

# BENCHMARKER Legal Week

Legal Week Intelligence

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**WORLD**

**TURNED UPSIDE DOWN**

## Survey results

Whichever adjective you choose to describe the increase in dispute resolution work since the first signs of the economic downturn were spotted more than four years ago, there is little doubt the recent market changes have caused a profound shift in the role of the litigator.

It was, of course, widely predicted that the market would see a counter-cyclical increase in dispute-related work precipitated by the series of economic shocks that began with the sub-prime mortgage crisis in 2007 and continued through the 2008 collapse of Lehman Brothers and subsequent panic in the banking sector, before now being played out as a sovereign debt crisis taking hold in Europe.

As corporate and finance mandates have dropped and the initial big-ticket restructuring matters have gone past their peaks, so litigators, both in-house and in private practice, have assumed the mantle of primary business drivers.

Many of the trends the legal market was experiencing before the economic crisis hit – such as the rise in power of the general counsel and in-house function, demand for alternative billing options and more innovative approaches to the way firms handle matters – have accelerated through the period of economic turbulence and been amplified in the dispute resolution market.

“We have certainly seen an increase in the amount of contentious activity over the past 18 months,” comments Hogan Lovells litigation partner Lawson Caisley when asked to summarise the current climate. “A lot of this arises out of the global slowdown as, when the financial tide goes out, disputes as to responsibility for losses are exposed and counterparties seek to dodge the consequences of what turn out to be expensive deals.”

Against a backdrop of challenging economic conditions and increased regulation, the Hogan Lovells litigation benchmarker survey analyses the disputes landscape and looks at the challenges facing in-house counsel.

**Richard Lloyd** delves into the detail



# Litigating in the new normal

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### Lie of the land

To form a more in-depth picture of the current state of the litigation market, *Legal Week*, in conjunction with Hogan Lovells, surveyed more than 200 in-house lawyers to garner their thoughts and impressions on a range of litigation-related topics. The vast majority of respondents to the litigation benchmarker survey were based in the UK (84%), with a little more than 30% of respondents working for a business with turnover equal to or in excess of £1bn.

The survey asked what effects the downturn has caused and in which areas in-house counsel have seen an increase in litigation, such as general commercial disputes, employment-related cases, regulatory actions and fraud and bribery matters. It also asked for feedback on the challenges of overseas disputes and the most difficult jurisdictions in which to litigate in comparison with the UK. In addition, questions also assessed the impact the economic downturn has had on in-house legal budgets and how in-house teams approach disputes.

A significant chunk of respondents (43%) spend more than a fifth of their legal budgets on litigation, with 28% reporting that their litigation spend has increased over the past year.

The picture that forms from the responses confirms many of the trends to have emerged in the past three years. The downturn has caused more companies to seek earlier settlement in cases and to do more work in-house. The greater reach of regulators and what is perceived to be a tougher corporate crime regime, as exemplified by the new UK Bribery Act, has given rise to more disputes and an increased fear of regulatory oversight. Companies continue to face more international disputes, with developing markets in Asia and the Middle East, as well as some of Europe's more mature jurisdictions, providing particularly challenging environments in which to litigate.

Additionally, there remains a large degree of frustration voiced by the in-house community over law firms' inability to demonstrate  
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### Key findings

- 53% of respondents say there has been an increase in legal advice to their company's board
- The areas in which respondents are seeing an upsurge in disputes are: 39% commercial/contractual, 34% regulatory, 29% employment and 26% fraud/bribery
- 46% are seeing more international disputes
- Respondents cite Italy (at 36%) followed by France, India, Middle East and China as the most difficult jurisdictions to litigate in
- 51% of respondents instruct the Bar directly and 26% do so more than two to three times a year
- The biggest impact of the recession has been faster settlement of cases (cited by 26% of respondents) and handling more disputes in-house (25%)
- 43% spend more than 20% of their annual legal spend on dispute resolution
- 28% have seen an increase in their litigation budgets in the last year

Our lawyers in the U.S., Latin America, Europe, Asia and the Middle East, bring local knowledge to successfully resolve more and more disputes worldwide.

# Survey results

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genuine innovation and transparency when it comes to costs and case management. Some in-house counsel are clearly prepared to make waves with their preferred advisers.

## The vocal majority

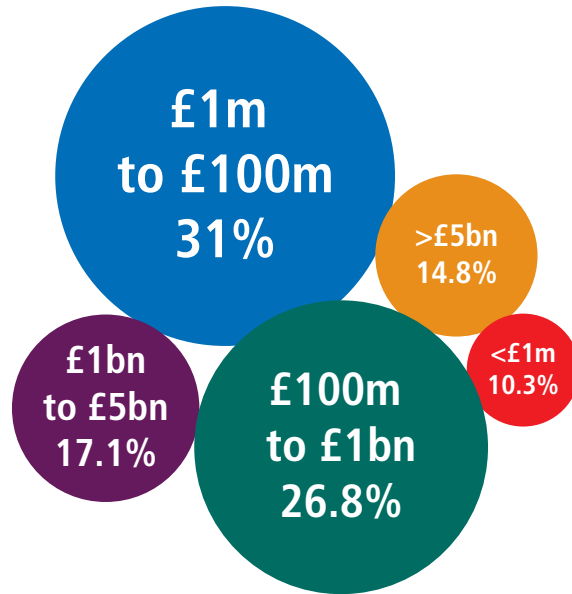
It is perhaps not surprising that the questions receiving the strongest response from those who completed the survey were those concerning law firms' approaches to costs and case management. When asked if they had seen anything particularly innovative or flexible from their law firms in case management and costs, 80% said they had not – a particularly damning statistic when considered against much of the recent rhetoric from private practice about embracing different forms of billing and different approaches to working such as outsourcing and offshoring.

However, it has become a familiar gripe. As their power within their own organisations has increased and the proliferation of panels has encouraged greater competition between advisers, so the criticism of law firms' billing practices has become more vociferous. At the heart of the matter has been the perceived inefficiencies perpetuated by the billable hour, which more in-house counsel have moved away from. One of the earliest to abandon billable hours was ITV general counsel Andrew Garard, who told *Legal Week* in 2008 that he would no longer accept time-based billing for any of the broadcaster's work.

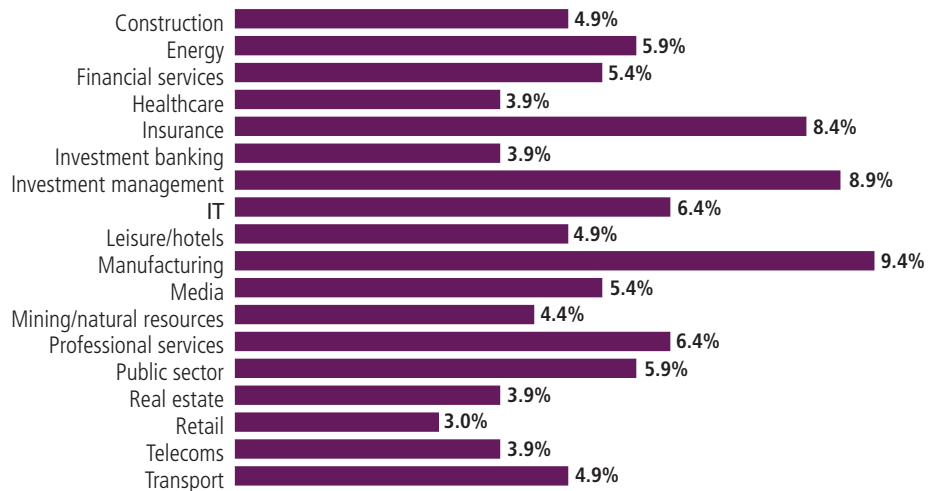
As he revealed ITV's panel of advisers, Garard commented: "None of the firms will bill us with reference to a measure of time on any matters. The pledge forms part of the agreement we have with the firms selected. As far as I am aware, we are the UK's first major corporation to have such a panel. Hopefully people will sit up and take notice and other companies will follow suit."

The message, at least in the

## Demographics – respondents by turnover



## Demographics – respondents by industry sector



context of litigation and the respondents to this survey, is still struggling to get through. "There is far too little that is innovative," insists one respondent. "They largely seem content to process rather than to structure litigation through to a conclusion."

Not all of law firms' efforts are

going unnoticed, though, and it should be recognised that there may be a time lag between the steps firms have taken in recent years to change their billing and case management practices and clients recognising the full effects of those changes. "The will to be innovative is there on the part of City firms,

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Certainty

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but it's tough to get it right," admits Hogan Lovells' global head of litigation Patrick Sherrington.

Plus, many legal heads recognise the steps that firms have taken. When asked to provide examples of innovation, several respondents to the survey mentioned the increased use of fixed fees and a willingness to outsource administrative tasks or the low-end work of a case. "Discounts offered off fixed rates and magic circle firms working with regional firms to mix high-end and low-end work on a single case," comments one respondent as an example of a change in mindset on the part of private practice lawyers. "There's a willingness to use cheaper staff where possible to reduce costs," adds another.

Of course litigation, with its lengthy and often onerous discovery requirements, is ripe for alternative approaches to case management, in particular outsourcing and offshoring. In a *Legal Week* survey on legal process outsourcing (LPO) earlier this year, litigation document review and e-discovery were cited by private practice respondents as the two areas most suitable for LPO (65.4% cited document review, while 55.3% highlighted e-discovery). The numbers dropped a little for respondents in-house, but the areas still remained two of the most popular.

One of the earliest corporates to embrace outsourcing for its litigation work was British American Tobacco, which has been using external provider Integreon since 2006. Keen to reduce his company's legal spend, particularly on discovery, the company's litigation chief Philip Scourfield asked a handful of City firms for ideas on how to better manage the process.

"I felt that I had to get our discovery obligations completed without paying City rates," recalls Scourfield, who approached Integreon after a suggestion from Hogan Lovells. According to

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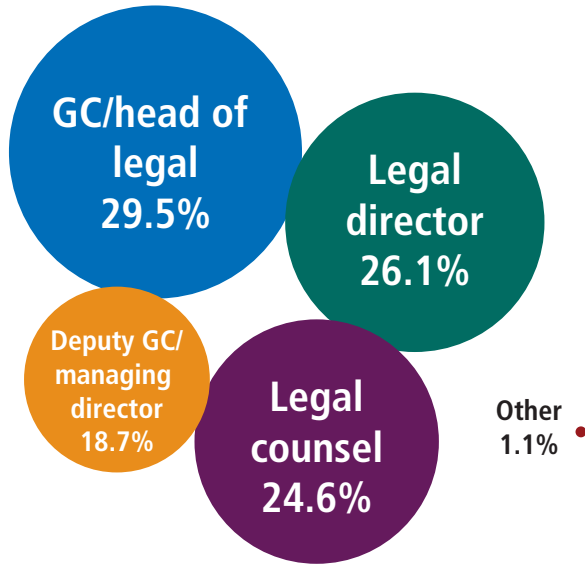
**13% of respondents  
say they have been  
involved in disputes  
caused by the US  
debt crisis**



Economic realities demand a sharp focus on containing cost. We are meticulous in managing costs with maximum efficiency.

# Survey results

## Demographics – respondents by job title



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Scourfield, once you have stripped out the lower-end, more easily commoditised work from a firm's workload, keeping an eye on how many hours the firm is clocking up can still be a crucial indicator. "I'd actually argue that hours are quite important in determining whether a bill is reasonable," he says. "If a firm tells me that something is going to cost £50,000 I don't really know if I'm getting a good deal if you strip the hours out," he adds.

By separating out the work on a particular matter, Scourfield can ensure he is using the right external advisers. "When you analyse what a lawyer really does you can break down the tasks and you come to realise that some aren't really legal and lawyers may not be best suited to that work," he insists. "The key is to identify the high-skilled work that you are prepared to pay a higher price for."

It is a point echoed by other

in-house counsel. "I'm always demanding more from outside counsel," comments Sony Ericsson general counsel Jonathan Pearl. "But if you are using decent people, if you are not going to pay them a decent rate, there's someone else who will."

### Change they can believe in

As well as criticising firms for their lack of innovation, those who responded to the survey were also asked what they wanted to see more of from their private practice advisers in terms of case management and costs. Among the responses were the inevitable demands for greater certainty and more transparency, a call for fees that more closely reflect the value of the work and a greater willingness to break up the component parts of a case, with each part handled by the most appropriate adviser. One particularly forthright in-house lawyer asserts: "More costs

**'If a firm tells me that something is going to cost £50,000 I don't really know if I'm getting a good deal if you strip the hours out'**

Philip Scourfield, British American Tobacco

information, budget planning, goal setting, better costs and litigation management. And better quality reports – most cannot be provided to the board."

While the survey throws up many familiar points of criticism, further in-depth discussion with a handful of senior in-house lawyers suggests private practice is listening to the gripes. "A lot on costs comes down to having a good, open relationship with the client," comments Hogan Lovells' Caisley. But it can be tough: "At times, it is like pushing water up a staircase," comments Jonathan Peddie, global head of litigation at Barclays, on his efforts to change accepted working practices – but in-housers have clearly become more sophisticated users of their advisers.

Peddie, for instance, emphasises making best use of a panel to ensure that a client is getting the best deal. Given that the financial sector has championed the primacy of the panel, it is perhaps not surprising that a bank would highlight the merits of a strong roster of advisers. But to Peddie, Barclays' 11-strong litigation panel is vital in ensuring that he gets the best deal on litigation.

"We need a consensual panel, a panel that is a consortium of very able people at all levels. Yes, there's competition between the firms, but there also has to be



**'As far as I am aware, we are the UK's first major corporation to have such a panel. Hopefully people will sit up and take notice and other companies will follow suit'** Andrew Garard, ITV

Hogan Lovells

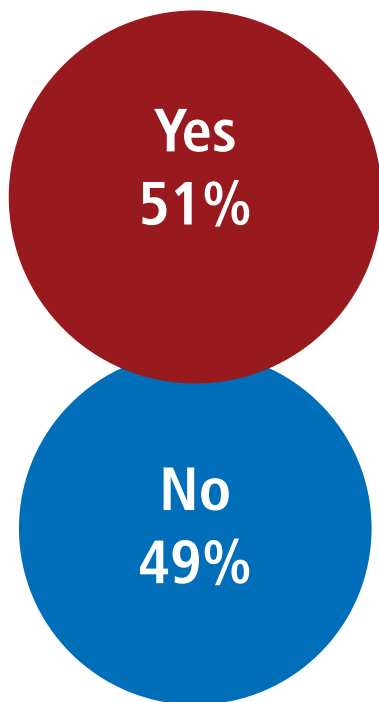
Communication

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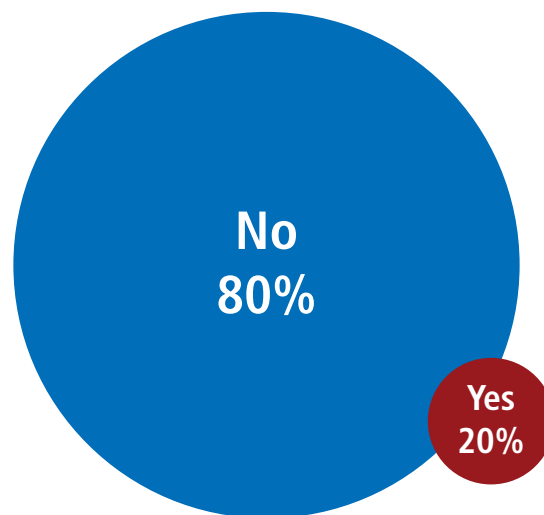
collaboration,” he comments. The roster, which includes Freshfields Bruckhaus Deringer, Hogan Lovells, Simmons & Simmons, TLT and Matthew Arnold & Baldwin, is designed to be able to handle the bank’s myriad litigation needs. “There’s not one firm that can tackle all of our litigation needs and we need the whole of our panel to be able to cover anything that may come up,” Peddie says. That means firms need to find a way of working together. A City firm may be expected to handle a chunk of Barclays’ volume, lower-value litigation run by a team of paralegals, but then that firm will be well placed to pick up higher-value work.

A bank like Barclays may have a particularly well-developed strategy for how it can drive the best value from its advisers, but other corporates have become equally demanding. “I expect innovation and I’m seeing it, perhaps more from mid-tier firms,” insists BAE Systems litigation head Joanna Talbot.

## Do you ever instruct the Bar directly?



## Have you seen anything particularly innovative or flexible from your law firms when it comes to case management and costs?



She cites firms’ greater ability to forecast how much a matter will cost and ability to keep the company informed of fees for ongoing matters as particularly useful developments. Hogan Lovells’ Caisley points out that many clients insist on regular costs updates.

As well as companies making better use of their preferred firms, many have also joined the growing trend of instructing the Bar directly for specific pieces of work. A little more than half (51%) of survey respondents said they instruct the Bar directly, with 26% saying they do it more than two to three times a year. This is a reflection of the changing habits of in-house teams, but also of the Bar’s evolution as chambers have made efforts to target work directly. “Barristers can give a really good steer early on, perhaps before you instruct a solicitor,” Talbot says.

“I’m a heavy user of the Bar,” Peddie admits. “For example, instructing through panel law firms and, where appropriate, directly. Direct access can be a dangerous false economy but on a specific financial crime point or a one-off regulatory matter it may not make sense to go to a

law firm.” Like Barclays’ range of solicitors firms, Peddie stresses the need to have relationships with all parts of the Bar, from the high end (“the Sumption factor,” as he calls it), to junior silks and the best senior juniors, and leading junior barristers in the country. “You don’t need to go to Mumbai for good value outsourcing,” he points out. “The junior Bar around the UK is stocked with very good and relatively cheap barristers.”

### In-house power

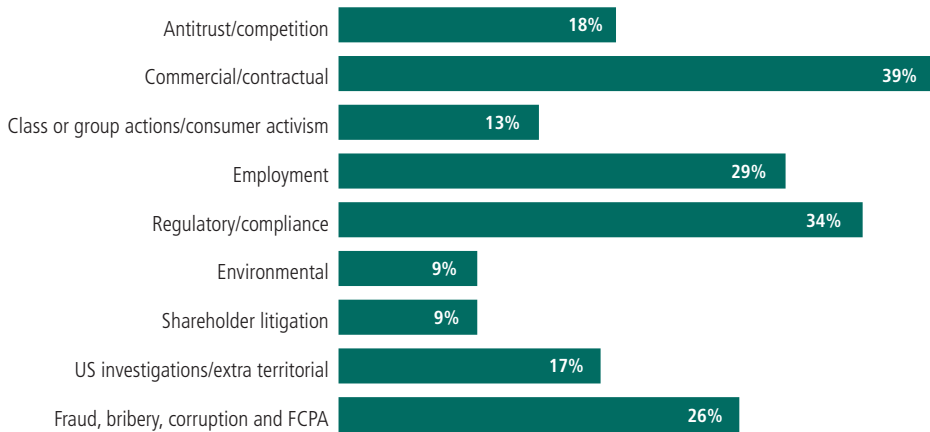
In-house counsel and law firms may still have some way to go to see eye to eye on costs and case management, but the increase in disputes in a number of areas is clearly forcing them to forge closer ties. When asked in which areas they had seen an increase in disputes over the last year, 34% picked out regulatory and compliance, second only to general commercial and contractual disputes (39%), as the area which has seen the greatest rise in litigation. This was followed by employment disputes (29%), a product perhaps of more layoffs in the downturn, and fraud and

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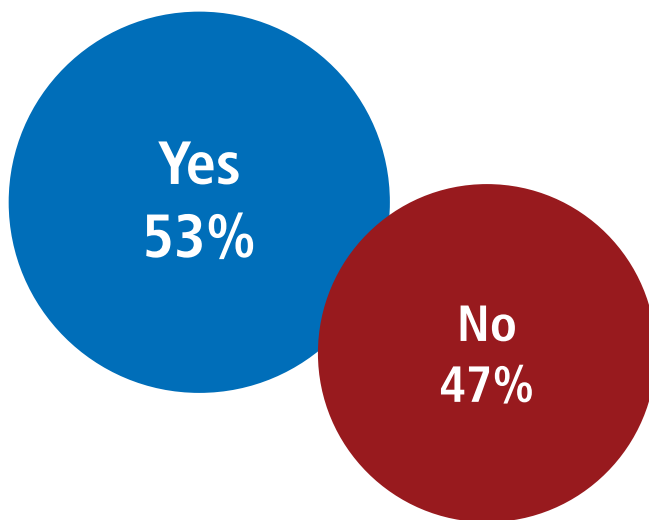
Having the right information at the right time is critical for litigation success. Clients value Hogan Lovells for the quality of its strategic advice and case management reporting.

# Survey results

## Percentage of respondents who have seen more litigation in the areas cited below



## Have you seen an increase in the amount of legal advice requested by your company's board?



Continued from page 7  
bribery, which was highlighted by 26% of respondents.

The rise in regulatory disputes is perhaps not surprising given that there has been a greater willingness on the part of regulators, such as the Securities and Exchange Commission (SEC) in the US and the UK's Financial Services

Authority (FSA), to not only bare their claws in their domestic markets but also to co-operate more on cross-border actions.

Fraud and bribery actions have been placed centre stage by the introduction this year of the Bribery Act in the UK, but they have undoubtedly been at the forefront of companies' minds for several

years thanks, in large part, to US prosecutors bringing actions under the Foreign Corrupt Practices Act (FCPA) and a number of high-profile cases, most notably Siemens.

The greater regulatory threat across the world has played a role in elevating the position of general counsel and their in-house teams within their own companies. When asked in the benchmarker survey whether the general counsel of their company sits on the board, 40% replied that they did. These companies are still in the minority, but are clearly part of an upward trend. A similar Hogan Lovells survey published in 2008 reported that just 16% of general counsel at respondents' companies then sat on the board.

Slightly more than half of respondents (53%) also said the amount of legal advice requested by their board has increased. When asked to explain that increase, numerous respondents cited greater regulatory and compliance concerns.

Against this backdrop, the UK Bribery Act has clearly given law firms, and litigators in particular, an opportunity to gain access to a company's upper echelons that they may not have had before. "We've been called in by the boards of a number of companies, including FTSE 100 companies, to present on the Bribery Act," comments Hogan Lovells litigation partner Michael Roberts. "A lot of boards have sat up and recognised that they need to be leading on this."

The new bribery regime is still in its infancy – the first conviction was only handed down in October – and its perceived threat may decrease as companies fully get to grips with the compliance requirements, but it is clearly part of a growing regulatory maze for companies' in-house teams and their advisers to negotiate.

### Foreign affairs

There is clearly a growing

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international dimension to regulatory work and across disputes in general. In a globalising world, with cross-border deals giving rise to complex, multinational litigation, in-house counsel more than ever need to have a grip on the threat of litigation in numerous markets around the world. In all, 46% of respondents to the benchmarker survey said they had seen an increase in the number of international disputes, with a particular emphasis on the US and China.

When asked what are the main challenges in managing multinational disputes, 62% highlighted knowledge of the relevant legal system, followed by language barriers (cited by 46%), cost controls (picked out by 45%) and conflicting legal systems (cited by 40%).

The domestic nature of much of litigation does not necessarily play to the strengths of the largest international, US and UK-headquartered firms, and many in-house lawyers cite the need to select outside counsel according to the jurisdiction. "I'm not sure the global model has delivered what it said it would," Peddie comments. "However, having an international capability to monitor trends and to be able to think globally is a massive advantage, but it is under-deployed. For most firms, 'global' means a multijurisdictional capability – the ability to represent a client everywhere – but the big benefit for clients is the ability to drive experience in one place into predictive risk management in another. There is not enough of this."

Although many of the world's emerging markets are often cited as posing the greatest challenges when it comes to litigating overseas, two European jurisdictions were picked out in the survey as being worse than the UK. Italy was chosen by 36%, followed

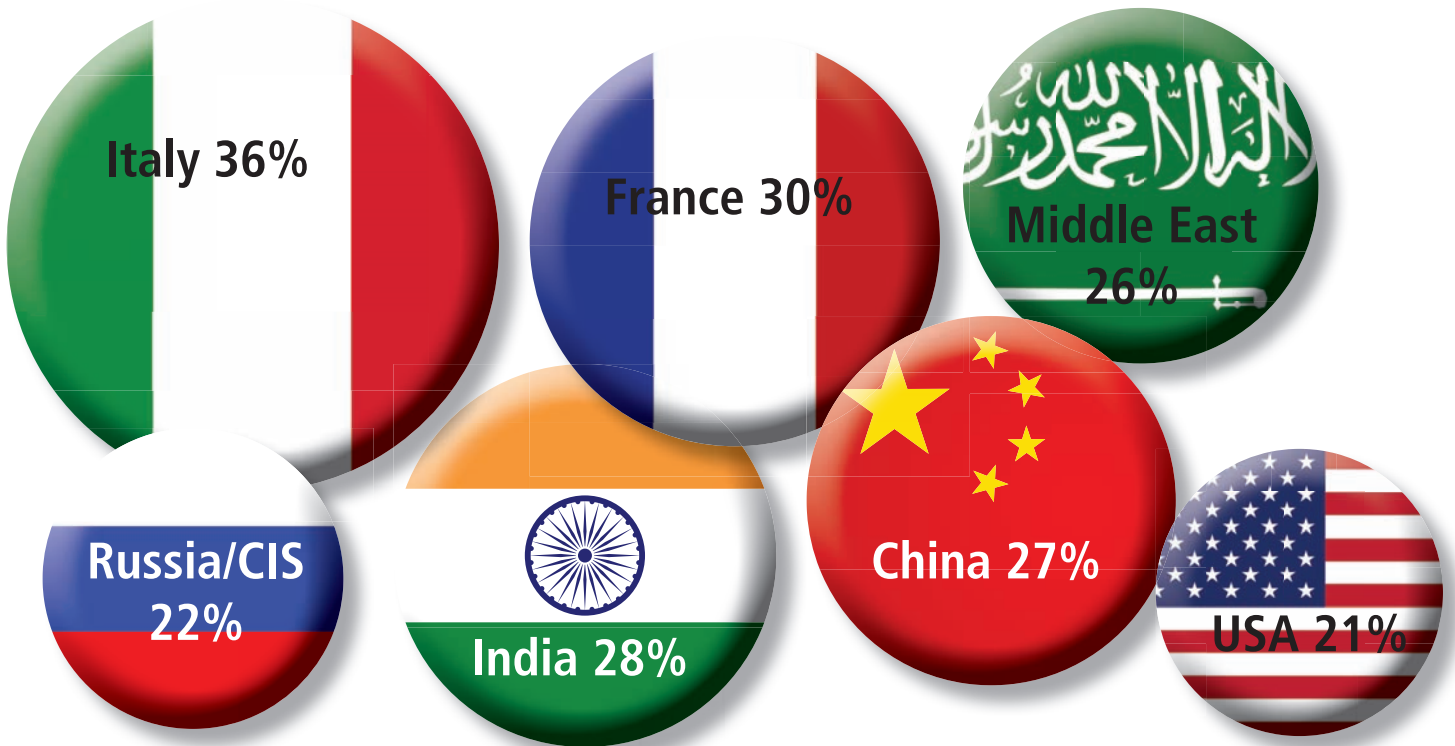
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**46% of respondents say they have seen an increase in the number of international disputes**



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## Which jurisdictions are more challenging to litigate in than the UK?



Continued from page 9  
by France at 30%, with India, China and the Middle East next, at 28%, 27% and 26% respectively.

Although the respondents' answers may reflect that their companies do most of their business outside of the UK on the continent, it is also fair to say that large parts of the Italian court system are not known for their efficiency. "One of the main problems foreign companies find is that litigation tends to be slower than in the UK," admits Francesca Rolla, a Milan-based litigation partner at Hogan Lovells.

"Then deadlines set by the court cannot be postponed and may be unrealistic – and in some of the smaller courts, judges may not be as experienced as in Rome, Milan or Turin."

"The higher up the judicial system you go, the more certain judgments become," one in-house head of litigation comments on the Italian system. "But you start at a low level where it's often very uncertain." The inefficiencies in the system, Rolla adds, mean that companies, and in particular foreign businesses, are more likely to seek an early settlement.

Away from Europe, it is not particularly surprising that the rapidly developing markets of the Middle East and Asia, with their less mature legal systems, are often cited as posing significant challenges when it comes to litigation. Local courts can often appear impenetrable, overly bureaucratic and inefficient, but some in-house counsel insist that developing a good knowledge of the

**'You don't need to go to Mumbai for good value outsourcing. The junior Bar around the UK is stocked with very good and relatively cheap barristers'**

Jonathan Peddie, Barclays

local systems and domestic firms can help iron out any problems.

With his company's large exposure to Asia, Sony Ericsson's Pearl has become accustomed to litigating in China which, he admits, has enabled him to become plugged in to the local legal market. His advice to companies litigating in the world's second-largest economy is to use homegrown firms, some of which he says are very good and often have local connections that foreign firms simply do not. He also dispels any notion that the local courts are balanced against foreign companies. "If Chinese courts always favour the home team, there will be a backlash from foreign exporters, which will obviously affect the economy," he insists.

However, the uncertainties involved in litigating overseas

as well as the reputation of the English court system have helped bolster London's appeal as a centre for dispute resolution. It is a point readily identified by the local legal community. "We have seen real growth in overseas corporates using the English courts to pursue claims," Caisley says.

The growing use of English courts is a point echoed by Hogan Lovells' Sherrington. "There has been a massive exercise to promote London as a centre for hearing disputes," he says. "I do think that following the Woolf reforms we were shooting ourselves in the foot a bit in telling parties not to go near the courts."

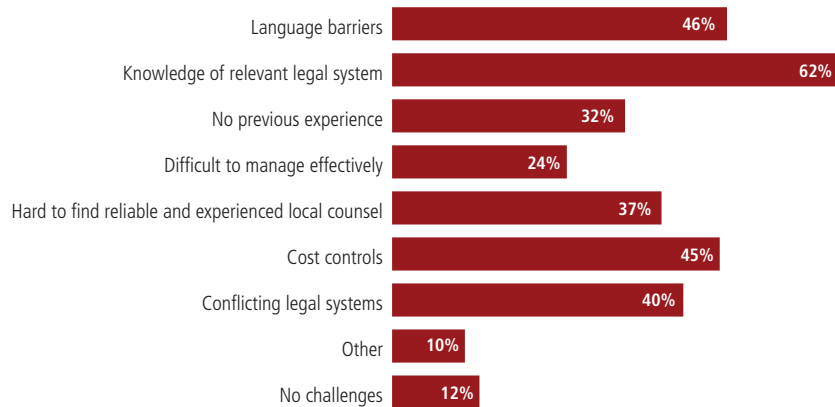
The promotion of London as a centre of dispute resolution including investment in the Rolls Building, the new home of the Chancery division, the Admiralty and Commercial Court and the Technology and Construction Court, has had a significant impact in attracting multinational cases that at first sight may appear to have little connection to London. City litigators are clearly reaping the benefits.

### Fun and games?

The continued global economic uncertainty looks set to keep litigators busy. That said, recent macro-economic shocks have not had a big impact on litigation volumes,



## What do you think are the main challenges for in-house lawyers trying to manage multinational disputes?



according to respondents to the benchmarker survey. Just 10% have become involved in litigation arising out of the economic crisis in the eurozone, while 13% say they have been involved in disputes caused by the US debt crisis.

The impact of the eurozone crisis may well increase in time as the full effects are felt by businesses across Europe, but most can only wait and see. "It's such a big issue but it's one companies have so little control over," Caisley points out.

According to respondents, the downturn has had a number of effects on the way they approach disputes. A quarter say that they are handling more disputes in-house while 26% report that they are settling disputes earlier or quicker. Gauging from their answers to the question 'what keeps you awake

at night?' respondents to the survey are prepared for a range of challenges in the immediate future. Reasons for insomnia include regulatory investigations and compliance issues, vexatious and opportunistic litigants, the eurozone crisis and the condition of the economy overall.

If litigation volumes remain at their high level or increase, then the pressures on in-house legal teams and their external advisers to deliver greater value will only grow. Thus, many of the dominant themes revealed by this survey – of continued frustrations over costs and case management, growing regulatory oversight and burgeoning litigation budgets – will continue to shape the litigation climate.

Some, though, are clearly relishing the new normal. "It's no longer simply about the merits and the cost. It's about strategic, regulatory and reputational consequences. You need to be a more sophisticated chess player, it's much more fun," Peddie enthuses. Everyone may not share that view.

**'If Chinese courts always favour the home team, there will be a backlash from foreign exporters'** Jonathan Pearl, Sony Ericsson

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## Transparency

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