

**Baker
McKenzie.**

The Year Ahead

**Global Disputes
Forecast 2022**

GLOBAL LITIGATION FORCE

With analysis from

**ECONOMIST
INTELLIGENCE**

**CORPORATE
NETWORK**

Foreword



Claudia Benavides
Global Chair,
Dispute Resolution

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

We feature political and economic commentary from The Economist Intelligence Unit, and legal analysis drawn from our extensive global network.

For the first time this year, we include survey data in the report. Our research covered 600 senior lawyers at large companies across four continents. We asked about disputes risk and future trends.

We also include data from our own Litigation Intelligence Tool, which helps companies to assess their litigation preparedness.

The picture is clear: Covid still dominates the disputes landscape, but familiar risks are coming back into focus, particularly around data and ESG. Our analysis suggests many businesses are underprepared for disputes, but can take simple steps to mitigate risk.

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

Global Litigation Force

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

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(Acritas 2021)

77 offices in
46 countries

More rankings
for Dispute Resolution and Arbitration than any other firm

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Represent 240 of the Fortune 500

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Global Economic and Political Trends



Robert Willock
Director MENA, Corporate Network
Economist Intelligence Unit

Public and private sector leaders will spend 2022 grappling with significant, permanent changes to the world of work. There is a broad consensus that the future is 'hybrid', and that employees will spend less time traveling and more days working from home. But there is much scope for disagreement on the details. How many days, and which ones? And will it be fair? Surveys show that women and ethnic minorities are less keen to return to the office, so businesses will need to ensure they are not passed over for promotions in favor of those who are happier to be physically present.

Other risks of inequality abound as the pandemic retains a significant influence on our lives and our work. The new Omicron coronavirus variant may yet prove to be both more transmissible but less deadly than Delta, which would be a good combination for public health prospects in countries that have achieved the widespread protection of their people.

Nevertheless, the global vaccination effort has so far been particularly uneven and inequitable. Most rich countries have already vaccinated the bulk of their adult populations and are now pressing ahead with child vaccinations and booster campaigns. Meanwhile, for some countries in Asia, Africa and South America it will be at least another two years before they reach that tipping point.

The Economist Intelligence Unit (EIU) has modeled the economic impact of slow vaccinations to show that those countries that do not vaccinate 60% of their population by mid-2022 will register GDP losses totaling USD 2.3 trillion in 2022-25. Emerging markets will shoulder around two-thirds of this damage, further delaying their economic convergence towards advanced economies and fuelling poverty and social unrest.

Into this vaccine vacuum steps China, which has spotted an opportunity to win friends and influence people with its Sinopharm and Sinovac products, now being distributed to more than 90 countries around the world, including many of those which are at the back of the queue for Western supplies.

'Westlessness' in general will be a theme in 2022, as the major economies of Europe and North America focus more on their own challenges and opportunities and show less interest in policing or supporting others. Again, China is likely to be the main beneficiary of any diplomatic deficit.

US efforts to peg back China with tariffs and tough talk have achieved only limited success, and it appears that China is currently winning what some perceive as a zero-sum game both politically and economically. American strategies will now focus on building alliances with trusted and similarly motivated partners, along the lines of its Aukus trilateral security pact with Australia and the UK.

The almost inevitable outcome of the US-China race for global economic leadership will be a bifurcation of technology and business between East and West. And that might force some countries and companies to pick sides. For those geographically and politically in the middle, and for multinationals in particular, that could be a tricky choice.

A less likely but potentially more explosive situation is developing around Taiwan. Beijing has not ruled out the possibility of taking the democratically ruled island by force. And Washington has committed to helping Taiwan defend itself against that eventuality, though there is enough intentional 'strategic ambiguity' in its pledge to give both China and Taiwan pause for thought regarding a potential invasion or a formal strike for independence, respectively.

The 2022 Winter Olympics in Beijing in February could be very frosty indeed; though climate change might be the common enemy that ends up moderating this geopolitical rivalry and bringing the world together. If hydrocarbon-dependent Saudi Arabia can commit to net-zero, everyone can. But talk is cheap and action is more expensive and elusive.

At least, as average temperatures continue to rise, the global economy is also heating up. After recording a GDP contraction of -3.7% in 2020, the world rebounded by 5.4% in 2021 and is forecast by the EIU to grow by 4.0%, ahead of the 2017-19 average of 3.3%.

But with the extraordinary fiscal stimuli that have been deployed during the pandemic to achieve that recovery, the return of consumer demand and the spike in commodity prices, the spectre of inflation now looms large. While a degree of upward price pressure will be useful to 'inflate away' some of the debt that has been accumulated by sovereigns and corporates over the past 21 months, if it rises high enough to cause central banks to tighten monetary policy, then that debt will become harder to service.

Tax will also be a hot topic in 2022, especially after most (136) of the world's nations signed up to an historic deal to ensure big companies abide by a fairer system of taxing profits where they are earned with a minimum corporate tax rate of at least 15%. Countries with low or no corporation tax will have to find other ways to make their business environment attractive and competitive.

Whilst in times of great disruption and upheaval, it is comforting to know that some things can be relied upon, the certainty of higher taxation and interest rates in 2022 and beyond is unlikely to provide much succour to the indebted as the Covid19 pandemic rages on.

The Big Picture for Disputes

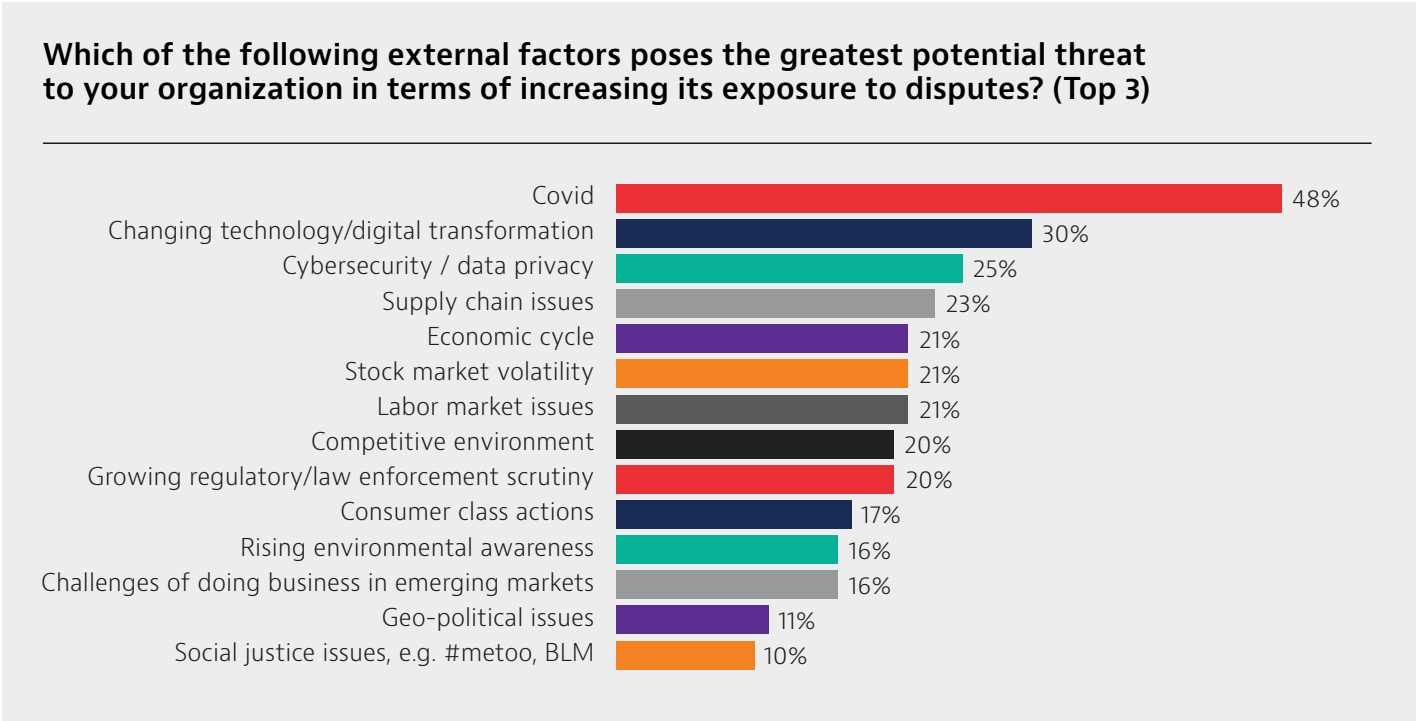
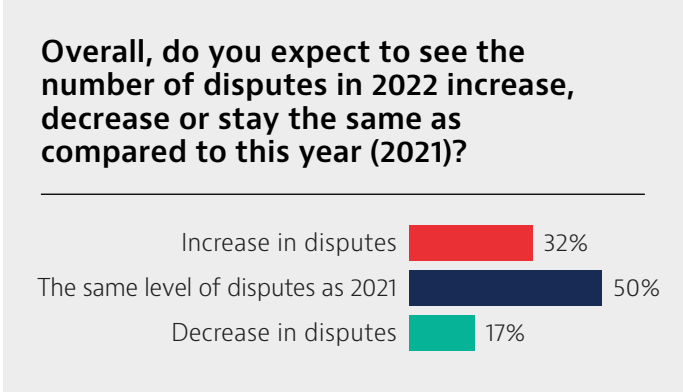
KEY POINTS

- Half of companies expect dispute volumes to stay level, but a third predict an increase
- Covid remains the biggest external factor driving disputes
- Cybersecurity and ESG disputes present the greatest risk
- Two-thirds of companies prefer arbitration to litigation for international disputes
- Online mediation is widespread, and as effective as face-to-face
- Over 80% of companies express concern about an external investigation this year

Disputes volumes show a mixed picture globally. In some jurisdictions, filings are rising as courts experience the post-Covid litigation wave we predicted twelve months ago. In other jurisdictions, that peak has passed, with filings slightly down compared to the busiest period last year. Overall caseloads remain high and many courts are grappling with large backlogs.

Our survey respondents were mildly pessimistic on this issue, with more predicting disputes to increase rather than decrease over the next 12 months.

The reasons for this are varied, but Covid remains the biggest **external factor driving disputes**. Nearly half of our respondents (48%) cited Covid as an issue. Digital transformation ranks second (30%), followed by cybersecurity/data issues (25%) and supply chain problems (23%). The economic cycle ranks only in fifth place (21%), perhaps reflecting the relatively benign economic outlook set out in the preceding section.



We asked our respondents what **types of disputes** concern them most. Cybersecurity disputes came top, with 57% of respondents considering this a risk to their organization in the next twelve months. The related category of data disputes came next

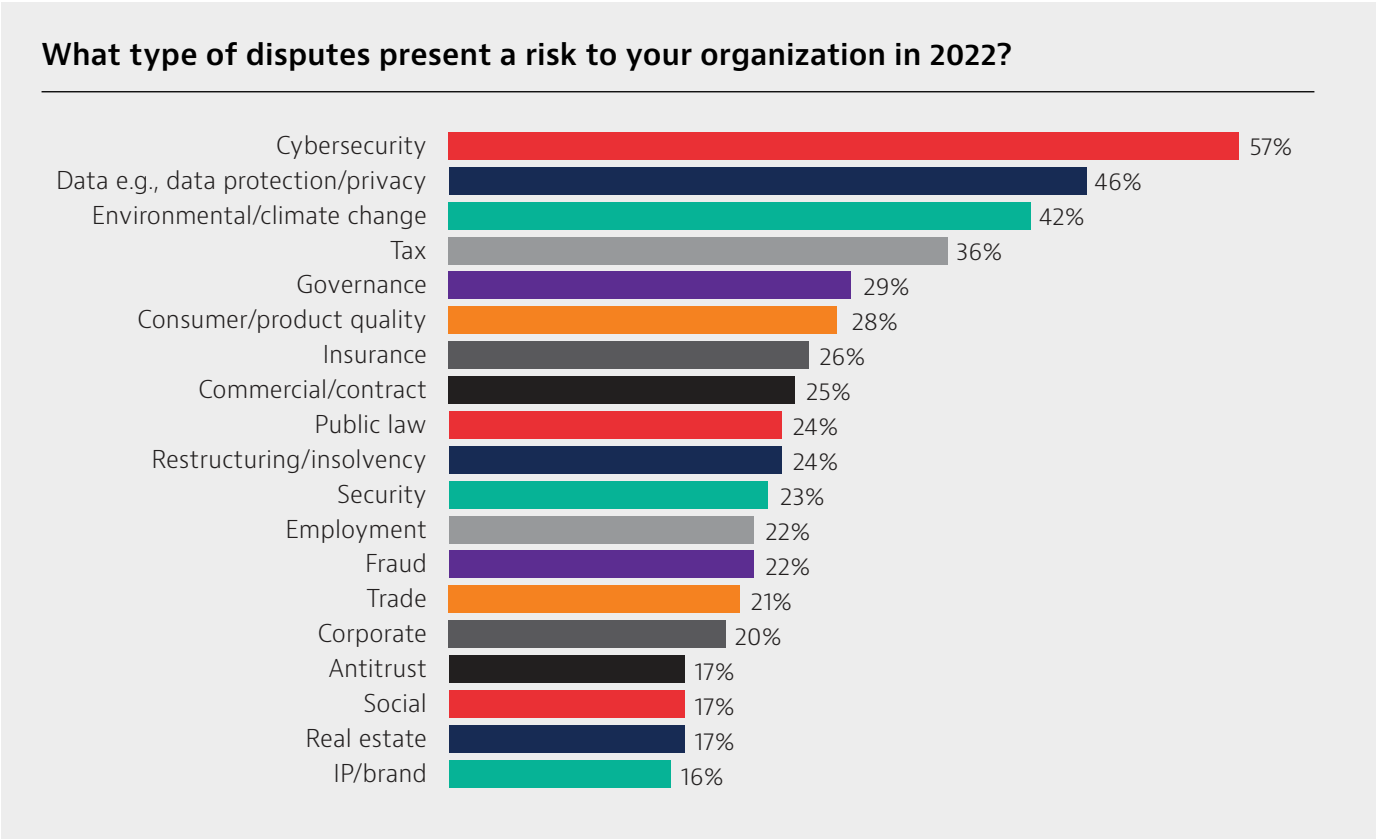
(46%), followed by environmental disputes (42%) and tax disputes (36%).

When we combined the responses for cybersecurity and data disputes, 72% of respondents considered it

a risk. Similarly, combining environmental, social and governance disputes gave a combined risk rating of 67%. These two broad categories represent the **two standout disputes risks** for most companies in the next twelve months. They share common features that elevate their importance: significant reputational risk, fast-moving issues, regulatory interest and global impact.

Our survey also looked at disputes outside of the courts. **Arbitration** remains a popular choice, with almost two-thirds (62%) of respondents preferring it to litigation for international disputes. Conversely, only around one-third (35%) of respondents preferred arbitration for domestic disputes. Arbitration’s ability to provide a neutral forum, and an award which can be enforced easily across borders under the New York Convention, seems to tip the balance for international matters.

The competition between venues for international disputes work has continued. Last year, Macau become the first jurisdiction to offer tax breaks for using its local arbitration centers. But the venue to watch is on the other side of the South China Sea. Filings at the Singapore International Arbitration Center more than doubled last year, with the data hinting at SIAC’s growing role in resolving US-China trade disputes.





SIAC's caseload growth last year was impressive, building on the good work from years before. Much of the increase was due to trade disputes, with Indian, Chinese and US parties predominant. With ongoing trade issues continuing to be in focus in Asia-Pacific, we can expect this trend to continue."



Nandakumar Ponniya
Partner, Singapore

Mediation continues to grow in importance as parties try to resolve proliferating Covid-related disputes. The move to online mediation does not appear to have dampened effectiveness. The Centre for Effective Dispute Resolution (CEDR) reported last year that it had conducted 600 online mediations since the start of the pandemic, and found that settlement rates were slightly better than those for in-person mediations (87% online versus 85% in-person¹). Online mediation is here to stay.

¹ For settlement on the day or within two weeks of the mediation.

Governments are also considering compulsory mediation as a means to tackle growing case backlogs. Such systems already exist, with varying scope and degrees of compulsion, in Australia, Italy, Greece, Chile and parts of Canada, and are under consideration elsewhere, such as the UK. We asked survey respondents if the introduction of compulsory mediation in a particular jurisdiction would make them more or less likely to choose it as a litigation venue. The results were generally in favour: almost two-thirds (63%) of respondents said they would be more likely.

Investigations remain a concern across the board. We asked respondents if they were concerned about the risk of an external investigation from regulators or law enforcement agencies next year. We found that a large majority (82%) reported concern. We asked the same question about internal investigations, and found that 65% reported concern. Regulators and agencies worldwide continue to co-operate, share information, and deploy new technology to drive compliance.

To learn more about compliance risks to your organization, visit our blog [**Global Compliance News**](#).



Cybersecurity and Data Disputes

The number of data breaches worldwide grew by over 30% in the last 12 months. The most common weakness is still humans: human error is involved in 85% of breaches.²

There are many emerging trends. The increase in employees working remotely means more business is being done on the cloud, bringing an increase in cloud attacks. Use of ransomware is also increasing. It is now involved in 10% of breaches, double the figure of last year.³

The global “attack surface” is growing – increasing technology gives cybercriminals more targets. Researchers predict that by 2025, the total number of internet-connected devices is expected to grow to 27 billion.⁴ The deployment of 5G will accelerate development of the Internet of Things (think heating systems, alarms, door locks).

The direct risks to organizations are well-known, and include loss of IP and confidential information, theft and fraud, disruption to business, and reputational damage. Legal risks flow from these, including regulatory and law enforcement action, claims for breach of contract, and class actions for breach of privacy.

These risks require a coordinated approach across functions. In particular, legal teams need to help devise incident response plans, review and manage contractual risk allocations in contracts, and advise on mitigation of risk through cyber insurance policies.

Legal teams also have a critical role to play in protecting against wider data infringements; those not caused by cyberattacks. This includes lack of consent or transparency when processing personal data or conducting marketing.

For more insight on digital transformation and its impact, download our **Digital Transformation and Cloud Survey report**, based on a survey of 500 global respondents.

Legal trends are also emerging. Countries continue to enhance data protection standards in law. Brazil’s first comprehensive data protection law was introduced in 2020 and began to be enforced last year. China introduced its new data protection law in November last year. Several US states are in the process of passing new laws. Canada recently closed a public consultation on its Privacy Act, with a report due this year.

A growing number of jurisdictions have introduced GDPR-style mandatory personal notifications for data breaches, including Singapore and New Zealand. Similar rules will come into effect this year in Japan and Thailand. Others are likely to follow.

Regulatory activity continues to grow. Data protection enforcement in the EU is well-established, and the number of EU actions increased significantly in the past 12 months. Other regulators are now catching up – South Korea and Singapore are becoming particularly active.

Whilst the US remains the home of opt-out data privacy class actions, other legislatures and courts continue to shape their own rules. Some are more welcoming than others. The Dutch courts have seen cases under class action legislation introduced in 2020, and we may see an increase in such actions elsewhere in the EU under the Representative Actions Directive.



The largest and most comprehensive recovery in a data breach case in U.S. history by several orders of magnitude.”

US Court of Appeals for the Eleventh Circuit affirming the USD 380 million settlement in the Equifax data breach class actions, June 2021

² Verizon 2021 Data Breach Investigations Report.

³ Verizon 2021 Data Breach Investigations Report.

⁴ IoT Analytics Research, September 2021.

Cases in the Canadian courts last year suggested a more restrictive trend, absent quantifiable harm to plaintiffs. The UK courts have seen a spike in data misuse litigation in the past 12 months, although a Supreme Court case in November held back from allowing opt-out class actions for data misuse cases.

This presents a challenging landscape for legal teams. Enforcement practices and the underlying law are changing rapidly in individual jurisdictions. Also, many data protection laws contain extra-territorial provisions, or impose restrictions on cross-border data transfers. Analysis must be truly global.

In the coming year we will also see developments in regulation of data use by artificial intelligence software. As companies embed AI into their products, there is a growing debate around how to balance potential benefits against harms. AI ethics codes have been launched, or are under development, all around the world. In May last year, the EU issued comprehensive draft regulations on use of AI. The following month, China published draft regulations governing AI in the Shenzhen Special Economic Zone. More will follow this year.



While waiting for the inevitable AI-specific rules to take effect, there is no shortage of current regulatory, technological, and commercial compliance issues associated with AI use and development. Even where a company believes it has done everything right, there is still a concern that after an adverse event the market, customers, and regulators think otherwise."



Prof. Ryan Abbott

University of Surrey and JAMS neutral, who led the international team of lawyers and researchers which last year obtained the world's first patent for an AI-generated invention.



Environmental, Social and Governance Disputes

ESG disputes are widely discussed, but the first challenge is to define them. In the broadest sense, these are disputes about whether a government or organization has failed to “do the right thing”. But for many companies this implies a voluntary element which is fast disappearing. Demands from customers and shareholders are expanding, and mandatory ESG obligations are being introduced by regulators and legislatures worldwide.

Disputes are no longer restricted to specific events or projects, as claimants seek to bring about behavioral change through challenging organizations’ commitment to ESG standards and the accuracy of their claims on implementation. What a company does or does not say — on its product labels, advertising, websites and company reports — has become an increasing source of disputes risk.

Claimants are using a variety of legal mechanisms to bring claims. They may allege deceptive practices under consumer protection laws; fraud or securities law violations; or claims in tort or delict. There is also a focus on making organizations accountable for supplier conduct, and parent companies responsible for actions of subsidiaries. Recent case law and legislation in Europe has made this easier for claimants.



Environmental disputes

Climate disputes remain a key risk in this area. There are over 1,800 ongoing or concluded climate change cases around the world, a figure which has doubled since 2015. Over 75% of claims were filed in the US, but an increasing number of cases with far-reaching consequences have been seen outside the US, particularly in Europe.⁵ Government entities make up the majority of defendants, but litigation against corporations is on the rise.⁶

Parties are no longer contesting climate science. However, we expect to see continuing debate around attribution, such as the causal relationship between emissions and specific extreme weather events. There is also an increasing focus on the impact climate change will have on the enjoyment of human rights, including specifically on the rights of future generations.

We anticipate growing numbers of cases this year, driven by increasing corporate disclosures and voluntary commitments around net zero, combined with activist pressure on greenwashing and other corporate behaviors.



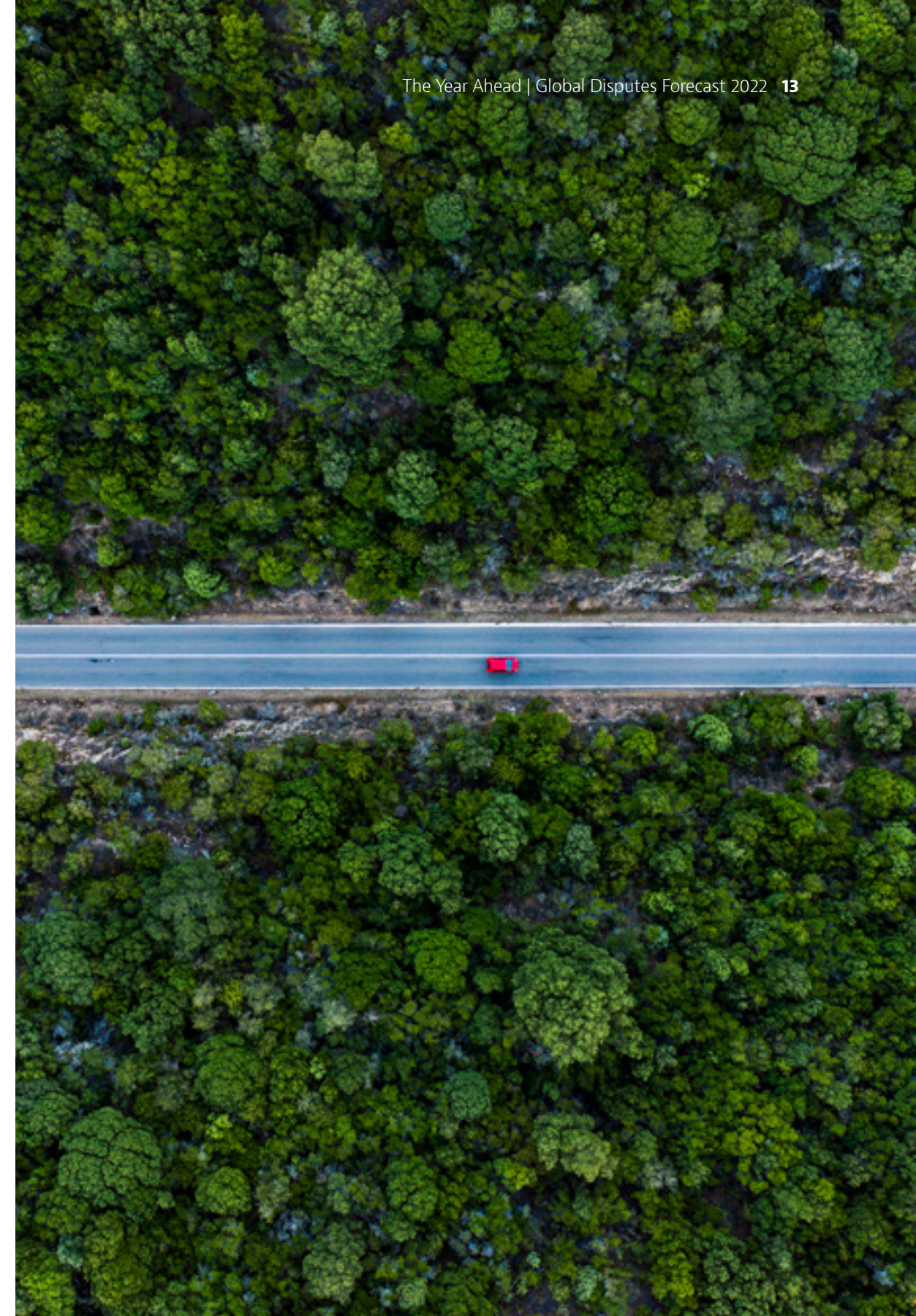
Since the adoption of the Paris Agreement, climate litigation against governments and corporations has increased in pace, volume and scope. Climate change litigation has become a global phenomenon, with cross-pollination of ideas, strategies and support across jurisdictions, linked to accessible global data platforms, plaintiffs using cases from different jurisdictions in novel ways, the rising number of precedent cases and a growing network within the legal community.”



Maryam Golnaraghi
Director of Climate Change
and Environment at
The Geneva Association

⁵ Global Trends in Climate Change Litigation: 2021 Snapshot - Setzer and Higham.

⁶ Climate Change Litigation – Insights into the Evolving Global Landscape - Golnaraghi, Setzer, Brook, Lawrence and Williams, April 2021.



Social disputes

The success of environmental campaigners in the courts has been emulated on other social or political issues. Social justice movements such as #metoo have sparked class actions based on corporate sexual misconduct allegations. Black Lives Matter activists have made claims against corporations based on freedom of expression. At present, much of this type of dispute is confined to the US, but such trends often spill over globally.

Social issues have become more common in employment disputes. There is increasing scrutiny of whether redundancy criteria may indirectly discriminate against certain groups – in particular ethnicity, sex and disability. Equal pay claims are also on the rise as laws tighten up in this area, especially where public reporting of the gender pay gap is a legal requirement. Claims in relation to harassment/bullying are an ongoing trend.

An emerging theme is claims from those with caring responsibilities — many of them women — and those with disabilities, where remote working challenges may affect performance and opportunities. Meanwhile, the mental health impact of long-term remote working and effects of long Covid are likely to result in an increase in disability-related claims.

For more insight on how organizations can strengthen corporate I&D, download our **Mind the Gap** report, based on a survey of 900 employment and I&D leaders across the globe.

Governance disputes

Our survey shows that governance disputes remain high on legal teams' agendas. These are cases about the way a company is run, targeting its ethical practices. It includes tax strategy, bribery and corruption issues, antitrust, executive compensation, and human rights. There is significant overlap with the "S" of ESG: good governance can often prevent social injustice.

We have seen recent examples of what may be called "connection" risk. For example, lawyers acting against a company in a class action may speak to the media; which may attract the attention of whistleblowers on a related claim; which may lead to regulators getting involved. Information about a company's operations is shared across matters and national boundaries, creating not just reputational risk but technical challenges (such as potential loss of privilege).

However, the greatest risks in this area often lie in a company's supply chains. There is particular focus on the use of child and forced labor in large corporate supply chains, triggering activist actions and external investigations.



Companies will need to engage effectively where the threat of ESG litigation does crystallize, ensuring appropriate remediation is actioned without aggravating liability and defending case by case while maintaining a broader view on license to operate and to reputation."



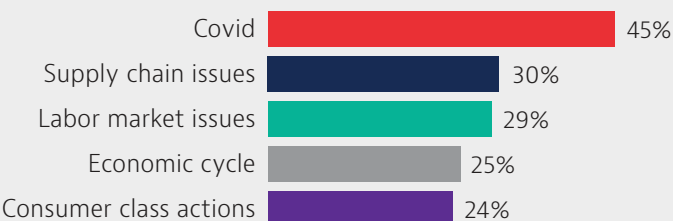
Francesca Richmond
Partner, London

Our values

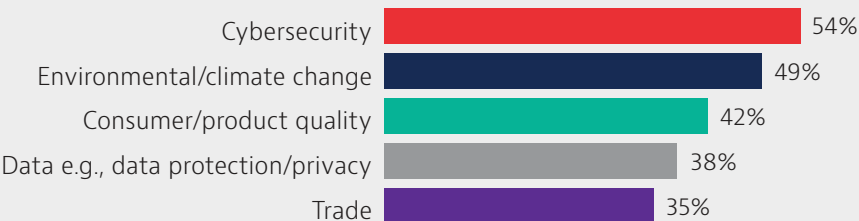
Baker McKenzie is a signatory to the **UN Global Compact**. View our **progress**, or read more about our **CSR initiatives** or our commitment to **inclusion and diversity**.

Consumer Goods and Retail

Top 5 external risks for disputes



Top 5 expected dispute types



CG&R companies rank **Covid** as their top external disputes risk for the next 12 months. Brick and mortar retailers have seen revenues reduced due to business closure orders and reduced footfall. This is leading to lease disputes. Many retailers are also bringing employees back from furloughs, facing disputes from those who are clinically vulnerable or are caring for vulnerable family members, or from those objecting to vaccination or testing mandates.

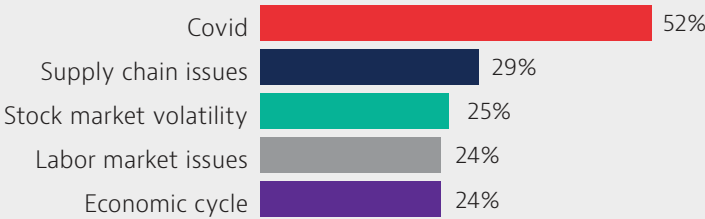
Supply chain issues were also ranked in our survey as a high external disputes risk, and over a third of respondents expected trade-related disputes in the next 12 months. Supply shortages and transport disruptions have led to delays and increased prices, with disputes following. We have seen particular issues from buyers turning suppliers: those with excess capacity selling to the market, but without the experience or legal protections of experienced suppliers. In the longer term, many CG&R companies are looking to shorten and diversify their supply chains, destabilizing existing relationships.

Nor have the more usual CG&R disputes gone away. Organizations still fear **consumer and product quality disputes**. The US, UK and Australia have seen high numbers of consumer class action cases in recent years, but recent legal reforms in other parts of the world, particularly in Europe, mean class actions may spread geographically.

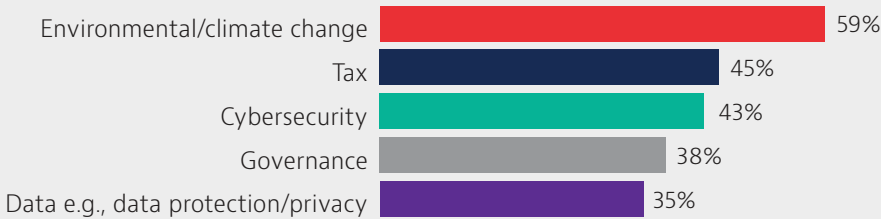


Energy, Mining and Infrastructure

Top 5 external risks for disputes



Top 5 expected dispute types



Covid continues to affect EMI organizations, particularly through disruption to normal patterns of supply and demand. Many EMI organizations are affected by the global energy crisis, with record prices driven by a surge in demand as the world pulled out of the Covid slump, with particularly strong demand in Asia. This has led to a wave of insolvencies and supply chain disputes.

Perhaps unsurprisingly, EMI organizations in our survey posted one of the highest scores for **supply chain** disputes risk. Such risk also comes from supply chain diversification, as we see a shift of manufacturing capacity towards south-east Asia, India and the US. Companies face additional challenges from construction delays on existing projects, particularly affecting solar projects.

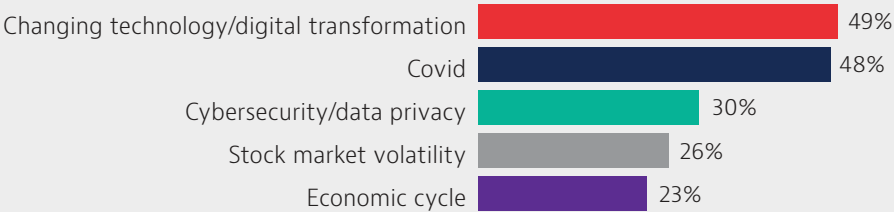
EMI companies are also concerned about **environmental disputes**, with 59% of respondents expecting to encounter them this year. Besides direct challenges from environmental activists, disputes will continue to arise from the transition to renewables, as new business and regulatory structures are implemented. This area continues to be of interest to regulators and law enforcement agencies. Our survey showed that no other industry polled higher than EMI for concern about an external investigation this year.

Tax disputes are also showing strongly, with 45% of EMI companies expecting them this year. Again, no other industry polled higher. There are many reasons, but they partly lie in operators working in emerging markets, often alongside state-owned entities. Nationalization is a risk but direct expropriation is out of fashion: unfavorable changes to tax systems, unexpected tax charges or other forms of “stealth nationalization” are more common.

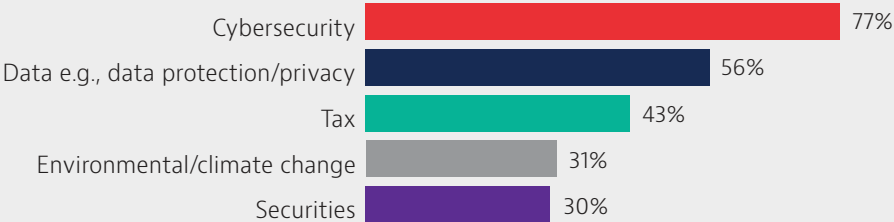


Financial Institutions

Top 5 external risks for disputes



Top 5 expected dispute types



Our survey highlighted the unique disputes challenges faced by financial institutions. Responses on risks and expected disputes types were very different from other industries, although showed some similarity to those faced by technology firms. **Changing technology** was seen as the greatest external disputes risk, with almost half of respondents (49%) citing it. Financial institutions operate in a highly dynamic environment, with fintech companies challenging traditional players, and disputes arising from disrupted relationships.

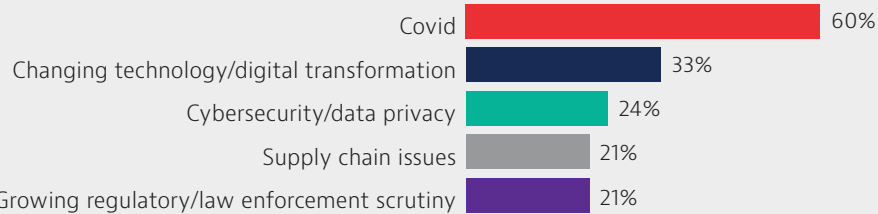
Strikingly, more than three-quarters of financial institutions (77%) expect to be involved in a **cybersecurity dispute** in the next 12 months. Banks and other financial institutions are concerned about the scale of potential liability for cyberattacks, and about strengthening data protection laws that give victims greater rights of redress, or impose liability for cyberattacks on directors.

Tax disputes also feature high on the radar. The spotlight on tax havens and anti-tax avoidance initiatives continues to create legal, compliance and reputational risk. FIs must balance customer relationships, expectations of privacy, information security and their public reputation. FIs also expect to encounter **environmental disputes**. New standards will undoubtedly increase scrutiny on financial institutions, especially around due diligence, disclosure and marketing of investments, including greenwashing.

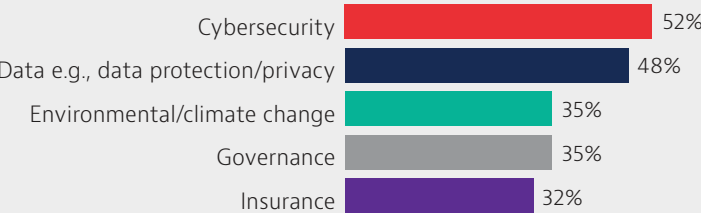
This sector must also cope with specific disputes challenges on issues such as rising debt defaults, cov-lite loans, discontinuation of inter-bank offer rates, and special purpose acquisition companies. The impact is clear: financial institutions predicted a greater **increase in disputes** this year than any other industry (38% predicted an increase; 54% thought levels would stay the same; 8% predicted a decrease). Financial institutions also reported the **highest disputes costs** of any industry in our survey.

Healthcare and Life Sciences

Top 5 external risks for disputes



Top 5 expected dispute types



This sector has been at the center stage of the recent epidemic, with **Covid** remaining by far the greatest external disputes risk in our survey. Covid has had both a short and long-term impact on the industry. In the short term, we have seen disputes arising from export bans or restrictions, intellectual property infringements, false advertising and changing business partnerships.

In the longer term, Covid has led to major changes in how health services are delivered. Analysis suggests use of telehealth is now 38 times the pre-Covid baseline.⁷ In some jurisdictions this has been accompanied by temporary or permanent regulatory changes. The rapid development of Covid vaccines has also demonstrated that traditional business models can be made more efficient, and that new partnerships are possible. Wherever we see major disruption to business patterns, we inevitably see disputes. For example, last year the US Department of Justice targeted telemedicine fraud in excess of USD 1.5 billion, highlighting a coordinated effort to regulate this emerging pattern of health care delivery.

Around half of respondents in our survey expect to see **cybersecurity disputes** (52%) or **data disputes** (48%) this year. Healthcare companies deal in the most sensitive of personal data, often flowing through personal health apps and outdated hospital systems that offer opportunities to cybercriminals. Class actions in this area are prolific in the US, and growing in other areas, particularly in Europe.

Healthcare and Life Science organizations reported the greatest rise in disputes costs in the last 12 months, compared to other industries in our survey. Over half (52%) reported disputes costs had risen, with around a quarter saying these were unchanged (26%) or lower (22%).

To learn more about the global outlook for Healthcare and Life Science disputes, [register](#) for our upcoming webinar.

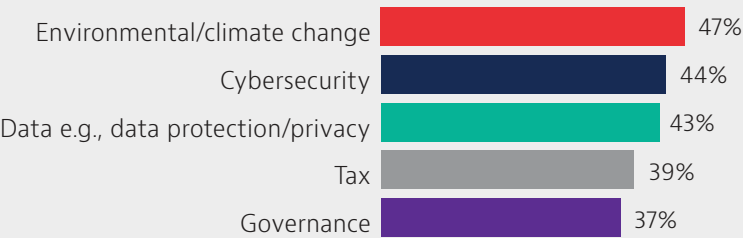
⁷ McKinsey analysis, July 2021.

Industrials, Manufacturing and Transportation

Top 5 external risks for disputes



Top 5 expected dispute types



Covid and **supply chain** issues feature highly as external disputes risks. Businesses are facing substantial business and operational disruptions, including closures of workplaces and ports, disruptions to supply and distribution channels, shortage of labor, goods and raw materials, and weakened demand. Disputes are arising through force majeure declarations and other contractual avoidance, as well as from attempts to restructure supply chains.

Labor market issues are also ranked highly as an external risk. One ongoing trend, particularly in the transportation sector, is in misclassification claims, as non-traditional or contingent workers seek the rights and protections of employees. Legal frameworks for such workers continue to evolve and, in many cases, bring greater protections for such workers. Claims and class actions are being brought by workers seeking minimum wage or other benefits, or redress for unfair termination. Claims across the world are attracting press attention, as the gig economy comes under scrutiny.

Environmental disputes top the list of expected dispute types this year. IMT companies are facing a range of issues, including transport emissions, the impact of infrastructure development and challenging community relations. Companies must consider exposure from using environmentally hazardous materials

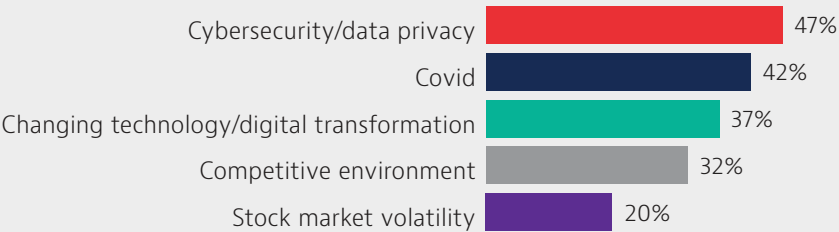
in manufacturing, not only directly but also by supply chain partners. Operators also face risks from excavating and clearing operations, pollution, and energy and water consumption from producing building materials.

Despite these disputes risks, when our survey asked about **litigation preparedness**, we found that IMT companies report the least confidence of any industry. Only 30% of IMT organizations express a high degree of confidence in their preparedness for litigation.

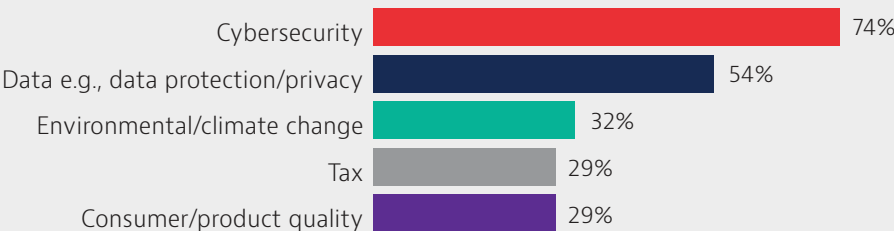


Technology, Media and Telecommunications

Top 5 external risks for disputes



Top 5 expected dispute types



This is a fast-moving industry with unique and changing risks. **Cybersecurity** and **data privacy** concerns are dominant in our survey. Covid has accelerated digital transformation across all industries, driving huge demand for TMT infrastructure, products and services, such as 5G, video conferencing software, and digital payments. This carries the key risk of ensuring the lawful collection, processing and protection of personal data. Technology providers face pressure to balance innovation against risk of misuse. Nearly three-quarters (74%) of TMT firms expect to be involved in a cybersecurity dispute this year.

This **competitive environment** is driving other types of disputes. We are seeing disputes with outsourced providers and between competitors. New technologies are leading to some unintended outcomes. To give one example, flawed facial recognition technology has led to false arrests, and resulting claims. And in the widest sense, laws have not yet evolved to deal with the most advanced new technologies. Can cryptocurrency be property? Can an artificial intelligence engine be named as the inventor of a patent? Can automated trading algorithms benefit from the doctrine of mistake when their trades go wrong? These are just a few examples of recent cases in this area.

Environmental disputes feature high on the list of expected disputes this year. This reflects rising expectations of accountability on the TMT sector in this area. Circular economy obligations are increasing on tech products, including for sustainable materials, disposal, and right to repair. Companies are also under particular scrutiny for ensuring their supply chain partners observe laws prohibiting use of child/forced labor or conflict minerals.

TMT companies also report high levels of concern about regulatory or law enforcement **investigations**. From our survey, 84% of respondents considered this to be a risk in the next 12 months. A little more, 85%, considered class actions to be a risk. These two figures were amongst the highest reported of any industry in our survey.

The potential problem is that whilst tech companies focus on high-profile disputes risks, they may be taking their eye off the ball in other areas. For example, only 11% of TMT respondents considered **governance disputes** to be a risk for their organization this year, whereas other industries reported two to three times that figure (an average of 29%).

To learn more about the global outlook for TMT disputes, [register](#) for our upcoming webinar.

Litigation Preparedness

KEY POINTS

- Organizations are underprepared for litigation, especially the smallest in our sample
- Legal teams need to consult widely across the business when planning for litigation

The risks over the next twelve months are real. However, our survey found that only a third (35%) of respondents expressed high confidence in their organization's level of preparedness for litigation.



This masked some significant differences. Amongst the smallest companies in our survey, with revenue of USD 500 million to USD 1 billion, just 27% of companies were highly confident. This figure rose to 73% of companies with revenue over USD 25 billion. There were also regional variations: 46% of US respondents were highly confident in their litigation preparedness, but just 18% of respondents in Singapore.

Nearly a year ago, Baker McKenzie launched its **Litigation Intelligence Tool**, designed to assess a company's litigation preparedness over more than a dozen factors, and benchmark it against peers. This reveals the areas where companies tend to do well in preparing for litigation (shown to the right in green), and the areas where they tend to underperform (shown in red).

This shows common weaknesses, particularly around litigation teams consulting across their organization when planning for, and responding to, litigation. Legal teams should be connecting with IT, Communications, HR, Compliance, Records and Management, amongst others.

Best practices

- Have a litigation team, dedicated to planning for and responding to litigation risks
- Evaluate relevant contract provisions in advance (e.g. jurisdiction clauses; choice of law clauses)
- Monitor complaints against the company and other litigation triggers
- Have a clear map of internal systems and sources of documents and data
- Ensure employees are aware of the company's document preservation obligations
- Strategize for the cost of litigation (e.g. template litigation budgets; reporting protocols for outside counsel)
- Manage litigation risk at a global level
- Train employees to recognize and protect privileged information
- Train employees on what they should do when they become aware of litigation or face a litigation threat
- Track litigation trends in your industry
- Have access to personnel trained in proper eDiscovery procedures, able to support litigation
- Have litigation response procedures and protocols in place, including for data preservation
- Take measures to ensure that former employees remain available to assist in possible future litigation
- Ensure litigation team consults across the organization when planning for and responding to litigation risks

Our “Four Ts” Model for Litigation Preparedness



TALK

- to colleagues across your organization about litigation risk



THINK

- about your contractual clauses
- about your litigation response protocols
- about where your documents and data reside



TRAIN

- employees on what to do when they face a litigation threat
- and on data preservation obligations
- and on how to recognize and protect privileged information



TRACK

- complaints against the company and other litigation triggers
- and litigation trends in your industry



Our survey shows that most companies are off to a good start. They evaluate dispute-related contract provisions and have litigation teams in place. But to make those teams even more effective, it is crucial to implement the other “Ts” such as developing litigation response protocols and including other business functions when planning for or responding to litigation risks. We know from our prior research that some companies think these planning efforts will drive up their costs but, in reality, the cost of being unprepared is much, much higher.”



Jennifer Semko
Partner, Washington, D.C.

To learn more about Litigation Preparedness, join our [global webinar](#), where our expert team will give tips how to get your organization ready for new litigation threats.

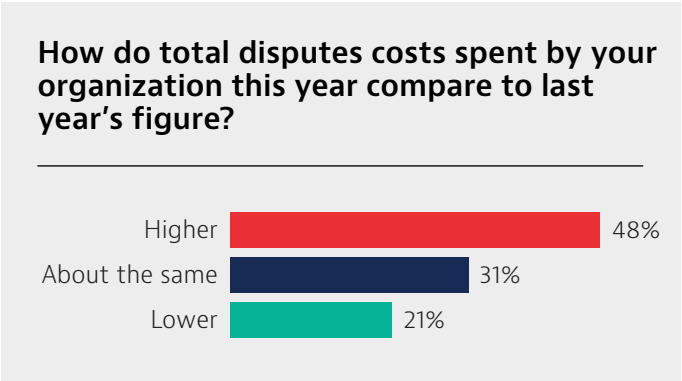


Costs and Efficiency

KEY POINTS

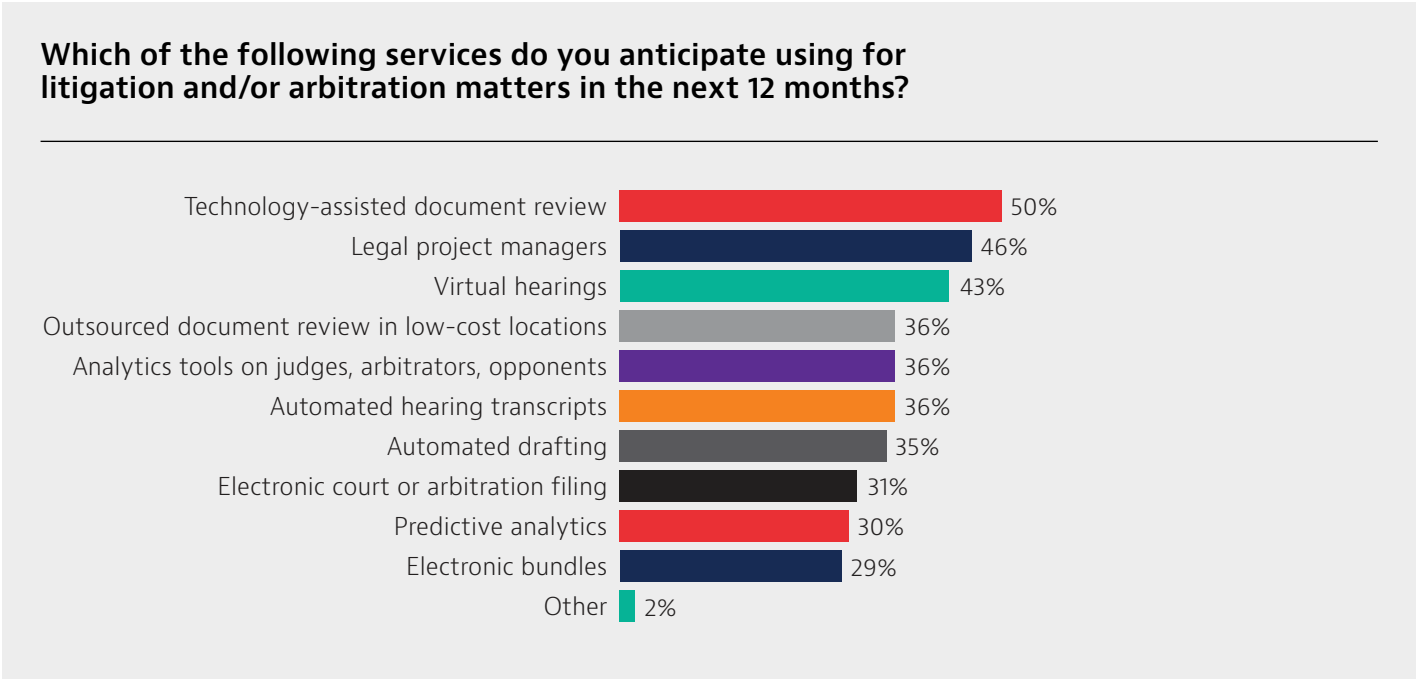
- Remote trials are driving down costs, but overall disputes costs continue to rise
- Disputes technology and other systems are not being used to maximum potential
- Organizations lack confidence in finding the right services for litigation support

Disputes costs continue to rise. The average organization in our survey spent USD 48 million last year on disputes (including settlements, judgments, awards and legal costs), amounting to an average of 1.0% of turnover. Almost half of respondents (48%) reported disputes spending to be higher than in the previous year.



Covid has been a recent factor driving higher overall disputes costs, but it has also led to positive change. Covid kick-started an overdue technological revolution in many court systems, with virtual hearings now a permanent feature. Many courts and arbitral institutions have also introduced online case management platforms in the last two years. This has led to a reduction in trial costs, as lawyers abandon paper bundles, long haul flights and related administration.

Our survey asked about the use of disputes technology and other cost-saving systems such as legal project management and outsourced document review. Usage is not yet widespread. Technology-assisted document review — which has now been around for over a decade — was the most popular tool and is expected to be used by half (50%) of respondents this year.



This relative lack of take-up might be driven by a lack of confidence in navigating new technologies and processes. We found that only a third (33%) of organizations have a high degree of confidence in finding the right services for litigation or arbitration support.



“

Litigation costs continue to rise year over year, and we believe that a big part of this is due to a lack of comprehensive information governance programs and general discovery strategy, combined with the overall increase in data volumes. Being proactive in advance of any litigation or investigation is important to controlling these costs.”



Bryant Isbell
Managing Director, Baker
McKenzie Global eDiscovery
and Data Advisory Group

“

There is room for the litigation market to embrace Legal Project Management more than it does at the moment. Project management is a big part of the litigation process, and there is benefit in having trained professionals bring best practices to bear. This improves efficiency and frees up the legal team to concentrate on what they do best.”



Sarah Gerrard
Legal Project Manager,
Baker McKenzie

Regional Developments: Asia Pacific

China

LANDMARK DECISION IN SECURITIES FRAUD SETS THE SCENE FOR MORE CLASS ACTIONS IN 2022

Towards the end of 2021, China saw the conclusion of its first class-action lawsuit against corporate fraud when a Guangzhou court ordered a Shanghai-listed company and some of its former executives to pay compensation of \$385 million to over 50,000 investors for losses arising from the company's financial fraud. This landmark decision sets the tone for class actions in the securities area, and we can expect to see more class actions in 2022, alongside increased internal investigations to manage such fraud risks.

Australia

PROPOSED CHANGES TO UNFAIR CONTRACT TERMS REGIME

The Australian Government has proposed legislative amendments to strengthen the unfair contract terms (UCT) laws that protect consumers and small businesses. The amendments proposed include: prohibiting the use, application and reliance on UCTs in standard form contracts; empowering courts to impose a financial penalty for breaches in addition to declaring the term unfair; creating a new rebuttable presumption; and expanding protection to cover more "small businesses". This is a significant change to the unfair contracts regime and is expected to evolve in 2022.

Hong Kong

OUTCOME-RELATED FEE STRUCTURES LIKELY TO BE PERMITTED FOR ARBITRATION

In early 2019, the prohibition on third-party funding for arbitrations in Hong Kong was lifted. However, lawyers in Hong Kong remain barred from funding a party for whom they act in arbitration by entering into conditional or contingency fee arrangements. An ongoing review of the legal position is likely to result in outcome-related fee structures for arbitration being permitted in 2022, subject to certain protections to mitigate against associated risks, such as conflicts of interest and frivolous claims. This permission will be another important step for maintaining Hong Kong's competitiveness as a leading international arbitration hub and its reputation as a pro-arbitration and pro-enforcement jurisdiction.

Hong Kong

CROSS-BORDER INSOLVENCY POISED TO BE THE THEME

In May 2021, Hong Kong announced a cooperation mechanism with Mainland China for mutual recognition of and assistance to bankruptcy (insolvency) proceedings. As pressure on Mainland property developers mounts, and worry over contagion risk increases, we expect 2022 to be the year for the cooperation mechanism to start generating tangible outcomes and realizing its potential. Meanwhile, we await Hong Kong's adoption of the UNCITRAL Model Law on Cross-Border Insolvency. It is hoped that UNCITRAL's Model Laws – on Recognition and Enforcement of Insolvency-Related Judgments, and Enterprise Group Insolvency – will be adopted in due course.



Regional Developments: Asia Pacific

Malaysia

NEW SHARIAH-COMPLIANT ARBITRATION RULES TO TAKE EFFECT

The Asian International Arbitration Centre's (AIAC) new i-Arbitration Rules, which offer a framework for Shariah and Islamic financial disputes, are due to come into effect in 2022. The rules, which were last revised in 2018, are currently undergoing public consultation. Notable features of the proposed new rules include: (i) a new provision on summary determination; (ii) incorporation of a fast track procedure and revisions to emergency arbitration provisions; (iii) revisions to the joinder and consolidation provisions; (iv) revisions to the tribunal's powers to award Ta'widh and Gharamah as compensation and penalty for late payments; (v) new provision for Shariah-guided third-party funding; and (vi) revisions to the process of reference to the Shariah Advisory Council, including a new provision on the appointment of a Shariah Expert by the tribunal.

Indonesia

UPCOMING PRECEDENT ON LIABILITY OF FRAUDULENT ACTIVITIES SURROUNDING THE USE OF ONE-TIME PASSWORDS (OTPS)

In October 2021, a civil case was brought against an Indonesian telecommunications company and an Indonesian bank by a consumer. A criminal group defrauded the telecommunications company into giving them a new mobile chip with the consumer's number, which they used to obtain an OTP to access the consumer's mobile banking account, and transferred approximately USD 18,000 out of the account. With the noticeable e-commerce growth in Indonesia, the outcome of this case may set an interesting and important precedent of establishing liability in the security of OTPs by banks and network providers.

Japan

UPDATES TO ARBITRATION ACT EXPECTED

During 2022, Japan's Arbitration Act is expected to change, in part to align more closely with the amended UNCITRAL Model Law 2006. Following an announcement by the Ministry of Justice on its website in March 2021, the following amendments to Japan's Arbitration Act are anticipated: (i) an enforcement scheme for interim and/or provisional measures issued by arbitral tribunals, which is in line with the amended UNCITRAL Model Law 2006; (ii) broader jurisdiction of the Tokyo District Court and the Osaka District Court over cases related to procedures under the Arbitration Act; and (iii) court discretion not to request Japanese translations of arbitral awards and written evidence. In addition, the interim draft proposals cover an enforcement scheme for settlement agreements arising from mediation procedures, which is in line with the Singapore Convention on Mediation.

Philippines

RATIFICATION OF THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP

The Philippines is expected to complete domestic procedures for treaty ratification before the implementation of the Regional Comprehensive Economic Partnership, a comprehensive free trade agreement between members of the Association of Southeast Asian Nations and six FTA partners. The Constitution requires this to be approved by the Philippine Senate before taking effect. The RCEP contains, among other items, a work program for settlement of investment disputes and provisions allowing State parties to the RCEP to undertake voluntary alternative means of resolving their disputes. The RCEP State parties aim to begin its implementation in January 2022.



Regional Developments: Asia Pacific

Singapore

REFORMS TO SINGAPORE'S CIVIL JUSTICE SYSTEM

Proposed changes to the court system in Singapore in support of digital transformation are expected to come into force in 2022. The changes, which were introduced by the Ministry of Law in July 2021, include proposals to conduct proceedings via electronic means, and documents-only hearings in appropriate circumstances. The Courts (Civil and Criminal Justice) Reform Bill will implement recommendations of the Civil Justice Review Committee, including the exchange of affidavits in evidence-in-chief before discovery, a single omnibus interlocutory application, scaling party-and-party costs, the scope of discovery and ambit of what must be produced, and single joint experts.

Singapore

PROPOSED FRAMEWORK FOR CONDITIONAL FEE ARRANGEMENTS

A framework for conditional fee arrangements to be entered into between lawyers and clients in selected proceedings should take effect in 2022, subject to Parliamentary approval. The proposals are contained in the Legal Profession (Amendment) Bill, which was introduced by the Ministry of Law in November last year. It would permit CFAs in international and domestic arbitration proceedings, certain proceedings in the Singapore International Commercial Court, and related court and mediation proceedings. The framework will apply to law practices and certain registered foreign lawyers and foreign law practices. These amendments build on the third-party framework introduced in 2017.

Taiwan

INTRODUCTION OF PROFESSIONAL ADVISORS IN CIVIL PROCEDURE

Taiwan is to introduce the role of "professional advisors" to assist the courts under a draft amendment to the Code of Civil Procedure. If the subject matter of a civil case involves a professional field, the court may, after consulting the parties, appoint a person with special knowledge and experience in that field as a professional advisor to participate in the litigation proceedings, such as evidence investigation. The professional advisor's role is to assist the court in adjudicating a case, but the court cannot adopt the professional advisor's explanation as evidence for fact-finding without the parties' consent.

Thailand

COVID E-HEARING PROCEDURES GIVEN PERMANENT STATUS

Thailand will benefit from a new e-hearing procedure this year, allowing full electronic court proceedings for civil cases. This will cover the whole lifecycle of litigation, including the commencement of proceedings, submission of pleadings, and conducting witness examination until the judgment hearing. It will also allow witness examination hearings to be conducted for any witnesses or parties who have domiciles in foreign countries. The procedure is applicable not only for new cases to be filed but also for pending cases. It represents a continuation of some of the measures temporarily introduced by the Thai judiciary in response to Covid.



Regional Developments: Asia Pacific

Vietnam

NEW LAW PROVIDES FOR ARBITRATION OF ENVIRONMENTAL DISPUTES

A new environmental protection law took effect on 1 January 2022. The Law on Environment Protection No. 72/2020/QH14 dated 17 November 2020 provides that disputes on compensation for environmental damage can now be brought to arbitration institutions, as well as courts. The law will shift the burden of disproving the causal nexus between the violating acts and damages done to the aggrieved party to the party committing the violation, a deviation from the general rule of proceedings that the claimant bears the burden of proving their claim. As a result of these changes, it is expected that environmental-related arbitration and litigation will increase in 2022 and beyond.

For more insight on how businesses view rising protectionism, regulatory scrutiny and shifting jurisdictional influence, and how this is impacting their supply chain strategies, download our report **State of Play – Supply Chains and Trade Realignment**.



Regional Developments: EMEA

England & Wales

CLIMATE CHANGE DISCLOSURES MAY LEAD TO INCREASED LITIGATION

The UK Government is considering implementing mandatory climate-related disclosures and financial information by publicly-quoted companies, large private companies and LLPs. This is in line with recommendations of the Taskforce on Climate-related Disclosures. Subject to Parliamentary approval, this new requirement will come into force on 6 April 2022, for accounting periods starting on or after that date. If such future disclosure is inaccurate or misleading this could increase companies' risk of climate-related litigation from activist shareholders or NGOs. Given the global spotlight on ESG considerations and the increased volume of climate change litigation globally, this development may be of wider interest to any corporation structure with a holding in the UK.

Belgium

DIGITAL TRANSFORMATION OF BELGIAN JUDICIAL SYSTEM

There are plans to further digitalize the Belgian judicial system this year, following the implementation of digital introductory hearings and an online platform for the filing of court documents, which are already in effect. Noteworthy initiatives include the introduction of digital service of judgments and the use of e-Sign by judicial authorities, as steps towards fully digital legal files. In the same vein, classic court letters will be generated digitally and a legal framework for digital hearings will be developed. Another expected step is the creation of a publicly available online database containing all Belgian case law.

Austria

ONGOING BILATERAL TERMINATION OF AUSTRIA'S BITS

Austria is expected to terminate its remaining bilateral investment treaties this year. In 2020, Austria decided to end its BITS bilaterally instead of signing the EU's joint termination agreement that arose following the CJEU's decision in Achmea. The Austrian Parliament has already ratified the termination of the BITS with Croatia, Slovenia and Malta. The Austrian Ministry of European and International Affairs has announced that all remaining BITS, which are still in force, will likewise be terminated shortly. At the same time, Austria has committed itself to strongly supporting the improvement of investment protection at EU level which should ensure comprehensive and effective legal protection for companies.

France

CMAP TO UPDATE ARBITRATION RULES

The Center for Mediation and Arbitration of Paris (CMAP) has introduced new arbitration rules applying to procedures filed as of 1 January 2022. The rules introduce new features seeking to align with companies and their counsels' practical approach and expectations. These include provisions for: (i) parties to communicate with the CMAP and arbitral tribunal exclusively through electronic means; (ii) awards to be rendered electronically; (iii) proceedings arising from similar arbitration agreements to be consolidated; (iv) third parties bound by arbitration agreements to intervene in proceedings; (v) multi-contract arbitrations; and (vi) emergency arbitrations.



Regional Developments: EMEA

Hungary

RULE CHANGE EXPECTED TO LEAD TO MORE IP LITIGATION BEFORE SUPREME COURT

We expect a significant increase in the amount of IP litigation before the Curia (the Supreme Court of Hungary) in 2022. In IP litigation, it is usual to seek a declaratory judgment of infringement first, and then follow up with a damages claim. Bringing a case to the Curia requires an application for leave in cases of low-value litigation. Cases that do not have a quantifiable value, such as declaratory judgments of IP infringement, were widely considered to fall into this category, despite the potential for high-value follow-up litigation. However, recent guidance issued by the Curia states that the low-value threshold does not apply to litigation without a quantifiable value. This will certainly mean more declaratory judgments in front of the Curia, including IP litigation.

France

NEW TRANSPARENCY RULES FOR LEGAL PROCEEDINGS

France is set to pass a law that aims to promote transparency in court proceedings. The law will lift a century-old prohibition on the recording and broadcast of all public hearings. A decree setting out detailed rules for the implementation of the measure is expected for 2022. As of the time of writing, the draft law also contains new controversial provisions regarding professional secrecy for lawyers, whereby judicial authorities could seize legal opinions in corruption, tax fraud and money laundering cases. It is unclear whether these controversial provisions would pass a constitutional review.

Netherlands

CEO FRAUD CASES SET TO INCREASE

The number of CEO fraud cases is expected to increase this year. CEO fraud is a type of cybercrime in which someone impersonates a company executive with the intention of gaining access to company data or finances. This is a trend that began during the first year of Covid-19, when the number of CEO-fraud cases doubled. According to the Fiscal Intelligence and Investigation Service, the fact that more employees are working from home makes companies more vulnerable to CEO fraud. Also, digital fraud becomes more sophisticated as technology (such as deepfakes) develops, making it more likely that even technically-savvy users could fall victim. In response, companies should ensure that their internal control mechanisms are up to date.

Luxembourg

CHANGES TO ARBITRATION LAW EXPECTED

Luxembourg is expected to complete a major overhaul of its arbitration rules. The draft bill, which was published in September 2020, aims to consolidate French-style procedural laws with UNCITRAL Model Law. The proposed law is still under discussion and has not yet been adopted by the Chamber of Deputies. It has recently been submitted for consideration by bodies such as the Chamber of Commerce and the Luxembourg Arbitration Association, who are understood to be generally supportive of the proposed reforms. If adopted, the new law would make Luxembourg a more attractive place for arbitration.



Regional Developments: EMEA

Netherlands

NEW 2022 NAI ARBITRATION RULES TO COME INTO FORCE

The NAI's new Arbitration Rules will come into effect this year. The rules, which were last updated in 2015, are the most widely used arbitration rules in the Netherlands. The final text of the new rules is yet to be released, but expected changes include the possibility to designate the Netherlands Commercial Court as the appropriate court for any pre or post-award litigation, enabling this to be conducted in English. Expedited arbitration will also be permitted for the first time, applying on an opt-out basis to disputes not exceeding EUR 2 million (approximately USD 2.3 million). Other features include enhanced transparency and disclosure rules, and allowing for e-awards.

Russia

FURTHER RESTRICTIONS ON ARBITRABILITY OF CORPORATE DISPUTES MAY OCCUR

An appeal is expected in a case regarding the enforceability of an LCIA arbitration award. Until now, restrictions on the arbitrability of corporate disputes in Russia have been imposed only on disputes concerning Russian legal entities. Here, however, arbitration arose out of an option agreement between two Cypriot companies and their Russian beneficial owners and concerned a stake in a foreign holding that owned a Russian company. The court agreed that, as the dispute concerned ultimate ownership (held through offshore structures), distribution of stakes and management of a Russian legal entity, the restrictions on arbitrability of corporate disputes applied. If upheld, these arguments will significantly restrict the arbitrability of corporate disputes.

Sweden

REFORMS TO THE SWEDISH COMPANY REORGANIZATION ACT

Changes to the Swedish Company Reorganization Act (1996:764) are expected to take place in mid-2022. These changes are in line with EU Directive 2019/1023 which aims at increasing the efficiency of procedures concerning restructuring and insolvency. Key elements of the proposed legislation include: (i) simplified requirements to initiate a reorganization and new requirements to be appointed as a reconstructor; (ii) the ability to withhold the performance of contractual obligations; (iii) new procedures for the courts to decide on a restructuring plan; and (iv) designated courts-in-charge of restructuring cases.

South Africa

DO LOCAL COURTS HAVE THE DISCRETION TO HEAR MATTERS SUBJECT TO AN INTERNATIONAL ARBITRATION CLAUSE?

The first-ever case on the interpretation of the new International Arbitration Act (IAA) is set to go before the Supreme Court of Appeal (SCA) in early 2022. It will hear an appeal against the decision to stay litigation proceedings on the basis that the parties have agreed for disputes to be resolved by international arbitration. The IAA, by incorporating the UNCITRAL Model Law, provides that a court faced with a matter subject to an international arbitration agreement "shall", on request by a party, stay those proceedings and refer them to arbitration under the agreement. The outcome of the appeal could significantly curtail the power of a local court to hear matters which are otherwise subject to an arbitration agreement.



Regional Developments: Americas

Brazil

INCREASED ESG AND COVID LITIGATION EXPECTED

Following trends in Europe and elsewhere, and with ever-increasing public consciousness of climate change issues following last November's COP-26 conference, we anticipate a rise in ESG litigation in Brazil. We expect to see class actions and individual lawsuits against oil and gas companies, as well as the industrial sector in general, seeking court injunctions to compel companies to put in place measures to reduce their CO2 emissions. Social issues, such as diversity issues and social conditions at supply-chain partners are likely to trigger ESG litigation.

Argentina

RISE IN DISPUTES WITH PUBLIC ENTITIES AND CLASS ACTIONS FORECAST

Following some regional trends, and given the fact that 2022 will not be an electoral year, we expect a rise in conflicts with public administration entities as well as a rise in consumer class actions, especially in the telecommunication, retail and pharmaceutical industries. We also expect increased enforcement of environmental regulations via class action litigation, especially given the regulators' under-enforcement of such rules.

Canada

BREACH OF GOOD FAITH CLAIMS LIKELY TO INCREASE FOLLOWING SUPREME COURT DECISIONS

We expect to see an increased reliance on the doctrine of the duty of good faith in contractual disputes, following two recent Supreme Court decisions. In *Callow v Zollinger*, the court held that dishonesty by silence may breach a duty of good faith. In *Wastech v Greater Vancouver Sewerage Drainage District*, the court held that a party's discretion in a contract must be exercised in accordance with the purpose for which that discretion was provided. A failure to do so breaches the duty to exercise contractual discretion in good faith.

Chile

UNPRECEDENTED DISPUTE BETWEEN FOREIGN INSURERS AND THE STATE

Foreign investors could institute proceedings against Chile before ICSID if ongoing consultations with the Chilean Government fail. Congress has been passing legislation to allow pensioners under a lifetime annuity scheme to 'withdraw' part of the funds they originally handed over to the insurer, something which may constitute an expropriation of the company's assets and a violation of foreign investors' rights under applicable investment treaties. A group of delegates to the Constituent Assembly – which is now drafting a constitution proposal that may be voted in the second semester – have proposed to renegotiate these agreements, which could damage Chile's longstanding reputation for legal certainty.



Regional Developments: Americas

United States

FORCED ARBITRATION BAN TO BE CONSIDERED

Congress is set to consider legislation that would prohibit pre-dispute arbitration agreements if they require arbitration of, or otherwise interfere with the rights of individuals, workers, and small businesses to participate in, a class action related to employment, consumer, antitrust, or civil rights disputes. The Forced Arbitration Injustice Repeal Act was passed by the House of Representatives in 2019 but did not advance in the then Republican-controlled Senate. The bill seems likely to once again pass the House of Representatives but it remains to be seen whether the bill can muster sufficient Republican support in the Senate to reach the required 60 votes, given the current 50-50 split between Democrats and Republicans.

Peru

RULING EXPECTED ON CONSTITUTIONALITY OF NEW CONSTITUTIONAL PROCEDURAL LAW

The election of the new judges of the Constitutional Court by the Peruvian Congress is expected to occur by March 2022. Among other pending matters, the new members of the Court are expected to decide on the constitutionality of the new Constitutional Procedural Law, which came into effect in July last year. Notable changes include the removal of the early dismissal of certain constitutional cases, even where these appear to be manifestly inadmissible, as well as requiring cases to be resolved with a single hearing, held within thirty days of the legal action being filed, and a judicial decision within 10 days of the hearing.

United States

DISCLOSURE OF THIRD-PARTY FUNDING MAY BECOME MANDATORY

Congress may consider legislation requiring disclosure of third-party litigation financing agreements in civil lawsuits. Under such agreements, lenders finance civil litigation in return for a portion of any recovery. However, the existence and terms of these agreements are rarely disclosed to the court or opposing parties, which is considered by some to create the potential for conflicts of interest. The proposed legislation, known as the Litigation Funding Transparency Act, would require disclosure at the outset of any class-action lawsuit filed in federal courts, or in any claim that is aggregated into federal multi-district litigation proceedings, of any agreement between a party and a third-party commercial enterprise that has a contingent interest in the outcome of the case. The bill has been reintroduced after failing to advance in the last Congress.

United States

PROPOSED SETTLEMENT AGREEMENT DATABASE TO BE CONSIDERED

Legislation requiring executive agencies to submit information regarding settlement agreements to a public database may be considered by the Senate this year. Under the proposed legislation, the Settlement Agreement Information Database Act, which was passed by the House of Representatives in January 2021, an agency would be required to submit information regarding any settlement agreement (including a consent decree) entered into by the agency related to an alleged violation of federal law. If an agency determines that information regarding an agreement must remain confidential to protect the public interest, the agency would be required to publish an explanation justifying any confidential requirements. Similar legislation was passed by the House of Representatives in 2019 but failed to advance in the Senate, despite bipartisan support.

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Chambers Global 2021

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 took place between September and October 2021.



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