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McKenzie.**

Litigation Intelligence: Ready for Anything?

Global Litigation Force

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01 Leveraging Litigation Preparedness

The threat of litigation is coming into sharp relief for global organizations, as they manage new and heightened operating risks.

An explosive combination of factors appears to be driving up both the frequency and value of litigation — including rapid digitalization, rising expectations and accountability in relation to Environmental, Social and Governance (ESG) matters, empowerment of employee and customer voices, and growing enforcement efforts and coordination between global authorities. These issues have only been accelerated by COVID-19, with some organizations beginning to uncover vulnerabilities arising from their response to disruption, and governments under pressure to fill holes in domestic finances.

This is a global phenomenon. Although North American companies have a reputation for willingness to litigate disputes, we are now seeing this trend play out worldwide. Whether by necessity or preference, litigation is an increasingly common reality and, as a result, litigation preparedness has never been more important to success. We know that organizations are best able to manage complex litigation risk when they have a robust response process that can be mobilized quickly once an issue is identified, as well as an awareness of how external and internal change will shift exposure to future litigation risks. Being ready for anything means creating a virtuous circle of understanding and action.

Against this backdrop, we set out to assess the litigation preparedness of global companies and identify opportunities to strengthen their approaches. Our research involving litigation, compliance and legal professionals indicates that readiness strategies and protocols may not be keeping up with the scale of the challenge — in-house teams report a need for more comprehensive and coordinated ways to manage evolving risks. But they are also concerned about a parallel surge in costs — highlighting a potentially problematic conflict that could undermine litigation preparedness.

Better preparation needn't mean bigger budgets. Effective response and planning capabilities support cost consciousness and help to mitigate collateral damage that can arise from litigation. Preparedness is a lever of control and certainty for organizations. This report and the accompanying benchmarking tool make the case for strengthening litigation preparedness — offering insights into key risks and practical steps leaders can take to effect change.



Jennifer Semko,
Partner in Washington DC

92%

of litigation, legal and risk professionals say their organization would benefit from a more effective, coordinated approach to identify, mitigate and prepare for disputes and potential litigation.



Is your organization ready for anything? Identify opportunities to strengthen your company's litigation preparedness and benchmark performance against peers in your sector and market with our new **Litigation Intelligence Tool.**



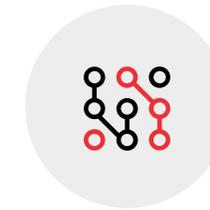
Key Drivers of Litigation



Rapid pivot to digital business models and working arrangements



Increased scrutiny of ESG promises compared to practices



Development of stronger mechanisms to litigate disputes outside North America



Government pressure to extend pandemic relief and fill gaps in public finances



Consumers and employees empowered to air grievances publicly



Greater coordination of global regulation and enforcement with examples of high-value fines

02 Counting the Cost

Organizations that participated in our research spent an average of USD 234 million each on litigation in the past year — including in-house and external counsel costs, relevant organizational infrastructure, judgments and fines. This represents a mean spend of 1.4% of annual company turnover.

Financial Institutions reported the highest litigation costs, followed by companies in the Energy, Mining & Infrastructure (EMI) sector. Both are under pressure from the dual forces of digitalization and sustainability — with pivots to tech-enabled products, services and ways of working, as well as growing scrutiny over environmental and societal impact, opening up new litigation risks.

Despite considerable resources being dedicated to litigation, the overwhelming majority of leaders still see

room for improvement. In fact, 87% of our survey group believe that heightened market risk demands a more structured approach to litigation readiness — expressing concern over shifting market conditions and new commercial and regulatory challenges.

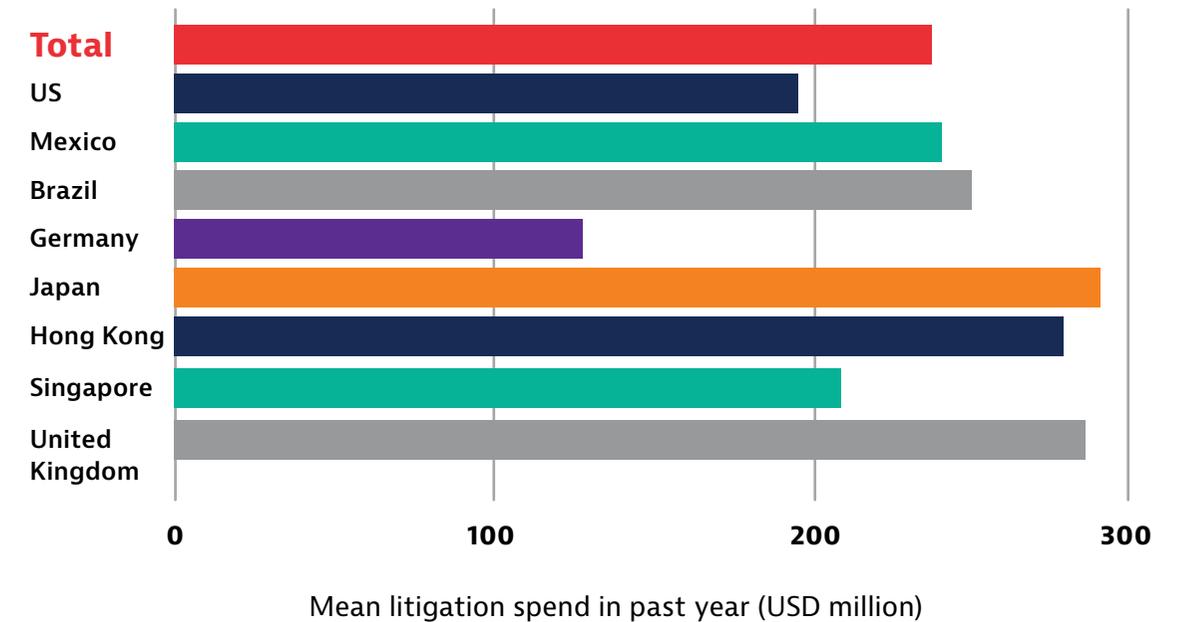
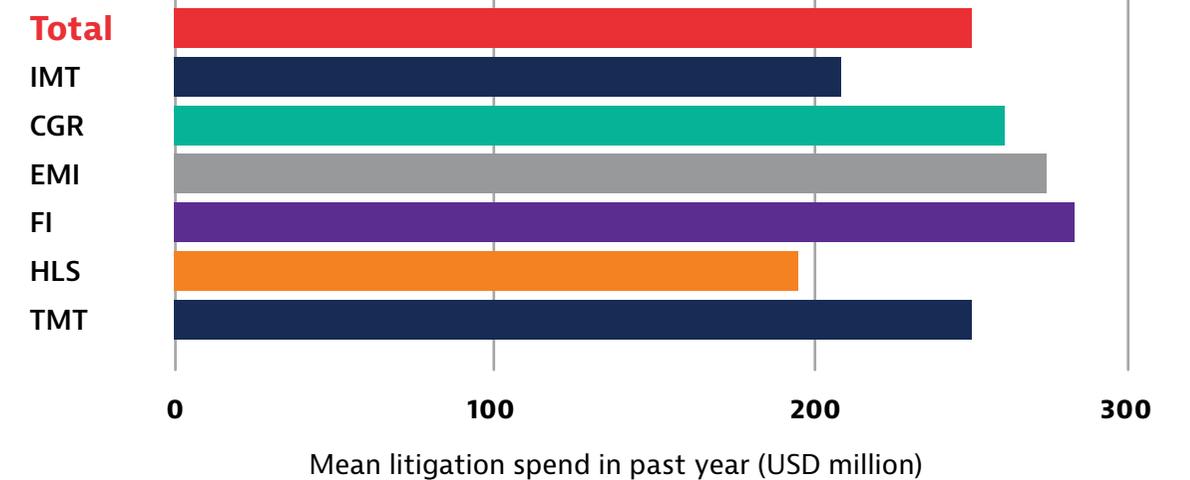
However, fewer than one-third of the same leaders are prepared to proactively identify and mitigate latent litigation risks. Rather than seeking to understand and manage the full extent of organizational exposure, concern over rising costs is driving avoidance. Choosing to remain “in the dark” is likely to prove damaging — leaving many companies vulnerable to litigation without comprehensive plans and tested protocols.

70%

of in-house professionals say that they choose not to identify potential litigation risk for fear of higher costs for their organization.



Annual Litigation Spend



03 Heightened Litigation Risks

Litigation risks mirror emerging issues in the wider market. Cybersecurity and the environment are the top two litigation threats cited by leaders in our research, giving a clear indication of the direction of travel. Managing heightened risk in these areas and across perennial contentious concerns presents a challenge for global organizations as they seek to improve readiness and manage cost.

Disruption arising from the global pandemic has accelerated an existing trend toward digital

transformation across industries. Organizations have long been developing digital routes to market and strengthening technology infrastructure in order to improve efficiency, security and response to customer demand. But the need to reimagine business operations and models overnight — making fast decisions on technology, suppliers and systems — has undoubtedly created new litigation risk, particularly in relation to data privacy and cybersecurity.

“Remote working has been a significant issue for financial institutions — giving rise to risk in relation to both cybersecurity and anti-bribery and corruption. Traditional trading floors are open plan for a reason, so monitoring trades and activity across a dispersed workforce represents a compliance challenge and brings greater risk of data loss and cybersecurity issues. The scale of the challenges associated with the digitalization of financial services is reflected in the European Commission’s draft Digital Operational Resilience Act (DORA), which would set EU-wide standards for digital operational resilience and see critical ICT third-party providers brought within the regulatory perimeter of financial regulators.”

Ed Poulton, Partner in London



By the same token, consumers, shareholders, employees and investors are demanding greater action and accountability in relation to ESG. In addition to mandatory disclosures and complying with sustainability regulation, company leaders are taking voluntary action on core ESG issues to meet stakeholder expectations — including setting ambitious diversity and climate targets and seeking cooperation from suppliers on priority issues. But adherence to ESG-related commitments, is key. Disconnect between promises and reality is a significant source of heightened litigation risk for organizations.

While this research uncovers dominant and universal sources of litigation, it also reveals some notable differences across sectors — with primary litigation

issues offering a picture of the commercial challenges and uncertainty faced in particular industries. For example, organizations operating in the Industrials, Manufacturing & Transportation (IMT) and EMI sectors report that environmental and commercial matters are their greatest litigation threats — reflecting ongoing scrutiny of ESG performance and the prevalence of activist stakeholders, as well as supply chain issues and contractual disputes arising from COVID-19 disruption. Companies in these sectors signal a lower focus on cybersecurity and data risks. However, the digitization of critical power infrastructure and centrality of technology within the Internet of Things and autonomous vehicles is likely to change this calculus in the near future.

“As ESG principles become enshrined in laws, they will become the subjects of the compliance obligations of the company and the directors’ duties of oversight. At the same time, when companies focus on fulfilling mandatory and voluntary standards in relation to ESG, there is growing recognition that those organizations may also be creating long-term value for investors. Long-term company value and sustainability are often intertwined.”

Peter Tomczak, Partner in Chicago and Chair of the North America Litigation and Government Enforcement Practice Group



04 Top Five Greatest Litigation Risks

| | IMT | CGR | EMI | FI | HLS | TMT |
|--------------------|-----|-----|-----|-----|-----|-----|
| Cybersecurity | 24% | 21% | 7% | 83% | 60% | 92% |
| Environmental | 73% | 13% | 85% | 30% | 55% | 21% |
| Commercial | 63% | 34% | 57% | 23% | 39% | 29% |
| Consumer / Product | 27% | 84% | 13% | 27% | 54% | 33% |
| Tax | 33% | 37% | 37% | 35% | 37% | 33% |

| | US | Mexico | Brazil | Germany | Japan | Hong Kong | Singapore | UK |
|--------------------|-----|--------|--------|---------|-------|-----------|-----------|-----|
| Cybersecurity | 46% | 38% | 44% | 40% | 50% | 44% | 58% | 62% |
| Environmental | 46% | 38% | 44% | 40% | 50% | 44% | 58% | 62% |
| Commercial | 52% | 56% | 34% | 44% | 36% | 22% | 52% | 30% |
| Consumer / Product | 38% | 50% | 38% | 40% | 40% | 52% | 26% | 34% |
| Tax | 32% | 38% | 28% | 28% | 52% | 36% | 36% | 34% |

Percentage of respondents that selected each option as a significant litigation threat.



05 Preparing a Coordinated Approach

Hoping for the best is not a viable strategy to achieve litigation readiness and could see costs spiral. It is not possible to eliminate risk entirely, but organizations that understand the dynamic nature of this landscape and take steps to proactively map internal and external trends to identify new potential litigation threats — from consumer and employee complaints to market-based enforcement trends — are better able to allocate resources and anticipate risk.

Similarly, robust and functional litigation processes can mean well-managed cases and contained costs, rather than damaging reputational issues and punitive judgments. Organizations that take a broad, connected approach to managing risks are better able to mobilize when litigation threats emerge — working across silos with effective management systems, protocols and training.

“Litigation threats can come from anywhere. They rarely conform to national borders and seldom come to the attention of a company’s risk management or litigation department from the get-go. With these things in mind, the key to dealing with these threats is making everyone in the organization responsible for spotting and responding to potential risk and improving coordination between the various departments so that emerging issues get addressed quickly and effectively. In large healthcare companies, “siloeing” and dispersion of responsibility often hamper quick and effective response and decision-making that might otherwise head off or mitigate an emerging risk. This is all the more important in the fast moving digital healthcare world that we are now living in. HLS companies must have a greater awareness of risk and better coordination among core business, information security and legal teams.”

Barry Thompson, Partner in Los Angeles

“The pandemic has increased litigation risk for organizations around the world – straining relationships between companies, investors, financiers, employees and suppliers. This risk is particularly apparent for those operating in Asia Pacific. As the production center of the world, many supply chains originate in the region, but legal infrastructure in some of these markets are often not best equipped to manage the kind of high value commercial disputes we have seen arising from COVID-19. Any company working in Asia Pacific should examine commercial agreements through this lens – determining dispute resolution processes and preferred jurisdictions in advance and ensuring that obligations and risks continue to be manageable in this new normal. Litigation preparedness provides organizations with a welcome opportunity to focus – calibrating their approach to reduce priority risks, manage recurring issues and assess current and evolving liabilities over time.”

Nandakumar Ponniya, Partner in Singapore and Head of Dispute Resolution in Asia Pacific



06 Core Dimensions of Litigation Preparedness



Litigation Intelligence Tool — Is your organization ready for anything?

Market disruption and heightened risk have brought the threat of litigation into sharp relief for global organizations, posing a major test for their legal teams and litigation processes.

Companies that are best able to manage complex litigation risk exercise foresight on new areas of exposure and operate robust response procedures that can be mobilized quickly once a threat is identified.

Is your organization ready for anything? We interviewed 400 litigation, compliance and legal leaders in global companies about their preparedness for litigation to provide a benchmark for organizations as they navigate heightened risk and calibrate their response.

Our Litigation Intelligence Tool will help you assess your preparedness compared to others in your industry and identify opportunities to strengthen your approach.

[Visit our Litigation Intelligence Tool](#)



07

Key Steps to Strengthen Litigation Preparedness



Gather Knowledge

Building a clear picture of points of exposure to potential litigation risk will help prioritize action. Use our **Litigation Intelligence Tool** to identify opportunities to improve and understand best practice.



Engage Leaders

Reputational damage as a result of poorly managed litigation can have serious and lasting impact on company brand and stakeholder trust. Therefore, litigation readiness is not just an issue for in-house counsel — it is also relevant for the C-Suite and Boards. Share points of exposure and include leaders in high-level plans.



Cover the Basics

Establish a trained litigation team to coordinate colleagues across departments and consider centralizing and memorializing your approach to litigation in the form of company-wide policies. Ensure that employees are aware of these protocols and understand how to escalate issues appropriately.



Think Global and Local

Effective litigation response often requires multi-jurisdictional consideration of regulation and the legal mechanisms for resolution. Track global litigation trends relevant to your company and create scenario plans to ensure that company policies and procedures are effectively designed to manage these macro litigation threats as well as local issues.



Anticipate Change

Litigation issues are dynamic and evolving. Proactively map internal and external trends to stay on top of risk exposure and reputational issues — considering employee and customer complaints, competition issues, policy and regulatory changes, enforcement patterns and judgments.



Revisit Strategies

Create a virtuous circle of understanding and action. Learn from past litigation handling — addressing failures in response infrastructure and revisiting employee training — and update protocols based on new intelligence.



In Depth: Understanding Primary Litigation Risks

08



Antitrust litigation as a tool of control raises the stakes for TMT

Insights from Francesca Richmond, Partner in London

Technology, Media & Telecommunications (TMT) organizations are experiencing a rise in competition litigation as their activities come under increasing regulatory scrutiny, and as legislation expands the rights of consumers with respect to digital services. That combination — and the perception that TMT companies have the resources to pay out on large damages awards — is attracting interest from funders, law firms and representative bodies interested to pursue mass tort actions.

Litigation is often deployed to force commercial outcomes in unregulated spaces or where the products or services are a pace ahead of regulation. Despite the best efforts of legislators and regulators across jurisdictions, they have struggled to keep pace with the TMT industry or to match the rapid innovation in products and services with regulatory oversight and control. As a result, litigation has been forced forward as a tool to tackle behavior in the industry — whether deployed by consumers, competitors, activist shareholders or NGOs.

TMT operators can be charged as gatekeepers of industry by others — whether in respect of their search engine, social media platform, app store, hardware or software — and, as a result, can attract challenges demanding that they operate in the interests of competitors (both new market entrants and established players). Perceived influence of operators in the digital space has only grown over the course of the pandemic, as culture and commerce move increasingly online. Market uncertainty

associated with COVID-19 has driven new and different areas of risk for TMT organizations: first by accelerating changes across industries — affecting the way we live, work, shop and socialize — and second by throwing into sharper relief the inequities in our society that call to be addressed.

On acceleration of change during the pandemic, companies have moved faster on digital transformation than they might have otherwise, introduced more automation in manufacturing and revised supply chain processes so as not to be captured by constraints on “just-in-time” supply or ability to export goods. TMT companies have continued to grow as they have adapted their offerings to meet these needs. At the same time, the speed of growth and operational change may have forced corners to be cut — raising the possibility that standards will not have been observed in winning business or delivering services, or that existing poor practice will have been exposed.

TMT is also a sector characterized by smaller companies and a “start-up” mentality. That can bring a risk of cultural and employee issues due to overwork, discrimination, lack of consideration applied to horizon-level issues (such as the social and community impacts of the products and services offered), and aggressive or predatory treatment of competitors. This opens up not only a regulatory concern in terms of oversight and sanction but also a wider problem for reputation, investment potential and consumer trust.

Antitrust is a significant litigation risk for 19% of global organizations – defined as an area in which the company is most likely to have to manage a dispute, arbitrate or litigate. This is particularly high in the Consumer Goods and Retail (CGR) and Healthcare and Life Sciences (HLS) sectors (33%) as well as TMT (29%).



09



COVID-19 disruption accelerates employment risk

Insight from Paul Evans, Partner in New York

18% of global organizations report employment as their greatest litigation risk. This is particularly high in Brazil (34%) and the US (26%).

When world economies face challenges, employment litigation claims of all types rise. However, the impact of COVID-19 on work and working life has created an environment that is particularly ripe for claims related to discrimination, retaliation, health and safety and the like.

In a very short period of time, employers were forced to close operations, reimagine how work gets done, right-size workforces to deal with changing demands, safely reopen workplaces and navigate public health issues involving testing and vaccines. The fast pace at which decisions have been and will continue to be made, as well as their unprecedented nature, has and will continue to lead to litigation across the globe.

Pay equity and matters involving diversity, equality and inclusion also continue to dominate discussions at the highest levels of organizations. Coupled with increasing legal disclosure requirements and voluntary disclosures brought about by both a sincere desire to see improvement and public pressure campaigns, the prominence of these issues — and litigation alongside it — has skyrocketed.

To counter rising risk, employers need to be smart — triaging their employment litigation risk to determine and isolate where they face the greatest exposure, in terms of both potential liability and brand impact. This requires actively monitoring industry trends, leveraging

relationships with employee attorneys and union representatives to learn what areas they are targeting and surveying internal employee populations to proactively identify issues that are driving dissatisfaction.

Regularly undertaking this exercise will allow employers to prioritize the types of proactive measures that can insulate the organization from potential employment law crises. Examples include auditing global pay equity to identify and remediate disparities, reviewing and updating key policies, identifying high-risk issues from employee complaints even before litigation, and targeting certain litigation for potential early resolution before it becomes a spark for additional matters.



10



Digital pivots increase exposure to cybersecurity and data litigation

Insights from Paul Glass, Partner in London

Litigation related to data and cybersecurity is rising considerably, as digital transformation expands the technology footprint of companies. The more complex the tech stack — with layers of providers that have a role in hosting, sharing and organizing confidential and personal data — the greater the likelihood of mismanagement and breaches. Data controllers are struggling to manage this risk in a meaningful way and are finding it is not possible to simply outsource liability.

Historically, class actions had been focused on the US and Canada. But adoption of General Data Protection Regulation (GDPR) in Europe and implementation of similar standards elsewhere has empowered more individuals with rights of action. The UK, Netherlands and Australia are all becoming more litigious in this area as a result, with the number of high value data class actions increasing rapidly.

We are particularly likely to see contentious activity arising from COVID-19-related digital pivots. Remote working arrangements and tech-enabled products and services, pivots to e-commerce, and supply chain management technology have been implemented quickly in response to the pandemic, often without full due diligence or consideration of potential gaps in existing cybersecurity systems and IT infrastructure. Expanding and repurposing technology or purchasing new digital

tools always carries risk, but even more so when speed is of the essence. Companies are storing up risk in this regard and must take care to audit and retrospectively address potential liabilities.

Data and cybersecurity concerns become especially problematic where they meet contractual issues. If a ransomware cyberattack interrupts or delays contracted supply, for example, a business may have to deal with disputes with customers as well as regulatory investigation and enforcement. In order to comprehensively manage litigation risk, it is critical that data controllers have a very granular understanding of their data and technology, including relevant consents for use of personal data and where it flows across suppliers and customers and borders.

Cybersecurity is the greatest litigation risk for 48% of global organizations. This is particularly important in the UK (62%) and the TMT (92%) and Financial sectors (83%).



11



ESG litigation — where sustainability promises and commercial responsibilities collide

Insights from Anahita Thoms, Partner in Düsseldorf and Global Lead for Sustainability in Industrials, Manufacturing & Transportation

46% of global organizations report environmental issues as their greatest litigation risk. This is particularly high in Singapore (58%) and the EMI (85%) and IMT sectors (73%).

Navigating where the law ends but market expectations and corporate purpose continue is a uniquely challenging dynamic in relation to ESG and litigation. For example, regarding compliance with legally mandated environmental standards, human rights responsibilities and equality disclosures, companies can find themselves subject to activism, contractual litigation and class actions where they fall short of agreed sustainability standards or public promises.

Companies must look very carefully at the representations they're making around ESG in contracts, with shareholders and in public discourse. In a private law context, the liability regime is mostly based on contractual duties — if the contract stipulates compliance with certain standards, violation of duty in this regard can trigger a damages claim for breach of contract. The best approach for avoiding action is to confirm in advance that a company can live up to specific duties and obligations before agreeing to them. It is also advisable to agree on limitations of liability, in order to make the remaining risk manageable.

Similar principles apply to class actions brought by consumers or activist shareholders. Where there is a gap between message and reality, companies leave themselves vulnerable to challenge. Historically, organizations could describe ESG efforts in terms of absolute goals even though they were aspirational targets. Now, legal and compliance departments play a big role in helping companies to identify, at the board and managerial level, what goals can be measured, what goals are aspirational, what can and cannot be said, and how companies should say it. However, unlike commercial disputes, reputational damage caused by association with a problematic supplier or an organization being found to have contravened their own ESG standards cannot be capped.



12



Governments under pressure signal renewed focus on tax enforcement

Insights from Antonia Azpeitia, Partner in Madrid

The current process of redefining international taxation — including work being done by the OECD and UN — and the unilateral measures around the digital economy, tax protectionism measures deriving from trade wars and transfer pricing are increasing tax litigation risk. In parallel, there is a significant uptick in the amount of information available for tax authorities, thanks to a general increase in the reporting obligations imposed on corporate taxpayers, economic actors and intermediaries.

COVID-19 is accelerating these challenges — creating an economic crisis and budget shortfalls, which create greater need for tax revenue — as well as giving rise to new ones. Understanding the impact on intra-group supply chain and pricing policies, which jurisdictions should absorb extraordinary losses or profits generated by the pandemic and how to justify these decisions to tax agencies worldwide will be critical.

Companies are also becoming more willing to litigate as a result of the excessive aggression of certain tax administrations, improvement of international

mechanisms available to avoid double taxation, potential impact of an apparently minor settlement in other jurisdictions, deferred payment and impact on directors' liability, among other factors.

In this context, preparedness is key. Companies would be wise to start working on their defense file as soon as possible — gathering contemporaneous information and considering potential dissemination to other jurisdictions. It is also useful to educate local people in charge of the regular relationship with in-market tax authorities regarding company policies and protocols in relation to litigation. A wrong initial approach can make the subsequent defense much more difficult.

Tax is a top litigation risk for 36% of global organizations. This is particularly significant in Japan (52%).



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Key Contacts & Research Methodology

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About the Research

Litigation Intelligence: Ready for Anything? is based on an independent opinion survey of 400 litigation, legal and risk leaders in global organizations, including a representative sample in the key markets (US, Mexico, Brazil, Germany, UK, Hong Kong, Japan, and Singapore) and sector groups: (Industrials, Manufacturing & Transportation; Consumer Goods & Retail; Energy, Mining & Infrastructure; Financial Institutions; Healthcare & Life Sciences; and Technology, Media & Telecommunications).

Interviews were conducted in January 2021.



Global Litigation Force

Protecting your business in a global market takes lawyers who can dominate pivotal cases while maintaining broad perspective. Our dispute resolution team comprises battle-tested litigators with deep roots in their home jurisdictions — drawing on the wisdom gained from local training, contacts and cultural understanding to drive your litigation strategy. As part of an integrated global team, we ensure that business objectives aren't sacrificed to one-off wins, and that your reputation for fair dealing remains intact.

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