing a workforce that is remote. The gaps in capabilities in terms of executing a good digital strategy are understanding the detail. If you put a strategy in front of the board they can understand it, but I don't think they understand the nuances and the nuts and bolts enough to provide input on whether the execution plan looks robust.

Chief Ethics and Compliance Officer, FMCG, USA

Digital trends

Understanding of digital trends

	All	Board	GC	C-Suite Exec
	Top percentage highlighted in green			
Data analytics	67%	74%	68%	59%
Remote working	82%	82%	82%	83%
Cloud computing	67%	68%	63%	72%
Business process automation	58%	62%	58%	55%
Artificial intelligence (AI)/machine learning	38%	44%	32%	38%
E-commerce/mobile channels	47%	65%	29%	48%
IoT (Internet of Things)	34%	38%	29%	34%
Augmented reality/virtual reality	25%	29%	24%	21%
Blockchain/distributed ledger technology	25%	26%	18%	31%
Drones/unmanned aerial vehicles	25%	21%	29%	24%
Autonomous vehicles	18%	24%	18%	10%
3D printing	21%	21%	29%	10%

Percentage respondents with good or excellent understanding of these innovations and their potential risk and legal implications

Digital trends

Understanding the gap

	All	Board	GC	C-Suite Exec
Data analytics	-13%	0%	-11%	-31%
Remote working	9%	18%	8%	0%
Cloud computing	-5%	3%	-13%	-3%
Business process automation	-8%	15%	-16%	-24%
Artificial intelligence (AI)/machine learning	-26%	-9%	-29%	-41%
E-commerce/mobile channels	-4%	6%	-11%	-7%
IoT (Internet of Things)	-7%	6%	-11%	-17%
Augmented reality/virtual reality	-5%	9%	-11%	-14%
Blockchain/distributed ledger technology	4%	9%	5%	-3%
Drones/unmanned aerial vehicles	9%	15%	11%	0%
Autonomous vehicles	4%	15%	3%	-7%
3D printing	10%	12%	11%	7%

Percentage respondents identifying technology as high impact minus % with good or excellent understanding

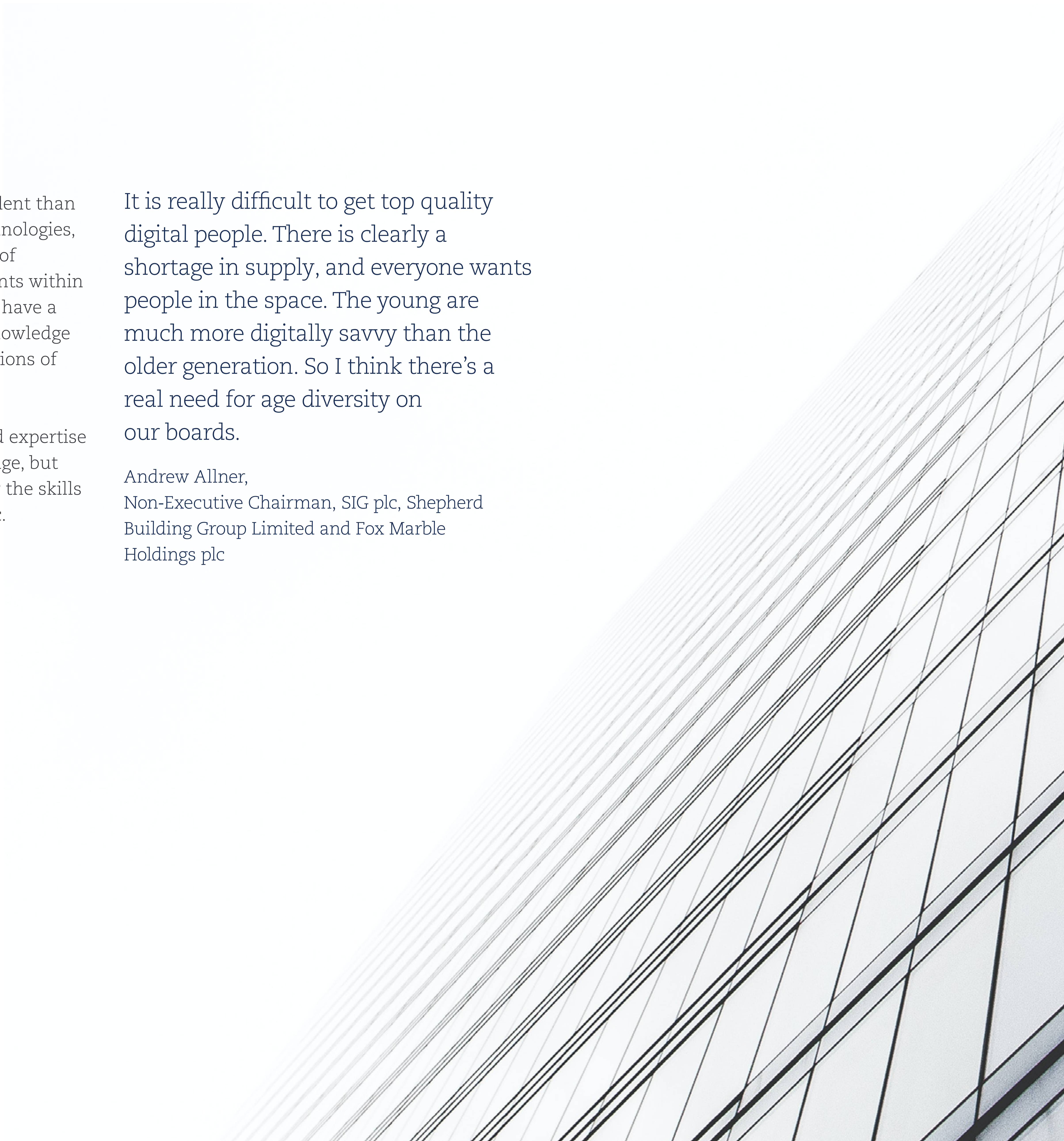
Digital trends

Board representatives are more confident than GCs, in that they understand key technologies, perhaps reflecting greater knowledge of technology initiatives and developments within the rest of the organisation. They will have a key role in facilitating training and knowledge sharing to meet the technology ambitions of their organisations.

Recruitment of staff with the required expertise has historically always been a challenge, but this has been severely exacerbated by the skills shortage resulting from the pandemic.

> It is really difficult to get top quality digital people. There is clearly a shortage in supply, and everyone wants people in the space. The young are much more digitally savvy than the older generation. So I think there's a real need for age diversity on our boards.

Andrew Allner,
Non-Executive Chairman, SIG plc, Shepherd Building Group Limited and Fox Marble Holdings plc



Technology risks

Cyber threats remain the top technology risk to organisations. Over 70% of board, GC and C-Suite executives say they are a high or very high risk.

Top technology risks

	All	Board	GC	C-Suite Exec
	Top percentage highlighted in green			
External cyber threats	77%	71%	79%	83%
Cost of technology investment	61%	56%	63%	66%
Complexity of systems	60%	47%	63%	72%
Internal threats/data loss	57%	53%	63%	55%
Regulatory and compliance requirements	53%	47%	58%	55%
Lack of internal technical talent	50%	38%	47%	66%
Reliance on legacy systems	47%	21%	61%	59%
IT systems failure	44%	35%	55%	38%
Disruptive digital competitors entering sector	36%	35%	39%	31%
Cost of retraining employees on new technology	34%	32%	34%	34%

Percentage respondents identifying each risk as expected to have a high or very high impact on their organisations

Technology risks

The day to day reality of cyberattacks is very apparent from our discussions. Incidents involving Denial-of-Service (DoS) attacks, ransomware or trojan viruses are commonplace. Instigating common policies and procedures across multiple countries and departments is a difficult task, exacerbated by the growing volume of digital data and complexity of the infrastructure within most organisations.

Ransomware and cyber-attacks are happening every single day. The increasing use of technology, coupled with the radical shift in working patterns with hybrid models, means that the risk around cyber incidents and information security are just incredible.

Chief Ethics and Compliance Officer, FMCG, USA

You need to have a well thought business continuity plan to respond to a cyber-attack, and this is extremely challenging, because planning and testing will involve multiple departments. To ask everyone to have a holistic approach can be quite challenging.

GC, Logistics, Hong Kong

Preparedness for technology risks

	All (not prepared)	Board (not prepared)	GC (not prepared)	C-Suite Exec (not prepared)
	Top percentage highlighted in red			
Lack of internal technical talent	32%	21%	26%	52%
Disruptive digital competitors entering sector	30%	21%	34%	34%
Cost of retraining employees on new technology	20%	18%	18%	24%
Complexity of systems	19%	9%	24%	24%
Reliance on legacy systems	18%	6%	16%	34%
External cyber threats	15%	21%	8%	17%
Cost of technology investment	14%	6%	18%	17%
Internal threats/data loss	14%	18%	11%	14%
IT systems failure	11%	9%	5%	21%
Regulatory and compliance requirements	8%	6%	11%	7%

Percentage respondents answering no

Technology risks

Skills shortages are also at the root of respondents not feeling prepared to deal with technology risks. A third say 'Lack of internal technical talent' and 'Cost of retraining employees on new technology' are barriers to progress. Addressing these shortages in the long-term may be beyond the remit of individual HR departments, and may require a broader socio-political solution, such as government intervention, educational reform or cultural changes in attitudes to learning and re-skilling.

A third of respondents say they are not prepared for 'Disruptive digital competitors entering our sector'. Consumer behaviours are changing radically, with digital shopping increasing globally, and businesses needing to reach consumers in new ways with innovative digital interfaces.

This presents an opportunity for new entrants, particularly those that can generate data driven insights, and threatens the brand loyalty of legacy customers.

Boards recognise that meeting new consumer expectations will necessitate increased collaboration with third party vendors to provide innovative service offerings.

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> I think education has to change to meet the whole rapid pace of change our society is facing. AI will create enormous change. We don't even know what jobs will be needed in 10 or 20 years from now, so education has to change in order to make children adaptable to whatever changes happen in society.
>
> GC, Engineering/Construction, South Korea

Technology risks

Digital transformation and technology risk - the regulatory perspective

External cybercrime and internal data security risks have long been key areas of regulatory focus, but regulation must continue to evolve, just as the threat is constantly evolving. Recent shifts towards greater adoption of cloud computing and the move to remote working have at once opened up opportunities and exposed more vulnerabilities that regulators are keen to tackle.

This presents challenges for C-Suite executives, board members and GCs who must satisfy multiple regulatory regimes across different jurisdictions while seeking cost-effective IT solutions. And it creates difficulties for regulators who simply cannot oversee everything – forcing them to focus on particular key sectors such as critical infrastructure or banking, in the expectation that the effects will then ripple out to others.

There may be a long tail from the scramble to work from home in early 2020 to problems coming to light. Leaders should beware of complacency that the perceived success with which operations were moved into a remote environment does not mean that the risk of data theft or breaches of confidential information has been avoided.

Stealing data or setting up related entities is much easier to do when working from home, and such activities may only be detected after the fact. Indeed, the scale of such issues may never be known, as unlisted businesses that do not have to disclose failures will probably not do so.

Regulators can use digital transformation to their own advantage too of course. For instance there is significant scope to ramp up data analytics to facilitate remote supervision. However, they need to be at the forefront of technological innovation to stay ahead of the game, which is very difficult to achieve.

"In my experience of investigating financial crime, being able to find information quickly is vital, but the amount of data to sift through is enormous," says Rachel Cropper-Mawer. "In some countries, there are strict rules about what data prosecutors can access, for instance they may not have a right to access data stored abroad. However, law enforcement agencies are very well-connected internationally with each other, and that is helping curtail illegal activity."

Being able to access real-time data is not necessarily a panacea. "While instant transparency means some processes can be streamlined, being constantly observed might encourage businesses to have a knee-jerk reaction to dealing with issues, rather than taking the time to implement a more considered approach" says Avryl Lattin. "There are benefits and drawbacks."

Contributors

Avryl Lattin
Clyde & Co
Partner, Sydney

Rachel Cropper-Mawer
Clyde & Co
Partner, London

Climate change risk

There is consistent agreement across all respondent types – Board, GC and C-Suite – that ESG, Regulation and Transition related climate risks will have the biggest impact over the next two to three years.

Top climate change risks

	All	Board/CEO	GC	C-Suite Exec
	Top percentage highlighted in green			
ESG (Environmental, Social, and Governance) risks e.g. risks relating to specific ESG related impact mitigation and adaptation, environmental management practices, biodiversity and nature-based solutions, duty of care	50%	44%	54%	50%
Regulation risks e.g. risks caused by the introduction of regulations or laws to reduce emissions or mitigate the effects of climate change	45%	35%	51%	47%
Transition risks e.g. risks caused by transition to low or zero-carbon economy, impacting the finances and valuations of organisations and asset portfolios	40%	44%	38%	37%
Liability risks e.g. risks in relation to responsibility for contributing to climate change, or failing to avert, minimise or report on physical or transition risks	27%	18%	33%	30%
Physical risks e.g. risks as climate change-related events lead to physical damage to business property, assets or supply chains	21%	15%	26%	23%

Percentage respondents identifying each risk as expected to have a high or very high impact on their organisations

Climate change risk

There is considerable pressure from government, regulators, investors and consumers for ESG in its broadest sense to be on the board agenda. Vocal stakeholders are demanding organisations set climate change targets and ambitions. The need to meet these demands is keenly felt, but so too is the need to manage recovery from the pandemic in a manner that does not compromise profitability.

Partner and Leader of Clyde & Co's campaign on Resilience and Climate Change Risk, Nigel Brook says: "It is not surprising that ESG has been identified as the risk with the highest impact. There is growing acknowledgment that ESG factors can directly bear on a company's financial performance, and that the risks and opportunities they give rise to should be taken into account by its board and reported to shareholders. But it continues to be a minefield for businesses as there is no consensus at the moment about what the E means, what the S means, and what the G means, or indeed the metrics behind them."

Preparedness for climate change risks?

	All (not prepared)	Board/CEO (not prepared)	GC (not prepared)	C-Suite Exec (not prepared)
	Top two highlighted in red			
Physical	20%	12%	21%	27%
Regulation	19%	9%	36%	20%
ESG	19%	6%	32%	17%
Liability	18%	6%	26%	20%
Transition	17%	3%	29%	17%

Percentage respondents answering no

Climate change risk

In the US, we've got the Securities and Exchange Commission (SEC) saying that the statements you make around climate and environmental matters are on the same footing as the financial accuracy of accounts. That's incredible in such a short space of time.

Chief Ethics and Compliance Officer, FMCG, USA

ESG is extremely important to CarTrawler and it's an area that we're highly focused on. ESG and climate change action is also a significant focus being driven for our investors.

David Johnston,
General Counsel, CarTrawler

Companies are recommended to plan ahead for the potential regulatory changes relating to climate change so that they could have the appropriate business and financial models when the regulation is fully implemented. The Energy White Paper (2020) issued by the UK government could be a useful guidance, as it outlines the government's medium to long term plans and goals in support of the country's net-zero climate target by transitioning to a clean energy system.

Catherine Wang,
Associate, Clyde & Co, London

It's clear that costs to reduce emissions will escalate as businesses face more stringent regulations, higher taxes, fines for non-compliance and the prospect of litigation. Perhaps even more significantly, these businesses will face scrutiny from their customers.

Mun Yeow,
Partner, Clyde & Co, Hong Kong

We are definitely seeing clients asking questions about our policy and strategy related to ESG concerns. But everybody is trying to recover post-Covid, and economically, when you enter the recovery stage, you have to strike a balance between growth and sustainability.

GC, Logistics, Hong Kong

Climate change risk

Organisations are seeing a shift away from the primacy of shareholders towards balancing the interests of all stakeholders.

Businesses are considering what contributions they are making to wider society and if they have a clear purpose that is compelling to all key stakeholders – employees, customers, suppliers, local communities, shareholders etc. The need to attract and retain younger staff is a key driver for this mindset.

Leaders are increasingly required to consider making decisions that could have a short-term negative impact on returns to shareholders, but may, in the long term, build a more valuable, sustainable business.

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Young people are going to look very hard at companies that aren't doing the right thing, including before taking a job, so it is very important in the employment area. Getting it right will lead to real competitive advantage. The biggest challenge is developing a very clear vision and statement of purpose, and then being clear how you prioritise timing and delivery. You have to make sure there's appropriate focus. Companies will be thinking about climate and sustainability in everything they do. It's going to take a central place in strategic thinking. You clearly need leadership from the top. You would certainly expect the CEO and NEDs to be passionate about it. Secondly, you need resources within the organisation – in a big multinational that means a central resource, but also resource in individual operating companies. It's got to be across the whole organisation. That obviously has budgetary implications.

Andrew Allner, Non-Executive Chairman, SIG plc, Shepherd Building Group Limited and Fox Marble Holdings plc

Climate change risk

Climate change risk – the regulatory perspective

Increased expectations around – and scrutiny of the disclosure regime for reporting on climate related risks is starting to create greater transparency around how companies manage and report on risk and more accountability for their carbon reduction policies. Governments in some countries are leading on adopting more robust regulation; in others, change is being driven by shareholder activists if companies are not felt to be doing enough, while pressure is also being exerted by other stakeholders such as customers and staff.

The compliance burden to demonstrate a commitment to net zero emissions will doubtless increase, and it is vital that leaders ensure their organisations are effective in building resilience in a real-world setting. Many businesses have learnt risk management lessons from the Covid-19 pandemic and are identifying and testing risk scenarios to gauge how prepared they really are for the impact of climate change.

This is challenging because the risks are varied and complex, and could impact simultaneously, for instance, extreme heatwaves creating healthcare, energy and transport problems all at once.

A focus on ESG issues should be (and increasingly is) high on the board agenda, both in terms of an organisation's own ESG profile and that of the companies it does business with, and especially for those in financial services. Regulation needs to tread a fine line between managing the risk of banks and insurers providing finance or risk cover for entities whose operations are significant contributors to carbon emissions (such as oil & gas companies), and enabling these industries, on which the world still relies, to continue to be funded and operate.

Banks are recognising that their financial crime risk assessments should include whether a company is ESG compliant. When it comes to environmental measures, Rachel Cropper-Mawer, Partner, says, "I can see more regulations coming in to make it a corporate criminal offence if companies do not take steps to minimise their own carbon footprint, or that of their supply chain. Businesses can minimise risk by auditing suppliers, conducting thorough due diligence, and implementing robust T&Cs. There is a huge amount of work to do to conduct proper risk assessments, and it can't be done overnight."

For such rules to be effective, regulators will need sharp teeth and extra-territorial reach, as is the case with anti-bribery and tax evasion laws.

Overall, however, climate change regulation is an area where very high levels of co-operation between regulators in different jurisdictions exist. This is translating into similarities between their announcements, making it easier for governments and businesses to achieve common goals.

Contributors

Rachel Cropper-Mawer
Clyde & Co
Partner, London

Avryl Lattin
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Partner, Sydney

Pandemic related risk

Board, GC and C-Suite respondents all agree that the pandemic-related risk with the highest impact will be 'Changed market conditions as a result of Covid-19' such as shifts in consumer behaviour or demand.

Top pandemic related risks

	All	Board/CEO	GC	C-Suite Exec
	Top percentage highlighted in green			
Changed market conditions as a result of Covid-19 e.g. shifts in consumer behaviour or demand	64%	63%	62%	69%
Government policies and regulations related to Covid-19 e.g. around public health practices	55%	60%	52%	53%
Resource/organisational challenges e.g. skills shortages, vaccine passports etc.	55%	57%	52%	56%
Environmental risks e.g. "Build back better" pressures, ESG-related regulatory and reputational risk	54%	57%	50%	56%
Deployment of digital technologies necessitated by Covid-19	52%	51%	55%	50%
Impact on global trade and supply chains	51%	57%	55%	41%
Difficulties managing a remote or hybrid workforce	46%	37%	48%	53%
Reputational e.g. how they have responded to Covid-19	32%	31%	33%	31%

Percentage respondents identifying each risk as expected to have a high or very high impact on their organisations

Pandemic related risk

Pandemic related risk preparedness

Leaders are least prepared for 'Resource/organisational challenges,' 'Impact on global trade and supply chains' and 'Difficulties managing a remote or hybrid workforce.'

Companies always develop business continuity plans and have in place business interruption insurance, but Covid has focused people's minds on what that really means day to day and in a practical sense for their company.

Shaun Johnson,
Vice President – Legal, Miahona

Preparedness for pandemic related risks

	All (not prepared)	Board/CEO (not prepared)	GC (not prepared)	C-Suite Exec (not prepared)
Top percentage highlighted in red				
Resource/organisational challenges	25%	20%	26%	28%
Impact on global trade and supply chains	21%	23%	17%	25%
Difficulties managing a remote or hybrid workforce	15%	6%	21%	16%
Environmental risks	12%	11%	12%	13%
Government policies and regulations related to Covid-19	11%	3%	12%	19%
Deployment of digital technologies necessitated by Covid-19	10%	6%	12%	13%
Changed market conditions as a result of Covid-19	7%	6%	7%	9%
Reputational (e.g. how t hey have responded to Covid-19)	6%	6%	7%	6%

Percentage respondents answering no

Pandemic related risk

Market conditions

All organisations are assessing the long-term impact of the pandemic on demand for their products and services. Almost all recognise that at least some of the changes will be permanent.

The pandemic will permanently alter the property portfolios of businesses, with a long-term reduction in office space and an expectation that increased dispersion of workforces will lead to many service industries relocating to suburban and rural areas. The character of cities and local high streets will permanently change.

In my role I have a good overview of which products are performing better than others – for example, clothing suffered massively, but shows signs of picking up. Cosmetics have suffered, but the furniture business is doing well. People have renovated because they are spending so much time at home. Also, the toy business has been booming.

GC, Logistics, Hong Kong

With people commuting less than before, there's a move back to local and that has implications for what the high street looks like. In addition to the movement online, there has been a movement of people going to local shops and services, and this is likely to have a negative impact on city centres.

David Johnston,
General Counsel, CarTrawler

I think there could be a real spike in travel for leisure purposes, visit friends and family etc. Business travel will take longer to recover, and it's questionable whether ultimately it will recover fully.

David Johnston,
General Counsel, CarTrawler

There will be a surplus of office space as businesses rethink their space strategy when leases come up for renewal. It will permanently change the landscape.

GC, Logistics, Hong Kong

Pandemic related risk

The pandemic has caused businesses to rapidly embrace digitalisation, a transformation. That is and will continue to be driven by people with certain skills. Post-pandemic, we still need people, but perhaps with new talents and an altogether different skillset. Flexibility will be key. Working from home has in many cases brought pressures and strains on employed parents with young children – leading potentially to burnout – where they struggle to find a balance between their day job and caring responsibilities.

Mun Yeow,
Partner, Clyde & Co, Hong Kong

E-commerce based models have become more common and many organisations will permanently retain digital methods of interaction with customers – meaning greater exposure to the associated cybersecurity risks and regulatory demands.

For some businesses, the increasing digitisation of customer interactions has instigated a shift to more iterative approaches to product and service development, an approach inspired by software and technology developers in the tech sector.

Economic uncertainty, and the prospect of a high inflation economy, is a concern.

Business culture has changed from big updates to constant iterative processes. Improving bit by bit, learning lessons and constant iterative improvement is something we can all learn from the tech world.

Graeme Trigg,
Head of Client Services, Hempsons

Covid accelerated the need to be more technology savvy, especially on sales processes and technology development to reach customers. It has changed the way we do business. Non face to face channels create verification issues, and have regulatory implications, particularly in financial services, for customer onboarding and online selling (e.g. advanced or complex insurance products). It impacts consumer protection, which will be a key regulatory focus.

GC, Financial Services, Hong Kong

I am concerned inflation will rise, and we may have to learn how to deal with an inflationary economy again.

Andrew Allner,
Non-Executive Chairman, SIG plc, Shepherd Building Group Limited and Fox Marble Holdings plc

Pandemic related risk

Resource/organisational challenges

Hybrid work will become the norm as companies across the globe balance a desire to bring people back to the office with a need for greater employee flexibility. This is especially true of large multinational corporations in the financial services and technology sectors. Companies are still formulating best practices and will iterate their policies using lessons learned as more people return to the office.

In the US and Europe, most respondents indicate expectations for employees to come in for two or three days a week, with relatively few in the office five days a week. Conversely, in Asia-Pacific, the biggest shift in sentiment seems to be around employees who previously worked at the office every day now being expected to opt for working remotely one or two days per month.

The key challenges when introducing a hybrid working model are maintaining a positive culture and ensuring that new and younger staff are effectively integrated into teams and are able to learn and develop.

As the survey bears out, although we are two years on in the pandemic, businesses continue to face difficulties managing remote and now hybrid workforces. This year could be marked by difficult discussions between employers and employees. Yet it should also trigger important strategic decisions for businesses keen to determine not just how they emerge from COVID-19, but how they want to structure their businesses for smooth and efficient working in five or even ten years' time. Those businesses that can navigate these discussions and decisions sensibly, reasonably, and successfully, could engineer competitive advantages in retaining and attracting talent.

Heidi Watson,
Partner, Clyde & Co, London

Remote working gives a whole new dynamic about how you manage the business and make sure that people feel engaged and connected. One of the concerns about 'pandemic remoteness' is it reduces the glue, the connection that holds us together. When that weakens, you have to make extra effort as an employer to show commitment and support and be very open minded and flexible in making things work for everybody.

Neil May,
Chief Operations Officer, Thackray Williams

Pandemic related risk

We've begun to recognise people are at different stages of their career and need different sorts of support. Some members of staff haven't been able to progress as quickly as they could, because, working remotely for such extended periods of time, they haven't had access to the regular and face to face support they would naturally get in the office.

Peter Holland,
Chief Executive, International Agency for the Prevention of Blindness (IAPB)

When I started my career I sat side by side with a senior lawyer - it was similar to doing a plumbing apprenticeship. I saw everything. I was mentored and coached. It's going to be a challenge to impart knowledge to career starters.

Chief Ethics and Compliance Officer, FMCG, USA

Businesses are facing a number of personnel challenges at the moment, and many are at a pivot point where the old ways of working no longer apply. While we are seeing companies moving back into the office, an insistence that all staff return to the office full time would appear to be a retrograde step. Employees have had a long time to assess what works for them, and it seems likely that a more flexible working model, in which employees split their time between home and work, is here to stay. However, this can be to the detriment of the informal ways in which office culture and relationships have developed in the past. The challenge is for companies to find a suitable hybrid alternative to the office "water cooler".

Rebecca Ford,
Partner, Clyde & Co, Dubai

I think it's difficult for new people - there's real benefit in sitting together and just picking stuff up and learning from each other.

David Johnston,
General Counsel, CarTrawler

Spending just two or three days a week in the office will have huge implications for collaboration and learning.

Andrew Allner,
Non-Executive Chairman, SIG plc, Shepherd Building Group Limited and Fox Marble Holdings plc

Pandemic related risk

Pandemic related risk - the regulatory perspective

The volume of regulation rolled out during the pandemic has been exceptional in its speed and its scale. Though the backlash against such extensive controls has been relatively limited so far, there may come a tipping point, if governments are felt to be being over-zealous at a time when they are still having to deal with so many challenges. "Keeping on top of fast-changing rules that differ from country to country, and even sub-nationally from state to state, with many different enforcement entities involved, remains incredibly difficult," says Avryl Lattin, Partner.

After the initial shock of temporary lockdowns, now boards, CEOs and GCs must face up to the realities of the next stage of the pandemic, where problems could compound especially if disruption continues and the economic picture worsens. Compliance with regulatory obligations will be under the spotlight in several key areas where pandemic-induced changes have created or exposed vulnerabilities.

For example, in financial services, rules restricting traders' use of personal mobile phones at work or access to confidential materials out of the office-environment, designed to limit the potential to commit financial crime, have been impossible to enforce in a remote working environment. With the onus on businesses to monitor risk and compliance, moving staff back to the office is one solution decision-makers are considering, but where this remains impossible, financial services companies must stay vigilant.

More broadly, attention is turning to investigating fraud in relation to government-backed support schemes such as Covid loans, furlough arrangements and other support payments. We could see an uptick in whistleblowing in this respect once furlough schemes end and staff are laid off. Companies will need to be able to show a clear audit trail to demonstrate compliance with hastily put together rules, and justification for relevant payments based on their operational situation.

Health and safety in the workplace will have to evolve for the post-pandemic era. Leaders that rushed to make remote working possible and are continuing with it now need to ensure that policies and practices, such as physical and mental health risk assessments and provision of suitable equipment like lighting and seating, come up to standard.

The push to beef up consumer rights shows no sign of slowing, especially in light of the major changes to the customer experience that have taken place in the past two years [such as growth in digital interactions]. We could also expect more regulation aimed at securing supply chain resilience. Covid-related disruption has highlighted significant weaknesses in global supply chains that regulators will now want to see strengthened.

Contributors

Rachel Cropper-Mawer
Clyde & Co
Partner, London

Avryl Lattin
Clyde & Co
Partner, Sydney

Insights from Clyde & Co

In one way or another, Covid-19, climate change risk and technological shifts are impacting almost all the decisions and plans that leaders are making as they assess the changing landscape and plot their routes to recovery, resilience and growth.

Though these factors are universal, every industry is unique and faces its own specific challenges and opportunities. Certain pressures affect some more than others, and the implications will vary – as will the perspectives of boards, CEOs, other C-Suite executives and GCs. The following section looks at how the findings outlined in this report apply to Clyde & Co's four key sectors as well as the implications of dispute resolution and corporate and advisory aspects of law, and what that means in real-world terms for decision-makers. Clyde & Co partners provide their insights on some of the major issues and risks that each sector is having to grapple with, both now and as they look ahead.

Insights from Clyde & Co

Insurance

The risk horizon in Insurance

For many insurers whose business lines have traditionally thrived on personal contact, such as Specialty insurance in London's Square Mile, post-pandemic concerns around whether to continue remote or hybrid working remain a key issue for boards, C-Suite and GCs.

On one side of the coin, those who can visit clients face to face may be in a better position to win new business or strengthen client relationships than those who are working from home. This is something that also needs careful thought when it comes to insurers' drives to minimise climate-related risks and improve their ESG performance by limiting air travel to client meetings to reduce their carbon footprint.

On the flip side, making staff return to the office could force some to leave, exacerbating a skills shortage that existed pre-pandemic. Arguably not enough is being done to attract new talent, with graduate schemes few and far between, but there are generational issues too. Since insurance career progression is founded on deep market knowledge and experience, it is essentially a lifelong vocation rather than something to move in and out of, which may seem a rather outdated concept for many young people today. How to tackle this trend requires deep thought at the most senior levels of the industry.

Artificial Intelligence (AI) is yet to mitigate the skills shortage, and for a sector where a huge amount of complex thought processes go into underwriting and pricing decisions, that shift could still be a long way off. Business process automation is more likely to become transformative for insurance businesses before AI, however, the cost of these innovations still seems prohibitive to many decision-makers.

In fact, investment in technology as a whole is a major issue for insurers, whether in terms of implementing suitable integrated systems for industry behemoths post-merger, amid a wave of consolidation, or leveraging data properly as a valuable business tool. Investing in the wrong systems could be as big a risk as not investing at all. But at a time when the market is softening and wages are being pushed up, IT capex can be a divisive item on the board agenda.

Covid-19 created significant reputational damage around pay-outs for business interruption claims, and the first party property book has become more of a challenge as a result. James Cooper, Partner, says, "Is Covid-19 an event that will start to fall away now, or will it lead to a change in the way risks are written? Will we see a modernisation of wordings or in how parts of the economy are rated for risk? These are interesting questions for leaders and GCs in the insurance industry."

Transfer of risk is also under renewed focus in some areas, with implications for risk pricing. For example, with the advent of autonomous vehicles, liability may shift from "driver" to manufacturer. Insurers have long been masters of adapting to such regulatory changes in how they handle risk transfer in an innovative and sophisticated way, and this could present a real opportunity for the sector.

So too could issues around climate change. For insurers, physical, transition and regulatory risks all effectively fall into the category of liability risks. As the insurance market for renewable energy projects grows, and D&O liability risk increases, there is plenty of scope for insurers to build up their books of business, expand their product offerings and fill in any emerging coverage gaps. Big decisions will need to be made around ESG – for example, whether to continue to insure coal producers/users as they transition towards more sustainable energy sources or exit that part of the market altogether. Tough choices, as well as real positives, lie ahead.

Contributor

James Cooper
Partner, London

Insights from Clyde & Co

Aviation

The risk horizon in Aviation

Aviation is still in the thick of pandemic-related disruption as operators look forward to recovery. However, the risks seen during the pandemic and those it continues to expose remain very much front of mind for boards, C-Suite and GCs. On-going, fast-changing, country-specific public health and immigration policies are still restricting travel, while health concerns and uncertainty about changing immigration policies could dampen consumer demand for some time to come. Meanwhile, pandemic-related supply chain issues risk acting as a drag on manufacturers' delivery schedules, although with the pandemic having disrupted operators' flight schedules and liquidity so severely, the impact is likely to be significant, but not severe.

Airlines face people related issues as some are re-recruiting staff made redundant during lockdowns, many of whom now need to be re-trained or re-certified. If employment terms and conditions are less favourable to those offered in pre-pandemic times, leaders will need to think about how their organisations can build back loyalty and ensure a high quality of service. From an asset management perspective, aircraft being brought back into service after a prolonged period out of operation must be maintenance-checked to ensure compliance with strict government regulations and manufacturers' terms and conditions.

A hiatus in operations has also triggered a raft of insurance compliance requirements for equipment that must be managed carefully as airlines ramp up operations this year.

With revenues over the past two years curtailed, the financial strain on airlines remains acute. Government support and renegotiated terms with lenders has helped, and so far no major carriers have gone out of business although several smaller operations have ceased to exist or are being restructured under voluntary reorganisation regulations. However, pressure to keep up financing payments is intense, and without further support, the next 12 months could prove challenging. We may see consolidation this year, especially in the saturated European market. On the brighter side, cargo operators have done well during the past two years and are expected to continue to thrive with new customer demand for all things to be delivered.

At the same time, business investment is vital. As the climate emergency focusses attention on sustainability, manufacturers need to continue their mission to build cleaner aircraft. R&D is underway to develop alternative fuels, electric aircraft, lighter planes and more efficient engines. Airline chiefs are aware that renewing their fleets is the quickest way to cut emissions, but this will not happen overnight. Government regulation on reducing emissions is inevitable to accelerate change. Climate change issues are high on the agenda at the UN ICAO assembly this autumn, and outcomes will filter down to national regulators with the possibility of enhanced standards and compliance requirements.

To develop cleaner technologies, manufacturers must have access to top talent, however the sector's skills pipeline is at a critically low level. Though there is a palpable intent at the top to rebuild a stronger aviation industry post-pandemic, the global STEM (science, technology, engineering, maths) skills shortage urgently needs to be addressed.

Carol Anderson, Global Aviation Professional Support Lawyer, who has just been appointed an Ambassador for Aviation in the UK by the Department for Transport says, "There's a lot of work to do to encourage more young people, women and other under-represented groups, into the careers pathway, particularly for technical jobs like pilots and engineers. Technology is moving so fast. If you don't have enough students coming through the system, how are you going to build a new operating environment or innovate?" With the emergence of drones and unmanned aircraft on the horizon, and with space exploration in many governments' sights, competition for talent globally is high.

Insights from Clyde & Co

Aviation

Investment in skills is key when it comes to staying ahead of major threats such as cybersecurity as well. Data theft, either by hackers accessing passenger reservation systems or even service providers fraudulently selling information on, is still a major concern, as are ongoing threats like the potential to interfere remotely with avionics. Conducting a cybersecurity risk profile is vital to identify and audit all the risks, many of which are hidden.

Geo-political risk looms large today and a close eye is being kept on tensions between Russia and Ukraine. Carriers are assessing their risks in conjunction with insurers to remain within their policy coverage. If conflict develops, a no-fly zone will be declared resulting in disrupted and extended airline routes.

Safety issues are also front of mind in the US, where the rollout of 5G mobile networks may have serious implications for aircraft safety systems, especially during landing and take-off. Airlines are keen to ensure that regulatory action is sufficient to protect aircraft. Risk managers and CEOs of carriers worldwide will be watching, in anticipation of 5G rollouts elsewhere.

After two years of survival mode, in 2022 that impetus remains strong. "We're not out of the woods yet, but a quick look at the history of aviation and its adaptability tells us that our industry continues to be resilient and will re-emerge stronger and fitter" says Anderson.

Contributor

Carol Anderson
Global Aviation Professional Support Lawyer, London

Insights from Clyde & Co

Construction

The risk horizon in Construction

The fallout from Covid-19 has had an extraordinary impact on the construction sector. On one hand, it has created heightened demand as governments look to stimulate their economies by investing in public infrastructure projects. On the other, boards, the C-Suite and GCs are wrestling with many significant pressures that have been exerted on the industry, squeezing already tight margins so much that we are starting to see insolvencies becoming a feature.

While construction was deemed an essential sector so sites could continue operating during lockdowns, restrictions around the movement of people across borders has limited companies' abilities to deploy the workforce where it is needed. Supply chain bottlenecks are also causing delays to plant and materials, resulting in increased cost and complexity of projects. New projects are being priced accordingly, but as Beth Cubitt, Partner, points out, "For existing projects which were estimated on pre-pandemic norms, contracts were not drafted with these unforeseeable Covid-triggered extra costs in mind. *Force majeure* or change of law clauses may not cover them, so construction companies will be left bearing those higher costs. Looking ahead, GCs will want to update those contractual mechanisms in new contracts as a matter of urgency."

Health and safety of the workforce has been a higher priority than ever during the pandemic and will remain front of mind. Disaster planning and agility continue to be high on the agenda too, and that may require upskilling and training local workforces and re-assessing 'just-in-time' procurement models. Some boards are even exploring taking ownership of parts of the supply chain to guarantee quality and streamline delivery.

Against this backdrop of rising costs, strong demand, skills shortages and new ways of working, digital transformation has been jump started. Overnight, companies have had to embrace technologies like cloud-based data repositories and are recognising the benefits of greater automation and machine learning. Though the upfront investment in innovations like artificial intelligence (AI) and robotics is high, many decision-makers are willing to make that long-term play, in the expectation that this will lower costs over time.

Alongside major risks like data security and privacy, the threat of external cybercrime looms large. Critical infrastructure projects are a major target, so leaders need to sanction continued investment in leading edge cybersecurity expertise and beef up their policies. Amid a global tech skills shortage, however, competition for talent is high.

International efforts to step up the fight against climate change is creating huge opportunity for the sector, changing the pipeline of work and accelerating the use of new technologies to meet net zero goals, build resilience and mitigate risk. At the same time, the environmental impact of projects is coming under ever more intense scrutiny, and regulations, compliance and reporting around ESG issues are only going to increase. Stakeholders such as shareholders, staff, customers, climate activists and the public are watching out for failures or underperformance. Leaders are increasingly recognising that there could be financial and reputational ramifications for those that lag behind.

Many lessons have been learned over the last year or two, and the industry has shown how agile and adaptable it can be. This will stand it in good stead as it grapples with challenges ahead.

Contributor

Beth Cubitt
Partner, Perth

Insights from Clyde & Co

Energy, Marine and Natural Resources

The risk horizon in Energy, Marine and Natural Resources

The combination of global trade and supply chain disruption, resourcing and organisational challenges and government policies and regulations around Covid-19 has had an unprecedented impact across what we see as the interconnected energy, marine and natural resources sectors, and the storm has yet to pass.

With natural resource and energy production so reliant on skilled labour, ensuring that there is sufficient talent deployed in the right areas has not been easy. Many projects have been delayed, creating a knock-on effect on supply, and giving rise to various legal challenges for boards, GCs and C-Suite to deal with such as claims under performance guarantees or declarations of force majeure.

In commodities trading, continued remote or hybrid working post-pandemic may make it harder for risk managers, who historically sat with or near to trading desks, to identify operational risks and spot non-compliance.

Workforce and supply chain disruption will continue as we look ahead. Business continuity plans are now well established, but they will need to be refreshed regularly and should therefore remain on the board agenda.

Concerns about high inflation identified in this report on the part of boards and GCs really resonate. Though inflation can be a boon to producers in the natural resources sector, fast-rising commodity prices create volatility in the markets, creating greater risk of default by traders or end-users. This will only add to the volatility already created by the pandemic.

Climate change risk is a major preoccupation too. Leon Alexander, Partner, says, “Few industries will be affected by climate change as much as the energy, natural resources and marine sectors, which have traditionally been heavily carbon-based. Leaders must stay alert to the ESG, regulatory, transition and liability risks it poses, and ensure their policies on managing those risks are being implemented as a matter of urgency.”

Liability risk is a critical issue for senior leadership at energy and natural resources businesses – more so than for businesses more generally. There is a clear and present danger of climate-related litigation following the high-profile ruling against Shell last year (Milieudefensie et al. v. Royal Dutch Shell plc) in which it was ordered to cut its CO2 emissions. Copycat lawsuits could ensue.

Increased regulation and the transition to a low carbon economy represent substantial challenges for energy and natural resources: especially when it comes to plans to phase out coal. Existing trade routes and flows will need to be replaced as different commodities need to be produced and transported from different locations on alternative modes of transport. All of which will need to be carefully managed from the top to minimise risk and disruption.

ESG risks also have significant implications for the shipping industry, which is considered a major polluter. The International Maritime Organisation has taken steps towards a greener future, but the sector will doubtless come under pressure to become ‘net zero.’

Insights from Clyde & Co

Energy, Marine and Natural Resources

Climate change also impacts staffing issues. Organisations that do not have a clear sustainability agenda may struggle to attract and retain talented graduates and younger staff. Leaders must think about future-proofing their talent pool.

The report's findings on technology risks, especially those relating to cybersecurity, are timely. The energy, natural resources and marine sectors are a prime cyberattack target. Already this year, several oil facilities have been hit, as incidents become more prevalent.

As for technological transformation, the development of drones and autonomous vessels is likely to have greater ramifications for the marine industry than other types of digital developments outlined. "Leaders will need to keep ahead of various legal risks associated with commercial autonomous shipping vessels, many of which are yet to be addressed in what is very much an international industry," says Alexander. "Similarly (and even more pertinently), as the use of drones becomes common, now that they are being trialled to lift loaded 40 foot containers many miles, or in deep mines, there is a new technological risk landscape for GCs, boards and C-Suite executives to navigate in a paradigm where it would be a mistake to assume such risks have already been considered by most international regulators or that such risks are already covered by typical insurance policies."

Contributor

Leon Alexander
Partner, Singapore

Insights from Clyde & Co

Corporate transactions

The risk horizon for Corporate transactions

From a transactional standpoint, the turbulence of Covid-19, the increasing focus on climate change resilience, and the drive towards digital transformation are all combining to put companies' operations and levels of preparedness for risk under more intense scrutiny than ever before.

Prospective buyers should be heightening their M&A due diligence by finding out more, not just about the key risks that business face, but whether the board, CEOs, other C-Suite executives and GCs are aligned on what those risks are, and how ready the business is to deal with them. What is already a very detailed (but paper-based) exercise will require an even deeper dive involving meaningful engagement with different types of senior leaders, as well as with other stakeholders such as staff and suppliers. Sitting down with people and asking questions similar to the ones we have looked at in this report could be a good place to start.

It will be necessary to flush out critical issues such as whether acquisition targets have appropriate climate change strategies and policies in place, if there are critical skills gaps internally, and how remote or hybrid working is handled, including looking at the terms of contracts.

For example, when it comes to climate change, as ESG credentials become as important an area of interest to financial regulators as the accuracy of accounts, that emphasis may start to ripple out to buyers.

"There's an obligation for buyers today to get even more under the hood of a target company, and understand its culture, how the business is driven, how people work and what the plan is for the future," says Stephen McKenna, Partner. "Now more than ever, it's about understanding what you're buying upfront and going in with your eyes open."

Assessing technology resources has become a particular area of focus in the last 18-24 months, as the digital risks and opportunities are increasingly fully appreciated by buyers. In some cases, specialist third parties are being brought in at the due diligence stage or even before to assess everything from whether there are enough computers or if the right software is being implemented, to specialist talent requirements or high-level innovation issues.

Inadequate systems may not necessarily be a dealbreaker if buyers are prepared to make those investments themselves.

However, sellers will be keen to make their business as saleable as possible and should take all these considerations into account early on. It may be necessary to assess whether all leaders are as skilled and knowledgeable as they need to be on critical issues like digital transformation or ESG requirements. This must be demonstrated across the whole leadership, from the board and CEO who determine the strategic vision, to the C-Suite who oversee implementation, and the GCs whose role it is to translate it into robust legal policies and procedures.

Having seen the most M&A activity taking place in healthcare and technology recently, as well as strong demand from owner-managed businesses in sectors like FMCG, oil & gas services and manufacturing to cash out via an exit, confidence is now starting to return more generally. As improving market conditions start to translate into dealmaking, Covid-19 and climate-related risks and digital trends will be well and truly under the microscope. Leaders need to be ready for that close examination.

Contributor

Stephen McKenna
Partner, Abu Dhabi

Insights from Clyde & Co

Disputes

The risk horizon for Disputes

Changed market conditions post-Covid could create fertile ground for disputes. Pandemic-induced disruption left many businesses unable to perform their contractual obligations, but there has so far been a general reluctance by counterparties to pursue claims against them. That could be about to change as economic conditions return to 'normal,' and as boards, CEOs and CFOs are forced to deal with the book of debt that has built up on their balance sheets as their own operations were put under pressure.

"A lot of GCs will be asked: does Covid amount to Force Majeure?" says Richard Power, Partner. "Although it comes down to the governing law of the contract and the facts of each case, there are lots of questions being raised and there is certainly plenty of scope for disputes. Commercial contracts now need to be tightened up and clients are already reviewing their draft wordings".

Though there is little defendants can do in retrospect to prevent a claim being made against them where the circumstances that caused a breach of contract have already arisen, they can be proactive about seeking a settlement. Where performance has been affected by Covid rather than because of some other egregious breach, claimants may be more willing to consider this option.

For some claimants, no matter how strong their case, the chances of obtaining recompense may be slim, if the other party is in a precarious financial position. Another issue is that claimants may not themselves have the cashflow to precipitate litigation or arbitration now, when pay-outs could take years. Leaders may therefore choose to delay taking any legal action yet, so claims could have a long tail.

Alternatively, we are seeing C-Suite and GCs becoming increasingly open to considering novel ways of pursuing claims, such as using no-recovery, no-fee portfolio debt recovery solution. For CFOs, such innovations are an attractive way to deal with debt pressures in a low-risk way with zero upfront cost, while for GCs, they represent an effective means to get results while managing restricted legal budgets.

Whether remote hearings will continue is also an interesting question. If they do, the costs of pursuing claims could be dramatically reduced, and previously unviable claims could become viable.

Rapid deployment of digital technologies to support remote working during the pandemic could also give rise to disputes, especially where the scope of works and deliverables were not properly understood or agreed in the rush.

A decent understanding of technology at the top level – and of the legal issues that surround it – is critical, to ensure that similar problems do not arise going forward.

Similarly, the liability risks emanating from how companies are addressing climate change issues should be properly appreciated by the board and C-Suite. Statements made to the market about climate change policies and emissions must be robust and transparent, and policies need to be implemented from the top down or D&O claims could result. With businesses increasingly expected to consider their Scope 3 emissions created by their supply chains, we're seeing an uptick in climate-conscious contract clauses being considered, such as audit rights over suppliers' own ESG policies and performance. Where this requires a renegotiation of contracts, such moves could prove contentious, especially where there is an unequal bargaining position.

Leaders have much to ponder.

Contributor

Richard Power
Partner, London

Respondent profile

The organisations we have consulted for this year's Looking Glass have a truly global footprint, with half headquartered outside the UK (Asia-Pacific 25%, Europe 9%, North America 11% and Middle East 3%) and with operations across all regions (see table below).

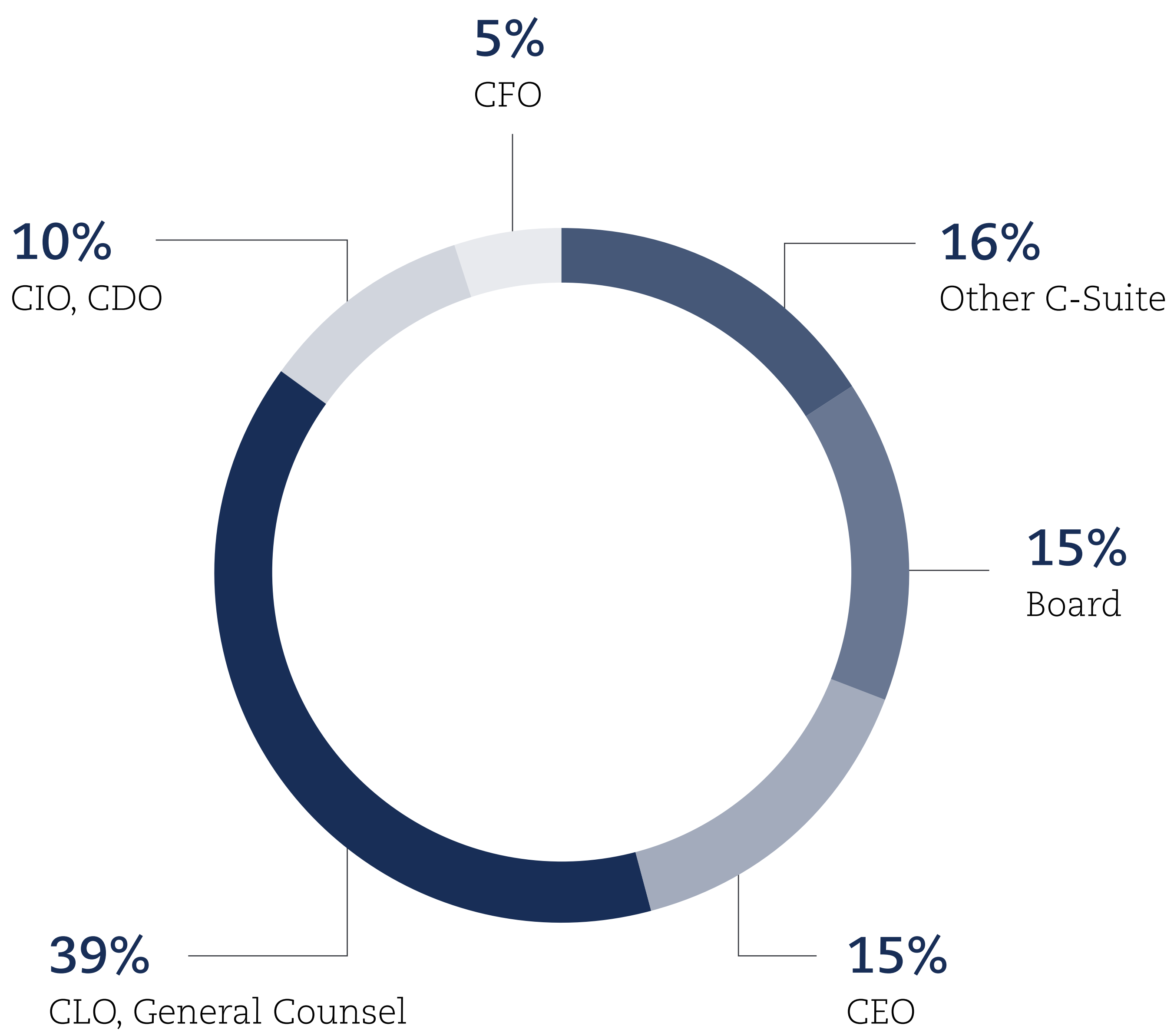
Region	% organisations operating in region
Europe	29%
Asia Pacific /Australasia	26%
North America	18%
Middle East	17%
Africa	13%
South America	14%

Respondents also have extensive individual professional responsibility at a global level (see table below).

Region	% respondents with responsibility in region
Europe	83%
Asia Pacific /Australasia	56%
North America	37%
Middle East	32%
Africa	30%
South America	23%

Respondent profile

Role



Sector

	% respondents
Financial	29%
Business and professional	26%
Government, public sector, charity, non-profit	18%
Construction	17%
Travel & tourism, hospitality	13%
Oil & gas, energy, infrastructure	14%
Healthcare, pharmaceutical	8%
Real estate	7%
Manufacturing	7%
Transportation	6%
ICT, communications	6%
Other	13%

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About Clyde & Co

Clyde & Co is a leading global law firm, specialising in the sectors that underpin global trade and commercial activity, namely: insurance, transport, infrastructure, energy, and trade and commodities. It is globally integrated, offering a comprehensive range of contentious and non-contentious legal services and commercially-minded legal advice to businesses operating across developed and developing markets.

Clyde & Co is committed to operating in a responsible way. This means progressing towards a diverse and inclusive workforce that reflects the diversity of its communities and clients, using its legal skills to support its communities through pro bono work, volunteering and charitable partnerships, and minimising the impact it has on the environment.

The firm has 440 partners, 1800 lawyers, 2500 legal professionals and 4000 staff in over 50 offices [and associated offices] worldwide.

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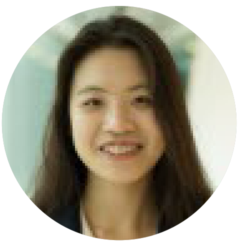

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440

Partners

1,800

Lawyers

4,000

Total staff

50+

Offices worldwide*

www.clydeco.com

*includes associated offices

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