

ADVISORY BOARD

Kenneth Tung

BIOGRAPHY

Kenneth Tung, Founder and Chief Strategy Officer, In-Gear Legalytics Limited

As a lawyer with almost three decades in commerce, Kenny has embarked on a journey that has seen him play many roles, including lawyer, business manager, ideas curator, evangelist, strategist and solution provider. Kenny is seen as someone who relates to a broad range of disciplines and naturally gravitates to a holistic approach to solving problems.

He believes that the legal service industry will change at an accelerating rate and decided to dedicate the rest of his career playing a role in this transformation. Upon graduation from Columbia University School of Law, Kenny practiced in New York City with Coopers & Lybrand International Tax Group and Goodman Phillips & Vineberg, before joining Coudert Brothers in China. After having worked on landmark projects such as negotiating the Shanghai GM JVs, he moved in-house (in search of what happens before and after business engagements with external counsel) and served as the regional GC for Kodak, Honeywell, Goodyear and PepsiCo in various geographies and business units.

After serving as the Chief Legal Counsel at Geely Holding, working primarily on new projects and strategies around the world, Kenny has been the ad hoc GC under Lex Sigma Ltd. advising top global industrial and financial players on strategic and business-critical issues and projects in Asia.

Together with Bill Novomisle, Kenny co-founded In-Gear Legalytics Limited to help bring efficacy and efficiency to existing and new providers of legal services. In a career inside multinational companies for almost two decades, Kenny has been building on his business and law experience and learned about driving process and efficiency in complex organizations. In-Gear has been advising clients such as a Magic Circle law firm and the top media player in India.

Born in Hong Kong to parents who left mainland China in the 1940s, Kenny went to a Chinese school before leaving for the U.S. to attend Choate and then college and law school at Columbia University

KENNETH TUNG'S FIVE BIG IDEAS IN COMPLIANCE MANAGEMENT

In 1997, when the author took up his first regional general counsel role, among the inheritance from his predecessor was a general memo on the FCPA. The author duly studied and learned from the memo, but compliance matters as we know it today did not take up a major part of his responsibilities. In 2005 in New York, the author spoke at his first conference on compliance, not so much for any experience in investigations or negotiating with the DOJ & SEC, but more as a voice from the business. Since then, the following five topics have been stirring in the author's mind, some of these informed by new developments such as technology and behavioral science, but all top of mind ideas that may shed a light on why compliance can be a strategic corporate function.

This is because compliance is much more than a check-the-box cost center with policy wonks who are designated as the conscience of their organizations or called upon to ceremonially pull the "stop" handle long after the problem became too big to fix. An effective compliance program flies off the page to imbue decisions even in day-to-day activities and permeate the organization. Compliance is part of everyone's job, and therefore is about inducing everyone in an organization to triage and trade off, not just about simple do's and don'ts and records on training sessions. Compliance cannot be summed up by merely a declaration of "zero tolerance", a list of company values or keeping a steady hand on reputational risks. It has context and is an integral part of a sustainable strategy to achieve an organization's goals, be it business models to achieve profits or policy implementation to deliver public good.

I. FINDING A COMPLIANCE STRATEGY & DEFINING THE FUNCTION

Self-regulation existed arguably since the beginning of human time (the Golden Rule), an example being the guilds in Middle Ages and their equivalents in ancient civilizations. However, the compliance role has been a relatively new profession in the business world as recruiters around the world would tell us. Born in an ambit much broader than public accounting function, compliance faces myriad and proliferating government regulations as well as labors to anticipate socio-economic forces, now ricocheting at the speed of social media.

A conversation about principal approaches to compliance helps to illustrate the headaches of chief compliance officers. Take the FCPA in the U.S., the journey so far does not paint a proud picture of compliance – fines, monitors, bigger fines, reputational risks (some impact on a listed company's stock price and abilities to do business), closing

down the third parties and other willful ignorance excuses, whistleblowers protection and incentives (to tell on businesses), criminal sanctions for individuals¹, rejection of paper-only/public relations like compliance programs,² and recently credits for companies to point out individual liabilities (the Yates memo). It reads like a Hollywood script for *Godfather* with the Fed's strategy in pushing the gangsters to testify against each other under the Racketeer Influenced and Corrupt Organizations (RICO) Act. Has our compliance effort come to this?

Behind closed doors, seasoned compliance leaders have been drawn into heated debates and form battle lines about whether a company's compliance policy and practice should accomplish just enough to meet the common denominators of regulatory expectations from relevant jurisdictions or be driven by a "true north" standard above all applicable laws. One point the people in the arena do agree on: many have experienced the frustration of the whack-a-mole school of compliance which is an untenable strategy.

In this light, organizations, whether businesses, NGOs and international sport associations are going through the growing pains in determining how their compliance departments fit into the organizational structure. For example, whether the chief compliance officers should report to an organization's board or its CEO has been discussed as a "hot topic". While this determination raises the awareness to develop compliance function into more than a "window dressing" exercise (or a pretty vase, as in a Chinese saying), this topic may turn out to be a red herring. The trade-off between independence and effectiveness needs to be managed from the highest governing bodies down through the organizations, regardless of which reporting line may be adopted.

A more useful focus may be to define the purpose of a compliance function and how it fits along the organization's strategy and reason for existence. More on this later.

II. GLOBALIZATION

As technologies that thrive upon the internet converge to bring us into the Information Age (following the Agricultural & Industrial Ages), the world has experienced the highest level of global trade, financial flows and information exchanges that history has witnessed. Also going global are fraud opportunities, validating the universality of human natures that underpin the fraud triangle.

Next, hot on the heels, it will not be a surprise to see law enforcement to go global. The U.S. has led by decades in the international application of antitrust, anti-corruption and sanctions laws. Back in a less international world, some of these applications were perceived as downright bullying attempts to exercise long arm jurisdiction. Today, we have

¹ Compare in China application of criminal liabilities for corporate executives who know or have reason to know wrongdoings.

² See, e.g., *Evaluation of Corporate Compliance Programs* recently issued by the U.S. DOJ.

regular cooperation among national authorities exchanging information and even coordinating prosecutions and extraditions, perhaps driven in part by the contributions of the fines to the fisc. Together with international anti-money laundering networks, driven in part by terrorist activities, these three “anti’s” form a triad of a global law enforcement that is worthy of comparison with the Interpol.

This brings multiple risks, and multiple-jeopardies, to companies that operate in multiple jurisdictions. It is not uncommon today to hear about coordination with other parts of a company or its HQ before deciding on responses to investigation, allegations or whistleblowing reports in a particular country, voluntarily disclosure in one jurisdiction versus another, the pressure of the game of being the first to disclose, etc., all snowballing into a complex calculus.

Western multinationals have been among the firsts to tackle the challenges and discontinuities of cultural, practical and legal aspects of these compliance issues. Now multinationals from emerging markets are paying attention to adapt to the expectations and regimes in the west where they are becoming significant investors. It is during these times and circumstances that compliance leaders must be conversant with and guided by their respective organizations’ globalization business strategy, if only to prioritize solutions and decide on trade-offs.

III. DATA ANALYTICS, ARTIFICIAL INTELLIGENCE (AI) AND TECHNOLOGY

Among the fanfare of compliance management systems and IT augmented risk management systems, witness JP Morgan’s 2015 announcement of a billion-dollar investment in a system, including algorithms that help to predict employees’ rogue activities before the employees themselves commit any wrongdoing. Think of the Pre-Crime team in the movie, *Minority Report*.

Under a more prosaic view, many companies have been deploying compliance systems to chew through structured and increasingly unstructured data generated by the organizations. The systems enable the companies to investigate and, to some extent, prevent wrongdoing, and to support the notion that their compliance systems have met standards of an effective compliance program in practice prescribed by the authorities.

Before compliance teams go out to select one of these compliance management systems from the bewildering range of offerings, it would behoove us to distinguish among system/platform, process and people. Here lies the hard-learned lesson that a significant proportion of technology deployment fails. More precisely, technology famously failed in adoption by many organizations. One only needs to picture a cart before a horse as an organization suits up in technology, often with vendors who don’t understand the beginnings of the company’s business strategy and operations, and little to no appreciation by the relevant function (here being legal and compliance) and the implementation agents of the job to be done by the entire organization.

So the starting point for compliance is to work with the rest of the organization to appreciate the workings of the body of a patient that we call the business of the organization - the strategies being deployed at any one time, the strategic initiatives, their implementation and day-to-day operations that follow. From there compliance needs to sort through how various parts of the organization are set up to do their jobs, how compliance mandates will impact such activities, solving conflicts, assessing trade-offs in various solutions and persevering in the change management required to implement these compliance mandates.

Only then will we have the blue print to talk to vendors and technology experts about a system that is informed by such insights to automate and augment a compliance program. This will of course require access to talents in the data analytics field that are in short supply, decisions on IT systems that suit the organization's people and processes in a dynamic business road map, and contending with cultural stereotypes and bias that stick only with anecdotes, judgment and intuition and resist to consider data and computing power.

For those who are lucky enough to work in more data sophisticated organizations, they may even be able to design a compliance system that will convert colleagues' perception of legal & compliance resources from being un-parsable and unhelpful to meeting today clients' expectation in terms of providing instant access, seamless interoperability, mobile connectivity, and an intuitively obvious user experience.

In the broader business world and across industries, the above is not a recent discovery, but the compliance function's recognition of what technology may involve as a big idea will be an important step in the right direction.

IV. EMOTIONAL INTELLIGENCE (EI)

This concept dovetails into the discussion above on AI augmented fraud detection technologies. As the Tom Cruises in the Pre-Crime - ahem - compliance department profile likely offenders before the proto-offenders commit the offense, we should also delve deeper into the fraud triangle to understand how to deter non-compliant behaviors and align the rest of the organization, from social forces to whistleblowers psychology, to address root causes and perceptions of compliance.

In addition to data analytics, compliance functions and supporting professionals can and should leverage recent advances in behavioral sciences, whether from the field of economics or behavioral science. For example, connecting parts of the organization to the perspective of an offender, before, during and after apprehension brings out the human angle of what compliance needs to address, beyond some box checking routine, abstract anecdotes and case studies.

In many cultures, the compliance function has to turn around the tribal and deep seated feelings that compliance serves as the tool of the corporate hierarchy, out there to scapegoat the under-informed and unfortunate who get caught in the bureaucratic net with

some minor and victimless infractions, and to make the boss's look good in maintaining "zero tolerance". Everyone in the organization pulling for compliance makes the difference between being against the tide and with the tide.

The application of behavioral science touches every corner of an organization. This is because compliance is everyone's job. But at the same time, the compliance function needs to take leadership in this effort.

V. CORPORATE LEGAL/COMPLIANCE STRATEGY

The point above on defining the compliance strategy and function goes hand-in-hand with business strategies of an enterprise or, in case of a non-commercial organization, its mission and strategies.

The idea here is not to emphasize that the tail should not wag the dog or that no business has room for conscience. It is to lead with the reason of existence of the organization. Whether in a world with a developed socio-economic environment that has been cultivating generations of citizens who share a political culture that values the rule of law or in the "wild west" where might still makes right, all organizations have a job to be done. Compliance must advance and be an integral part of the reason for existence of the organization, not only just to help avoid fines and reputational damage.

A similar argument has been made for corporate social responsibility – that it is not just charity, public relations or some feel-good aspects of social media marketing. A CSR that gets traction is one that gets in-gear with one or more core strategies of a business.

The same goes for compliance.

Moreover, for a compliance effort to be successful, it must work through the business models, operations, people and processes lest it will just end up as a compliance program on paper only. That means compliance must cross silos. Being deeply connected to and driven by the organization's strategy will give a fighting chance to initiate and reach understanding with the rest of the organization and to achieve the delicate balance under a common purpose. Speaking the same language as those in charge of the business of the organization will also help to avoid the all too common phenomenon of the "tone at the top" diluting into "muddle in the middle" and ending up in "baffle at the bottom".

To this end the compliance function, like corporate legal departments, has first to assess and fill in the gaps its current capabilities.

The punch list for gap closure is not long but fundamentally includes many "business" competence. Compliance professionals, whether or not lawyers, must debunk the expectation and perception that we operate like lone wolves rather than as members of teams who must trust and delegate. We need to stop leading only with the rules and regulations and adopt the mind frame of an owner who is driven to make the business

model work, and if necessary reinvent a business model that can circumvent external barriers, whether or not founded on laws and regulations. That is to say, be someone who can navigate the spheres of rules, business needs and facts with equal fluency.

It is only on the basis of having realized these ideas can an organization gain the credibility to discuss “zero tolerance”.