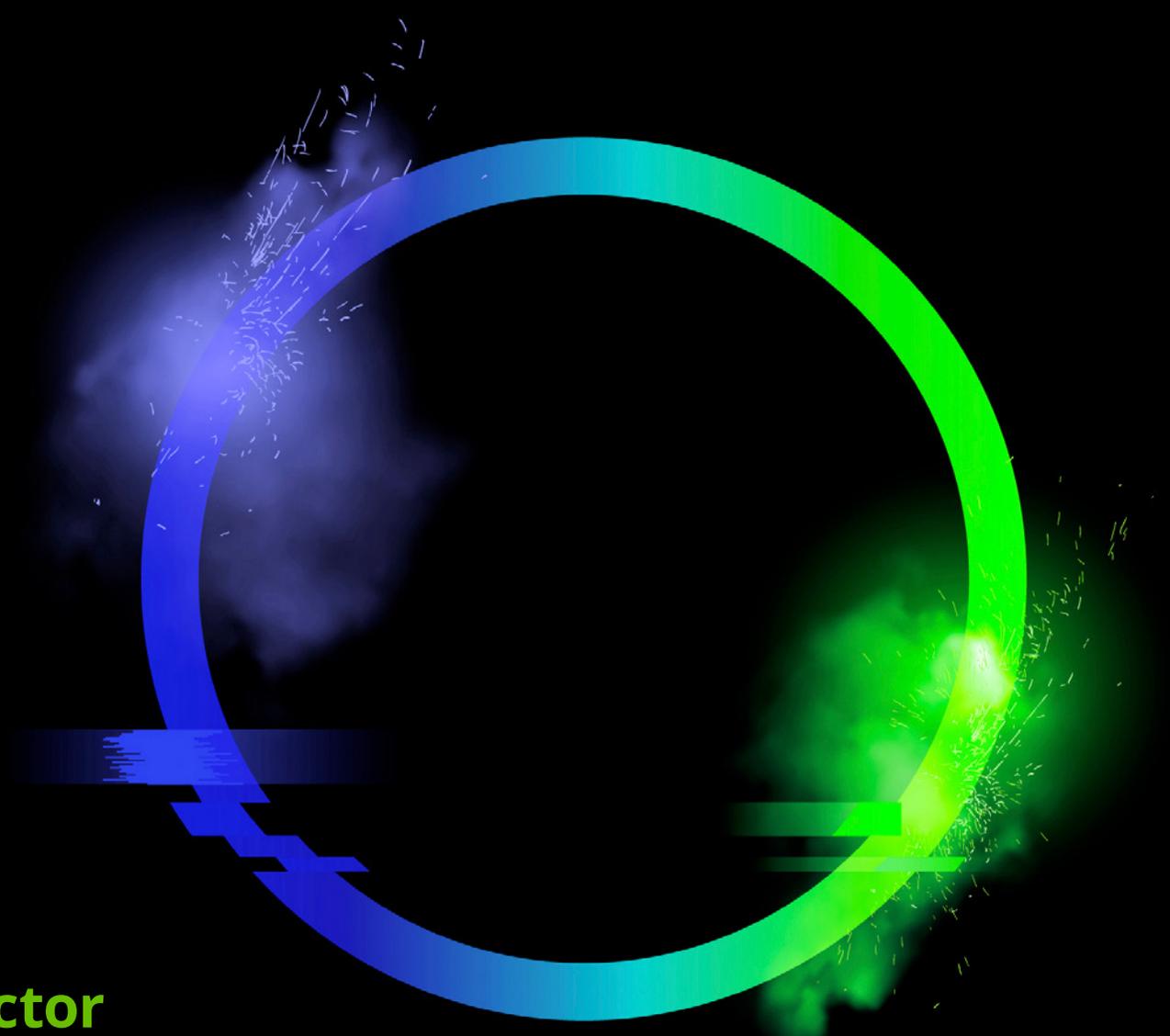


Deloitte.



The disruption factor

How the disputes market is reacting to disruption



66

As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say, we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know."

Donald Rumsfeld

Contents

Foreword	4
SECTION 1	
Understanding disruption	6
SECTION 2	
Are disputes becoming more frequent?	9
SECTION 3	
Dealing with disruption	11
SECTION 4	
Spotlight on ESG	14
SECTION 5	
Spotlight on group actions	17
SECTION 6	
Spotlight on AI	19
SECTION 7	
Spotlight on use of technology in disputes	22

Report contacts



Elizabeth Gutteridge
+44 (0)20 7303 4628
egutteridge@deloitte.co.uk



Claire Jolly
+44 (0)16 1455 6315
clajolly@deloitte.co.uk



Timothy Johnson
+44 (0)20 7007 0302
timothyjohnson@deloitte.co.uk

If you would like to talk to the Deloitte team about any areas of this research, please don't hesitate to contact one of us. We would be happy to share our findings and thoughts about the drivers of disputes in greater detail than can be shown here.

Global contacts

Larry Andrade, Toronto
+1 (0)416 643 8989
laandrade@deloitte.ca

Chris Clements, Dubai
+44 (0)7968 338895
chrisclements@deloitte.com

Battine Edwards, Paris
+33 (0)1 55 61 54 75
bedwards@deloitte.fr

Neil Hargreaves, Riyadh
+966 (0)112888600
nehargreaves@deloitte.com

Jen Larson, Chicago
+1 (0)312 486 2539
jenlarson@deloitte.com

Guy Norman, Hong Kong
+852 (0)2852 1055
guynorman@deloitte.com.hk



Foreword

Donald Rumsfeld's (US Secretary of Defense) famously foot-in-mouth speech of 2002 was ridiculed worldwide for the obfuscation it was trying to achieve. But there was an underlying general truth in what he was saying.

Just because we don't know what's going to happen, it doesn't mean that we don't know that something will happen, or that we shouldn't prepare for it. Preparing for the unknown lies at the heart of best business practice.

Our research revealed that disputes market's 'known knowns' have remained fairly predictable. Few surprises there.

Many of the factors that drive disputes haven't changed: human error, bad contract drafting, buyer's remorse, etc. These are things we all expect and are used to addressing with our clients.

However, it's the increasing unpredictability of the disputes market that is causing concern. The 'known unknowns' (AKA the disruptors) are growing in number and importance.

First, there are the one-off, headline disruptors, like the global pandemic and the Russian invasion of Ukraine. Then there are the evolving disruptors such as environmental, social and corporate governance (ESG), which is disrupting the wider economy and setting new trends in the disputes market.

It's also interesting to see how ESG began in the Energy sector but now has a much broader reach, suggesting that many factors are proving to be portable across sectors.

It seems inevitable that Artificial Intelligence (AI) will be added to the A-list of evolving disruptors. Clearly, the world will have to answer the many legal, governance and regulatory questions arising from new technology and its application to our lives.

The market reacting to new disruptors always takes time, which is why we're witnessing a lag in disputes generated by these 'known unknowns'. For example, we're only just starting to see COVID-related disputes coming through.

And how is the disputes market reacting to all this? Our research shows that, although most recognise the inevitability of disruption, the majority will wait to see what happens and then react accordingly.

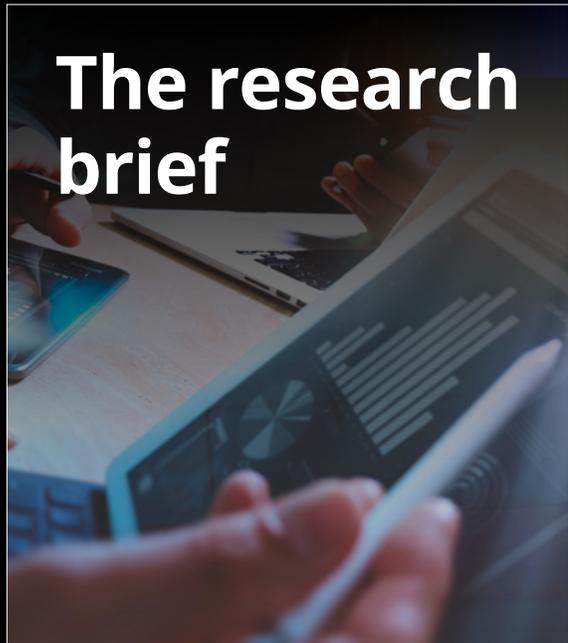
We found that only a sophisticated minority of corporates are proactively incorporating disputes risk into their wider risk assessment as they look to meet these unavoidable, if unseeable, challenges coming down the tracks. Of course, some future disruption will come from 'unknown unknowns'. Nobody can say exactly when those disruptions arrive. Or what they'll look like. But we're 100% sure they will. That's a known unknown.

Elizabeth Gutteridge
Partner, Global Disputes Leader, Deloitte LLP

66

We're finding that a few clients are coming to us and saying: "Can you talk to us about climate change?" or "can you talk to us about the energy transition?" We go back and say, "What aspects?" They say, "I don't know, can you just talk to us about it, please?"

In-practice lawyer



The research brief

What we did

Our challenge was to come up with informed insight by carrying out independent market research into the current and future trends of the legal disputes market.

In particular, the aim was to understand disruptive digital trends to see how they are impacting clients and potentially triggering disputes.

How we did it

From 22 April to 21 June 2022, we applied qualitative research to obtain a detailed and nuanced understanding of market perspectives.

This consisted of in-depth, face-to-face, interviews lasting up to an hour with senior litigators from a range of leading firms, as well as individuals responsible for legal disputes within major corporates across several sectors.

We interviewed leaders in positions such as Group General Counsel, Senior Legal Counsel, Head of Litigation, Head of Legal and Senior Principal Legal Counsel.

What to expect

This report explores the key themes arising from our research and examines the challenges that disruption in the disputes market is presenting for organisations and in-practice lawyers alike. We cover:

- The five types of disruption that drive disputes;
- The arguments for disputes becoming more and less frequent in the future; and
- The ways that in-house and private practice are meeting these challenges.

We have also shone a spotlight on the topics that we believe will come to the forefront of disputes in the near future:



ESG



Class Actions



AI



Use of technology in disputes



SECTION 1

Understanding disruption

Many of the factors that drive disputes remain constant. They're usually caused by what one interviewee called "human nature issues" – namely errors or unreasonable behaviour.

However, disruption of one kind or other also comes into play, not only affecting the volume but also the type of dispute. And there's a great deal of disruption out there right now, so we expect to see changes in the market as a result.

Our research identifies the following types of disruption driving disputes:

-  **Economic**
-  **Geopolitical**
-  **Shock events**
-  **Sector**
-  **Digital**



1. ECONOMIC DISRUPTION

Economic disruption causes parties' circumstances to change, leading to broken contracts and commercial disagreements. And with claimants hungry for financial redress, the motivation to litigate increases.

Several of the lawyers interviewed on the subject harked back to the effects of the 2008-10 downturn when everyone felt squeezed.

In such situations – after the usual lag before disputes become formal litigation – there's a rise in supply chain issues, bad debts, insolvency and defaults on rental agreements. People are more likely to want to get out of deals that aren't delivering as expected, and post-deal earn-outs come under threat.

And, considering the current economic disruptors worldwide, we can expect more of the same in the near future.

There was the recession and a technology-driven bubble where ideas were probably more advanced than the sustainable technology at the time. Then, you had the financial crash, the huge overexposure, worthless mortgages... Then COVID came along, followed by the Ukraine war and the sanctions that will also have a massive impact.

In-practice lawyer



2. GEOPOLITICAL DISRUPTION

Geopolitical disruption can also cause contracts to be stretched or broken, leading to disputes.

Our interviews took place after Russia invaded Ukraine. Lawyers were already starting to see claims coming through and anticipated more. But they are questioning how it will pan out.

For example, will Russian companies threatening to sue have the appetite to follow through? Indeed, will they even have access to the foreign currency and UK legal expertise required to pursue their claims? The jury is out on that one.

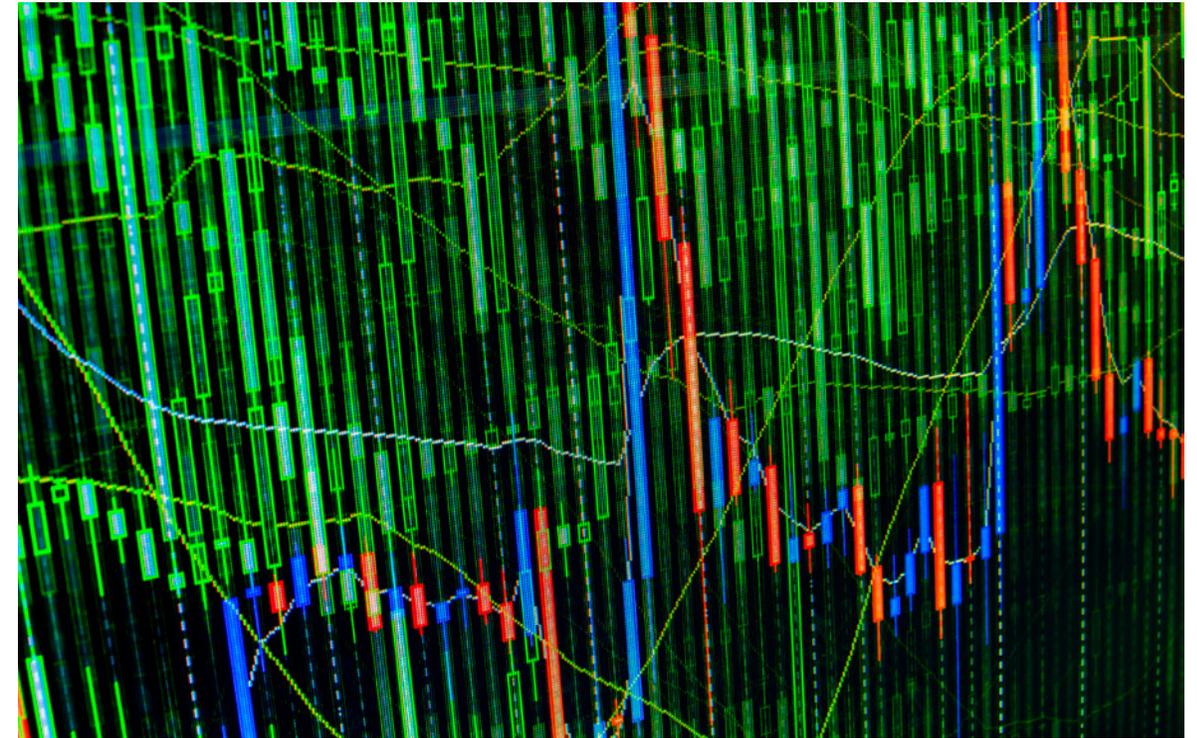


3. SHOCK EVENTS

By 'shock disruption' we mean things that were either not predicted or that seem to come out of nowhere.

The result of the Brexit vote with, for example, its abrasive effect on supply chains, is a prime example of the former. And the COVID pandemic an example of the latter.

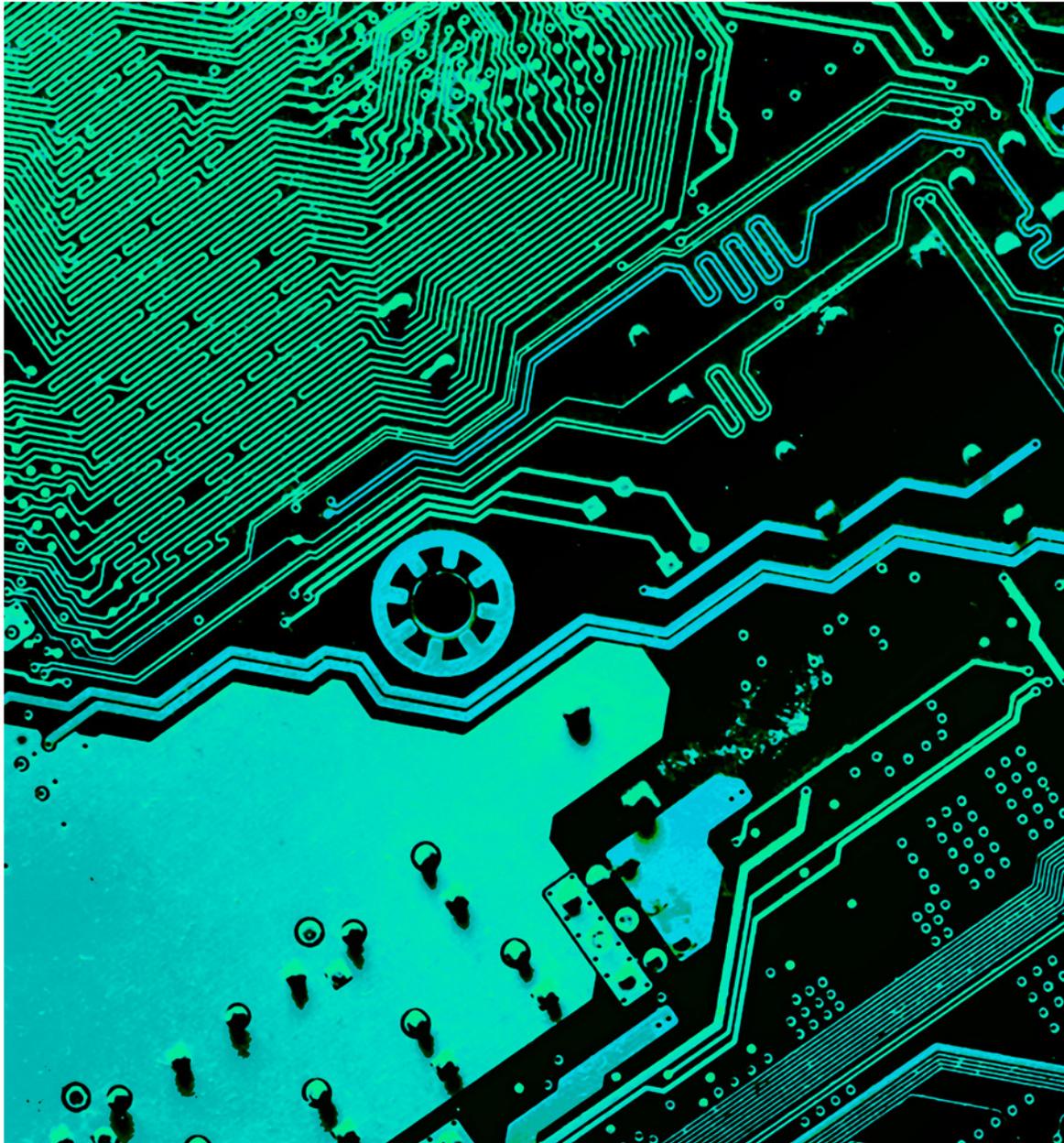
COVID is an especially huge and unanticipated disruptor, leading to bad debts and broken contracts. The commercial property sector was particularly badly hit. Our interviewees explained that many contracts are being rewritten, and that they're seeing a surge in new disputes now that the pandemic has eased.



What's more, banks that were forced to rush COVID-based loans are now subject to claims from those who took them out, questioning advice received or even whether they should have been given the loans in the first place. There will also be regulatory scrutiny and the banks themselves will be bringing claims to try to recover their losses.

With COVID we've seen more force majeure claims where people have said, "I can't perform because circumstances have changed". ...And for a couple of years nothing happened because nobody wants to push the first domino over. But now people are saying, "Well, COVID is over, trading is back, I need to get paid."

In-practice lawyer



4. SECTOR DISRUPTION

A good example of this is the ‘green transformation’ and de-carbonisation of the energy sector. It has triggered a surge in litigation risk and disputes.

These include ‘Green Washing’ claims and shareholder activism. Also, in the rush to be seen to be getting involved in green energy, many companies and governments have entered into complex and unknown contract territory, such as local carbon capture and storage (CCS) projects, which doesn’t always deliver.

In financial services, changing regulation can expose companies to new risk. For example, the Financial Conduct Authority (FCA) ‘Consumer Duty’, which is intended to represent a paradigm shift in how the FCA regulates the retail sector, is felt likely to result in a “flurry of claims”.



5. DIGITAL DISRUPTION

Last but definitely not least is digital, which is introducing a cornucopia of potential new litigation risks.

For example, the pressure of needing to ‘digitally transform’ is driving non-technical companies to acquire digital assets they do not fully understand. This can cause post-acquisition disputes.

Then there’s the cyber risk. Non-compliance with the appropriate technical and organisational security demanded by the General Data Protection Regulation (GDPR) and Data Protection Act (DPA) can bring class actions (as well as huge regulatory fines) and, if security is outsourced, the need to sue the third-party provider deemed responsible.

Intellectual property (IP) risks have expanded too. Who owns it? Has data been breached? There’s also the growing use of social media to stir up and coordinate consumer claims – effectively grouping them together to exert more pressure. And this heightened social interest provides a new consideration around whether to pursue or defend claims, beyond the assessment of legal merits.

And AI is set to offer a host of nascent legal challenges in areas such as liability, risk, ethics and, as ever, regulatory compliance. In all these digital areas – particularly AI – businesses are navigating relatively uncharted waters. Some will inevitably hit the hidden rocks of dispute.



SECTION 2

Are disputes becoming more frequent?

THE CASE FOR

Historically, the volume of disputes tends to ebb and flow over time, pushed and pulled according to the gravity of Disruption.

Our research indicates that although the legal world is becoming increasingly aware of the rise in new dispute risks (especially digital), they are yet to see a huge volume of cases. On paper that looks likely to change. But in reality our respondents are unsure.

As has been made clear above, many disruptive elements are very much in play. And changes to the rules on Class Actions in the UK also suggest more disputes may arise.

There is evidence that litigation funding is also fuelling an increase in disputes. Some in practice lawyers report growth in the size of their litigation teams. And many are hiring more project managers to cope with data-heavy disputes, which would also seem to give the trend greater credence.

There's also a post-COVID glut of M&A deals. This means that they are often completed in a rush, with insufficient time for drafting contract clauses or pre-deal due diligence – thus leaving the door open to post-completion disputes.

These things tend to go in cycles. In some areas there will always be disputes. IP, for example, is one that is always there. But others are less predictable. Sometimes things you expect to escalate don't. There are a lot of variables, so we tend to react and then scale up and down in the moment rather than plan too much.

In-practice lawyer

THE CASE AGAINST

And yet those in-house lawyers we interviewed are not increasing the size of their teams and don't anticipate having increased budget for outsourced advice.

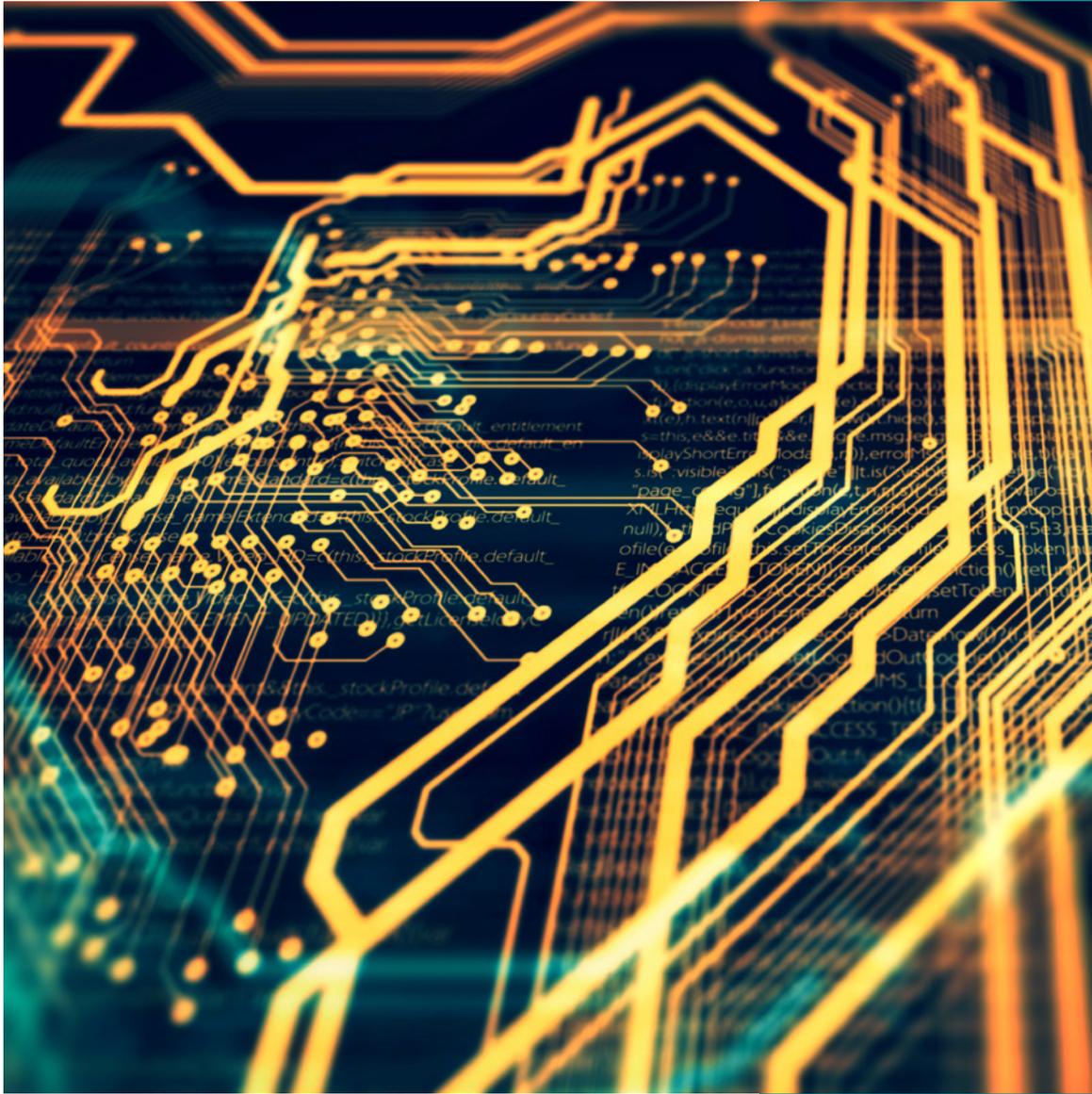
They recognise that the nature of disputes is bound to change over time – especially their size, the volumes of data and regulatory complexity – but the general feeling is that there are always disruptive elements in play. Disputes may ebb and flow, but the overall volume stays roughly the same.

In-practice lawyers we interviewed were less willing to be drawn on this issue, although there is definitely some scepticism that AI will result in the much-predicted avalanche of disputes.



We only have so much bandwidth and appetite for disputes. Our general approach is to minimise litigation – wherever possible avoiding all the costs and hassle that it involves. So, overall the number of disputes doesn't tend to vary that much over time.

In-house lawyer



SECTION 3

Dealing with disruption

-  **Reactive vs proactive**
-  **Being prepared to address disputes**
-  **Using external advisors wisely**
-  **Growing risk advice**



REACTIVE VS PROACTIVE

Whether disputes are rising or not, how businesses prepare and respond to them is very important. And here the difference between in-house and in-practice is more marked.

In-house counsel told us that they tend to work in departmentally siloed and resource-constrained circumstances. They have busy schedules, small teams, generalist skills and, often as not, risk management is 'owned' elsewhere in the organisation. Hence, they are less able and likely to prepare for future trends and to take a more reactive 'wait and see' approach – responding as and when cases occur, and the law develops.

Indeed, many corporates appear to be carrying considerable unidentified and unmanaged risk in the system. They are unprepared for the emerging types of disputes where the risk is harder to assess – and there is little evidence of them getting on the front foot, except perhaps in highly regulated and more obviously demanding sectors, such as Healthcare and Financial Services.

There are exceptions to every rule. A minority of more sophisticated corporates are taking steps to identify and manage risk, bringing new skills and tools onboard. It's not too much of an assumption to say they are showing the future direction of travel for the wider market.

The same applies to in-practice lawyers. Particularly the leading law firms who are keen to get on top of current trends. Nonetheless, even they are loathe to speculate about the future, such is the level of uncertainty in the disputes market. However, they are undoubtedly making themselves better positioned and better able to prepare for it.

When you enter into an area like AI or green energies, there are bound to be issues under the contract. How are you going to avoid that when you're moving into virgin territory?

In-practice lawyer



BEING PREPARED TO ADDRESS DISPUTES

The first step is for in-house counsel to get involved in strategic conversations – especially about risk – and generally take a more holistic, forward-looking approach towards potential risks and risk management.

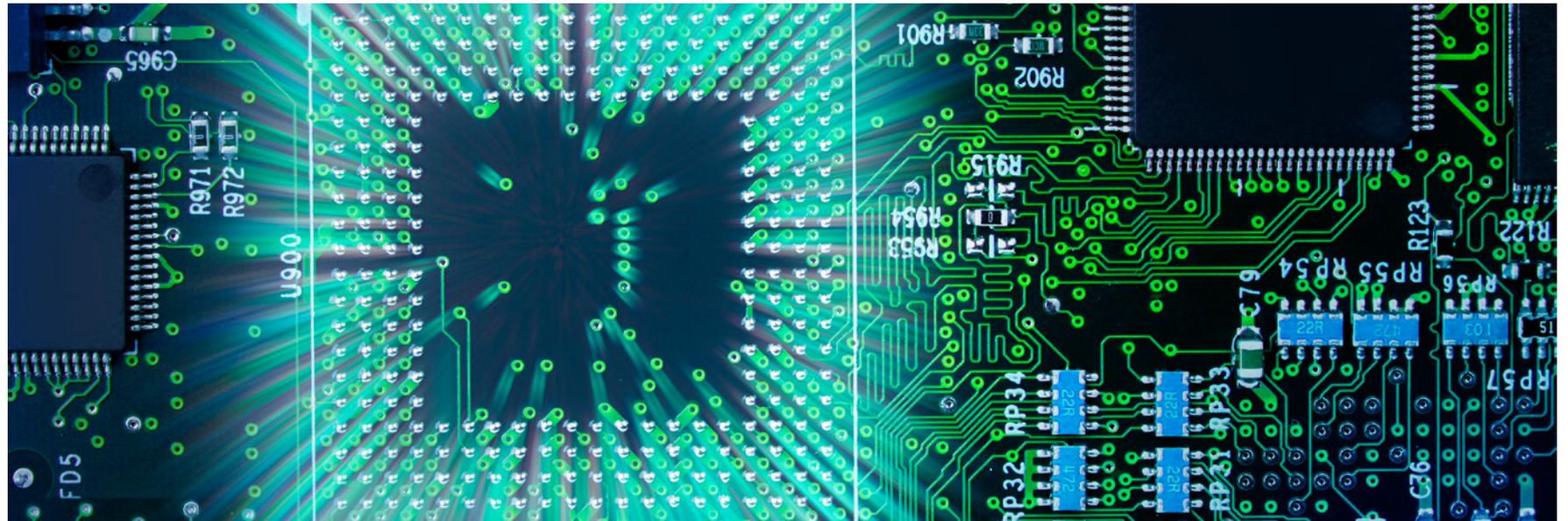
It's about being prepared (and brave enough) to step out of a comfort zone and engage with areas of increasing dispute risk. It's also about getting to know the issues and applying the technology that can help to address them.

That was the message our research gleaned from those who have taken a bolder pre-emptive route.

In short, if in-house counsel want to be proactive in the disputes market, they need to connect with the rest of the business and beyond.

The best companies are well connected with their Boards. If the Board have correctly identified all risk areas, then the right people tend to get involved and the work is given priority and budget, etc. In-house lawyers aren't used to working across the business generally, so this is a new thing for them. They need support from the business as a whole, otherwise they'll just keep doing what they've always done.

In-practice lawyer





USING EXTERNAL ADVISORS WISELY

In some companies, the early integration of the legal team with internal strategic planning and risk assessment is already happening – enabling them to address the challenges of cyber and GDPR. They also recognise that it’s unwise to spread internal resources too thin across multiple trends, and that the right external expertise can add significant value.

With that in mind, we were encouraged to find that more sophisticated organisations are engaging with legal and other trusted advisors in the risk assessment process, and not just when a dispute happens.

They are creating multi-disciplinary teams with a breadth of expertise. For some companies that means hiring more programming and data science expertise. For others, the need is to cover more niche financial areas.

And in formal disputes, external specialists are increasingly required. The era of ‘generalist’ IT consultants, forensic accountants and economic experts is over, as they are felt to be “insufficiently specialist”.

It’s a question of resource and what you can focus on at any one time. We have to rely on others to bring these issues to us... And if we’re going to instruct, it will be for those cases where we don’t have the expertise in-house. We’re too stretched to be experts in everything.

In-house lawyer



GROWING RISK ADVICE

Our research shows that some of the most experienced in-practice lawyers are doing more risk advisory work. They are educating clients on the potential dispute risks caused by the changing world, with cyber, ESG, digital, data and AI forming the bulk of the syllabus.

Respondents see this as a growing area because most clients haven’t previously included litigation in their risk management activities. Apparently, it can be a challenge getting clients to make the necessary internal connections, but there’s definitely more work on its way.

Companies in heavily regulated industries such as financial services and healthcare, as well as those who handle loads of personal/customer data, are the most likely to be open to advisory help on GDPR, data and cyber.

Energy companies and those that have a prominent public reputation to protect are also interested in ESG advice. They have seen too many of their peers take a public tumble on slippery green issues and understandably don’t want to follow suit.

Most businesses have someone focusing on ESG, but no one person can cover all the areas from human rights to climate change. If the climate situation worsens, everything will need to be accelerated... It’s all so new and changing so quickly. Although this provides an opportunity for law firms to do some horizon-scanning, it also makes it impossible for clients to keep up or have the resources to focus.

In-practice lawyer



SECTION 4

Spotlight on ESG

When we defined 'sector disruption' (above) based on interviews undertaken, we used the pressure of ESG on the energy sector as an example. Now let's look specifically at what respondents told us about their ESG-related experiences and how these exacting standards will affect all companies in some way or other.

-  Greenwashing disputes
-  Government subsidies
-  **OUR VIEW** – ESG reporting



GREENWASHING DISPUTES

The consensus is that some companies have rushed blindly into setting targets or claiming ESG success without realising that this exposes them to legal risk.

ESG is 100% ripe for litigation. Some companies have rushed in to claim they will do this and that without thinking it through from a risk point of view. We at least thought about our targets, but like every organisation, we've gone public with them. And if we don't meet our targets, I can 100% guarantee we'll get sued.

In-house lawyer

Consequently, the wording of corporate ESG targets – and how well defined those promises are – has become an important factor. Clearly many companies have over-committed and will find it hard to meet their targets. Carbon offsetting is a significant potential area of dispute where net zero claims rely on offsetting projects that do not bear scrutiny.

Indeed, our respondents are starting to see claims against companies based on their over/under commitments – particularly against oil and gas companies.

'Shareholder activism' is also on the up. Investors have become much more vocal and ESG-aware. Disputes can – and will – arise from their claims that a company has failed to meet its green promises.

Conversely, there are companies that have been far more cautious, heavily involving legal teams in any claims or promises made, but they could still be exposed to risk. The whole ESG area is still relatively new to all concerned and contains unforeseeable pitfalls.

And, as one respondent wryly commented, "disputes seem to breed disputes". Witness the recent derivative action against the directors of major oil companies. We should expect more of the same.

There are other risks as well, like energy companies diversifying into renewables. Although they've got hundreds of years of experience digging stuff out of the ground and selling it, they have no experience in generating, distributing and transmitting electricity generated by the wind or the sun. Just because you're an energy company and it's a good thing to diversify doesn't mean that you know what you're doing.

In-practice lawyer





GOVERNMENT SUBSIDIES

Even our world-wise respondents were raising large legal eyebrows at the “huge promises” around subsidies promised to foreign contractors for renewable technology. It’s a new area and ripe for dispute.

For example, in Dubai, green technology-based disputes between local government and international company owners are reported to be growing.

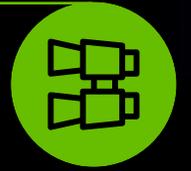
Clearly, there is a potential for a glut of Investor-State disputes further down the line.

“Tell us about the risk you’re facing,” I said. “And what about your pricing mechanisms for PPAs? Have you got a fixed price? Is it adjustable and if so, by reference to what?” I explained they could end up selling electricity at a loss. About the need to consider the off-taking obligations, and the punitive clauses when they can’t generate electricity from their wind farm because there’s no wind. They hadn’t thought it through at all.

In-practice lawyer



OUR VIEW – ESG reporting



We are regularly asked by companies to assure the reporting of their ESG data. For example, checking if they’re on track to meet their emissions targets.

But that isn’t always an easy task, as we often find that the data is unavailable, or of poor quality. This opens up the risk of legal action for the companies reporting it.

In particular, we have seen that:

- The financial industry is increasingly offering incentives on loans to corporates that meet ESG targets. However, the targets are often ill-defined, and the borrowers can’t always produce the high-quality data necessary to demonstrate compliance.
- In complying with their Section 172 duties, directors are making statements in annual reports about ESG risks and progress made that are not being subjected to the same level of scrutiny as the numbers in their financial statements.

When these turn out to be wrong, or when financial statements are not updated to be consistent with them, the directors can face legal action.



SECTION 5

Spotlight on group actions

When we asked about group actions, both those in-house and in-practice believe that class actions are increasing in the UK in some sectors. Financial services and healthcare being the top two mentioned.

The corporates recognise this as a potential area of vulnerability, but they're not sure how to manage it. Whereas the in-practice respondents felt that the UK is still in the early stages (compared to the US's old and ongoing love affair with 'class actions'). Either way, neither is entirely comfortable with it. More procedural guidance is required.



Fed by funding



The potential for litigation



The CMA connection

66

This is one area where we might expect an increase, as there is a lot happening and things are changing. But it's still early days and hard to predict how things will unfold – not least in terms of government rulings."

In-practice lawyer



FED BY FUNDING

Increases in litigation funding have made it easier to bring cases in the UK. That's brought a corresponding growth in boutique litigation law firms actively seeking out claimants and cases. And now that electronic signatures are acceptable and the litigation process is increasingly online, the group action process is smoother for all concerned.

If you are a consumer-led business, there is always the threat of a class action which is becoming increasingly popular now in the UK.

In-house lawyer



THE POTENTIAL FOR LITIGATION

Companies are generally aware that GDPR and an increase in cyber-attacks has heightened litigation risk. But they tend to be more concerned about the risk of fines from the Information Commissioner's Office (ICO) and consequent bad publicity, rather than litigation per se.

From a risk management point of view, respondents report increased liaison with risk/compliance and IT colleagues to develop policies and procedures. Third party breaches are seen as a particular concern.

And yet, even among the legal profession, there's uncertainty about how easy it is to prove a loss from data breaches.

Indeed, with non-financial data it's hard to know where the loss actually lies, and how – or even if – it's happened. There's a sense of it all 'being out of our control' and in-house counsel find they have to trust rather than know for sure that they are protected from cyber-attack.

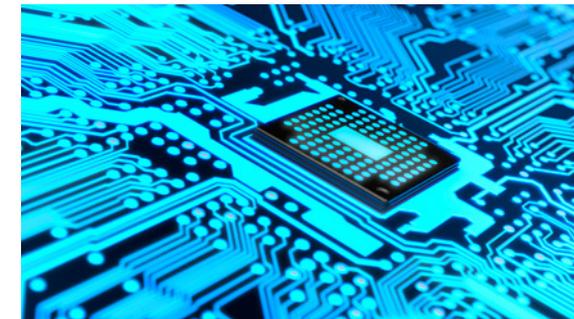
Until recently, many thought the litigative "floodgates would open" but the November 2021 judgment by the UK's highest court in *Lloyd v Google LLC* [2021] UKSC 50 has made that less certain.

It appears to be having a significant impact on the viability of mass data protection claims, with the resulting discontinuation of claims against several major tech companies.

It's this kind of legal outcome that makes lawyers so circumspect about commenting on the future – when one ruling can change expected outcomes overnight.

This is the one area where I have found it easier to get traction within my company. In fact, they were asking me to get involved as it's such a high profile and relatively well understood risk. It's partly the risk of litigation, but it's really more to do with the fear of fines and negative reputational impact. Both of which are high on the Board agenda.

In-house lawyer



THE CMA CONNECTION

In-house practices tend to talk about CMA rulings alongside group action disputes. The potential for litigation has grown since the CMA anti-trust/competition rulings. However, this area is felt to be even more out of their control than data-based claims, and loss can be complex to establish.

Competition lawyers and affected corporates – especially those in financial services – are watching what happens with interest. Changes to the rules on the opt out ruling for class actions, or the need for a lead claimant, could make all the difference.

Class actions in England are not as mature as in the US or Australia, and we're still finding our feet. We need more clarity from the courts on what can and what can't be included.

In-house lawyer



SECTION 6

Spotlight on AI

A small number of corporates we spoke to are considering issues from the use of AI – such as bias. They refer to cases and legislation (especially in the US) around AI-induced bias in recruitment decision making and product development.

Given the spotlight on AI, it's become an emerging area for regulation. The FCA has requirements for financial institutions to address bias in their product portfolio. And the EU is developing legislation around AI ethics.



Liability and AI



OUR VIEW – Sources of liability



66

There are lots of risks around unintended consequences with AI. By definition you can't protect against that in a contract precisely because it's unintended – such as bias in recruiting, or latent underperformance of the AI system itself. The latter needn't come to light until years of operation – and years of exposure."

In-practice lawyer



LIABILITY AND AI

Corporates are keen to ride the technology wave, but they are aware that they are surfing into unfamiliar territory and could take a tumble. It's a highly specialist area and they certainly don't claim to have all the answers. In fact, they're asking lots of questions.

For example, liability from AI is a very nebulous area. So, who is responsible for the failure or the successes of AI? Where does the fault lie? Our respondents are assuming that if the AI is not doing what it's supposed to do, then the supplier is at fault. Whereas, if the inputs are suspect, then the vendor takes the blame. That seems the common sense point of view, but it's likely that only as cases emerge and are won that clarity will be obtained.

And because it isn't an area many lawyers or in-house practices feel qualified to advise on, the tendency is to rely on the technical expertise of others.

Indeed, the lawyers feel they are being required to 'know the unknowns'. They simply don't know enough to judge whether AI will result in the 'wave of claims' predicted by some pundits. Some firms say they are starting to talk to clients but – understandably – find that the latter are only just starting to get their heads around this new and complex topic.

Any increasing awareness of the risk is more likely due to high profile cases rather than corporate forethought. Ultimately, the feeling in-house is that AI is just another area of risk that needs to be considered in future contracts. But how do you frame an AI contract? That's another area of uncertainty. From a legal perspective, it's hard to put together a deal to protect clients. Even defining what is meant by AI can be difficult.

It's the risk that is causing people to hesitate. If you've got thousands of miles of pipeline, using an AI system to monitor and manage it is a huge risk – and not just a legal one. It isn't just a systems risk, it's a business risk as there can be all sorts of knock-on claims from supply contracts and general business loss... Contracts involving AI need to be very carefully written. In general, there isn't a proper understanding of how the IT system integrates into the business of the customer, and without that you can't reduce or properly assign the risk in a contract.

In-practice lawyer

OUR VIEW – Sources of liability

Depending on how the law develops, one could imagine potential liability for any of the:

- **Creator** of the AI algorithm.
- **Trainer** of the algorithm. That would be whoever selects the dataset used to train it and/or the data provider.
- **Entity** implementing an algorithm in its products – such as a car manufacturer.
- **Owner** of the end product/licensee using it.
- **Practitioner** applying end product – such as a doctor using imaging diagnostic software.

Predicting ownership issues

Patents require an idea in the mind of the inventor – something not always true of AI-driven inventions. And who (or what) owns the AI's intellectual property?

The legal world is split. Early case law in the UK, US and EU says that machines cannot own IP.

But cases in Australia and South Africa have gone the other way. Generally, AI doesn't have legal personality... yet. But will that change?

Copyright may be simpler. In the UK, whoever "made the arrangements necessary" for the creation of the work owns it. But then again, consider how AI can generate work in the style of existing artists. Existing legislation is challenged to know how to handle that conundrum.

It's extremely difficult to tell if infringement is taking place within a 'black box' AI system. Any infringement may be unintentional if an AI system re-invents an approach already under some form of IP protection, within the black box.

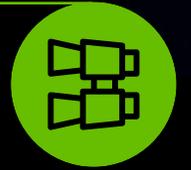
And what about licensing of data and uses of that data, such as royalties for use of an algorithm trained on the data? As you can see, there are currently more questions than answers.

What new legislation could do

Like AI itself, guidance and legislation are in the early stages. The EU has taken the initiative and is forging ahead with sweeping proposed regulation that would implement safety standards for high-risk systems in medicine, transport, market surveillance, safety equipment, educational assessment and job recruitment.

Such standards are to include: monitoring; 'bias-free' data governance; transparency (so people are made aware when AI is in use); human oversight; accuracy; robustness, and security. The plan is to ban some uses of AI that could be seen as unethical manipulation of people/ authoritarian use by government.

The legislation could be very significant for corporates, not only imposing fines as a percentage of revenue, but also having the extra-territorial remit to target companies based outside the EU if they trade with it.





SECTION 7

Spotlight on use of technology in disputes

Both in-house and in-practice respondents recognise that technology can help with the legwork and tech tools are being widely used already.

The pandemic undoubtedly forced the acceleration of digital adoption in the legal world. Now all cases (except for the smallest and private disputes) involve E disclosure. Relativity is the most commonly used E disclosure platform, with Everlaw and DISCO also being popular. But there is still an underlying mistrust of technology, particularly (and perhaps understandably) about giving full access to data.

More sophisticated, accurate solutions are hoped for. For example, current tools still require a human, quality control element. There's a vague expectation

that technology is improving with better machine learning capability to reduce the human input and costs, so lawyers can spend their valuable time on what they do best. But some feel that it's not improving fast enough and that legal tech is lagging that of other professions.



Using Data to Discover



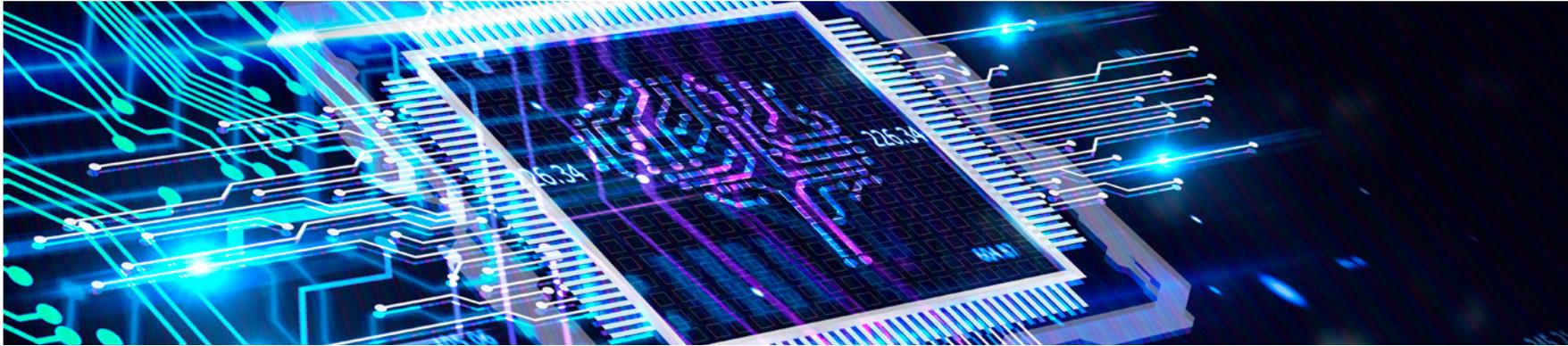
Moving into new areas



Needing new skillsets



Ensuring the solution isn't the problem



66

Often clients don't have very good systems, and they don't want people coming in and poking around them. Not because they're trying to hide anything but just from a general data security/GDPR perspective. Which means some clients want to do their own research and package up the data to give to us, rather than us coming in and taking it – especially things like Directors' mailboxes."

In-house lawyer



USING DATA TO DISCOVER

As disputes grow bigger and more data-heavy, the use of technology to lighten the dispute resolution load is becoming the norm.

Almost all law firms and some of the larger in-house corporate teams, are increasingly using AI and machine learning in disputes. The technologies are particularly valuable at the disclosure stage in complex cases – helping reduce time and resources required. There's simply too much data to be handled manually.

Once you apply one aspect of AI or automation, you understand what it can offer, and it spawns other ideas so you can see it growing in its use.

In-practice lawyer

Although this makes it easier to present trail of events to a tribunal/court, judges and lawyers still need human, technical and forensic accounting expertise to interpret the data and demonstrate loss, but at least a lot of the 'legwork' has been done. (Interestingly, several respondents commented that there was more that could be done by the courts to limit the level of disclosure.)

Some law firms have their own in-house tech teams and licensed software. They believe that, despite some downsides, it is well worth the effort. It's a "cleverer way of doing litigation".

Initially, significant time and money is spent up-front getting everything set up. Identifying and inputting the correct sources of data is demanding but vital: "what you get out is only as good as what you put in".

We still have a way to go in persuading in-house lawyers that using predictive coding is appropriate and defensible. The only thing that will convince them is seeing that the document bundles for review get smaller and the fees lower... Frankly nobody really understands how the proprietary software works. Even the technologists on my team don't really understand what's going on under the bonnet. That doesn't increase confidence.

In-practice lawyer



MOVING INTO NEW AREAS

Having been proven valuable in Disclosure, the technologies are being used in other areas, such as contract updating and in applying automated costs and budgets – making it easier to allocate fees.

We are looking for new tech innovations from suppliers to improve processes. For example, we have contract analysis that picks out all the relevant clauses so we no longer have to locate and update these manually.

In-house lawyer

Some law firms are happy to keep hiring external expertise to interpret the data. And many are recruiting legal project managers to coordinate efficiently across the new range of specialist skillsets.

When we have a hugely complicated issue to prove evidentially, we employ a team of data scientists to mine the internet. The technology can be used to catch witnesses out or prove a case to the requisite standard.

In-practice lawyer

We were also told about the use of data scientists to spot errors in witness statements or evidence, as well as in fraud detection. This can involve anything from handwriting analysis to mining mountains of data on the internet.



NEEDING NEW SKILLSETS

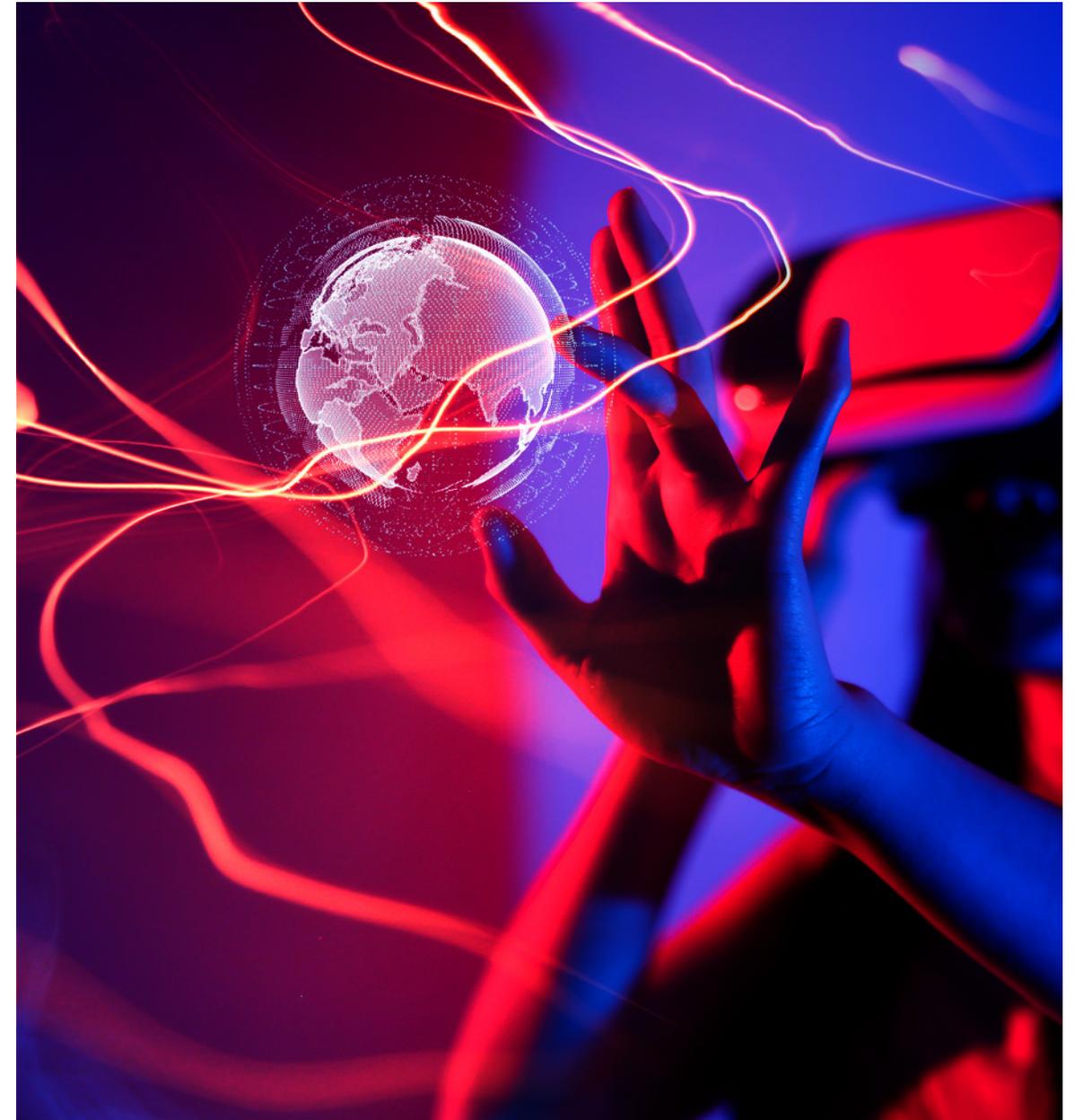
The use of AI and increasingly advanced tech has changed the skillsets required in law firms and corporates.

Senior legal expertise is still essential – the technology is in no way replacing that. But lawyers simply don't have the necessary tech skills. Which is why, at a more junior level, such skills are increasingly important.



ENSURING THE SOLUTION ISN'T THE PROBLEM

The use of AI in dispute resolution is not without its challenges. Our respondents reported that they're starting to see 'satellite disputes' about the use of the tech. For example, conflicts about the software used and where it has been trained to 'look'. Such disputes could reduce any efficiencies gained, as well as stopping firms from evolving their processes with the times, simply from the fear of getting it wrong. Which is understandable if the right know-know is becoming so hard to hire. Clearly the technology is only as good as what – and who – stands behind it.





This publication has been written in general terms and we recommend that you obtain professional advice before acting or refraining from action on any of the contents of this publication. Deloitte LLP accepts no liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 1 New Street Square, London EC4A 3HQ, United Kingdom.

Deloitte LLP is the United Kingdom affiliate of Deloitte NSE LLP, a member firm of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"). DTTL and each of its member firms are legally separate and independent entities. DTTL and Deloitte NSE LLP do not provide services to clients. Please see www.deloitte.com/about to learn more about our global network of member firms.

© 2022 Deloitte LLP. All rights reserved.

Designed and produced by 368 at Deloitte. J30015-2

CONTENTS	FOREWORD	SECTION 1	SECTION 2	SECTION 3	SECTION 4	SECTION 5	SECTION 6	SECTION 7
----------	----------	-----------	-----------	-----------	-----------	-----------	-----------	-----------