

# 「The Year Ahead Global Disputes Forecast 2023」

# Foreword

Welcome to the sixth annual edition of The Year Ahead. As always, this report sets out our predictions for the world of litigation and arbitration for the next twelve months.

As we have navigated the challenges of Covid, lockdowns, war in Europe and high inflation, it seems that uncertainty is the new certainty. New legal developments around the world have further complicated the commercial environment.

To help understand these trends, we feature legal analysis drawn from our extensive global network. We have also drawn upon

survey data from 600 senior disputes lawyers at large corporations across four continents.

We reveal that while corporations expect more disputes, they continue to feel unprepared. The economic cycle has replaced Covid as the main driver of disputes, and there are new trends around Environmental, Social and Governance disputes. We also show which industry sectors face new disputes threats, and which jurisdictions will see new legal developments.

We look forward to working with you in The Year Ahead.



**Claudia Benavides**  
Global Chair,  
Dispute Resolution

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# The Big Picture

## Economic, Political and Legal Trends

The impact of **Covid** is receding in many parts of the world, but not all. China's economy is cooling, partly due to its zero-Covid policy. And as one threat recedes, others emerge. Supply chain disruption caused by Covid, along with Russia's invasion of Ukraine and the energy crisis in Europe, have led to widespread **global inflation**.

Central banks have reacted with **interest rate** rises, bringing to an end the era of cheap money which has existed in many economies since the financial crisis of 2008. The Organisation for Economic Co-Operation and Development (OECD) predicts annual growth in the world economy of just 2.2% in 2023, well below historic trends.

**Global trade** has taken a knock, as governments place greater value on security of supply, and deploy international trade and sanctions as a means to drive political objectives overseas. Corporations are focusing on supply chain resilience, given ongoing challenges.

Covid also accelerated the process of **digital transformation**. Many global organizations pivoted to new business models in response to disruption, building new products and services, and making strategic acquisitions. The world of work has changed, with greater emphasis on workforce flexibility, and growing **labor shortages**.

However, labor shortages are likely to ease as economic growth slows. Several developed countries, particularly in Europe, are forecast to enter **recession** this year. Businesses are already preparing by reducing headcount.

This is a time of great change, and this change has placed **corporations under strain**. Many are renegotiating deals that no longer work in the current environment, forging new partnerships as they adjust operational and business structures, or divesting assets.

As usual, these trends have an impact on **international disputes**. The initial wave of Covid-related cases concerning commercial contracts and securities has given way to

a broader range of disputes around supply chains, construction projects, employment issues and sanctions. We anticipate an increase in fraud, insolvency and insurance claims.

The legal world itself has not stood still, particularly on **jurisdictional issues**. Russian courts have ruled that sanctions imposed on Russian entities are a basis to avoid jurisdiction agreements. The obligations of EU countries under international investment treaties are regularly being breached as the EU courts and institutions seek to assert their jurisdictional dominance. The government of Dubai abolished a widely-used and respected arbitration institution, leaving disputes clauses pointing to a non-existent body.

We will also see changes to **litigation funding** in 2023. Some jurisdictions are approaching maturity, with established standards and the development of secondary markets. Others are still trying to find the correct regulatory balance. And the stream of cheap capital which has flooded towards funders in recent years may now begin to recede.

# What Types of Disputes, and How Many?

To support this report, we surveyed 600 senior lawyers from large organizations around the world, asking their views on the key disputes risks in the next twelve months. 82% of respondents expected the **number of disputes** in 2023 to either stay the same or increase. Only 17% of respondents expected

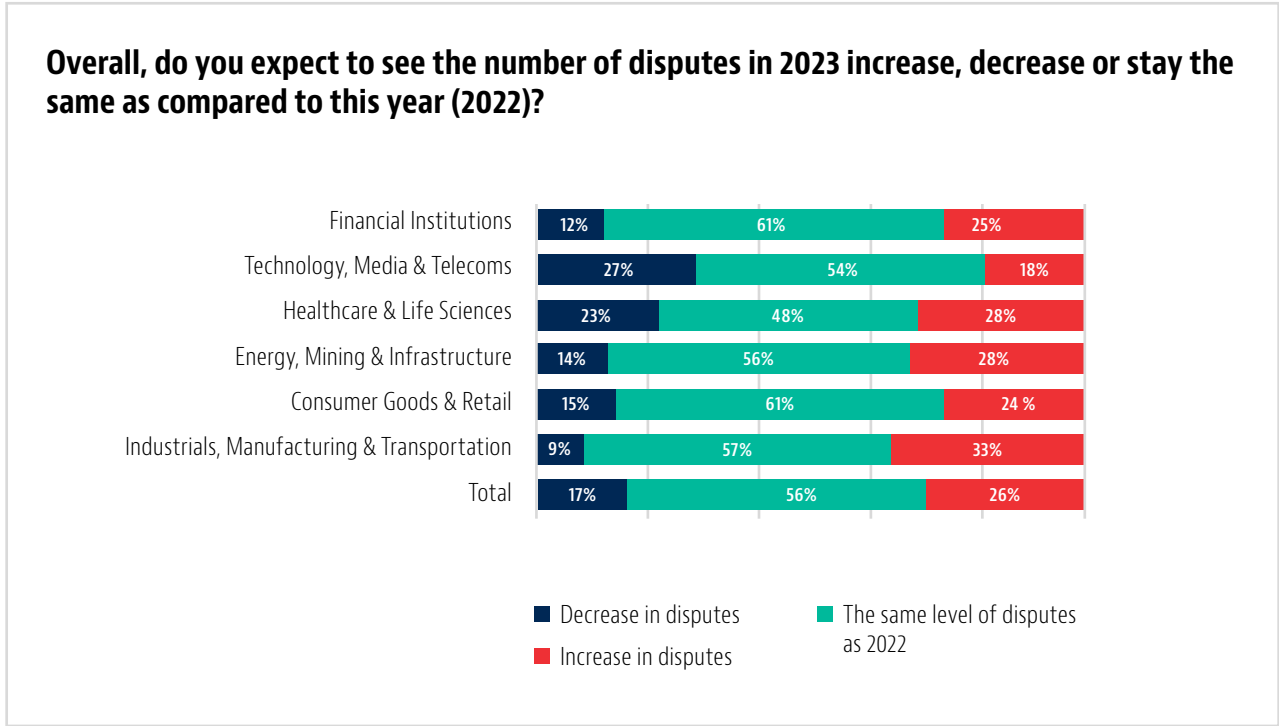
a decrease. This was a consistent view across all geographic locations, but results varied significantly by industry.

The Industrials, Manufacturing and Transportation sector showed the greatest balance towards future increases.

Technology, Media and Telecoms was the only sector to show an overall balance towards falling volumes.

We also asked what **types of disputes** present a risk to respondents' organizations in 2023. The results were clear: cybersecurity and data disputes are the primary risks. Environmental, social and governance disputes are a close second.

The "big two" mirror our results from [last year](#). However, there are important changes. In some industry sectors, such as Energy, Mining and Infrastructure, and Healthcare and Life Sciences, concerns over **ESG disputes** now surpass those for cybersecurity and data. Organizations are also concerned about different types of ESG disputes to those they most feared 12 months ago.



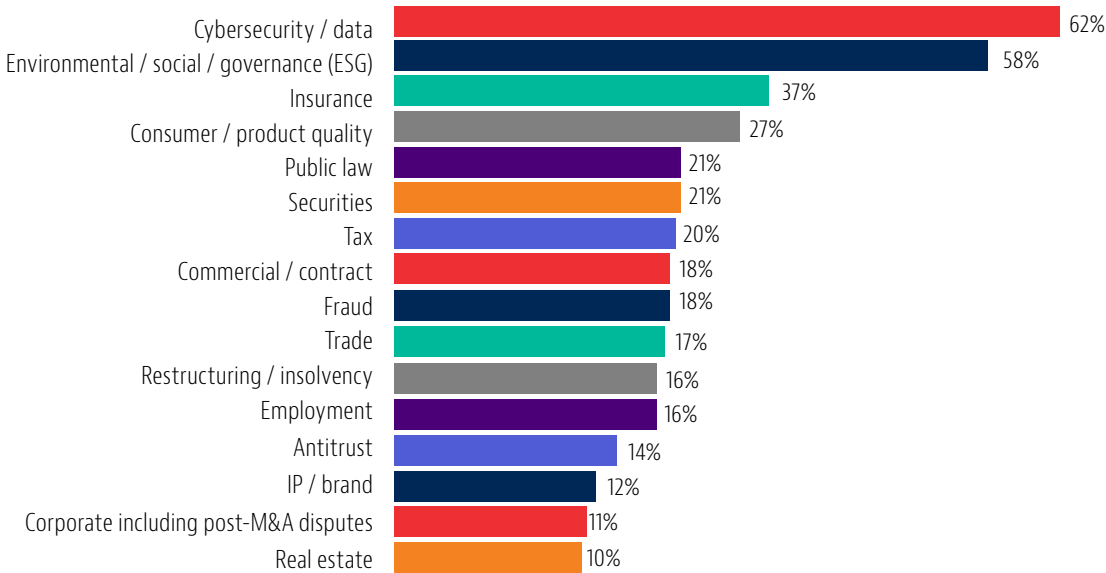


Environmental disputes are important, but corporations are now more concerned about **governance disputes**.

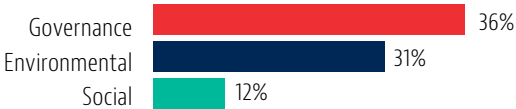
Governance risks go to the heart of an organization’s decision-making and culture. Cases that attack a corporation’s integrity in the market can have high reputational stakes, and sometimes existential risks.

**Insurance disputes** make up the top three, in a significant rise from last year’s survey (from 26% in 2022 to 35% in 2023). Insurance and reinsurance disputes typically rise when the economy cools; claims thresholds are triggered and organizations look to recover losses. Other types of disputes near the top of the list include product quality, public law, securities and tax.

What types of disputes present a risk to your organization in 2023?



What types of disputes present a risk to your organization in 2023?  
(Breakdown of ESG risk)



# External Factors Posing Disputes Threats

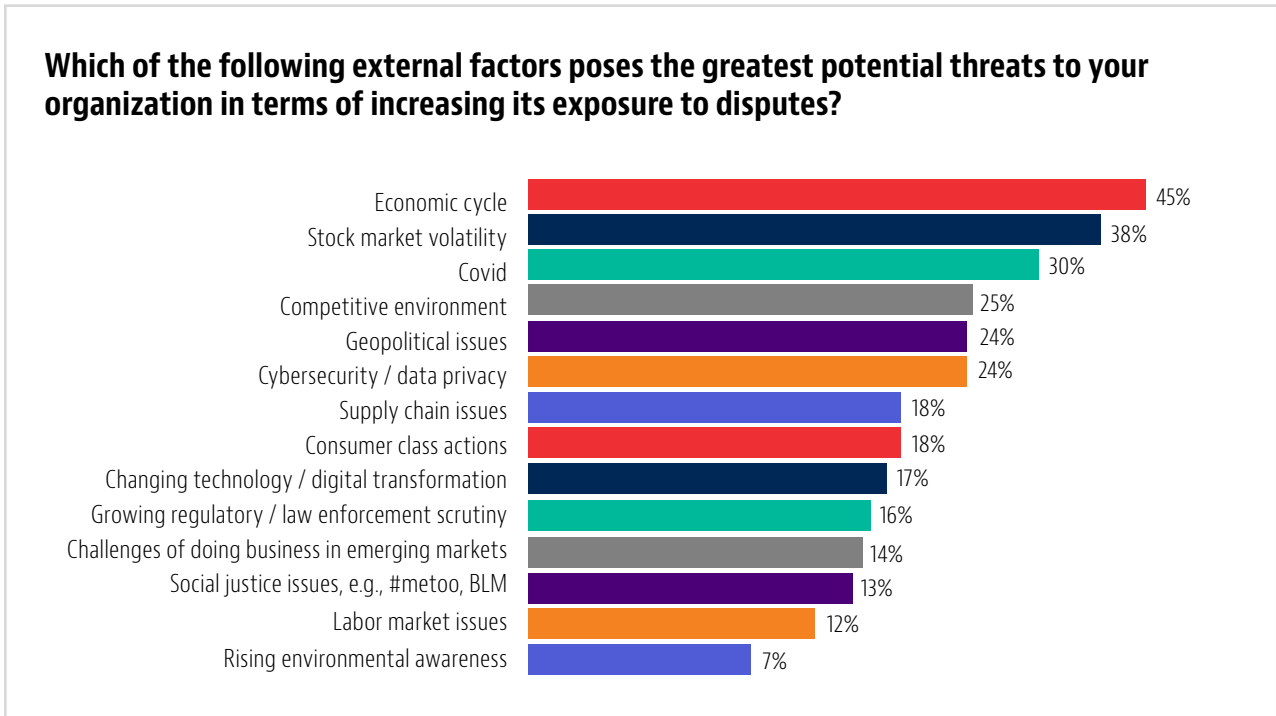
Last year’s survey showed Covid as the greatest external factor posing a disputes threat. Concerns about Covid have now receded, and have been replaced with concerns about disputes caused by the **economic cycle** or **stock market volatility**. This is a consistent pattern across all the geographic regions we surveyed.

Other rising threat factors include the **competitive environment** and **geo-political issues**. Amongst those citing geo-political issues, the dominant responses were around the US, Brexit and China, with Russia featuring lower down the list. This may seem a surprising result: many international corporations are experiencing an impact

from the Ukraine-Russia war. However, the majority of those impacts are indirect, and even direct effects may not offer a practical cause of action.

We also asked our respondents about **specific risks** such as external and internal investigations, and class actions. We found concerns across the board: 87% were concerned about an internal investigation next year, 86% were concerned about an external investigation, and 85% were concerned about class actions.

These figures represent significant increases from last year, especially for internal investigations (65% in 2022). This may be a reflection of the economic headwinds ahead: experienced legal counsel know that difficult trading conditions increase the temptation for improper behavior, and reduce the ability of transgressors to hide it.





## Litigation Preparedness

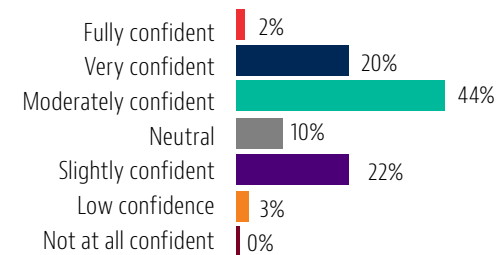
Our survey shows that, despite the risks, organizations still feel **unprepared for litigation**. Only 22% of respondents were fully confident or very confident in their organization's level of preparedness for litigation. The lowest-scoring sector was Energy, Mining and Infrastructure, where just 15% of respondents felt fully or very confident. On a geographic split, scores

were lowest in Brazil, with an equivalent figure of just 12%.

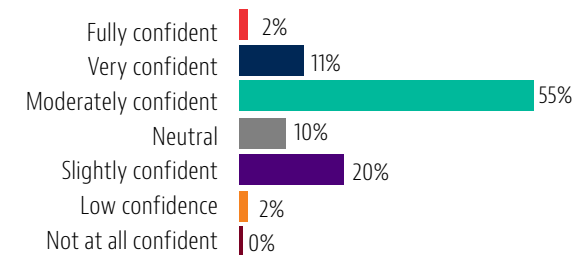
Organizations also lack confidence in finding the right services for litigation and arbitration support. These services typically include document review, legal project management, translations and transcriptions. Only 13% were fully or very confident on this topic.

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

### How confident are you in your organization's level of preparedness for litigation?



### How confident are you in finding the right services for litigation or arbitration support?





# Key Issues

## Cybersecurity and Data Disputes

For the second year running, cyber and data disputes topped our list of dispute types presenting a risk. Cybersecurity incidents involve financial, operational and reputational damage, and they are becoming **more frequent**. Ransomware attacks saw a 13% increase last year, with a move towards more sophisticated methods. This includes “double extortion,” in which threat actors not only encrypt files but take a copy and threaten to release these if the ransom is not paid. “Triple extortion” involves demanding ransom payments from the victims’ clients or suppliers whose data was compromised.

Ransomware is increasingly offered as a **service**, with software capable of exploiting vulnerabilities being sold to perpetrators who are not technically sophisticated enough to develop it themselves. We have seen instances of victims paying for decryption keys that then do not work, thought to be due to incompetence rather than malice. However, lack of expertise does offer law enforcement a better chance of tracing those responsible.

“As we are a big organization there are frequent times when all teams across the globe are not on the same page regarding cybersecurity, so it leads to a risk.”

**Functional Head at IMT corporation, USD 10 billion+ revenue**

There is also a trend for attacks targeting **non-personal data** such as trade secrets and other commercial data. Other attacks ignore data altogether and target control systems. These may be against critical infrastructure systems, such as power generation, water treatment and food processing facilities. It is not only high-profile organizations being targeted. Evidence in the US suggests that the scrutiny caused by pursuing so-called “big-game” targets has led hackers to shift their focus onto smaller, less high-profile ones.

In our survey, respondents cited time and again the **difficulty of recruiting and retaining** suitably skilled security personnel in the current environment. Many organizations felt exposed through a lack of the right people on the job. It was also clear that survey respondents were not just concerned with the electronic environment. Many see the greatest risks coming from **areas that receive less attention**: physical access to buildings, disposal of paper records, or simply employees discussing the corporation’s details

“Dealing with outdated technology is a huge concern. Legacy systems are a prime target for bad actors.”

**Head of Risk at TMT corporation, USD 10 billion+ revenue**

with friends and relatives, or in a public place. Meanwhile, the claims keep coming.

In Europe, **group data claims** are being driven by an expansion of litigation funding, a rise in litigious consumer associations, and procedural reforms. National provisions necessary to comply with the EU Collective Redress Directive must take effect by June 2023. This requires all member states to allow qualified representative entities to be appointed that can bring collective actions on behalf of consumers in a wide range of areas, including data protection. We expect to see mass litigation in data claims continuing to grow in the UK, the Netherlands and Italy, and in the medium-to-longer term, in France, Belgium and Spain.

However, difficulties remain in establishing common issues across a class, and in most

jurisdictions, claimants still need to opt in. This potential obstacle is driving creative solutions by claimant law firms — in the UK, we have seen efforts to reframe group data claims as competition law issues, such as abuse of a dominant position, which would then allow claims to be brought on an opt-out basis. Whether such claims succeed remains to be seen.

Although the majority of data claims still relate to breaches that result from hacking, there is an expanding number of class action claims being pursued against **business models that use data**, including claims against proprietary databases that have value and can be licensed to others, cases around third-party cookies used for ad tracking, particularly against data brokers, and claims against services, such as social media sites, who employ data for other purposes, such as advertising.

In California, most provisions of the **California Privacy Rights Act (CPRA)** became operative on 1 January 2023, with some look-back provisions to January 2022. The CPRA enhances the privacy protections introduced by the California Consumer Privacy Act in 2020 and applies to companies worldwide “doing business” in California. Under the amended provisions, from 1 July 2023, the California Privacy Protection Agency will have the authority to bring administrative enforcement actions for alleged violations. The changes also expand the private right of action available to consumers to a wider range of personal information.

## Environmental, Social and Governance Disputes

Over half of our respondents said that ESG disputes presented a risk to their organizations in the coming year. And as we have seen, concerns over governance disputes overtook environmental disputes for the first time this year.

**Governance disputes** are about the way an organization is run. They may be based on broad legal duties, such as the Caremark duties in Delaware, which effectively require directors to oversee in good faith the corporation's compliance with relevant laws. Other broad duties include human rights legislation or anti-bribery and corruption rules. Alternatively, disputes may have a more specific legal foundation, such as modern slavery or conflict minerals legislation. What they have in common is a direct challenge to a corporation's integrity and reputation in the market.

The lawyers in our survey gave remarkably consistent comments on this topic. They see the key risk as **the board**. They worry over its composition, quality, and experience. They have misgivings over remuneration structures and conflicts of interest. And they particularly dislike their advice being ignored by directors.

Many believe disputes can be prevented by a clear strategy, clear roles, and good systems and controls. Above all, they see good communication within the organization as the key to good decisions.

Governance risks for organizations will **continue to widen** this year. National governments are enacting more legislation in this area. International standards are also increasing, such as the UN's continued work on developing an instrument on civil claims arising from business-related human rights violations.

Meanwhile there is continued focus on making **parent corporations** responsible for the actions of subsidiaries, and organizations accountable for **supplier conduct**. Organizations are becoming more accustomed to auditing their supply chain, but need to take care. What may look like best practice in the conduct of a due diligence exercise may have unintended and unhelpful consequences for litigation strategy if the corporation is targeted with a claim.

**Environmental disputes** remain high on the radar. Greenwashing disputes are on the rise, arriving on general counsel's desks through a confusing array of regulatory and litigation

"Governance disputes start where there is lack of communication and lack of understanding between higher and lower management."

**Legal Professional at  
TMT corporation,  
USD 10 billion+ revenue**



routes, including advertising and antitrust regulators, consumer protection claims and securities litigation.

This area is dominated by concerns over **climate change**. The number of climate change cases continues to rise, spreading from the US to other jurisdictions. Industry trackers show that major new cases are emerging at a rate of around three per month. Many cases are brought by activists seeking disclosure of key information or to challenge climate policies.

Our survey respondents were particularly concerned about **extreme weather events** and the disruptive effect they can have upon a corporation's production and other activities. When global supply chains are already under stress, lost production days due to floods or storms can cause real issues, both practical and legal.

We may see a decision this year from the Paris courts in a **major climate change case** against French oil giant Total. The case has been brought by a coalition of NGOs and local authorities, which seek an order for Total

to "take the necessary measures to drastically reduce its greenhouse gas emissions." Parallels have been drawn with a similar case in the Netherlands in 2021.

Whilst corporations have no shortage of issues, governments have wider problems still. There is an increasingly obvious conflict between **international investment law** and international climate change obligations. It is difficult for governments to take action to tackle climate change without affecting investors, and expensive disputes often result. Russia's invasion of Ukraine, and the subsequent energy price spike, have shown governments in Europe and beyond the risks of **energy dependency**. Some will seek a quick fix in fossil fuels from domestic sources or trusted partners. This may run against environmental objectives, adding fuel to the activists' fire.

**Social disputes** remain a risk but are harder to define. Many of our survey respondents see these disputes as predominantly around discrimination, particularly in the employment context. Some organizations feel that failure to take part in political actions can lead to risk from within their workforce.

#### Our values:

Baker McKenzie is a signatory to the [UN Global Compact](#). View our [progress](#), or read more about our [CSR initiatives](#) or our commitment to [inclusion, diversity and equity](#).

# Post-M&A Disputes

Global M&A volumes hit a **record high** in 2021, breaching USD 5 trillion for the first time. This post-Covid surge was triggered by low costs of borrowing and high valuations. The boom peaked in the final quarter of 2021, and we have since seen twelve months of cooling activity.

Many deals were done at speed and with **limited due diligence**. Parties may have agreed terms that look uncomfortable with the benefit of hindsight. This can have compliance consequences, sometimes priced into the deal. The other likely consequence is post-M&A disputes. These disputes can be exacerbated when valuations fall, as there is greater scope for deals to underperform expectations. Sellers see reduced earn-outs and buyers see lower returns. They look for legal answers.

In the coming year we expect to see a rise in **post-closing contractual disputes** based on purchase price adjustments,

representations and warranties, indemnities, pre-contractual disclosure and post-closing cooperation. We will also see related **tortious claims**, which take various forms in different jurisdictions but have at their core a wrongful act against shareholders.

We also anticipate a rise in distressed M&A, as the global economy slows. Many of these deals will eventually lead to disputes.

Recent years have also seen growth in the use of **warranty and indemnity insurance**,

Preferred dispute resolution mechanisms				
	Domestic commercial contract	Domestic business sale and purchase agreement	Cross-border commercial contract	Cross-border business sale and purchase agreement
Courts	61%	40%	55%	44%
Arbitration institution	38%	58%	45%	56%
Other	1%	2%		



both in the US market and beyond. This, coupled with high transaction volumes, will lead to increased claims against these policies. Similarly, some jurisdictions have seen the growing popularity of clauses shifting **antitrust risk** in the deal; these may be effective, but where there is scope for uncertainty they will end up in dispute. Sellers must also take care over **ESG warranties**; these are increasingly common, but provide a ground for a claim where obligations are not met.

As many of these disputes will end up in **arbitration**, or other specialist confidential mechanisms, it makes trends hard to analyze. Our survey asked respondents where they preferred to resolve contractual disputes. This revealed a clear preference for arbitration over the courts in business sale and purchase agreements.

This balance of preference varies significantly around the world, but where arbitration is preferred it tends to be because the courts are less experienced in these cases, the matters are of higher value, and confidentiality is a bigger concern for the parties.

To address this relative lack of information, further research has been carried out by Baker McKenzie into publicly available post-M&A judgments and awards, along with our own database of cases. The results bear out our practitioners' experience: claimants' success rate in these claims is relatively low, particularly with warranty claims. Indemnity claims have more success. It is also rare to see disputes around material adverse change clauses. This may change as the turbulence of recent times feeds through to courts and tribunals, but we do not anticipate a significant rush of cases.



## Tax Disputes

**One in five** (20%) of our survey respondents expected tax disputes to present a risk to their organization next year. The perceived risk is particularly high in the EMI sector (28%). Geographically, the figure was highest in Brazil (29%). We also found that expected risk was lower for relatively smaller or larger organizations, but peaked for mid to large-sized firms with turnover in the USD 2 billion to USD 10 billion bracket.

We are seeing year-on-year increases in the **number of tax disputes and audits** being brought. This represents a significant challenge to organizations, stretching tax resources to respond to wide-reaching policy change. A separate Baker McKenzie survey last year — [Risk Reshaped: Tax Disputes Outlook 2022-2025](#) — found that organizations are now managing an average of 20 live disputes and audits apiece.

This comes alongside a marked increase in the **value of tax disputes**, a trend that we expect to continue this year. While some organizations have grown through the

pandemic, the financial position of others suffered. There remains the potential for large tax adjustments, including those relating to historic tax years due to a lag in audit periods, which represent significant challenges to organizations' financial performance.

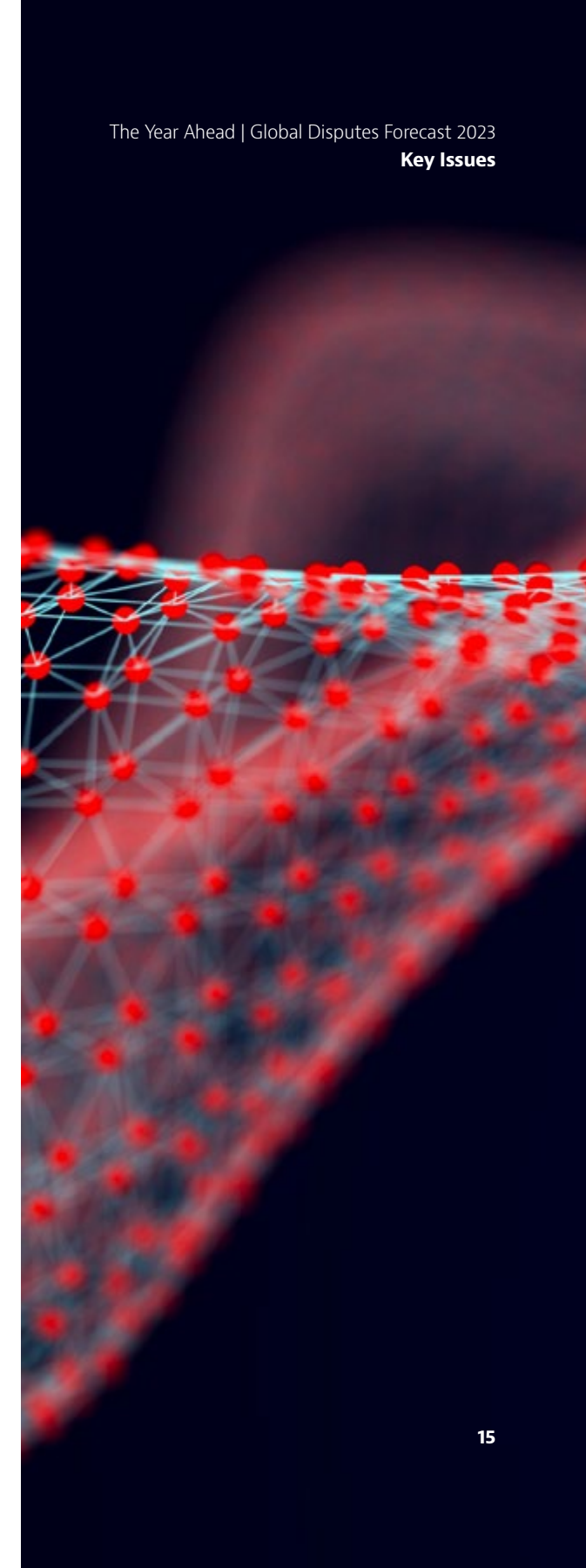
**Digital transformation** is also changing tax exposure and driving a rise in disputes. As non-digital organizations embrace technology at scale or remote working arrangements, many will face new and unfamiliar tax considerations. These changes to business and operating models are likely to affect organizations' tax exposure, giving rise to transfer pricing complexity, new permanent establishment risks, indirect tax liabilities and tax controversy inherited through M&A.

A failure to grasp the tax implications of these changes represents a real threat to organizations that are already experiencing high levels of disputed tax. Digitalization gives rise to other challenges, as tax laws struggle to keep pace with rapidly evolving technology and the new ways of working it offers. The lack of clarity around the proper

tax treatment of these new technologies and situations for tax purposes increases the likelihood of disputes.

**ESG considerations** are playing an increasing role in the management and resolution of tax disputes, as, depending on the circumstances, boards and management may elect to settle disputes privately rather than litigate publicly, in order to avoid negative attention, even if this means a higher adjustment. As a result, advance tax rulings and negotiated settlements will continue to gain relevance in dispute resolution. However, as tax authorities come under pressure to raise revenue and the value of disputes rises further, the balance may tip in favor of litigation.

**Inherited tax controversy** remains a major risk area. Transactions often include tax risk acquired from the target. We have described in the [section above](#) how the recent M&A boom has often led to expedited due diligence. In the tax context, organizations may also be moving rapidly to execute deals before a change in tax policy or the tax rate.



Fast-tracked processes can mean gaps in due diligence or leave acquirers without a full understanding of the target's tax position, leading to potentially costly post-integration restructuring and subsequent investigations. It is also becoming increasingly common to see post-transaction litigation between buyer and seller or between a spun-out entity and its previous owner about legacy tax issues.

Changes to **international tax policy** and the implementation of these reforms are a potential source of future disputes. The proposed OECD reforms — known as "Pillar One" and "Pillar Two" — have been broadly welcomed by tax leaders. However, the rules are complex, the timeline for implementation remains unclear, and significant uncertainties persist about where the burden of tax changes will rest. There is potential for tension between global cooperation and national interests, particularly as raising tax revenue

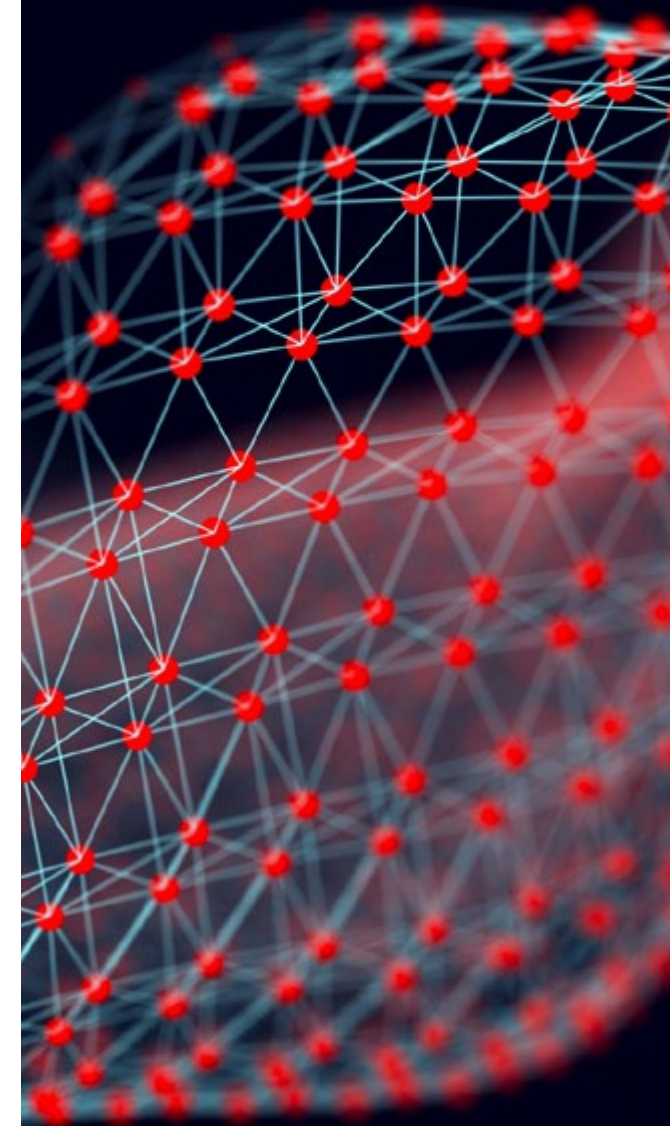
has become a post-pandemic priority. Varying interpretations of international tax rules designed to maximize tax revenue locally are expected to be particularly problematic. There are also concerns about the imbalance in the ability of OECD members to enforce proposals.

In addition, for the majority of multinational groups not captured by Pillar One, regular **transfer pricing disputes** will continue to be a major source of uncertainty and risk.

To learn more about transfer pricing disputes, read our latest report in conjunction with Bloomberg: [The Global Landscape of Transfer Pricing Controversy: Trends You Can't Afford to Ignore](#).

"Tax risk has been reshaped by a changing business environment, fiscal budgetary pressures, and more aggressive enforcement."

**Chief Legal Officer at Consumer Goods & Retail corporation, USD 50 billion+ revenue**



# Employment Disputes

Increased employee mobility and the tight job market, making it harder for employers to fill vacancies, are the major factors behind an uptick in **restrictive covenant enforcement** claims filed by employers, particularly across North America and the Asia Pacific region. More than ever, employers are seeking to enforce restrictive covenants when workers quit their jobs, including non-competition agreements, confidentiality agreements, and agreements not to solicit employees or clients. In the US, a state-by-state trend towards restrictions in restrictive covenants has made it important for employers to be creative in how they utilize and enforce these agreements.

A number of risks result from the post-Covid return to the office. There is frequently a mismatch in employer and worker expectations around what **hybrid working** looks like in practice. Tensions between accommodating a desire for flexibility and establishing effective working relationships and culture are a potential breeding ground for employment disputes. Employees who have the choice to work remotely may be at risk of slower career advancement than colleagues who have

returned to the office regularly. As well as potential discrimination and other claims arising out of failure to promote, or termination of employment, employee relations issues more generally could give rise to general worker discontent, grievances and disputes.

In the US, **medical or religious accommodation claims** continue as employers bring more employees back to the office or brick-and-mortar workplace whilst Covid remains in circulation. Some medical claims concern Long Covid, which has been recognized as a disability by the US Equal Employment Opportunity Commission. Requests for religious accommodations include requests to be exempt from mandatory vaccination policies as well as mask-wearing and periodic testing.

In North America and Europe, unions are becoming more active. The rise in **industrial action**, spurred on by the current economic climate and cost of living crisis, means we anticipate an increase in litigation between trade unions and employers, as well as against governments. We are also seeing signs of

governments preparing for future unrest: for example, the UK recently made controversial changes to trade union law, enabling employers to engage temporary workers to cover striking workers, and increasing the liability of trade unions for unlawful industrial action.

In the US, we expect to see more claims against corporations of unfair labor practices and violation of employees' rights as unionization efforts resurge. This is partly fueled by the Biden administration's pro-union policies, which continue to take form.

**Equal pay** claims are still on the rise. With the recent increase in pay transparency laws in the US, including required disclosure of salary and wage ranges in job advertisements, and with pay transparency under discussion as part of the EU's proposed equal pay and pay transparency directive, we expect to see more claims in this area.

**Misclassification** and related claims are still an ongoing risk, as the gig economy grows and governments continue to adjust frameworks





for recognizing employment relationships. For example, in the US there is a new proposed rule by the Biden administration on independent contractor misclassification that is likely to make it more difficult for employers to classify workers as independent contractors. There have also been movements in several Asia Pacific jurisdictions aimed at increased protection of workers in the gig economy.

Workforce litigation derived from **restructuring and reorganization measures** is likely to rise as more organizations look to reduce costs through workforce reductions and other cost-cutting measures. We anticipate challenges to dismissals, layoffs and furloughs, such as alleged inappropriate notice, unfair dismissal, invalid dismissals for failure to follow proper process, or discrimination, amongst other claims. In Europe we are

seeing unions and works councils **scrutinizing terminations** and finding new ways to challenge those.

Finally, increased legislative protection for **whistle-blowers** in Europe and the Asia Pacific region — such as Australia and Japan — means we are likely to see a rise in complaints and associated litigation.

“Because of Brazilian culture, more than 30% of dismissed employees go to the courts with claims to increase the amounts received with the termination.”

**Brazilian-based Head of Compliance at TMT corporation, USD 500m+ revenue**

To learn more about whistleblower complaints in Asia Pacific, explore Baker McKenzie’s custom research: [Asia Pacific Whistleblowing Landscape: Benchmarking and Best Practices](#)

# Industry Focus

## Consumer Goods and Retail

Over half of our respondents in this sector expect **cybersecurity and data disputes** to be a risk to their organizations in the coming year. Multiple surveys show that retailers face a higher incidence of cyberattacks than any other industry, particularly around attempted account takeovers and malicious bot traffic.

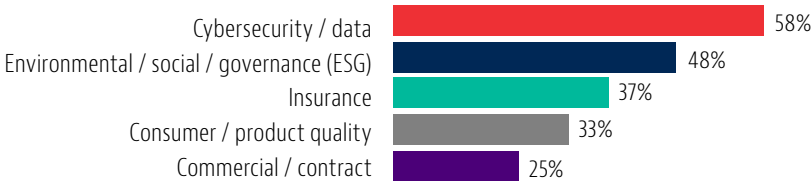
**ESG disputes** are identified as a risk by almost half of respondents. We anticipate growing litigation between brands and suppliers around suppliers' claimed ESG credentials, and

liability for any regulatory defaults. Plastics litigation is also a key trend, often involving an allegation that producers have falsely advertised the recyclability of their products.

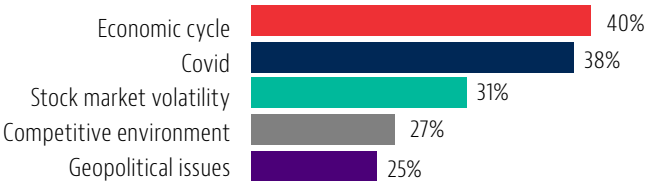
Operators in this sector are also concerned about disputes arising from the **economic cycle**. Increased prices, labor shortages and energy price volatility are all likely to feed supply chain and wider disputes in the coming year.

Commerce in the **metaverse** is a current hot topic, but we do not anticipate a rush of disputes in the next twelve months. In the longer term we can expect to see disputes around unauthorized use of IP rights, unsolicited marketing, fraud and unfair commercial practices. There will also be claims about the scope of older licenses, distribution agreements and sponsorship arrangements, made without metaverse scenarios in mind.

Top 5 expected dispute types



Top 5 external risks for disputes



# Energy, Mining and Infrastructure

**ESG** tops the list of disputes types expected to present a risk in 2023. For EMI operators this is business as usual, but legal teams will want to track the shifting profile of disputes under the wide ESG umbrella, and identify the highest priorities. Some of the emerging claims are direct attacks on how these corporations do business, which cannot be solved with a checkbook.

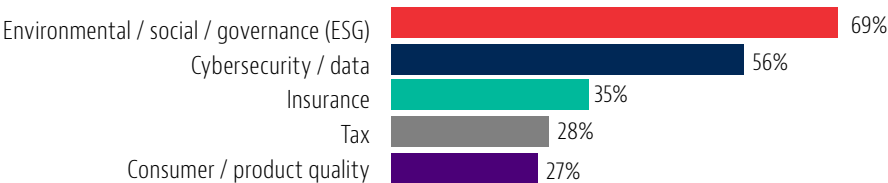
**Energy transition** is a key factor. Climate disputes will continue, as expectations of governments, corporations, shareholders and activists grow. Energy operators are investing in renewable technologies such as wind and solar farms, hydrogen projects and carbon

credit schemes. Performance, supply and pricing issues are common. This transition often involves a move from offshore to onshore, accompanied by conflicts with local communities, planning issues, and higher levels of regulation.

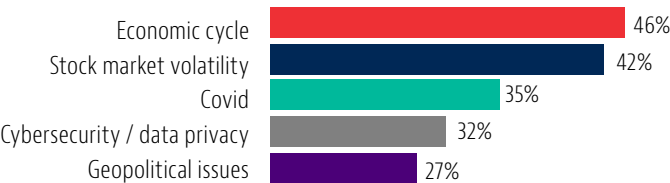
New trends can also be marked by immature regulation and a lack of established market practice around contractual terms, bringing heightened disputes risk. Specific examples include the growing use of corporate power purchase agreements, and the use of battery energy storage systems.

The consequences of the war between **Russia and Ukraine** may have long-term effects on the extractive industries, but there are more immediate consequences. Players with direct exposure have had to divest assets, terminate joint ventures, and exercise force majeure relief. Huge rises in wholesale gas prices will continue to cause gas pricing and supply disputes. Infrastructure projects in Europe and beyond have seen delays and increased costs. We will see a spike in construction and project disputes.

Top 5 expected dispute types



Top 5 external risks for disputes





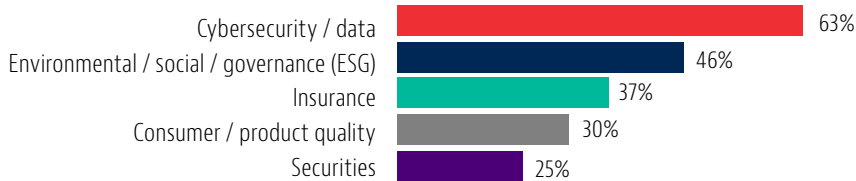
# Financial Institutions

Financial institutions continue to expect **cybersecurity and data disputes** in the coming year, along with ESG disputes. We will see growth in **climate-related litigation** against financial institutions from NGOs and activist shareholders. Until recently, claims have focused on the disclosure of climate-related information. However, the trend is now moving to scrutiny of what prudent financial management means. For example, what fiduciary duties are owed when acting as a financial advisor in investment planning or M&A transactions?

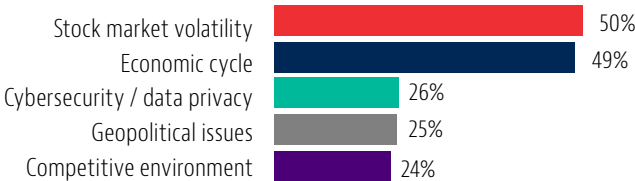
Our survey shows that the **economic cycle and stock market volatility** are seen as the greatest external disputes risks for financial institutions in the coming year. An economic downturn will bring increasing defaults, leading to recovery actions and litigation. Some corporations may struggle to service debt owing to higher interest rates and wider credit spreads. Economic volatility also tends to cause an increase in fraud and other misconduct issues.

Financial institutions also face significant **regulatory risk** in the year ahead, as regulators and other agencies increase compliance enforcement. The invasion of Ukraine has led to increased risk from sanctions and related disputes. The downstream stage of sanctions is likely to cause particular issues, in areas such as anti-money laundering and Know Your Customer investigation and enforcement.

Top 5 expected dispute types



Top 5 external risks for disputes



# Healthcare and Life Sciences

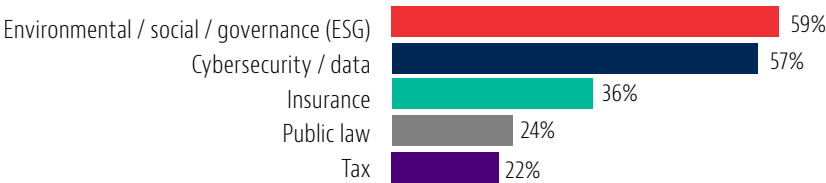
More than half of respondents in this industry are concerned about ESG and cybersecurity/data disputes in the coming year. These figures are both up from last year's survey. **ESG issues** include the use of hazardous substances in product manufacturing, access to quality care and medications, and price transparency. Class actions against healthcare organizations for **data breaches** continue to rise. There is also a more widespread concern: digital transformation has reached all corners of the industry but regulations and regulators have not yet caught up.

Covid is no longer perceived as the top external disputes risk, but **supply chain challenges** have worsened for many operators and we will continue to see disputes in this area. The dominant concern now is around the economic cycle. In particular, although there has been a slowdown of traditional M&A activity in the sector, we have also seen increased **merger control and related disputes**.

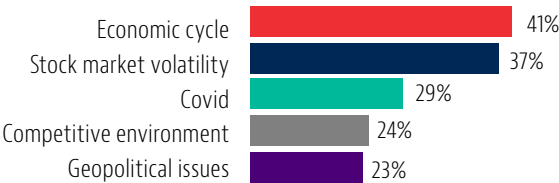
**Licensing and collaboration** continue to rise. As old relationships are terminated and new partnerships established, litigation will

emerge. Finally, our survey showed that 90% of healthcare and life science organizations are concerned about the risk of an **external investigation** next year, the highest of any industry.

Top 5 expected dispute types



Top 5 external risks for disputes



# Industrials, Manufacturing and Transportation

Over two-thirds (70%) of industrial, manufacturing and transportation organizations say that **ESG disputes** present a risk in 2023. This was the highest figure of any industry sector in our survey. 90% of such organizations report concern over class action risk in 2023. Again, this is the highest figure of any sector in our survey.

Operators in the sector are facing significant ESG risks. The general backdrop is one of increasing enforcement from public authorities, and attention from shareholder activists. The specific risks are many. Plastics and recycling

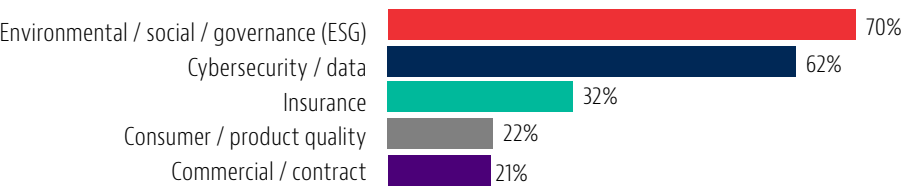
claims are ballooning against all members of the supply chain, particularly in the US. Human slavery due diligence and disclosure requirements are also growing rapidly, increasing disputes and compliance risks.

The focus on Covid-related disputes has receded from last year, but the **longer-term impact** of Covid is still felt. Many organizations are onshoring their manufacturing operations, driven by experiences from the pandemic and fears of trade wars. Production is moving from places like China and India to be closer to home

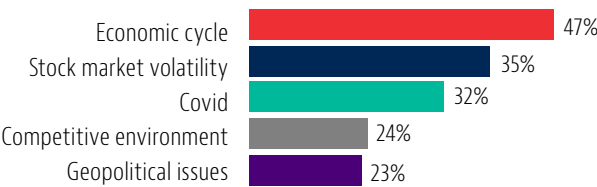
markets. Logistics are cheaper and simpler, and increased automation offsets higher labor costs. This has a disruptive effect on existing relationships, flowing through into disputes.

This sector has also seen recent high-profile **antitrust litigation**, with more cases likely. Antitrust class actions are well-established in the US, and increasingly common in the UK, Netherlands and Italy. We also see Germany and Poland as growing centers for this type of litigation.

Top 5 expected dispute types



Top 5 external risks for disputes





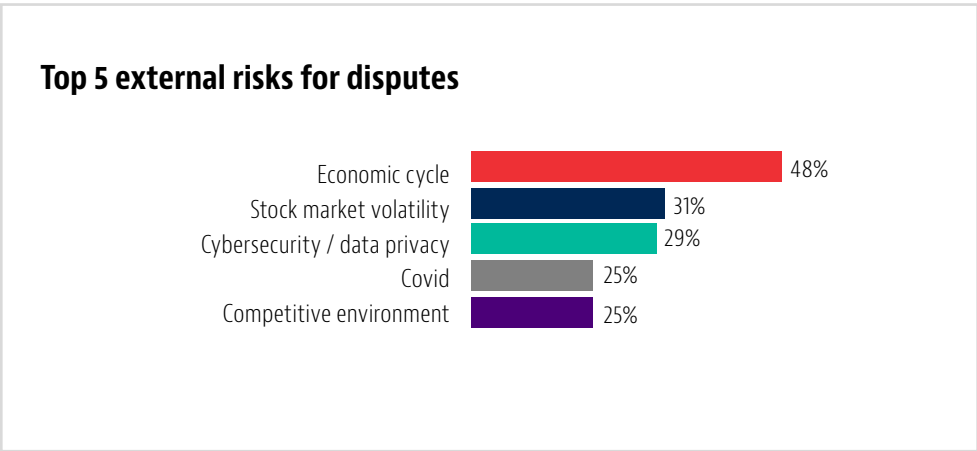
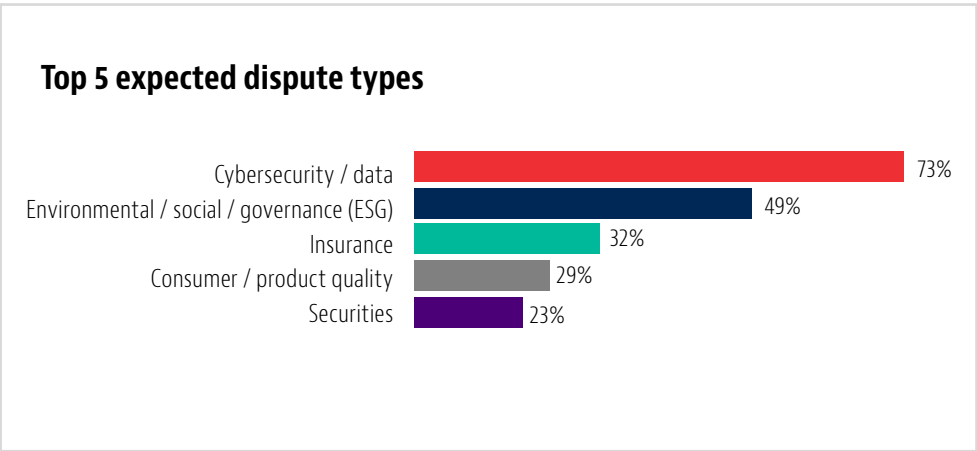
# Technology, Media and Telecommunications

When we asked respondents if they expected the number of disputes to increase, decrease or stay the same, TMT was the only industry to show a slight bias toward decreasing numbers. This may reflect a heavy year for disputes in 2022. As with last year, **cybersecurity and data disputes** top the list of concerns: almost three-quarters of TMT organizations are concerned about such disputes in 2023. **ESG disputes** rank second, with legal teams tackling a broad range of issues from repair and recycling obligations for products, through to fake news and protection of minors on technology platforms.

In terms of disputes threats, TMT organizations are relatively less worried about geopolitical issues, and relatively more concerned about the economic cycle, compared to other industries. Whilst online activity brings some protection from on-the-ground issues, it creates other challenges.

Disputes relating to the **metaverse** — or any globally accessible virtual environment — can raise difficult issues of applicable law and jurisdiction. It can also be difficult to identify and trace defendants in the virtual world — a current issue with cases of IP infringement by creators of non-fungible tokens.

Nor have traditional disputes gone away. There has been significant **convergence** between the gaming, music and film sectors in recent years, resulting in new partnerships and new ways of working. Experience from other sectors shows this can often lead to disputes. Tax disputes are also likely to feature as tech corporations increasingly become the focus of tax authority scrutiny, and governments tackle issues such as digital services taxes and transfer pricing.



# Regional Developments: Asia Pacific

## China / Hong Kong

### Expanded reciprocal enforcement of judgments between Hong Kong and Mainland China

Mainland China and Hong Kong are expected to implement a new law expanding the scope of judgments granted by the Mainland courts to be recognized and enforced in Hong Kong. The legislation will also establish a comprehensive mechanism for the registration of Mainland judgments in Hong Kong. The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill was passed by the Hong Kong Legislative Council in October last year. The Bill will come into effect once Hong Kong and the Mainland have put in place the relevant implementation mechanism in their respective jurisdictions. Once in force, the measures will offer better protection and certainties to parties' interests, and further consolidate Hong Kong's role as a dispute resolution hub.

## Hong Kong

### Statutory framework for remote hearings to be introduced

Hong Kong is expected to introduce a new statutory framework governing remote hearings this year. The government recently indicated its intention to introduce The Courts (Remote Hearing) Bill for the Legislative Council's consideration. Although the Hong Kong judiciary has been making continuous efforts to promote the use of remote hearings in the last few years, this is currently governed by common law principles and the various guidance notes of the judiciary, and stakeholders have previously expressed concerns about the lack of a statutory framework. It is hoped that the Bill, if passed, will provide a comprehensive legal framework concerning the application, operation and effect of remote hearings for court proceedings, providing greater clarity for users.

## Australia

### Increased penalties for competition and consumer offenses, new prohibitions on unfair contract terms

New unfair contract terms provisions will come into force later this year, following the expiry of a 12-month grace period. The Treasury Laws Amendment (More Competition, Better Prices) Act 2022, which came into force on 9 November 2022, introduced a civil penalty regime prohibiting the use of and reliance on unfair contract terms in standard-form contracts and increased the penalties that may be awarded for breaches of the civil penalty provisions under competition and consumer laws. The increased penalty regime applies to conduct engaged in from 10 November 2022. The legislation includes a 12-month grace period for the commencement of the unfair contract terms provisions, which will come into force on 10 November 2023.

# Regional Developments: Asia Pacific

## Singapore

### Increased cross-border insolvency and cryptocurrency cases expected at the SICC

An increase in the number of cross-border insolvency, restructuring and dissolution matters before the Singapore International Commercial Court (SICC) is anticipated this year. In October last year, the SICC introduced new rules that extend its jurisdiction to hear corporate insolvency, restructuring and dissolution proceedings under the Insolvency, Restructuring and Dissolution Act 2018 that are international and commercial in nature. The new rules also provide processes for the transfer of proceedings commenced in the General Division of the Singapore High Court to the SICC. Additionally, we have seen an increase in cryptocurrency-related matters in the General Division, which can be transferred to the SICC and also expect these types of matters to grow in 2023.

## Indonesia

### New beginning for protection of data privacy in Indonesia

An increase in enforcement and compliance issues is expected following Indonesia's landmark new data protection legislation, Law No. 27 of 2022 on the Protection of Data Privacy. The new law was passed in October last year but provides for a two-year transitional period for personal data processors and controllers to bring their data processing into compliance. The law applies not only to parties located in Indonesia but also to offshore parties that manage personal data owned by Indonesian nationals. Additionally, the law creates a new Personal Data Authority, which will oversee data protection compliance, including enforcing administrative sanctions. Failure to implement data privacy protections, including unlawful use, collection or disclosure of personal data, is subject to criminal sanctions, such as fines and/or imprisonment.

## Japan

### New online system for court documents to become operational in eight District Courts

A new system for the online submission of court documents, known as "Mints," is set to become operational in January. The system, which was implemented last year but is not yet operational, is part of the IT orientation of civil court proceedings in Japan. Mints will be used in cases where both parties elect to do so, allowing the parties to submit documents to the court and receive documents from an opposing party through Mints. Currently, certain documents relating to the filing of lawsuits are not covered by the system. The system will initially be rolled out across eight District Courts where High Courts are located, including Tokyo and Osaka, before gradually being extended to all District Courts.

## Vietnam

### New law on protection of consumer rights expected this year

The new law on protection of consumers' rights is scheduled to be passed in May 2023. As of the time of writing, the draft law retains the existing key principles in the resolution of disputes involving consumers, such as the principle that the consumers need not prove the fault of the trading organizations/individuals. In addition, the draft law also clarifies various substantive issues and even provides that social organizations serving to protect consumers' interests will not need to pay a court fee in advance in a representative action on behalf of the consumers. This has the potential to increase the number of litigation/arbitration cases relating to the protection of consumers' rights in Vietnam, both this year and beyond.



# Regional Developments: EMEA

## England & Wales

### Reform of Arbitration Act 1996

The Law Commission of England & Wales is considering proposals to reform the Arbitration Act 1996, to ensure it remains “state of the art.” A consultation period ended in December last year, with the policy development and report set to follow this year. Proposals will be made by the Law Commission on textual changes to the Act, to reflect developments over the last 25 years since the current framework came into force. Areas likely to be reformed include confidentiality, independence of arbitrators, summary disposal, interim court measures in support of arbitration, jurisdictional challenges and the appealability of points of law. The changes are intended to continue to support London’s leading role in international arbitration.

## Belgium

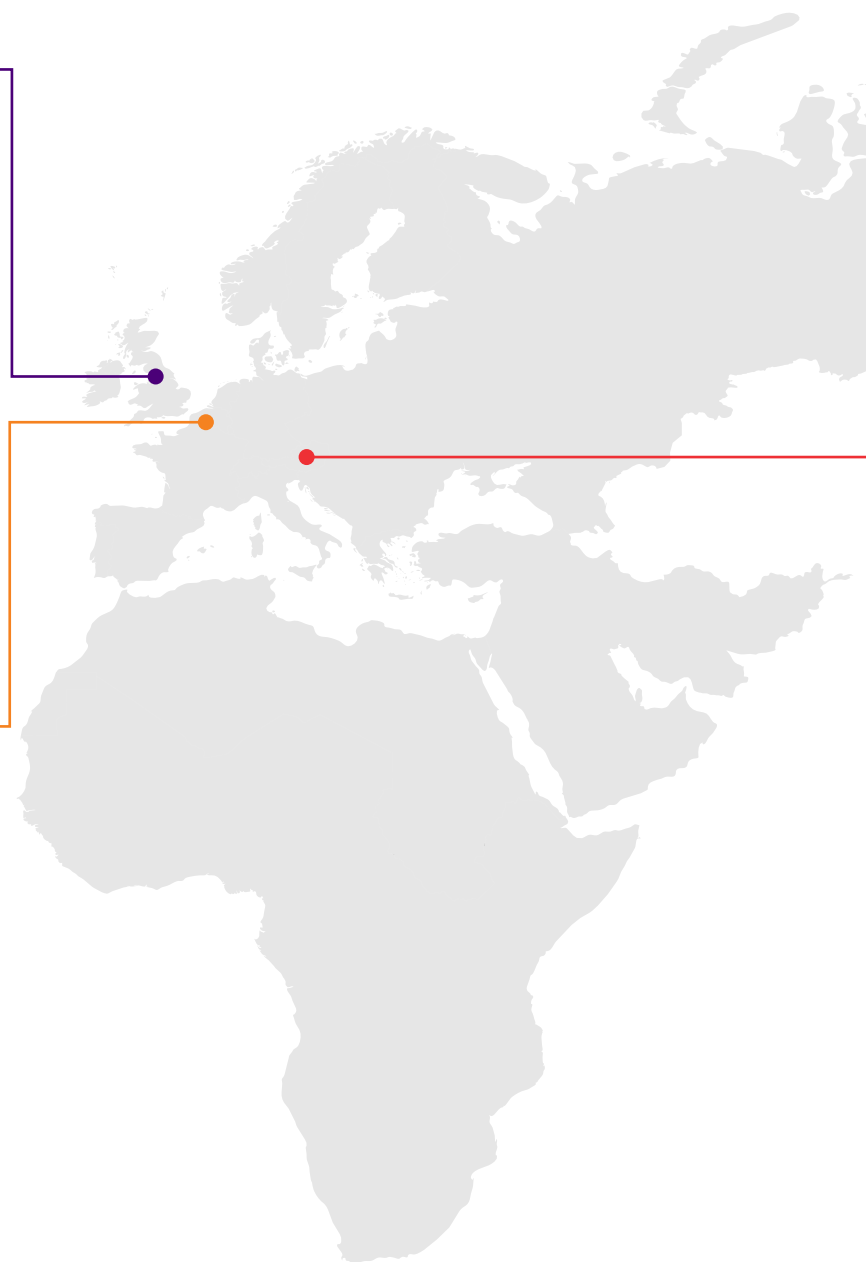
### Digital database for all judgments and decisions

A new digital database of court judgments and decisions will come online later this year. The legal framework providing for a publicly-available central online database of all Belgian case law was passed by the Parliamentary Chamber of Representatives last year. According to the draft law, from 30 September 2023, judges will be able to upload and view all judgments and decisions, and lawyers, defendants, civil parties and judicial experts will be able to view the rulings relating to their own cases. From 31 December 2023, the database will be accessible to the general public, meaning that judges will no longer have to read out their rulings in court. However, to protect privacy, the judgments and decisions will be anonymized.

## Austria

### Amendments to law on consumer arbitration expected

The provision of Austria’s Civil Procedure Code governing arbitration agreements is expected to be amended this year. At present, Section 617 of the Civil Procedure Code states that an arbitration agreement between an entrepreneur and a consumer is only validly concluded for disputes that have already arisen. The changes, which have been under discussion for some time, are expected to exclude from the scope of this provision legal and natural persons, who formally act as consumers, but functionally as entrepreneurs. The amendment would strengthen Austria as a place of arbitration for corporate disputes, especially where one party is a private foundation.



# Regional Developments: EMEA

## European Union

### Collective Redress Directive to be implemented by EU member states

The EU Collective Redress Directive will take effect by June 2023, significantly bolstering consumer rights within the EU. The Directive requires all member states to allow qualified representative entities to be appointed that can bring collective actions on behalf of consumers in a wide range of areas. Member states enjoy a significant degree of autonomy in how these collective proceedings will operate within their jurisdictions and are free to offer a more wide-ranging regime than required. The Directive was endorsed by the European Parliament in November 2020. The deadline for member states to translate this into national law was 25 December last year, and it is to be implemented and enforced by member states by June 2023.

## Italy

### Reforms to civil and criminal judicial system

New rules governing Italy's civil and criminal procedure and sentencing are expected to be implemented, following a decree in October last year. The reforms aim to improve the efficiency of the civil and criminal judicial systems, reducing the average length of civil trials by 40% and criminal trials by 25% by 2026. Key civil procedure reforms include (i) requiring parties to submit all claims and evidence before the first hearing, at which the court will attempt to settle the dispute; (ii) simplified and more efficient enforcement procedures; (iii) extended application of ADR mechanisms, including compulsory mediation; (iv) strengthened impartiality and independence requirements for arbitrators; and (v) the introduction of interim measures in arbitration. The criminal justice reforms aim to make sanctions more effective and timely and incentivize early settlement and the use of restorative justice.

## European Union / Ukraine

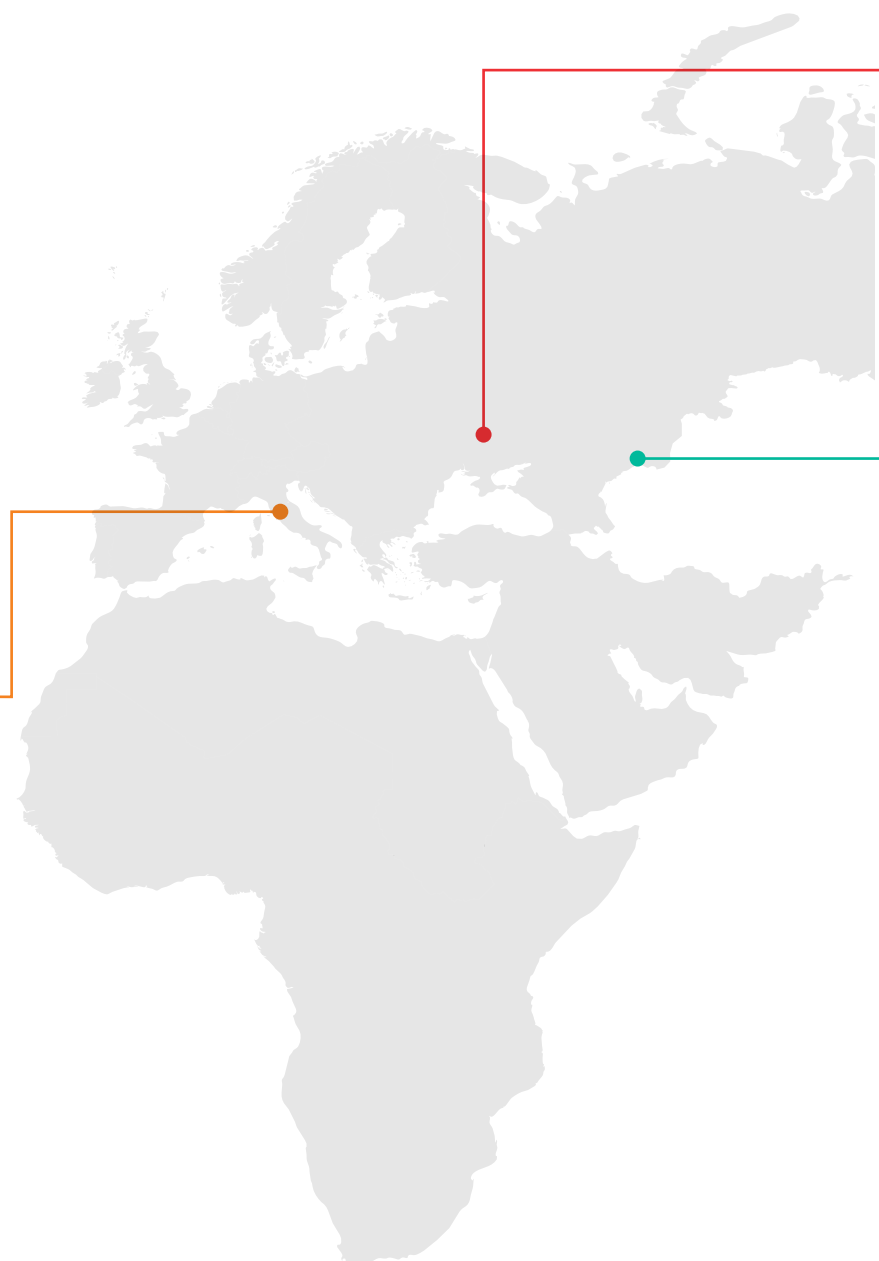
### Hague Judgments Convention to enter into force

The Hague Judgments Convention will come into force later this year. The Convention establishes an international agreement on the recognition and enforcement of court judgments across borders in civil and commercial matters and seeks to do for the enforcement of court judgments what the New York Convention does for arbitral awards. The Convention has been ratified or acceded to by the EU (binding all EU member states apart from Denmark) and Ukraine. It will enter into force for these jurisdictions on 1 September 2023. Other signatories that have yet to ratify the Convention include Costa Rica, Israel, Russia, the United States and Uruguay.

## Kazakhstan

### New insolvency laws proposed

A new bill on insolvency is being considered by the Parliament of Kazakhstan. It aims to introduce a mechanism to restore Kazakhstani citizens' solvency and tackle the issue of non-repayment of loans and other credit. The bill provides an out-of-court bankruptcy procedure for individuals with debts of 1,600 monthly calculation indexes or less (approximately USD 10,200), and a bankruptcy court procedure for higher debts. The bill also provides for the possibility of concluding a settlement agreement. If adopted, the changes may affect several laws and codes including the Civil Code, Tax Code and Code of Administrative Offenses. It is also of significance for local banks and financial companies providing personal loans and finance. The bill is expected to be adopted by April 2023.



# Regional Developments: EMEA

## Luxembourg

### Introduction of an ex-ante merger control regime with judicial review

Luxembourg is considering introducing a domestic merger control regime. The regime would empower Luxembourg's Competition Council to carry out ex-ante control of certain mergers before their completion. It would also set out a procedural framework that would allow the companies involved to appeal the Council's decision to block the merger and permit competitors to challenge the Council's approval of the merger before the courts, ensuring independent judicial oversight. It is hoped that the new regime would allow for early detection of threats to competition, although there are concerns that it may prevent big companies from merging and becoming strong enough to compete with other global competitors.

## Poland

### Changes expected to corporate liability laws and sanctions

Amendments to Poland's Law on Responsibility of Collective Entities are expected to occur this year. According to the current draft, a prior conviction of an individual will no longer be required as a condition for the liability of a collective entity. Collective entities will be held liable for crimes committed to their benefit, regardless of the possibility of identifying the natural person who is the perpetrator of the criminal act. The amendment will also introduce the possibility of voluntary submission to liability (with the court's consent), with a limitation of the fine to PLN 5 million (approximately USD 1.1 million) and tighten the sanctions, including fines of up to PLN 30 million (approximately USD 6.4 million).

## South Africa

### Appeal court poised to rule on legal privilege in context of national access to information legislation

An appellate court is expected to rule on the scope of legal privilege in South Africa. The case relates to whether two media houses are entitled, under South Africa's Promotion of Access to Information Act, to access a copy of an independent investigative report into alleged accounting irregularities at a listed global retailer, or whether this could be refused on legal privilege grounds. The High Court said no, noting that the retailer had failed to place sufficient objective facts before the Court based on which it could "assess whether it [could] be said that objectively, litigation was in contemplation." An appeal is expected this year and will determine the scope of legal privilege in this area.



# Regional Developments: EMEA

## Switzerland

### New rules on corporate law arbitration proceedings

As of 1 January 2023, Swiss corporations, limited partnerships and limited liability companies may subject corporate law disputes to a statutory arbitration clause that binds companies, their governing bodies and shareholders. To account for the specificities of such corporate law disputes, the Swiss Arbitration Center has issued "Supplemental Swiss Rules for Corporate Law Disputes." These new rules also implement the statutory requirements applicable to corporate law disputes that can have direct legal effects not only for the parties but also others. Under the new law, affected third parties must be notified about the arbitration and are offered the opportunity to comment on the appointment of the arbitral tribunal and to participate in the proceedings.

## Sweden

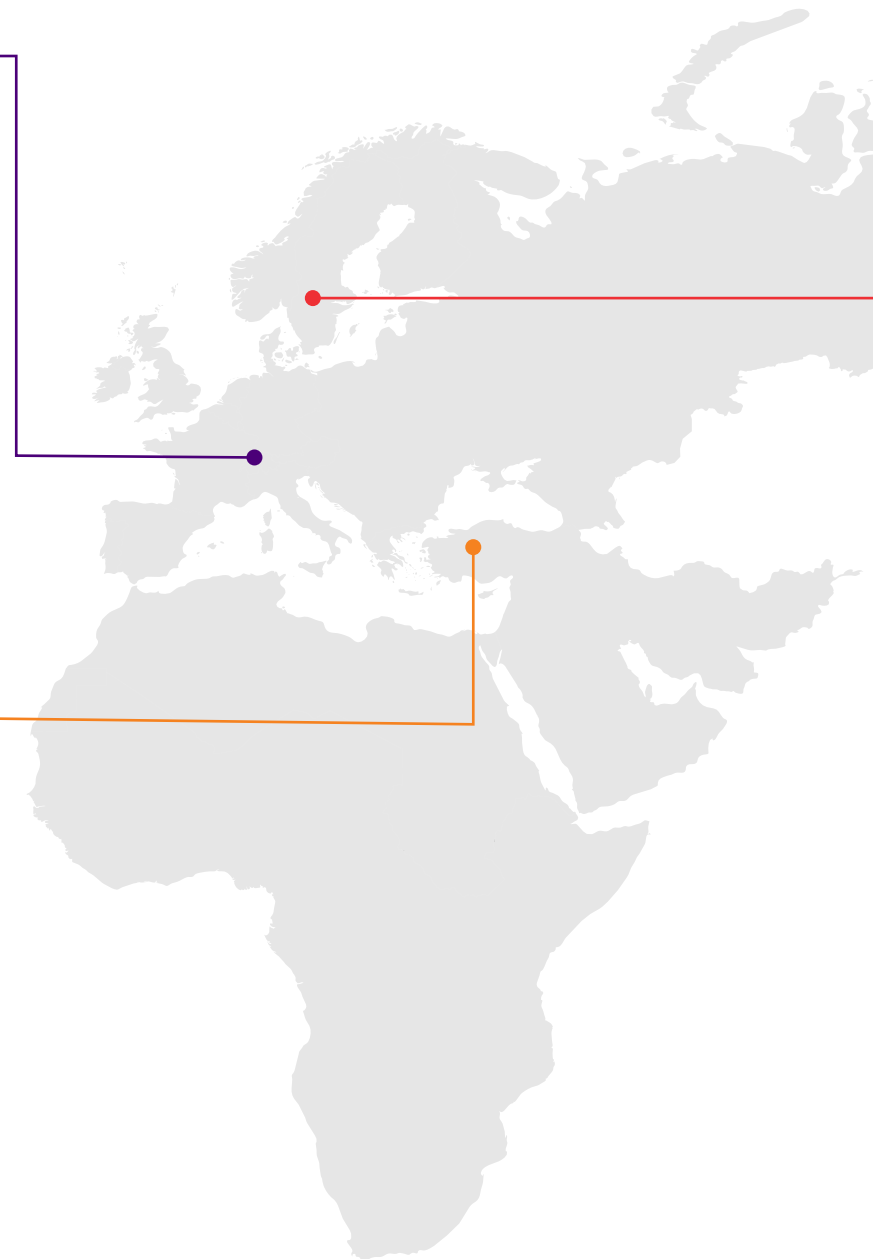
### New rules on document production in representative actions expected to enter into force

Changes to the scope of document production in representative actions are expected to enter into force later this year. According to the proposal, a defendant may be obliged to produce personal information of individuals that are potentially covered by the plaintiff's proposed action. These rules apply even if the information lacks evidential value, which is usually a criterion for document production in Swedish courts. This proposed change might have a significant impact since it will broaden the obligations for businesses to reveal information about their customers. The changes come as part of the Swedish government's proposals for implementing EU directive 2020/1828 on representative actions in consumer disputes.

## Türkiye

### Significant change in jurisprudence regarding bankruptcy disputes

A recent court decision is expected to result in an increase in creditors bringing bankruptcy proceedings to override arbitration agreements. Previously, a creditor would need to first initiate arbitration to get an award confirming its receivables, and based on this award, the creditor could then request the bankruptcy decision from a Turkish court. However, last year, the Turkish Court of Cassation ruled that creditors do not need to initiate arbitration, even where there is a valid arbitration agreement, if they proceed with a bankruptcy request. Although not binding, the decision offers a template for other creditors who wish to avoid arbitration.



# Regional Developments: The Americas

## Mexico

### April 2023 deadline to arbitrate against Mexico under NAFTA

The deadline for investors to file claims with respect to investments established or acquired under the North American Free Trade Agreement (NAFTA) will expire this year. On 1 July 2020, NAFTA was terminated and replaced by the United States-Mexico-Canada Agreement (USMCA). Any investments made after that date will not be susceptible to arbitration, as the investment chapter of the USMCA restricts access to international arbitration for most US companies investing in Mexico. However, USMCA permits legacy NAFTA claims (those relating to investments made or acquired before NAFTA's termination) to be filed for three years after NAFTA's termination, i.e. until 1 July 2023. NAFTA requires a notice of intent to be filed at least 90 days before the claim is filed, so the true deadline for commencing a legacy NAFTA claim is 1 April 2023.

## Peru

### Legislative proposal to modify the State Procurement Law and the Arbitration Law

The Peruvian government has presented a draft bill to Congress that would amend several aspects of arbitration under the State Procurement Law and Arbitration Law. The proposed changes relate to (i) the accreditation of arbitration centers; (ii) the granting of interim measures against the State; and (iii) the default mechanism for resolving disputes related to the State Procurement Law, which will be the national courts unless there is an agreement referring to arbitration. These proposals could be approved and enter into force later this year.

## United States

### New CPRA expected to increase privacy litigation

The California Privacy Rights Act (CPRA) became fully operative on 1 January 2023. The CPRA, which amends the California Consumer Privacy Act, significantly strengthens many of the privacy protections offered to California-based consumers. As a result of these changes, privacy-related litigation will likely increase, in part because of the law's lookback period (access rights now go beyond 12 months), the expiration of the existing law's exceptions related to employee and business-to-business data, and the addition of numerous new obligations, including data subject rights being extended to the employment context and a new right to limit use and disclosure of sensitive personal information.

## Brazil

### Increased litigation to set aside arbitral awards expected

Arbitration has been highly successful in Brazil and has become the preferred venue for dispute resolution in connection with complex contracts. In principle, an arbitral award is tantamount to a final judicial award and the recourse against it is limited. Nonetheless, there has been an increasing number of judicial lawsuits trying to set aside arbitration awards, especially on grounds related to challenges to certain arbitrators, on the grounds that they lacked the proper independence/impartiality.

# Regional Developments: The Americas

## Venezuela

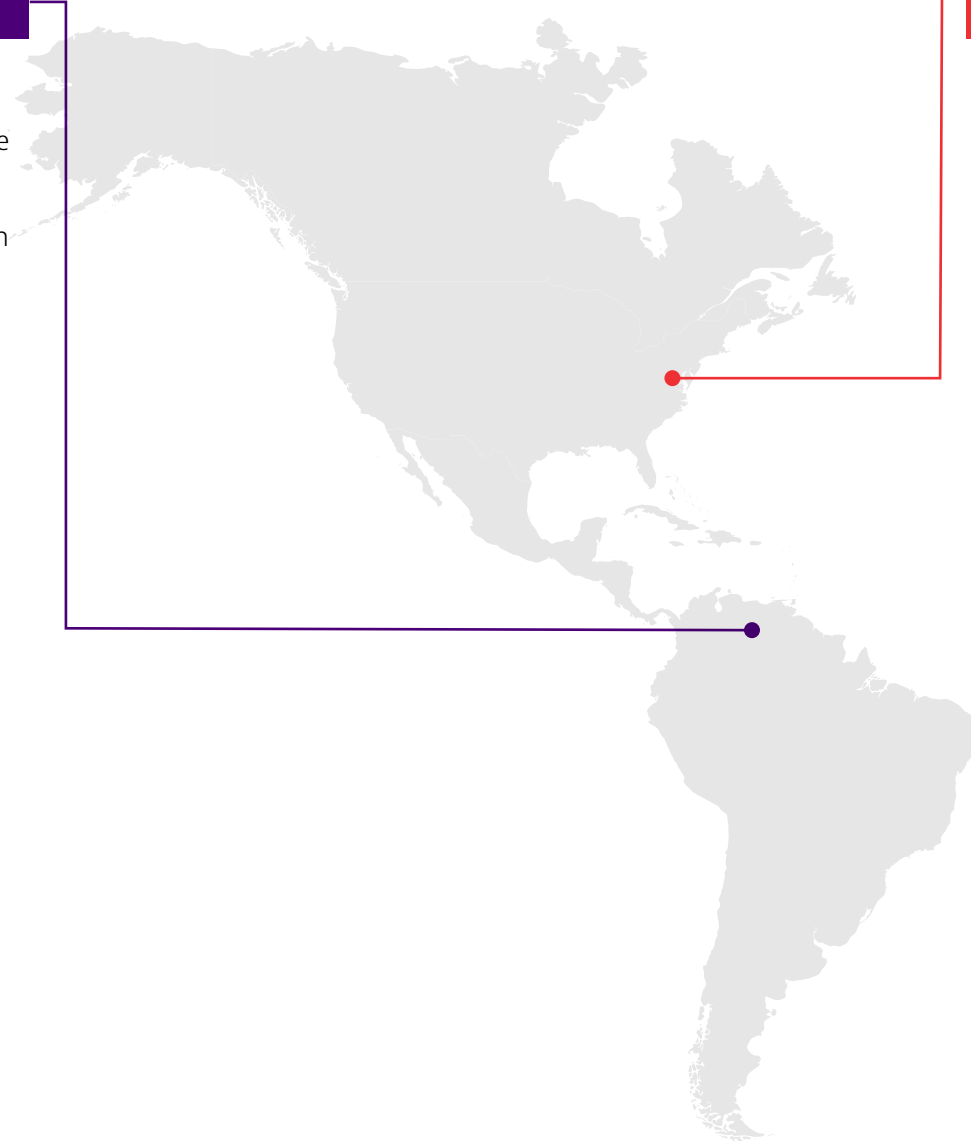
### Introduction of oral proceedings for civil and commercial cases

Venezuela is expected to reform the Civil Procedure Code of 1986 to permit oral proceedings in all types of civil and commercial judicial cases. At present, most cases proceed by way of written submissions. The introduction of oral proceedings has been proposed on several previous occasions, mostly covering only specific areas, such as constitutional and labor, but even these limited measures were only partially successful. Now, however, a judicial commission, with the support of the National Assembly, is engaged in implementing oral proceedings for all civil and commercial cases and the reforms are expected to pass and be in place by late 2023. It is hoped this will expedite the resolution of cases in areas constituting the bulk of judicial litigation in Venezuela.

## United States

### Supreme Court to clarify scope of attorney-client privilege in "dual-purpose communications"

The US Supreme Court is expected to clarify the law around attorney-client privilege later this year. The decision will resolve a split among the federal circuits as to when attorney-client privilege protects "dual-purpose communications" - those containing both legal and non-legal advice. The D.C. Circuit previously held that dual-purpose communications are privileged where one of the significant purposes is to obtain or provide legal advice. In contrast, the Seventh Circuit held that dual-purpose communications in connection with tax return preparation are never privileged. In the present case, the Ninth Circuit adopted the "primary purpose test." The outcome, which is expected by the end of the Supreme Court's term in June, will have significant implications in both criminal and civil proceedings.





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### **Survey methodology**

The study surveyed a total of 600 senior legal and risk leaders from large organizations (annual revenue greater than USD 500 million) based in the UK, USA, Singapore and Brazil. Fieldwork was completed in September 2022.



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Publication date: 10 January 2023