

LEGAL RISK: LAWYERS AS BAROMETERS OF CORPORATE HEALTH

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Left to right: Reyes Cerezo and Miguel Soler



Left to right: Luis García del Río and Pablo Bernad



Left to right: Gonzalo Estampa, Jesús Remón and Manuel Leído



Left to right: David Bara and Santiago del Pino

Category: [In-house news](#)



The future of corporate lawyers is moving towards becoming a strategic function capable of transforming legal risks into opportunities and creating sustainable businesses, agree experts

In recent years, companies have had to adapt to a new economic and regulatory environment, not only having to adjust to difficult domestic market conditions but also to complex and hyper-regulated international markets.

A recent international Study by KPMG – 'Beyond the Law' – looks at the future of the in-house lawyer's role, providing interesting findings and identifying clear trends that are already being reflected in many companies based in Spain. One of the key aspects is the importance that conflict management has within companies, considering the large financial investment required to litigate, as well as in relation to breaches of business relationships.

This issue and more were debated at the recent Iberian Lawyer In-House Club Master Class held Madrid, in collaboration with KPMG Forensic. This brought together a specially invited audience of in-house lawyers and leading external lawyers specialised in conflict management to discuss future trends in the provision of corporate legal services.

The Master Class was an informal and interactive roundtable debate moderated by Pablo Bernad, a Partner at KPMG Forensic, and Luis García del Río, a Partner at García del Río & Larrañaga, with a long history with Repsol, the Spanish energy giant.

The debate focused on the proactive approach to risk, an in-house lawyer's independence, the importance of lawyer involvement in decision-making, and the risks involved in the growth of disclosure and discovery processes.

A 'proactive' approach

When managing risk, there's no instruction book, said Vicente Sierra, a Partner at Freshfields Bruckhaus Deringer. "Risks are on the increase throughout industries, and jurisdictions, and the consequences of non-compliance are growing exponentially, including economic sanctions, reputational damage and imprisonment. And this is the reason why it becomes so essential to benefit from the most adequate professional advice."

Historically, in Spain, lawyers were only called when a problem arose, with companies adopting a reactive rather than a proactive approach. But 'proactivity' has become today's top priority when it comes to early prevention of risks and conflicts.

There are some fundamental elements necessary to ensure that this 'proactivity' is both efficient and effective, say experts. It has to come from the top down, and management needs the resources to be able to deal with both urgent and day-to-day risks and potential conflicts, both domestically and internationally. And the in-house lawyer's role in this process is indispensable.

Independence and involvement

Participants agreed that the key issue to an in-house lawyer's role is having confidence to balance company priorities and risk, while maintaining their independence. García del Río at García del Río & Larrañaga said that an in-house lawyer has to maintain a balance between a company's business needs and market expectation with controlling legal risk.

To do this, however, they must be involved in the decision-making processes and strategy of their companies. "We need to be present so as to be able to advise and facilitate the business, as well as detect risk and give alternatives and solutions," said Reyes Cerezo, Head of Legal and Compliance at Atento.

"If we reflect on problems of our respective sectors, the legal one is exceptional in all senses," said Santiago del Pino, Head of Legal at Sacyr Vallehermoso. "Our companies face big compliance issues especially as we are jumping between jurisdictions and different sectors." But conflicts is a part of day-to-day business, and participants agreed that it is essential that lawyers intervene in the preliminary discussions of any commercial decision.

While lawyers cannot be involved in taking the actual decisions themselves, it is crucial that they present the legal arguments involved so that the decision-maker can take make it in the most informed manner - independence is key to the legal role, said Miguel Soler, Head of Legal at Prosegur Spain. And there is a big difference between providing a legal opinion in a Report to the Board as opposed to being present at the moment the decision is being taken, said García del Río, a Partner at García del Río & Larrañaga. "Every committee should count on the presence of a representative from the internal legal department as lawyers can bring up issues that others are not able to see or anticipate."

Participants stated that although you go into a contract with every intention to comply, it's unrealistic to think that there is a risk of non-compliance. In-house lawyers said that when looking at a contract they can identify those provisions with which they may not comply, and ensure to include provisions to balance this. Which is why being present at the decision-making table is so crucial.

Predicting the future

The responsibilities of risk prevention fall exclusively on in-house lawyers, said Bernad at KPMG Forensic, whether alone or with the help of external law firms.

The starting point is always the contract, participants agreed. Lawyers have to take a pre-contentious perspective when analysing what needs to be included in the contractual terms, and this begins in the first phases of negotiations, said Jesús Remón, a Partner at Uría Menéndez. "If companies don't do that, the contract will not be useful for preventing eventual disputes and for its subsequent solution."

The difficulty of dispute clauses, however, is predicting the possible conflicts that may arise in future, and there is no one formula that works for everything - it depends on factors of each case.

"What I really miss as an in-house lawyer is the presence of a litigator when dealing with dispute clauses," said Maria Segimón, General Counsel for Spain and Portugal at CBRE Global Investors.

"Commercial lawyers are always involved in the contractual negotiations, but when you are dealing with dispute clauses, you need a litigator there or at least for commercial lawyers to discuss with the litigators the most appropriate clause to include as they know how these clauses will actually work in practice – this will vary depending on the different circumstances of the contract and client interests that may need protection in the future."

Participants suggested that corporate lawyers should have a minimum amount of training on litigation matters to be able to help on these aspects. They also leaving the disputes clause until the last minute in negotiations. But the view was that if a company has a standard policy for dealing with disputes then there is no reason they should be 'midnight' clauses – if there is a precedent then that is the standard to be followed at all times.

"Disputes resolution policies should be seen as a part of company strategy," said Javier Fernández-Samaniego, Managing Partner at Bird & Bird. "Multinationals in Spain are already taking the lead from their Anglo-Saxon colleagues and adopting these polices international solutions, but this is not so prevalent in domestic companies."

Disclosure and discovery in disputes

Bernad at KPMG Forensic said that their recent Study showed that one of in-house lawyers' primary concerns surrounds the volume of information involved in discovery and disclosure in litigations and arbitrations.

Five years ago, the topics of disclosure and discovery were not something that the Spanish market was acquainted with. "Big Spanish companies are preparing for more and more disclosure as they currently don't have policies established to be able to use discovery," said Bernad at KPMG, "and in some cases their systems are not prepared to deal with what could be numerous witnesses or complainants."

However, preparations are slow, and this has a great deal to do with the recent Criminal Code Reform. "There has been a brutal movement to adapt to the Code, and everyone spent a great deal of money to do so, but since then everyone has lived the same frustration," said Santiago del Pino, Head of Legal at Sacyr Vallehermoso. "Nothing has really happened since the Code came into force, so in relation to disclosure and discovery, people are waiting to see what happens before preparing so as not to waste more time and money."

Therefore, while great strides have been made in the past year with regards to risk and conflict management, there is more to come. Increasingly complex legislation, the ongoing internationalisation of Spanish companies and the exposure to the Anglo-Saxon and US regimes mean that both in-house lawyers and their external counsel face a wave of challenges and opportunities to contribute to their companies' strategies and success.