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'The Big Two': Big Company Legal and Risk Pros Continue to See Litigation Threats in Cybersecurity and ESG

(L-R)Cyrus Vance Jr. and Peter Tomczak of Baker McKenzie.

By Ross Todd
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Once again, while we here at The Litigation Daily were asking big firm litigators where disputes might pop up in 2023, the folks at **Baker McKenzie** were asking similar questions to in-house legal and risk professionals at large companies.

Yesterday the firm published the results of its sixth annual "The Year Ahead" forecast for disputes around the globe. The survey quizzed more than 600 senior legal and risk leaders from organizations with annual revenue of more than $500 million based in the U.K., U.S., Singapore and Brazil from a half-dozen industry sectors about the sorts of disputes they expect to see in 2023—and whether they're ready for them.

Around the globe, 73% of respondents said they expect the number of corporate lawsuits they face in 2023 to stay the same as last year or decrease—up from 67% who held similar views headed into 2022. While a similar percentage of executives in the United States responded the same way as their colleagues around the globe this year (71%), the U.S. number is actually a slight dip from the 75% who expected disputes to fall or remain flat last year.

While respondents expect dispute volume to remain relatively steady, an increasing portion of respondents expressed a lack of confidence in their organization's preparedness for litigation—a hop from about 30% to more than 33% globally and a leap from 14% to 33% in the U.S.

Some of that relative unease could be fueled by the nature of the disputes respondents expect to see coming. For the second straight year, cybersecurity/data and environmental/social/governance (ESG)—areas of the law with lots of plaintiff-side interest and plenty of moving parts—were most frequently cited as litigation risks. This year 62% of respondents cited cybersecurity and data as a dispute risk and 58% cited ESG. Cyber and ESG were so far ahead of other concerns that the report dubs them "the big two." (Just 37% of respondents mentioned the third-most cited threat, insurance.)

Yesterday we discussed the "big two" with **Cyrus Vance Jr.**, who served three terms as Manhattan District Attorney before joining Baker last year as the global chair of its cybersecurity practice, and **Peter Tomczak**, the chair of the firm's North

America litigation and government enforcement practice group, who is based in Chicago.

On the cyber front, Vance said at the beginning of his tenure as DA "this issue didn't exist."

"We are now 12 years later at a point where there is no business of any size that has any reporting obligations or regulatory interface that doesn't think that cyber is among its biggest concerns. And every board of directors feels exactly the same way," Vance said. He added that in the current landscape the advantage is on the attackers' side and he doesn't see that changing any time soon.

"They are remote. They are operating at machine speed, and they only have to get it right once," he said.

Tomczak, however, pointed out that in some sectors, including energy, mining and infrastructure, and healthcare and life sciences, concerns over ESG disputes actually are more prevalent. Among respondents in the U.S., ESG was actually the most cited litigation risk, at 65% as opposed to cybersecurity at 60%. Tomczak said he suspects that some of the perceived litigation threats from ESG in the U.S. are likely driven by some of the political divisions that have popped up recently around ESG issues. "It's really going to be regulated, at least at present, more by private lawsuits than by sweeping governmental propagations and enactments of laws" in the U.S., Tomczak said.

The ESG litigation he sees surfacing is varied. Tomczak described "conduct-based" litigation where plaintiffs are challenging actions companies are substantively taking. But he also described "disclosure-based" litigation challenging the truthfulness of company statements about ESG commitments or the labeling of their products. He said he also sees "governance-based" litigation, particularly in Delaware, regarding the board's attentiveness to fiduciary duties and oversight to compliance with laws that increasingly reflect ESG principles.

But even short of litigation, Tomczak said companies are increasingly hearing from institutional stakeholders—not necessarily regular plaintiffs—inquiring about board strategy and goals regarding long-term value creation. Those questions, which can give rise to disputes, also address concerns being brought forward by the ESG movement.

But, also on the horizon, Tomczak said he is getting questions about potential "contract-based" ESG disputes. Since many ESG principles are being baked into contractual provisions between companies, he said the potential for contract-based ESG disputes is spreading throughout the global supply chain. "Those are no longer aspirational, but actually contract provisions with real bite, real representations and real ramifications," he said.

Vance, meanwhile, said on the cyber front he's watching to see if litigation evolves out of the failure of critical infrastructure, such as power grids. "As attacks occur and are successful, there may be some deep municipal pockets that may end up as defendants in lawsuits," he said. And he added that as companies, including hospitals, find themselves in attacks that result in injuries or deaths, they could end up litigation targets as well.

"There's some kind of shared responsibility that has yet to be allocated," he said.