

RESEARCH: TRENDS & CONCLUSIONS

With the benefit of over 14 years of research and tens of thousands of votes from clients and private practitioners, Who's Who Legal takes a closer look at developing trends in the corporate governance legal marketplace worldwide.

Since our last edition in June 2010, the conduct of financial institutions and investors, the composition and compensation of boards, and their relationship with shareholders have continued to undergo significant changes. Governments and policy makers all over the world have made concerted, and relatively uniform, efforts to introduce legislation, regulations and guidance as a response to the global financial crisis and its perceived causes.

The changes have been promoted by the media as a shift in corporate mentality towards a more responsible, restrained culture. In actuality the changes have not been revolutionary but rather supplementary to pre-existing rules and laws that were previously improperly adhered to. The crisis created a greater focus on governance as it highlighted the complacency in the market and box-ticking approach many institutions and companies took. As a result, there is an opportunity for governments and policy makers to build on the growing body of policy and law to ensure a real change in compliance behaviour.

OVERVIEW

Over months of research we collected thousands of nominations and votes from lawyers, in-house counsel and industry professionals, resulting in the identification of 464 leading practitioners in corporate governance. We feature 53 countries in the research this year, including new additions Qatar and Guatemala.

Traditionally, M&A work involves a degree of corporate governance. Lawyers are tasked not just with facilitating mergers and acquisitions but ensuring parties understand their legal duties and accountability to the new company, its stakeholders, and governing institutions, and where necessary, litigate on their behalf. Not all M&A lawyers advise on governance issues, but most governance specialists are former M&A practitioners who have accrued profound levels of expertise over the course of their careers. Regions with established M&A customs emerge as home to the most compliance experts in the research overall, reflecting the strong overlap in the lawyers listed, market trends and expertise between the two editions. However, we have identified a notable lag in general activity on the governance side while new reforms take effect and legislative regimes find their footing. Lawyers repeatedly mentioned the uncertainty in the market and how it is affecting company board decisions and governance strategies. Brazil bucks the trend: with more lawyers listed this year than last year it has reinforced its reputation as one of the fastest growing emerging markets.

DEVELOPMENTS IN COMPLIANCE: IMPACTS ON ACTIVITY

There has been a marked change in the numbers of lawyers listed from the established M&A centres, such as England and the US, and flourishing jurisdictions. Lawyers consistently remarked

on how the uptick in M&A activity and budding economic growth has prompted – and in some cases required – further consultations and government proposals to improve governance rules. For traditional active regions in the research, it is an opportunity to improve their systems; for emerging countries it is a chance to institute good governance structures to attract international investment.

In general, there has been an international growth in practice of corporate governance. The changes being made to various governance systems are creating a lot of potential work for lawyers in the long-term. We are seeing an emphasis on compliance and conduct as companies strive to meet new procedural requirements. The research has grown to cover more countries as questions of governance, and the need for governance specialists, become more urgent and complex to enable global business to occur.

We examine local matters in greater depth to discover the role governance plays in international business in the aftermath of the global financial crisis.

Leading Countries for 2011: Number of Lawyers Listed

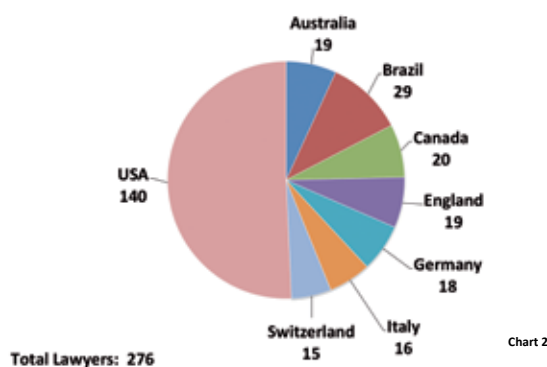


Chart 2

Leading Countries for 2010: Number of Lawyers Listed

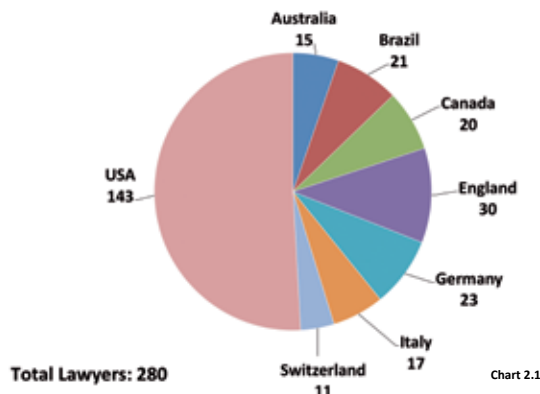


Chart 2.1

BRAZIL

Brazil is the largest country in South America, the fifth most populous nation in the world and enjoys a GDP per head greater than that of India or China. During the global recession the country proved resilient: it experienced rapid growth in employment, as its unemployment rate fell to 5.3% in December 2010 – the lowest on record. Foreign interest in commodities and investment in infrastructure and energy led the surge in employment. Much like Qatar, winning the FIFA World Cup 2014 and the 2016 Olympic Games in Rio de Janeiro has provided Brazil with a golden opportunity to showcase itself to the world. The flagship infrastructure programme aimed at stimulating development and boosting expansion, is creating a lot of work for M&A and governance specialists as it enters its second stage of development in time for the country's upcoming sporting events.

As can be seen in charts 2 and 2.1, the 2010 research featured 21 Brazilian lawyers – a 27% increase from last year in the number listed. This places Brazilian representation second only to the USA in the 2011 research. Leading firms in the country, such as Pinheiro Neto Advogados, Demarest e Almeida Advogados, Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados and Souza Cescon Barriau & Flesch Advogados, all stand out with three listings each. Local lawyers talk of a boost in corporate governance: companies such as Petrobras and Telefónica are seeking advice on creating partnerships with domestic entities, and shareholder agreements, particularly in the aviation and energy industries. As one local lawyer commented, “the country is taking a more sophisticated approach to corporate governance: clients invest more time and money into getting the right people to identify and deal with the correct issues to get the deal right first time”. Policy makers are developing the governance system to support the increase in work: the introduction of further transparency and requirements for financial statements disclosure from Brazil's Securities and Exchange Commission are being viewed domestically as a hard-line measure, but internationally it is regarded as a step in the right direction towards a stronger and more stringent governance regime, in line with that of many developed economies.

AUSTRALIA

In response to the financial crisis the Australian government focused on executive remuneration and gender equality on boards. The regulator has aggressively enforced continuous disclosure laws, and the judiciary has made a number of decisions that have admonished boards or executives for misleading disclosure to the market. The decisions have been described by Bob Austin of Minter Ellison in Sydney as “a wake-up call” for clients. “These kinds of decisions are expanding the practice as it creates calls from directors for advice”. Work has been centred around restructuring governance arrangements, market disclosure issues, remuneration and retirement benefits, AGMs and advising boards on insolvency options. They expect the trend to strengthen over the next 18 months.

SWITZERLAND

In Switzerland, the financial crisis prompted the need for a more distinct corporate governance system outside of its established corporate law. The government has strongly encouraged financial institutions set up specific advisory boards to identify and implement governance principles. Although they are not mandatory, they carry the threat of sanctions for improper implementation. Generally, the industry is more sensitive to these encouragements now than a few years ago and there has been little opposition; on the contrary, private companies are adopting similar governance structures to those found in banks and financial institutions. The Financial Market Supervisory Authority aims to create an advisory body for all entities to use, and replace encouragements with mandatory conditions. Lawyers anticipate this future development by expanding their practice to offer specialised governance advice, for a host of areas in relation to all types of transactions, not just M&A. They recognise their clients' need for more regulatory advice on how governance boards can best deal with shareholder involvement, pay and foreign governance requirements, which has translated into a 26% increase in lawyers listed for this year. The Swiss legal landscape is difficult to navigate as there are few governance precedents so lawyers have to find new solutions to big problems, which calls for innovative and knowledgeable lawyers. Simply, the changes are generating more work than ever.

ENGLAND

England has seen a drop in lawyers included in the publication this year. Due to the transitional period between recommendations being made and legislation and regulations being implemented, clients have been uncertain of the changing market and are waiting to see how they will impact in the medium term. The European Commission's Green paper on Corporate Governance of Financial Institutions has identified a number of failures in the UK corporate market, and the UK government's responses have attracted heated political debate and media attention.

The Department of Business Innovation & Skills produced a consultation in January to further highlight the problems in the UK's corporate environment: short-termism, investor engagement, directors' remuneration and takeovers were the key areas recognised as being in need of improvement. Largely, practitioners agree that changes are necessary but there is contention about how proportionate the methods are in resolving these problems. Changes to corporate reporting and audits were proposed early this year by the Financial Reporting Council (FRC) aimed at improving the quality of information and enhancing transparency by requiring fuller reports by auditing commissions – in short, to report all information to stakeholders, not just financial. Lawyers believe this is a requirement that clients, particularly investors, will be uncomfortable complying with as the degree of disclosure that it calls for may pose potential problems for clients in the investment field.

There is the added complication of shareholder engagement. The FRC has expressed concern about how directors engage with shareholders, how much information they are privy to and their inclusion in decision making. Two US judicial decisions have raised the matter of shareholder activism once again (*Air Products and Chemicals, Inc v Airgas* and *In Re Del Monte Foods Co*), which is fuelling shareholder advisory and litigation work, according to both US and UK lawyers. Ultimately, the belief of many lawyers is that good engagement is done behind closed doors, but once they are public, relations have already soured. The research identifies an increasing trend for shareholder groups to openly challenge the board's decisions, and although shareholders can nominate new directors via independent, self-funded solicitations, lawyers believe it is only a matter of time before they have the right to do so through the company. Generally, an increase in activism leads to more litigation and even to more M&A work as companies leave themselves open to takeovers. A tougher approach from regulatory bodies in the US and UK is expected this year.

Remuneration is another hot topic identified in our research. Director pay has been a contentious issue, publicly and politically. According to one lawyer, what the market in England has failed to do is to achieve a balance between sensible reward for good performance and competitive recruitment. As in the US, there is no cap on executive pay and nor will there be: the focus has been on increasing the involvement of non-executive directors in the UK, and establishing independent remuneration committees in the US. Lawyers we spoke to were pessimistic about the proposals: generally the view is that they are the result of political agenda reacting to public outcry, and in the long term will damage the international competitiveness of the UK financial market.

In short, London-based lawyers believe there is a risk of over-regulation in the UK and too much uncertainty, "legislation cannot force good behaviour", in the words of one London lawyer. "The UK rules are some of the toughest in Europe already. There will be a resistance against prescriptive rules in Europe; convergence across member states is unlikely since the proposals are so political in nature". But this is not to say more governance measures are unwelcome or standards are not being raised. Since the early 1990s, starting with the Cadbury Report, there has been an ongoing trend to adopt better, and more tailored governance strategies in the country. But lawyers stress the need for change that actually drives boards to be more aware of governance issues: substantive change must be smart change. Ultimately clients are worried about increasing their costs without feeling confident it will pay off in the long term. 2010 was the 'year of the crisis' as one London contributor labelled it: in the age of social networking and Wikileaks, boards are increasingly apprehensive of data infringement losses and disclosure. There needs to be more focus on risk-management, decision-making by the right people and reliance on sound information.

GERMANY

In Germany, restructuring of banks and disposition of bad assets

has been the mainstay of practice for corporate governance lawyers. The Euro crises depressed corporate ventures in the German market, but contributors hope that integration and compliance will generate more work in the future. Barring further Euro crises, lawyers expect activity to improve over the next 18 months. Further, in line with parts of Europe, the country is reforming its remuneration system for directors of financial institutions, currently capped at €500,000 per year. In a move to make decision-makers more responsible for a company's successes and failures a clawback mechanism has been introduced to allow supervisory boards to recover some remuneration if the company's performance is worse than expected. Significantly, shareholders can apply the mechanism if the board refuses to do so. Lawyers report that clawbacks are being used, although cautiously and with mixed results, but it is viewed as an undeniable growth in shareholder power in the country.

USA

The United States has experienced major legislative changes in the past two years, the effects of which are now becoming clearer. The enactment of the Dodd - Frank Act 2010 has compelled companies to accept and comply with a new regime, aided by lawyers. We featured 143 US-based lawyers in the 2010 edition, and 140 this year; however the composition of the nominees has changed.

As can be seen in chart 3, New York entries fell by over 20%. It is generally accepted that the culture of poor internal standards and irresponsible director behaviour had to change. The financial industry, particularly large companies, is paying a heavy price of strict regulation for its years of relative freedom.

Leading US States: Previous Editions

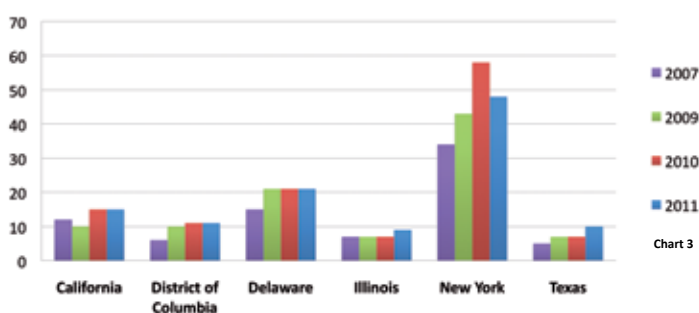


Chart 3

Regulatory specialists in New York remark that the crisis has rightly heightened clients' responsiveness to regulation but criticise the added government control that has come with it. President Obama limited the number of bank takeovers in order to prevent the formation of banks potentially too big to fail, and gave the Federal Reserve powers to enhance prudential standards, such as disclosure requirements and debt limits. Again, lawyers are concerned about over-regulation of the industry: the uncertainty surrounding the new regulations slowed down corporate work, but the improving economy has meant fewer bankruptcies, investigations and lawsuits. As companies become more familiar with the legislation and courts rule on it, there

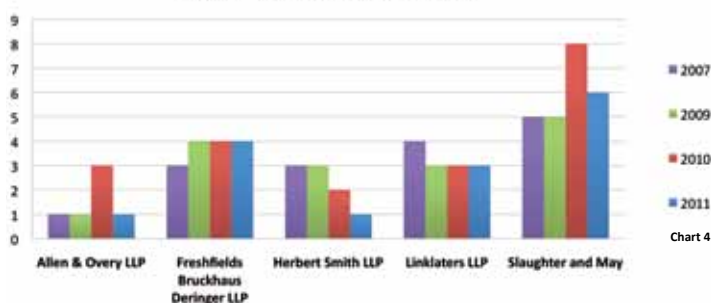
will be a need for more legal guidance as to its application. Despite the Dodd-Frank Act, it seems to be generally business as usual for the industry and directors. New York lawyers expect to see more transactions, compliance issues and shareholder activism in the next year.

Illinois and Texas have enjoyed more prominence in the research this year. Texas saw a 30% increase in the number of lawyers featured this year, and Illinois had an increase of over 20%. Lawyers spoke of the need to widen the net beyond traditional financial centres: more expertise is being developed outside of New York and DC. As one Chicago-based contributor said, "the biggest change is the globalisation of corporate governance practice". Major industrial cities such as Houston and Chicago are viewed as important in rebuilding the reputation of institutions and companies in the US.

FIRM ANALYSIS

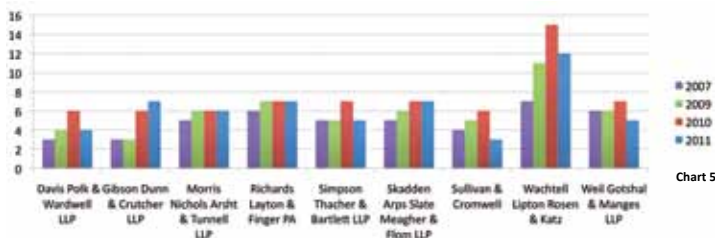
The UK representation – comprised of the England research – has not seen much change over the past four editions. Freshfields Bruckhaus Deringer LLP and Linklaters LLP maintain a steady number of nominations across the years and Slaughter and May consistently lead the UK research.

Leading firms in England: previous editions



In the US, traditional M&A firms, such as Wachtell Lipton Rosen & Katz, and Skadden Arps Slate Meagher & Flom LLP are doing well from the uptick in that area. As chart 5 illustrates, Morris Nichols Arsht & Tunnell LLP and Richards Layton & Finger PA remain the leading Delaware firms in our research for corporate work this year; while the other firms in the chart are unchanged or experience a marginal drop in inclusions. Generally, this suggests the market was able to withstand or recover from difficult market conditions, particularly the Delaware firms, which were the most unchanged across the three previous editions.

Leading Firms in the US: previous editions



Two prominent trends have been identified from our research: there will be a greater degree of regulatory scrutiny and information sharing and shareholder activism will strengthen over the year.

From the European perspective, increased scrutiny is already being experienced but the verdict on the "comply and explain" regime is still out – there is an expectation that the European Union will consider making the regime a compulsory requirement, despite a Europe-wide governance model being unpopular among lawyers. A further concern is the UK Bribery Act, which will be in force from July 2011. Lawyers anticipate an increase in both national and overseas demand for advice on compliance and due diligence on third parties. This is a concern that emerging countries will have to consider in the course of doing business. Tied into this is the level of information available to boards, the composition of decision-making bodies and their review processes. Shareholders have already exhibited a level of dissatisfaction with decision making and are looking to obtain more rights. The information accessible to boards will dominate their governance strategy and internal conduct.

Lawyers are keen to draw out the positives as well as lament the negatives: the industry must promote corporate governance where it is done well, such as the Barclays Audit of 2010, which was viewed as an unusually candid report that offered more than the typical box-ticking explanations often found in such audits. They stress that over-regulation is a real threat to the integrity of the industry: imposing more rules will not effect real change, it must be internal and ultimately the question will not be 'should we comply?' but 'how will we comply?' Presently, governance work is inextricably linked to M&A work, but in time it will require law firms to develop more distinct expertise, dedicated governance teams and a better understanding of global governance practices.