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New Roads to Dispute Resolution

The global dispute resolution survey

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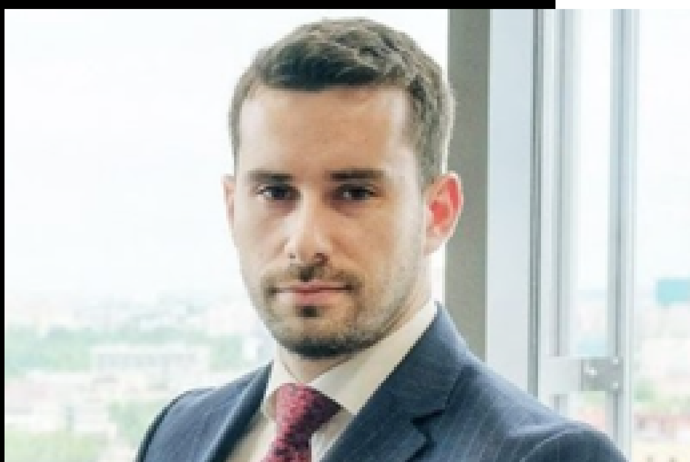

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Foreword

We're delighted to present the first edition of our Deloitte Legal research on global dispute resolution. When we embarked on this endeavor, many parts of the world had only recently returned to in-person court hearings, and many countries were working through a large backlog of cases that had built up due to restrictions and lack of resources. Besides a consolidation of the considerable advancement on digitalization of legal services and litigation in particular, the third year of the pandemic saw added complications from geopolitical uncertainty, higher costs, and risk of recession, but despite these risks, our research showed that companies have become increasingly willing to litigate.

As we have seen in other areas of business, social pressures related to sustainability and climate have placed emphasis on maintaining and defending company reputation. Reputation, and pressure from stakeholders, consumers, regulators, and employees, may explain some of the increased willingness to "win" at litigation, although our research also showed similar pressures to settle amicably.

The pandemic also accelerated digitalization – the general counsel we surveyed are far more open to implementing Artificial Intelligence (AI) to save time and money, and to increase accuracy and predictability of litigation outcome. Around half of respondents suggested digitalization will replace some work of litigation lawyers – a similar proportion stated they had increased the size of their legal department since 2020. We see this as a positive indication that lawyer time is being diverted to the more creative side of their work – solving complex legal issues by using innovative routes, finding new lines of reasoning, and providing value to their businesses, by allowing the technology to perform the repetitive, mundane and routine tasks that make up part of litigation work.

While research reports on dispute resolution are not new, few carry such significant level of responses or insight, and we thank all the legal professionals who gave some of their time to complete our survey. We also thank our colleagues from around the wider Deloitte organization for their input into this report, providing us with further insight around cybersecurity, tax controversy, and technology. It is a welcome reminder of the breadth of knowledge and experience we gained from our multidisciplinary approach while working with a diverse and vast array of clients.

We intend to re-run this survey in the future to measure changes in trends. In the meantime, we look forward to hearing whether these findings resonate with you. Do get in touch if you'd like to discuss this in further detail.

Eduardo, Mihnea and Mircea

Executive summary

Corporate disputes of all types have increased since the COVID-19 pandemic. Whether from tensions over employment, consumer rights or tax, businesses are facing growing volumes of litigation on multiple fronts. At the same time, disputes are becoming more complex, time consuming and expensive – yet the appetite to litigate is higher than ever.

To find out why, Deloitte Legal conducted a large survey on dispute resolution, attracting responses from 568 companies around the world, with annual revenues ranging from US$100 million to more than US$3 billion. Our goal was to discover which disputes have escalated, how companies are responding and what helps them reach a successful resolution.

The survey also investigated the widespread and growing influence of digital litigation tools, as well as how trust in the courts and other dispute resolution mechanisms has shifted.

Its key findings are:

01

Litigation is rising, with 64% of respondents noting a higher volume of cases since early 2020. Looking ahead, survey respondents identified consumer protection, cybersecurity, and corporate and capital markets litigation as major threats, while environmental, social and governance (ESG) and employment disputes were also areas of big concern.

02

The credibility and independence of external legal counsel were the biggest motivations to seek third-party assistance with a dispute. Furthermore, selection of such counsel hangs mainly on the additional services and expertise it offers in non-legal areas, ranging from industry-specific advice to tax counseling.

03

Most companies have more trust in national and regional courts than they did five years ago, but that is not the case for other types of court or arbitration bodies.

04

Digitalization has made huge strides, with most companies now investing in AI-based risk assessment tools and case management software.

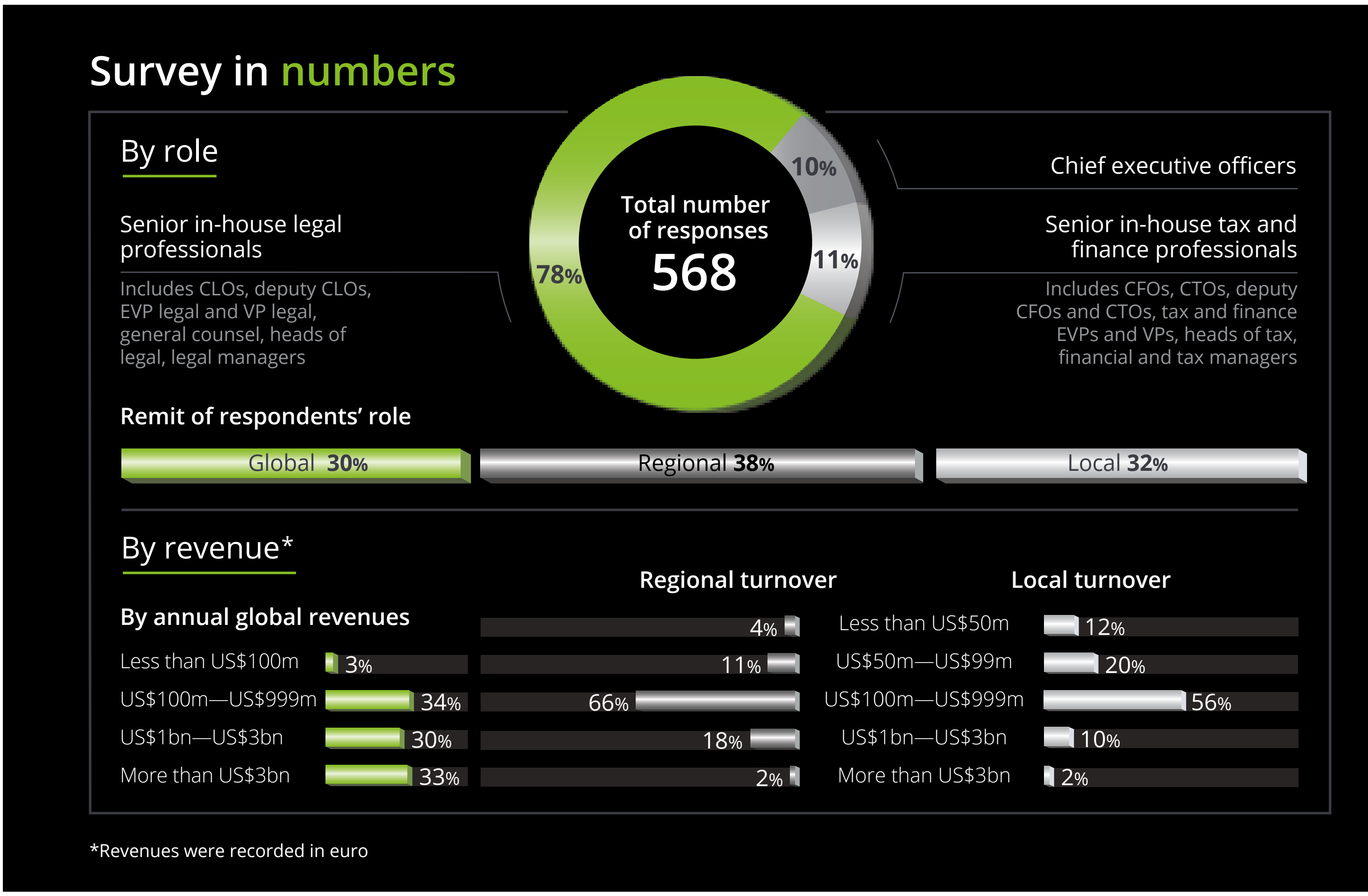
Introduction

To discover how companies are positioning themselves to respond to the growing number of disputes, Deloitte Legal surveyed senior legal and executive leadership at almost 600 companies across Europe, Asia, the Americas and the Middle East. Europe was, however, the focus, accounting for more than three-quarters of responses.

Chief legal officers and their departments comprised the majority (78%) of respondents, with responsibilities split between global, regional and local remits.

There was also an even division by size of company, with roughly a third having annual revenues of up to US$1 billion, a third having revenues of between US$1 billion and US$3 billion and the rest boasting turnovers exceeding US$3 billion. All types of business were represented, from financial services to entertainment, real estate to media, and consumer to professional services. Of the 12 sectors represented, three – financial services, consumer, and real estate and construction – comprised about a third of respondents, while none of the other nine sectors exceeded a 10% weighting.

The picture that emerged is of a post-COVID-19 landscape characterized by more disputes, more appetite to litigate and greater trust in courts. In response, companies are beefing up their legal departments and drawing on specialist external



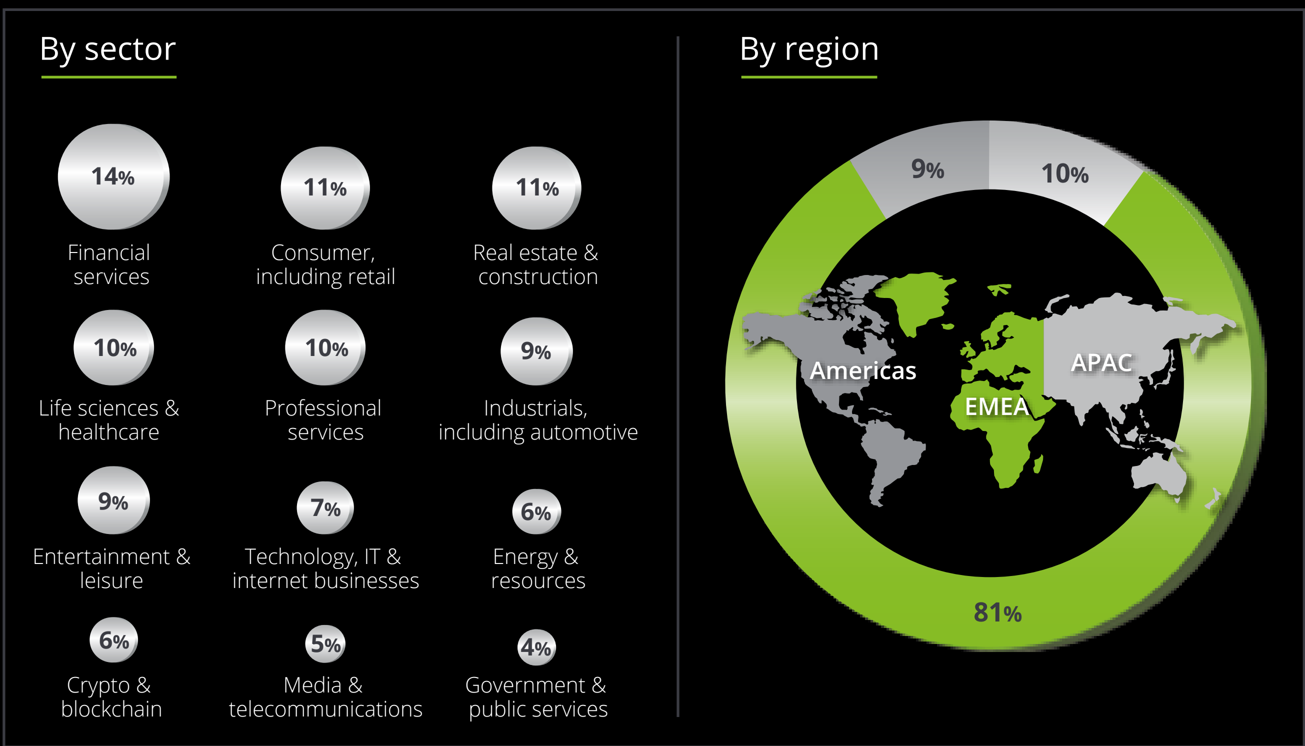
advisers to help them with cases that they say are becoming increasingly complex and important, with larger sums at stake.

Digital tools for case management and risk management are also becoming commonplace, with a majority stating that AI will revolutionize litigation decision-making within five years.

While such technologies are best employed for routine legal work, external counsel is valued when cases explore uncertain legal ground. The top litigation threat identified in the survey concerns consumer protection and product liability, closely followed by cybersecurity and data protection.

In some cases, what worries companies does not correspond with the volume of litigation in those areas – for now, at least. For example, most companies have experienced more tax enforcement cases as regulators become more active, but only a small fraction identified tax as a litigation threat. Other big contributors to increased litigation since 2020 are labor and commercial disputes.

To find out how companies are negotiating this new legal landscape, Deloitte Legal worked with Euromoney CS to produce this report. Special attention is reserved for the main causes of disputes, the likelihood of litigation and the value companies place on external assistance.



Note: due to rounding, some totals do not equal 100%

CHAPTER ONE

Disputes in a post-pandemic world

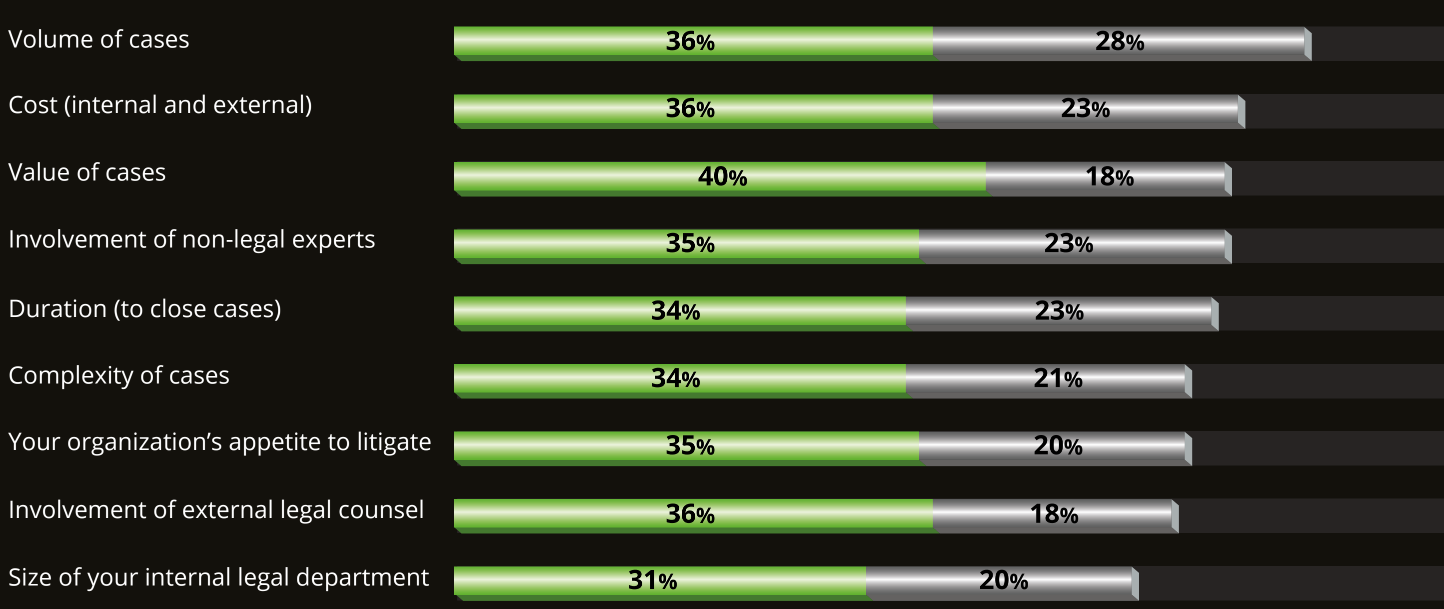
COVID-19 has driven significant work towards legal departments. Our survey shows that since 2020, litigation activity has intensified across every metric, with almost two-thirds of companies (64%) noting a heavier caseload.

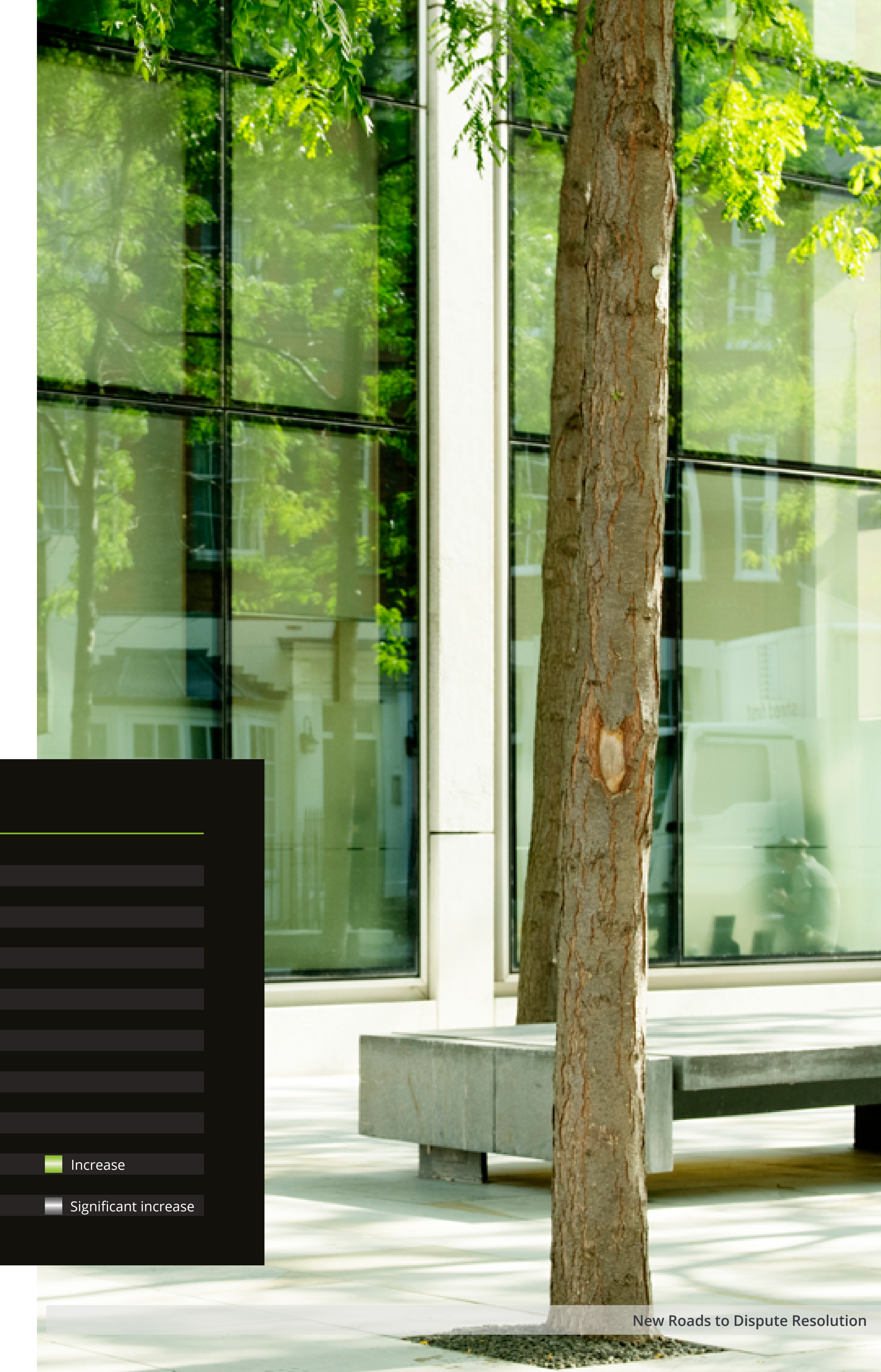
Furthermore, a majority of respondents agreed that cases are now more complex and more expensive (55% and 59% respectively), and are taking longer to resolve than before the pandemic (57%). They also said that greater sums are at stake (58%), which may partly explain why companies have become more willing to litigate despite the extra challenges involved.

It is little surprise, then, that companies are both adding internal resources and using more third-party support. Again, a majority of respondents said that since the pandemic they have expanded their legal departments (51%) and stepped up contracting legal and non-legal experts from outside the company (54%).

COVID-19 appeared to have had a direct impact on commercial, labor and tax litigation, with more than half of companies reporting higher caseloads in these areas since 2020. However, only about one in three reported an increase in bankruptcy or insurance cases. This could be because many countries shielded businesses from the full financial effects of lockdowns via loans and tax breaks, or possibly because the full impact of ongoing supply chain disruption is yet to play out.

Percentage of companies reporting increased litigation activity since the spread of COVID-19



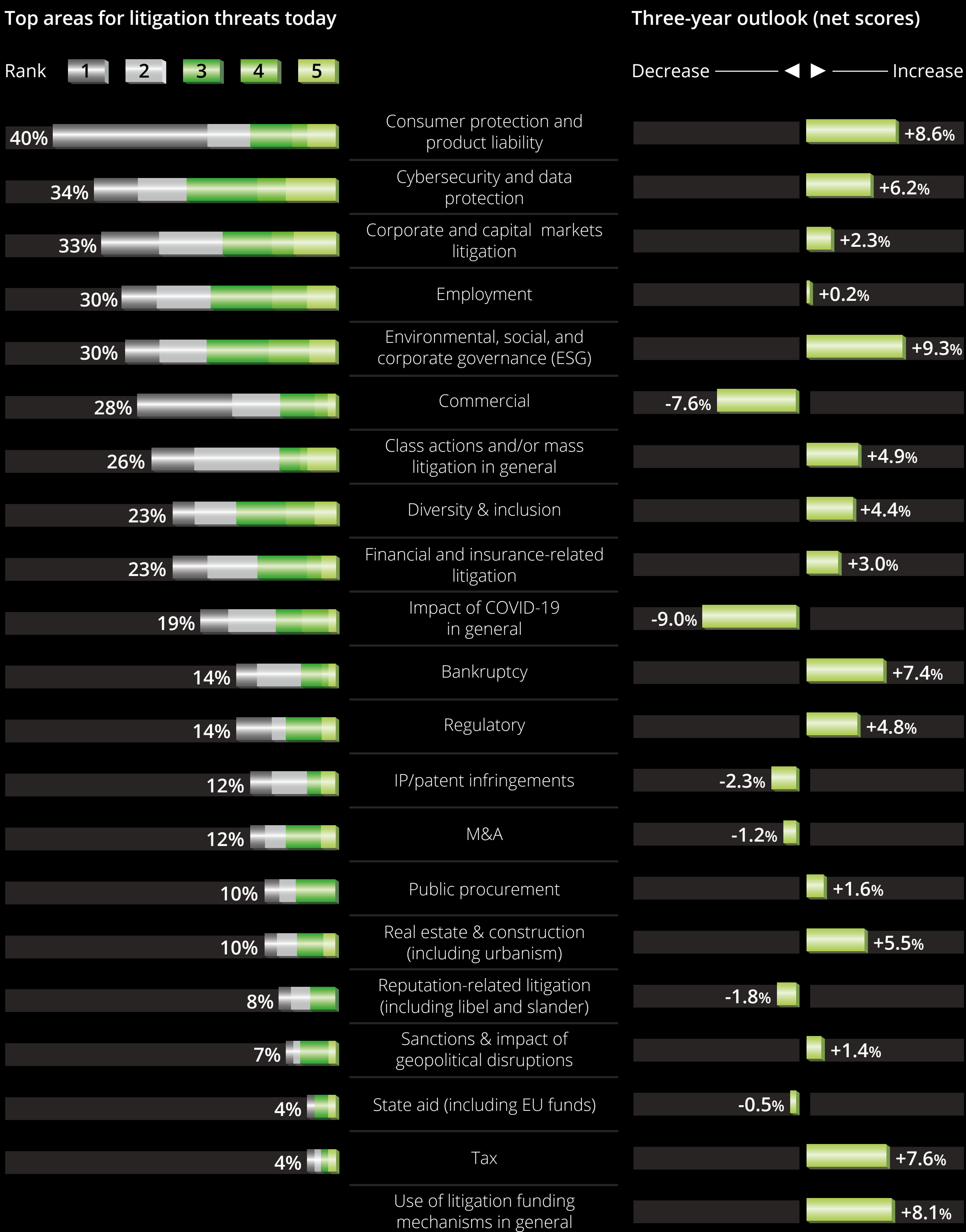

Increase
Significant increase

Fractured outlook

Although business is quick to identify where litigation has increased until now, opinion is fractured as to what the next three years will bring. Across themes such as employment, intellectual property and M&A, roughly as many companies believed cases will rise as did those expecting a fall. Net scores, calculated by subtracting the number of respondents expecting a decrease of litigation activity from those expecting an increase, ranged between +0.2% and -2.3% in those areas.

That said, predictions leaned most strongly towards more litigation in the fields of product liability and consumer protection (net score of +8.6%) and tax (+7.6%). This outlook may reflect intensified regulatory scrutiny in these areas, with consumer protection agencies given more power, plus better consumer education. The growing role of ESG considerations is also reflected, with ESG litigation the top pick for an increase over the next three years (+9.3%).

Litigation threats today and in the next three years



Note: net scores calculated by subtracting percentage expecting a decrease from percentage expecting an increase

It is also worth noting that, despite only a third of companies reporting more bankruptcy-related litigation activity since the spread of COVID-19, this may be about to change: a net score of +7.4% reflects an expectation that the number of bankruptcy cases will increase over the next three years.

Picked as one of the main drivers of disputes in the coming years, consumer protection was already identified as the top litigation threat facing business today. Accordingly, more than 40% of respondents ranked consumer protection in the top five areas for litigation threats their company is facing right now (also see box below).

Getting on top of new EU consumer protection rights

Over the past two years, national consumer protection authorities in EU member states have been given additional competencies, as well as the ability to impose even higher fines for breaches of regulatory requirements.

These new powers are the result of a recent comprehensive set of new policies and rules, implemented by the EU to ensure a high level of consumer protection and rights.

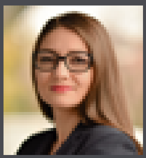
The goal of the new rules is to standardize business behavior for areas exceeding national borders, as well as to adapt the existing framework for the digital ecosystem, such as the Digital Content Directive or the Omnibus Directive.

To ensure compliance, businesses need to have these developments on their radar and adapt as required. This includes, as a first step, mapping all processes corresponding to selling channels and interactions with consumers in the digital environment.

These new consumer rights will also lead to a new wave of consumer-related litigation activity – a risk well recognized by companies, as our survey shows.

In addition, as consumers become more aware of the expansion of their rights, and their ability and appetite to address claims or even launch class action suits (following future implementations of the Representative Actions Directive) increases, companies' focus should shift to the possibility of facing an increased number of complex litigious claims.

Authors



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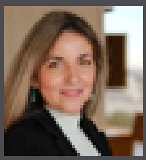

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Solving the cyber challenge

The global COVID-19 pandemic has accelerated digitalization and, as a result, phishing and social engineering attacks.

Cyber consistently ranks in the top enterprise risks across industries. There is an increased understanding in all industries of how IP is vulnerable and customer trust is fragile.

However, industries lie across a spectrum of digital transformation, with varying degrees of regulatory maturity around cyber as well as a host of geographical and other considerations. While many common themes have emerged during the pandemic, such as supply chain security and remote work accelerating the need for zero trust, there isn't one single approach to solving the cyber challenge applicable to all industries.

Whatever direction a company takes, it is vital to be aware of some increasingly important areas of interest.

Many governments are ramping up regulatory efforts to counter widespread cyber threats, making cutting-edge security initiatives imperative. Where regulations aren't driving change, the growing connectivity and personalization of technology is also forcing ecosystems to be rearchitected on secure footings.

"What's critical for leadership is to bring the general counsel and the topic of cyber in at the beginning, when you're designing change," Simon Owen, Global Clients and Industries Leader, Deloitte Cyber, said. "What data, what assets are part of the change? What technologies do you need to protect them?"

Finally, the realization that all industries are vulnerable has led to broader efforts to share knowledge – being adaptable and learning what works in other industries will become increasingly relevant.

The second-biggest litigation threat today was perceived to be data protection and cybersecurity. According to Matthew Irvine, Partner at Deloitte Legal UK, this might be a reflection of the impact of new laws such as the EU General Data Protection Regulation (GDPR).

"It seems that businesses are understandably concerned by the increased willingness of the regulators to enforce GDPR and similar regulations and to impose fines for non-compliance at higher rates than ever before," Irvine said (also see box above).

Finally, companies are also very concerned by corporate and capital markets litigation.

Tax and regulatory litigation

With a net score of +7.6%, tax is expected to be among the main drivers for litigation activity. This confirms the results of a previous Deloitte survey from 2022 (Age of Controversy), which found that 77% of companies saw the number of tax disputes increasing at a global level.

While becoming a bigger concern in the coming years, tax litigation was not perceived as a threat by the vast majority of survey respondents at present: less than five in every 100 companies ranked tax among their top five litigation threats today.

> **"Experience shows that in times of economic crisis, tax authorities become more assertive and clients are automatically more inclined to litigate."**

Annick Visschers
Partner
Deloitte Legal Belgium

"Experience shows that in times of economic crisis, tax authorities become more assertive and clients are automatically more inclined to litigate," commented Annick Visschers, Partner, Deloitte Legal Belgium. "This explains why companies do not appear to be unduly concerned by the prospect of more tax litigation."

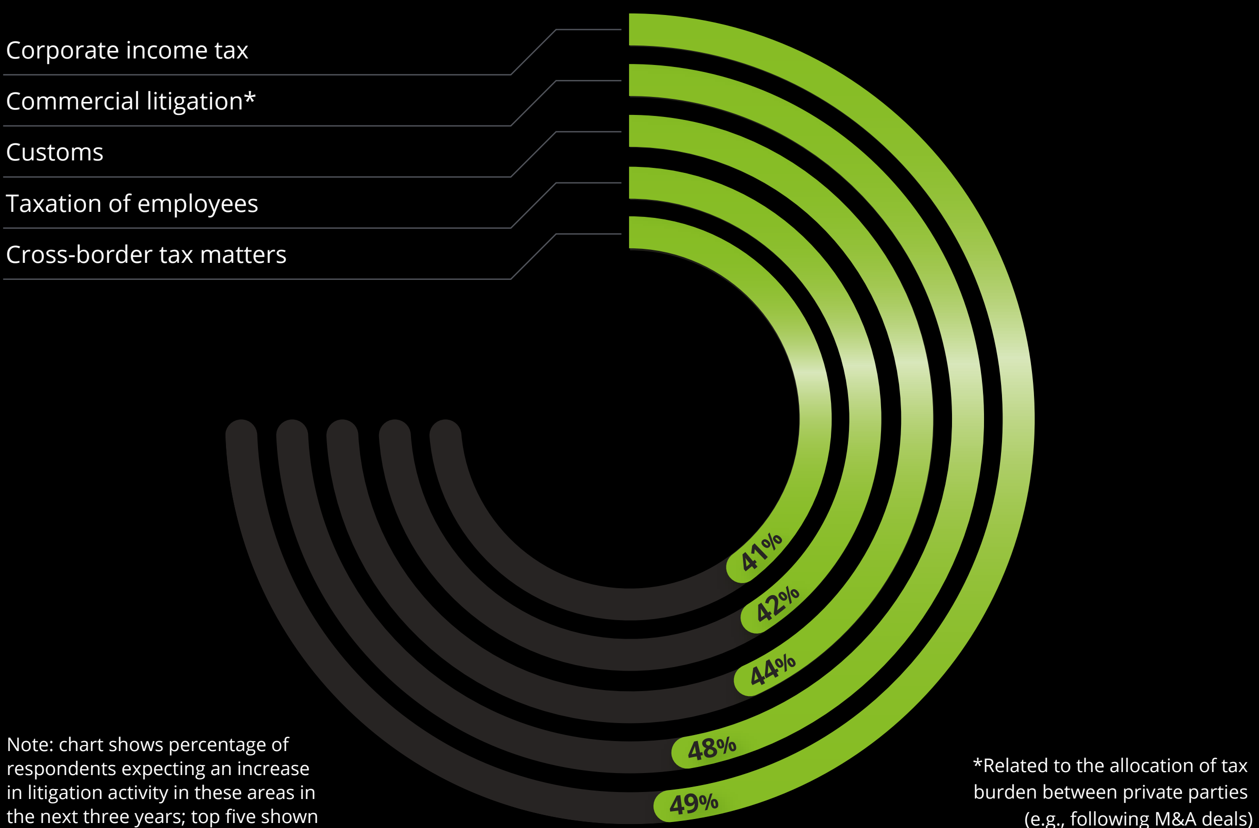
Within the more litigious landscape, the allocation of tax burden between private parties is expected to be in the top two issues in dispute, perhaps due to merger and consolidation activity after COVID. Valarie Fung, Partner at Yang, Chan and Jamison (Deloitte's legal practice in Hong Kong), thought this is driven by increased mergers and acquisitions activity. According to Fung, "the surging number of disputes on the tax burdens between private companies in M&A transactions has rung the bell that a clear tax compliance framework and related dispute resolution mechanism are necessary".

Customs-related and cross-border tax litigation were also predicted to rise, as are disputes related to corporate income tax. In contrast, the outlook leans towards fewer VAT cases over the next three years, particularly outside Europe.

And while companies do not identify tax litigation as a threat today, Deloitte's previous survey showed that tax legislation is becoming increasingly difficult to understand. As a result, three-quarters of that survey said that asking external counsel for a second opinion was usually or always useful in a tax dispute. Our latest survey supports this, with tax specialists the most widely used of all advisers apart from industry-specific consultants.

Companies also tend to predict more regulatory litigation, particularly around antitrust, data protection and industry-specific legislation – results that chime with greater regulatory scrutiny in certain regions, especially Europe. On the other hand, fewer anti-money laundering (AML) cases are expected, perhaps because of big companies' confidence in their compliance procedures and also because regulators are preoccupied elsewhere. This outlook was shared across almost all sectors except crypto and blockchain service providers, two-thirds of which expected more AML cases in the next three years.

Tax-related litigation threats over the next three years



Note: chart shows percentage of respondents expecting an increase in litigation activity in these areas in the next three years; top five shown

*Related to the allocation of tax burden between private parties (e.g., following M&A deals)

CHAPTER TWO

Seeking help

Rising caseloads have encouraged businesses to beef up legal resources. Fifty-one percent of companies have grown their legal departments since 2020, and 54% increased their use of external counsel. Furthermore, almost every respondent acknowledged seeking third-party legal advice at some point since the pandemic (only 2% did not), with more than two-thirds (71%) doing so in at least a quarter of cases.

"We've seen increased litigation against our clients from an evolving litigation industry in different areas, including consumer protection, data protection, environmental, social and ethical governance," observed Michael Falter, Partner, Deloitte Legal Germany, which explains increased demand for more sophisticated advisory services.

"We noticed across Europe a need from clients for a litigation management service that goes beyond handling individual disputes to offer cross-border lawsuit management and the capability to handle both complex disputes and volume cases."

Michael Falter
Partner
Deloitte Legal Germany

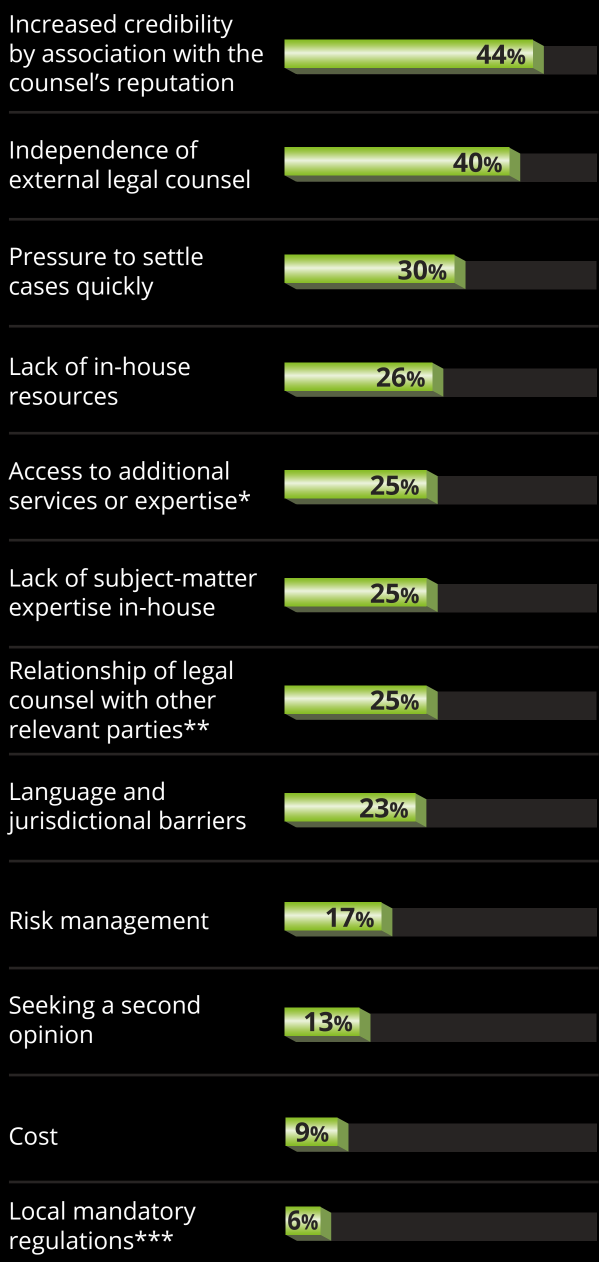
"We noticed across Europe a need from clients for a litigation management service that goes beyond handling individual disputes to offer cross-border lawsuit management and the capability to handle both complex disputes and volume cases," Falter said.

However, these broad outsourcing trends hide significant variations in process. For example, 22% of respondents automatically seek external counsel if a case is worth between US$100,000 and US$500,000, but for a further 29% that

trigger only occurs between US$1 million and US$10 million. The largest companies – those with revenues above US$3 billion per year – are most likely to seek third-party advice, with one in three doing so automatically if a case is worth between US$100,000 and US$500,000 and a further 9% at even lower thresholds.

Financial thresholds aside, companies hire external counsel mainly to benefit from their reputation and independence, but also due to pressure to settle cases quickly.

Reasons for engaging external legal counsel in litigation cases



*e.g., data analysis, RPA, specialized consultants (tax etc.) and non-legal experts

**e.g., authorities

***e.g., prohibiting court representation by internal counsel

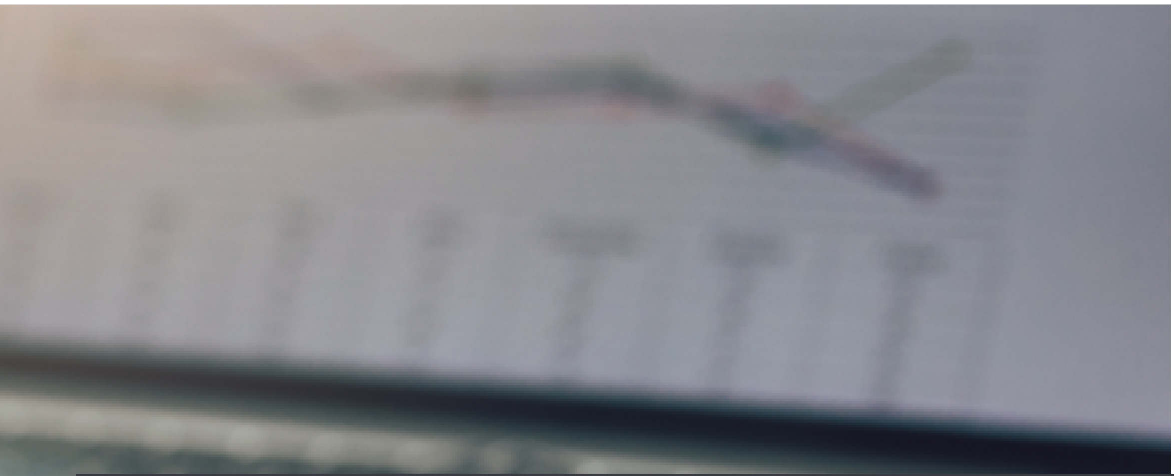
Note: multiple responses possible

The specific choice of external counsel is often driven by existing contractual relationships, although the main drivers are the additional services they have to offer. For most companies (54%) such services – which might include access to data analysis, robotic process automation (RPA) and other non-legal expertise – are a key distinguisher when selecting counsel.

Around half of respondents also identified the external adviser's reputation and relationship with other relevant parties in a case as among their top selection criteria. On the other hand, for 81% the cost of external services was not a priority, despite the often relatively low sums at stake in a dispute.

For non-legal advice, companies in every sector turn most frequently to industry specialists, usually from providers linked to or recommended by their external counsel.

Naturally, companies seek different types of non-legal advice depending on their business. For example, forensic and fraud investigation services were very popular among crypto and blockchain specialists, while two-thirds of entertainment companies ranked damage quantification services among the top three types of non-legal advisers they turn to during a dispute. IT advice was a popular choice in disputes involving financial services. Forty-five percent of respondents bring in tax specialists for tax-related disputes (see box "It takes a village").



It takes a village...

Disputes can arise for a multitude of reasons and often require multiple specialists, in addition to lawyers, to analyze the case and advise on the appropriate cause of action. Having access to those specialists can help speed up the process and provide a streamlined, coordinated approach to resolution.

For instance, auditors need to be involved to apply audit and accounting matters, engineers are required for calculating costs and damages (quantum) in many industries (think construction or oil and gas), forensic accounting professionals become 'detectives' to discover evidence, and IT specialists may be needed to determine the extent of losses related to data.

Bringing the right help in at the beginning can not only help a company be prepared for potential disputes, but often unearth the underlying issues at the root of the disputes – fixing those may even help prevent a dispute altogether.

One example is in the area of tax controversy. Annis Lampard, Tax Controversy Leader for Deloitte Private in the UK, highlighted the value of adding tax expertise from outside the legal sphere to the advisory team. "Having a tax lawyer involved in a potential controversy is undoubtedly invaluable," she said. "But we try to get ahead of controversies by identifying risks and common themes in an organization through preparedness workshops. We work with clients to create a decision tree and clear governance around handling tax controversies, but also quantify historic tax risk during M&A due diligence."

For these intricacies, specialists in tax structures, transfer pricing, strategy, and tax accounting and reporting are essential. "Bringing all these professionals – including the lawyers – together can help identify issues from the start or identify adjacencies that will help mitigate any risk. And should a dispute still arise, we are all more prepared for tax authority negotiations."

The digital revolution in numbers

59% agreed that AI and RPA will revolutionize litigation-related decision-making within the next five years

58% agreed that AI/RPA significantly reduces costs and time spent dealing with litigation cases

56% agreed that blockchain technology will provide reliable evidence in disputes

53% agreed that AI/RPA will make litigation outcomes more predictable

52% agreed that AI and RPA will replace (some part of) litigation lawyers

Digitalization

Alongside expert advisers, many companies are also seeking a technological edge by using AI and other digital tools to help manage and resolve disputes. Our survey demonstrates widespread acceptance of digitalization, with three-quarters of companies investing in risk assessment tools to identify litigation that requires reporting or special management, and half of respondents investing in RPA to handle volume litigation.

Almost every company in our survey was investing in digitalization (less than 5% said they do not yet), and most were extremely bullish about its potential. More than half (59%) – and 70% of CEOs surveyed – believed AI will revolutionize litigation decision-making within five years.

Part of that revolution will involve replacing some work of litigation lawyers, expected more than half the survey respondents, despite a similar proportion also noting that they have grown their legal department headcount since 2020. One outcome of this push-pull between technology and human talent may be that AI is used eventually to replace repetitive, routine litigation work, leaving in-house and external lawyers free to focus on niche topics and more complex cases (also see box "The disputes tech revolution").

AI will also make outcomes more predictable and reduce the cost and duration of cases, while blockchain will provide reliable evidence in disputes, believed a majority of respondents.

The Americas, represented in our survey mainly by Canada, Mexico and Brazil, appears to be a torchbearer for these trends, with 40% of respondents from the region citing AI platforms as their favorite dispute resolution mechanism.

This is not the case in Europe, where the more traditional avenues of courts, tribunals and settlements are preferred, but could be a sign of things to come as companies deal with more volume litigation in areas such as consumer protection.

The disputes tech revolution

As the survey shows, most companies already prioritize investing in litigation-related technology. This is in line with the general trend of investing in legal automation that we see in our legal management consulting projects and confirms legal technology is here to stay.

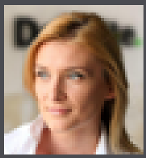
Starting from taking a risk-based approach when managing litigation work, to making data-driven decisions and automating repetitive tasks in mass litigations, legal tech is seen as a solution to improve litigation management and help litigators focus on strategic decisions and value-added work.

AI and RPA technologies have made significant progress in recent years. As they continue to improve in terms of training required, languages covered and functionalities, they gain traction, with more and more use-cases using these technologies to help with large volume work.

Most respondents agreed that they will play a key role in improving decision-making, reducing the cost and time spent with litigation, as well as predicting with better accuracy the outcomes of a dispute. This trend corroborates the general view that AI and RPA are no longer buzzwords, but opportunities to transform litigation, including in areas such as providing better reliability of evidence.

As such, we believe that investment in AI and RPA will increase in the coming years, with a variety of use cases in sight of most litigators.

Authors



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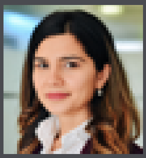

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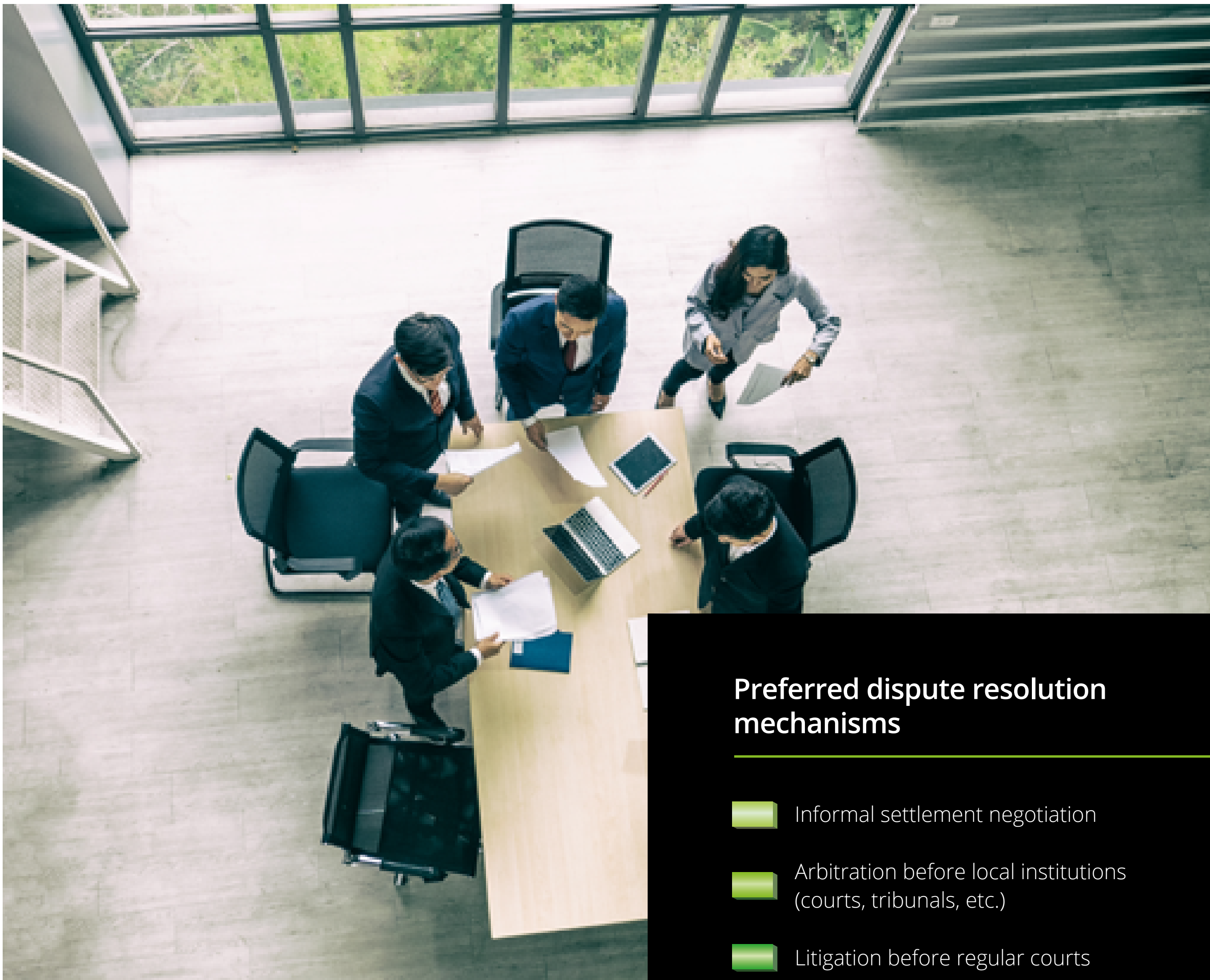
CHAPTER THREE

Routes to resolution



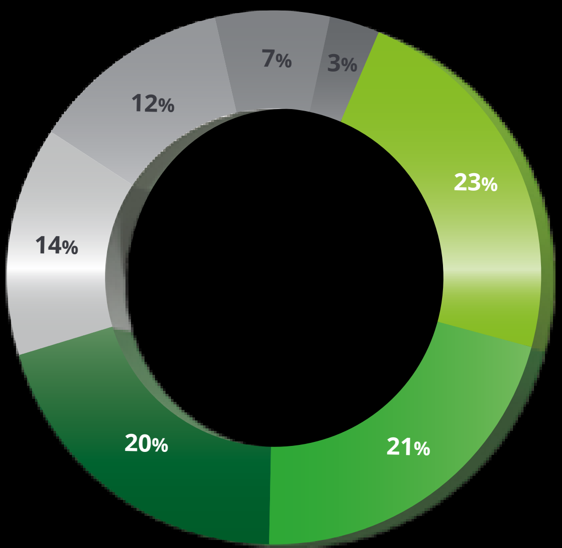
Preferred dispute resolution mechanisms

- Informal settlement negotiation
- Arbitration before local institutions (courts, tribunals, etc.)
- Litigation before regular courts
- Arbitration before international institutions (e.g., ICC, LCIA, VIAC, HKIAC)
- AI-based dispute resolution platforms
- Mediation
- Pre-litigation administrative courts or pre-arbitration adjudication boards (e.g., DAB)

Although digitalization appears set to bring significant disruption to dispute activity, companies still prefer traditional paths towards resolution – at a global level, at least. The top resolution mechanism for 41% of companies was arbitration or litigation before regular courts or tribunals. Another 23% preferred informal settlements above mechanisms such as the courts, AI platforms or international arbitration.

There also appears to be little middle ground between settlements and arbitration or litigation, with only 7% of companies choosing mediation as their preferred form of resolution and less than 3% naming pre-litigation or pre-arbitration hearings as their top choice.

Appetite to litigate is supported by confidence in national courts, with most respondents (56%; net score of +16.4%) reporting growing trust in courts over the past five years. Almost two-thirds of European companies said the same, although Asia-Pacific trended the other way, with 63% reporting falling trust in national courts. Even so, Asian companies were less likely than European ones to seek settlements.



When choosing between resolution methods, companies prioritized ease of case management, enforceability of any decision and familiarity with the process. The confidentiality of proceedings was also important, which ties into the decision about whether to litigate at all. Asked what motivated them to litigate or not, or to settle, most companies put their reputation near the top of the list. On the other hand, cost and speed were relatively unimportant when it comes to selecting a resolution method.

"It's not all about money – businesses litigate to protect their reputation and due to pressure from regulators and internal stakeholders," commented Robert Griffiths, Partner at Deloitte Legal UK. "However, they want decisions to be enforced, so arbitration is the favored forum for dispute resolution."

"It's not all about money – businesses litigate to protect their reputation and due to pressure from regulators and internal stakeholders."

Robert Griffiths
Partner
Deloitte Legal UK

Cost does appear to matter, though, in the Americas, where it was the second-most important factor, which may explain the popularity of AI-based resolution platforms in that region.

Conclusion

Our research shows that companies are becoming more willing to litigate despite the growing cost and time penalties of doing so. They tend to look beyond the sums in – or costs of – dispute, prioritizing instead their reputations and pressure from regulators and internal stakeholders.

Reputation and stakeholder pressure also work the other way, pushing companies to avoid litigation and to settle amicably. Again, the cost or value of pursuing a dispute are generally the weakest drivers of a company's decision to litigate, settle or pursue other remedies.

Low concern about legal costs and high concern about reputation perhaps also explain the relatively low thresholds for companies to seek external legal help. Of those with revenues above US$3 billion per year, 42% will outsource automatically even for cases with sums in dispute of less than US$500,000. However, low-value cases may be occurring less frequently, as almost 60% of respondents said the value of disputes has risen since 2020.

Either way, in the current disputes landscape, companies turn more frequently to external advisors, undeterred by costs. Instead, companies select advisors based on quality of their reputations, the reach of their networks and – most importantly – the breadth of their additional services, from data analytics to RPA capabilities and non-legal support.

Methodology

For this report, Euromoney CS, acting on behalf of Deloitte Legal, surveyed 568 tax, finance, and legal professionals working for companies in the Americas, Asia-Pacific, and Europe, Middle East and Africa.

Most of the respondents (78%) were senior in-house legal professionals, such as chief legal officers and their deputies, executive vice presidents legal and vice presidents legal, and general counsel.

Eleven percent of respondents worked in tax and finance functions. This cohort included chief financial officers, chief tax officers, their deputies, and tax and finance EVPs and VPs,
and similar roles.

Finally, 10% of respondents were chief executive officers.

The focus of the research was on Europe, where 79% of our respondents were based. The Americas and APAC contributed 9% and 10% respectively, and 3% were located in the Middle East and Africa.

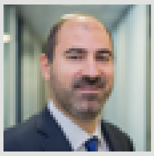
Survey respondents were from 12 industries, consumer & retail and real estate & construction being the largest contributors, with 11% each. Other sectors contributed between 10% and 4% each.

In terms of global annual revenues, companies ranged from less than US$50 million (4%) to more than US$3 billion (2%). Most (66%) worked for companies with revenues from US$100 million to US$1 billion.

Survey fieldwork took place throughout September 2022.

We would like to thank Deloitte Legal's Dispute Resolution Global Steering Committee for their contribution to this report.

Dispute Resolution Global Steering Committee:



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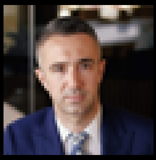

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