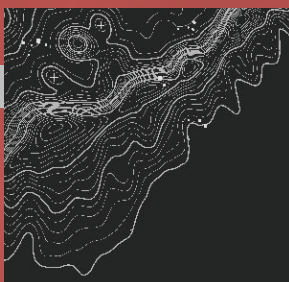


M & A DISPUTES REPORT

2022

*Global Economic Headwinds Impact
M&A Market and Drive Disputes*

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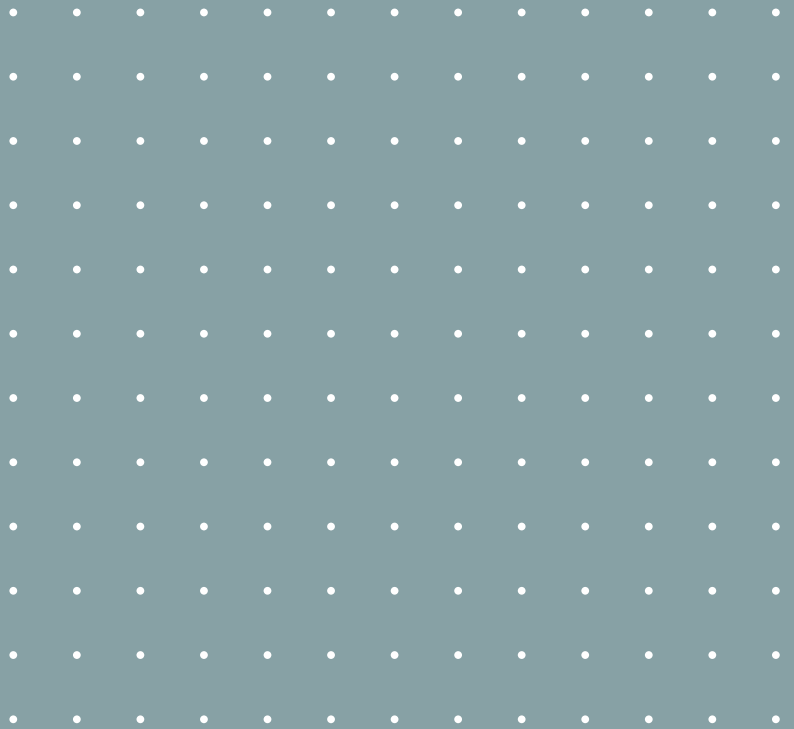
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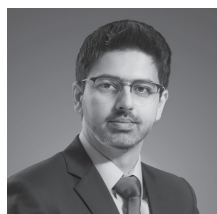
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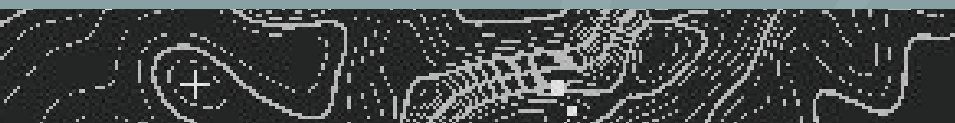
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Foreword

In last year's M&A Disputes Report, we predicted an escalation in mergers and acquisitions (M&A) disputes as global dealmaking volumes hit a record high, with \$5.9 trillion in transactions propelled by easy access to capital and roaring stock markets. We also questioned what the fallout could be when that frenzied M&A activity hit "the inevitable bump in the road" and the abundant liquidity dried up.

That speed bump arrived with a bang this year amid mounting geopolitical tensions, surging inflation and turmoil in financial and energy markets. These macroeconomic headwinds are changing the calculus for dealmakers—and fuelling a new wave of post-transaction disputes.

That's according to Berkeley Research Group's (BRG) third-annual M&A Disputes Report, which finds that the volume of disputes has risen further in the last year, with respondents expecting increased activity over the coming 12 months. Our latest report again brings together the perspectives of some of the world's top deal lawyers, disputes lawyers and private equity professionals, along with leading BRG experts, to reveal valuable insights into how the current market environment is changing the characteristics of those disputes. Among our key takeaways:

- Macroeconomic concerns are expected to drive disputes in the coming year, ahead of the direct effects of geopolitical tensions and the lingering impacts of COVID-19.
- Disputes increased the most in the FinTech industry in 2022 amid the cryptocurrency market meltdown. Energy & Climate—where environmental, social and governance (ESG) factors are playing a more significant role—and Traditional Financial Services rounded out the top three.
- The Construction & Real Estate sector, amid upheaval in the Asia-Pacific (APAC) region and volatility in the tight US housing market, is expected to see the biggest increase in disputes in 2023, with Energy & Climate and FinTech tied for second place.
- The Europe, Middle East and Africa (EMEA) region is expected to drive dispute activity in the coming year, with strict regulatory regimes and political strife seen as bigger factors than in North America or APAC.

This year's survey results suggest that in a volatile economy, dealmakers may deepen their focus on opportunistic transactions—potentially increasing the likelihood of disputes. Alongside larger disputes, we are also seeing major companies and institutions pursuing a greater number of smaller ones, perhaps to recoup funds in a constrained market. Most are settled before trial, and lawyers are increasingly counselling their clients to take steps to mitigate disputes, such as conducting enhanced due diligence.

"This year's study sees considerations around cryptocurrency markets and ESG come to the fore—both areas that might only have featured fleetingly in previous years".

– TRI MACDONALD, President, BRG

Private equity (PE) involvement in M&A further complicates the picture, as such firms—whose tolerance for risk in a downturn may be higher than that of corporate dealmakers—remain well stocked with dry powder and continue to raise funds and hunt for bargains in a distressed environment.

"Since we embarked on this annual study three years ago, its focus and findings have been set against a backdrop of 'the unprecedented'—from the pandemic to war, energy crises and the threat of global recession", said BRG President Tri MacDonald. "This year's study sees considerations around cryptocurrency markets and ESG come to the fore—both areas that might only have featured fleetingly in previous years. Clearly it's hard to make firm predictions in this climate. That complexity highlights the value of our report, which combines industry, market and technical insights from BRG experts with perspectives from some of the leading disputes and transactions lawyers from across the globe".

We hope this report will help our clients and readers keep their ears to the ground in this quickly evolving landscape. In this spirit, BRG will continue to provide updates on this rapidly changing space over the coming year.



**MUSTAFA
HADI**



Executive Summary

Changing Economic Tides: M&A Deals and Disputes Heading into 2023

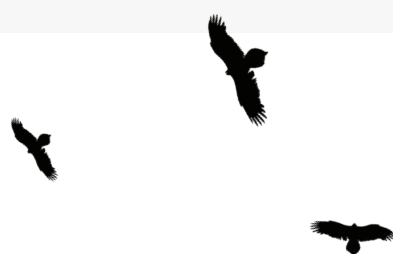
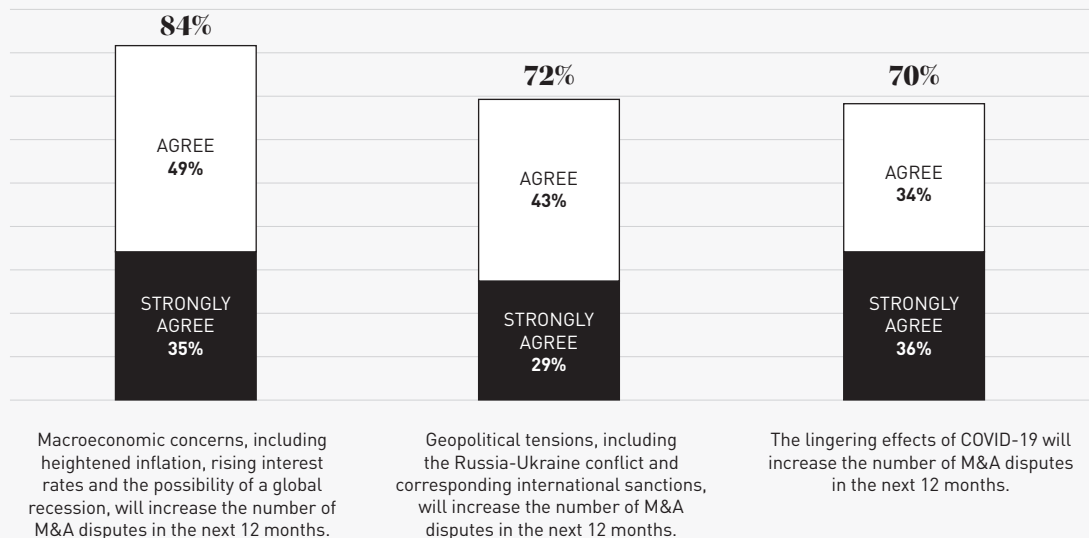
The upheaval from COVID-19 is giving way to new shockwaves hitting global markets. Yet while merger volumes have moderated, dealmakers on the lookout for opportunistic transactions—including private equity firms flush with unallocated capital—continue to scoop up companies as changing conditions present new countercyclical deal opportunities. This ongoing transactional flow and the increased volatility across multiple fronts, from swings in energy prices to soaring inflation, are expected to drive growth in mergers and acquisitions disputes in the next 12 months. Those changes are also triggering increased dispute activity in sectors such as FinTech and Energy & Climate.

These are some of the key findings from our latest survey of 181 respondents, conducted as a follow-up to BRG's 2021 *M&A Disputes Report*. Maintaining the global focus of that research, this year's report includes respondents from across Asia-Pacific, Europe, the Middle East and Africa and North America, consisting of 75 lawyers (private practice and in-house), 58 PE professionals and 48 corporate finance advisors. Our 2022 findings were informed further by qualitative interviews with a dozen M&A transaction and disputes lawyers from leading law firms around the world.

Our report found that dispute activity increased in 2022—a trend that respondents expect to continue over the next 12 months as fallout from the economic downturn accelerates and the likelihood of disagreements over key deal aspects (such as valuations) increases. More than 8 in 10 respondents (84%) said macroeconomic concerns, including heightened inflation, rising interest rates and the possibility of a global recession, will increase disputes in the coming year. Nearly three-quarters (72%) said geopolitical tensions, such as the Russia-Ukraine conflict and related international sanctions, would also be a factor, and 70% cited COVID-19's lingering effects.

“As the economic effects of higher interest rates and increased energy costs feed through to the wider economy, we expect that buyer hesitancy will increase and performance of recent acquisitions may fall short of expectations”, said BRG Director Kevin Hagon, who specialises in M&A disputes. “This period of adjustment is likely to produce an upswing in M&A disputes over the coming year and may cause a further slowdown in new deal activity if sellers don't adjust quickly to less-favourable valuations”.

2023 M&A Dispute Catalysts





Macroeconomic Concerns Drive Sector Shifts

The above dispute catalysts represent a shift from 2021, when COVID-19 still loomed large over transactions, leading to disputes in industries that were hard hit by the outbreak, like Hospitality & Leisure, as well as sectors that notched big pandemic gains, such as Life Sciences and Technology.

The dramatic developments of the past year—from plunging stock prices and cryptocurrency tumult to real-estate market disruptions and the energy crunch in Europe and elsewhere—have put other industries in the hot seat. Those dynamics are fuelling disputes in FinTech, Energy & Climate and Traditional Financial Services, while respondents rank Construction & Real Estate as the top industry for increased dispute activity in the year to come.

“Over the past year, we’ve seen more disputes about cryptocurrency”, said Richard Rollo, a trial lawyer and director at Richards, Layton & Finger in Delaware. “Everyone thinks this is the next big thing, so everyone is trying to launch their own crypto-related business”.

In the oil and natural-gas sector, years of underinvestment—and the practical realisation that the energy transition is complex and will take time—have led to disruption in energy supply and prices, said BRG Managing Director Aaron Howell. Geopolitical upheaval is now causing further stress. “Increased urgency around energy security is straining relationships within the sector and driving shifts in investment and regulatory behaviour”, Howell said. “In this environment, defensive behaviour is expected, leading to an inevitable increase in disputes”.

“Increased urgency around energy security is straining relationships within the sector and driving shifts in investment and regulatory behaviour. In this environment, defensive behaviour is expected, leading to an inevitable increase in disputes”.

– AARON HOWELL, Managing Director, BRG

KEY FINDINGS

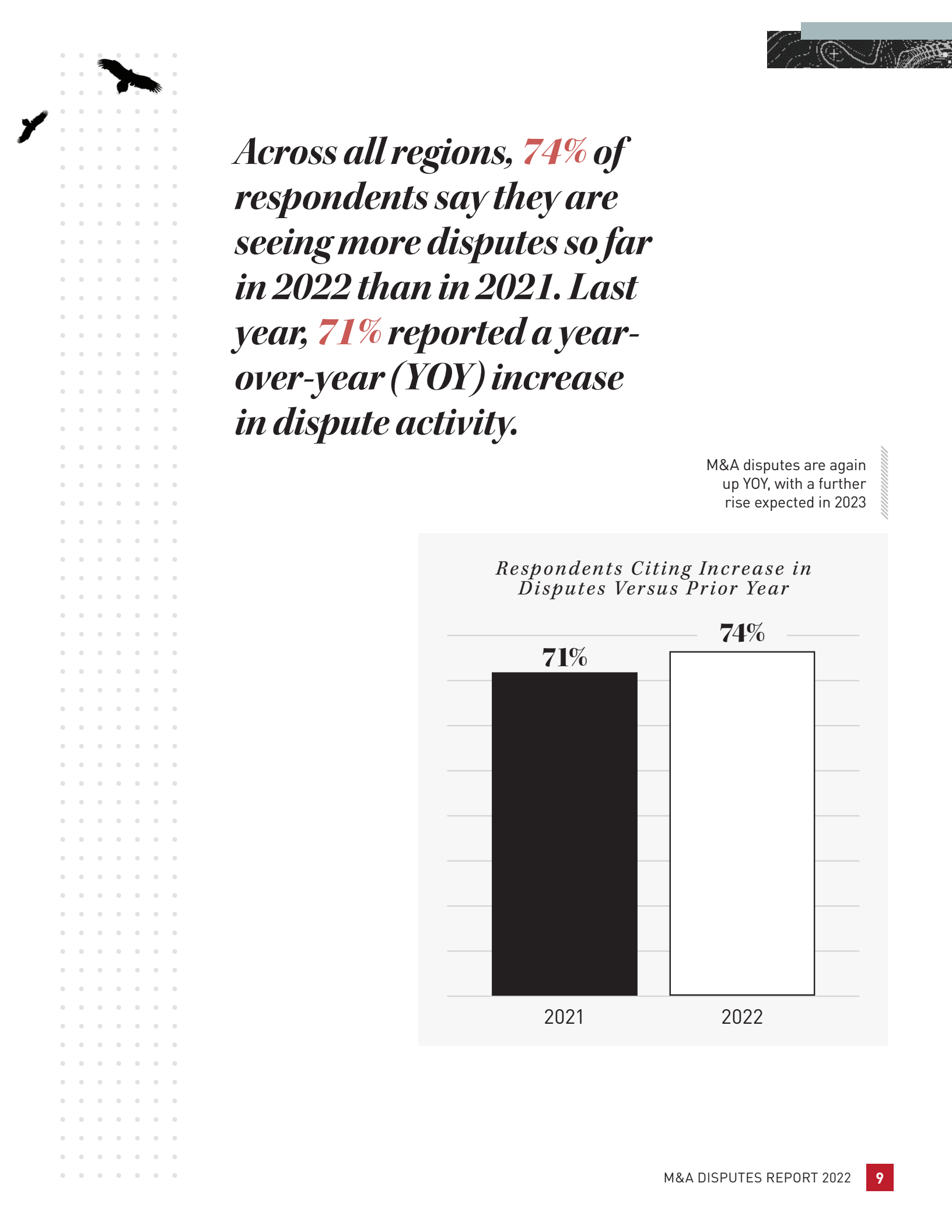


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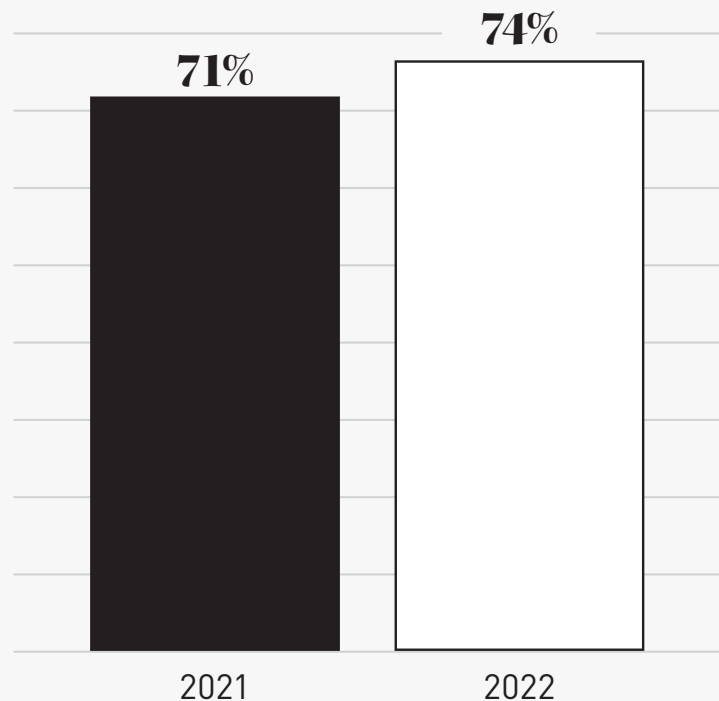
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*Across all regions, **74%** of respondents say they are seeing more disputes so far in 2022 than in 2021. Last year, **71%** reported a year-over-year (YOY) increase in dispute activity.*

M&A disputes are again up YOY, with a further rise expected in 2023

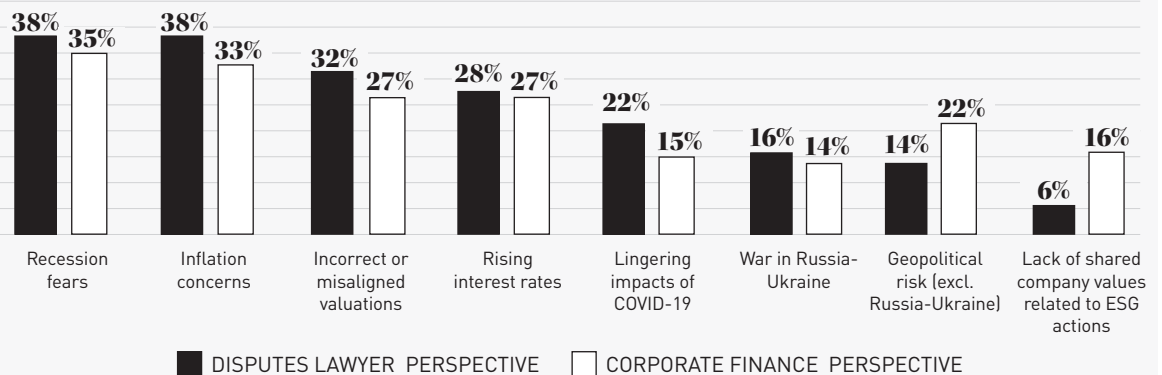
Respondents Citing Increase in Disputes Versus Prior Year





Recession fears and inflation concerns were the top two dispute catalysts this year, according to disputes lawyers and corporate finance attorneys and advisors.

Matters or Trends that Most Commonly Lead to Disputes



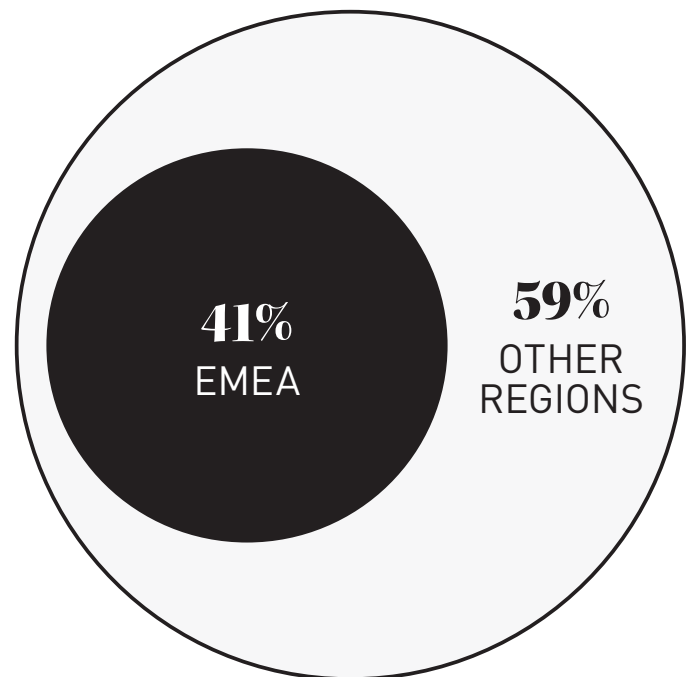
Macroeconomic concerns are now driving disputes, a switch from 2021's COVID-influenced dispute climate.





*For respondents who expect dispute volume and value to increase in the coming year, **41% cited EMEA as the key region to watch**, reflecting deepening economic and political uncertainty in the region.*

||| This is a shift from last year's focus on APAC, which remains active but was ranked second at 32%.



*Regions Driving M&A
Dispute Activity*



*Financial and energy
market turmoil is
driving M&A dispute
activity.*

MEDIA & TELECOMMUNICATIONS

ENERGY & CLIMATE


CONSTRUCTION & REAL ESTATE INDUSTRIALS

FINTECH RETAIL & CONSUMER GOODS


TECHNOLOGY **TRADITIONAL**


AVIATION **FINANCIAL SERVICES**

HOSPITALITY & LEISURE LIFE SCIENCES



FinTech, Energy & Climate and Traditional Financial Services are the top-ranked sectors for increased dispute activity this year. In 2021, the leaders were Hospitality & Leisure, Life Sciences and Technology.





Enhanced due diligence is a must. Lawyers strongly advise both buyers and sellers to conduct enhanced due diligence as a preventative disputes measure. But for sellers, material adverse change (MAC) and material adverse effect (MAE) clauses are less essential than situation dependent.

*Lawyers Advising
Enhanced Due Diligence*

	2021	2022
COUNSEL TO BUYERS	40%	50%
COUNSEL TO SELLERS	49%	62%

FULL FINDINGS

BRG M&A Disputes Report 2022



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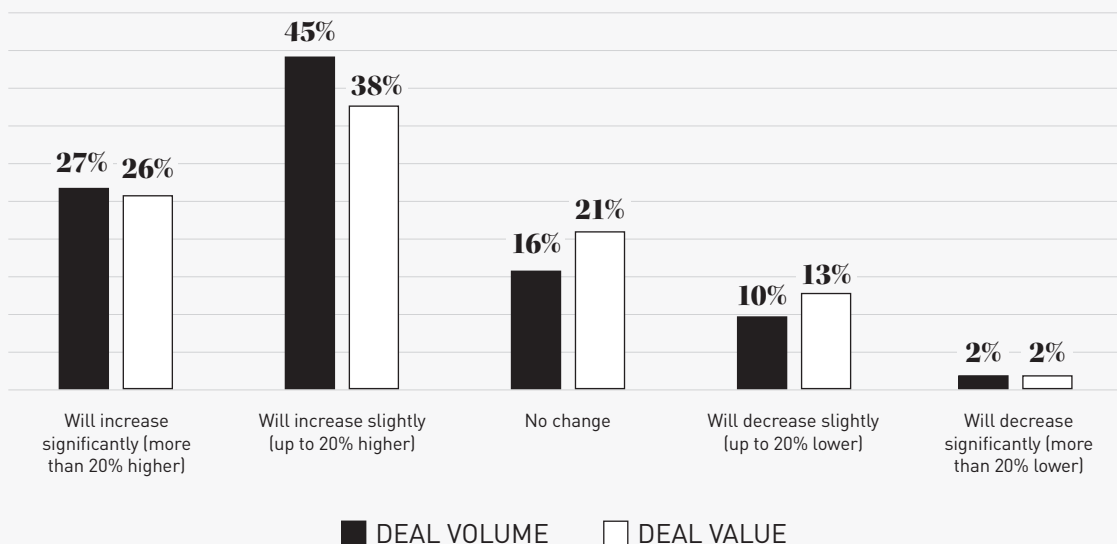
M&A Market Outlook

Deal Volumes Expected to Rise after Moderating in 2022, with Dispute Activity to Follow

Global dealmaking is coming down from 2021's breakneck pace, when strong economic conditions and pent-up demand drove record transaction values and volumes. In the first half of 2022, worldwide M&A activity totaled \$2.2 trillion, down 21% from the prior-year period and marking the slowest opening six months for M&A in two years, according to Refinitiv.

But transactions are still going forward—and though some experts predict economic uncertainty could dampen merger activity in the coming months, the majority of BRG's survey respondents maintained a rosier outlook. Nearly half (45%) expected deal volume to increase slightly over the next 12 months, while 27% predicted a significant rise (i.e. more than 20% higher). Nearly 40% expected deal value to increase slightly during that period, and more than a quarter (26%) predicted a significant increase.

Expected Change in M&A Deal Volume and Deal Value Over Next 12 Months





Dealmakers Seek Opportunity Amid Upheaval

“This kind of unpredictability can give businesses pause and perhaps even stop them from entering particular transactions, but it can also create opportunities, and we’ve definitely seen that in the last year”, said Byron Phillips, a disputes lawyer and partner at Hogan Lovells in Hong Kong.

For example, whilst Greater China has seen a recent slowdown in M&A activity, the push to digitise industries there is fuelling M&A, Phillips said, with “lots of traditionally non-tech businesses looking to acquire or collaborate with tech businesses. This creates such an interesting dynamic across the globe and particularly in Asia Pacific, where there’s a huge focus on tech and innovation across multiple-sectors and flourishing tech start-up ecosystems.”. This digitisation by acquisition is likely to result in post-merger management challenges and cultural issues, as well as disputes, as acquirers try to integrate offline and online business models.

The rise of ESG investing and related regulations may also be driving merger activity in a down market. “For companies that are listed in the West, fossil fuels are a dirty word, and so you come under pressure to divest those assets and play down your involvement”, said Matthew Weiniger KC, a dispute resolution partner at Linklaters in London and chair of the firm’s international arbitration practice. “If you’re divesting, it means someone’s buying. I have a client in the Southern Hemisphere that is busily buying lots of assets that people have gotten rid of”.

“Unpredictability can give businesses pause and perhaps even stop them from entering particular transactions, but it can also create opportunities, and we’ve definitely seen that in the last year”.

– BYRON PHILLIPS, Partner at Hogan Lovells



SPACs Lose Steam, but PE Funds Keep Striking Deals

One major 2021 M&A trend—transactions involving special-purpose acquisition companies (SPACs)—appears to be losing steam as the valuation bubble bursts and regulators step up scrutiny. Disputes lawyers said SPACs have not taken off in international markets as they did in the United States, where those deals have become more litigation prone.

Increased PE participation continues to shape the M&A landscape, including how disputes arise and are litigated. Despite the challenges [tight credit markets](#) pose for traditional leveraged buyouts, the private equity industry continues to play a significant role in merger deals, [accounting for 30%](#) of all global controlling-stake M&A volume in the first half of 2022, according to Bloomberg. Some funds are amassing dry power even against this uncertain economic backdrop—for instance, Hong Kong-based Baring Private Equity Asia recently [raised \\$11.2 billion](#), one of the largest PE funds ever raised in Asia.

“The valuation and M&A landscape in the US market is challenging”, said BRG Managing Director Dan Galante, who specialises in transaction-related diligence. “We are seeing an increase in private capital activity for investors willing to take a minority position or subordinating credit; or equity incentives such as recapitalisation or refinance transactions in the next year”. This could be part of a broader trend, where private capital steps in as traditional credit providers, such as banks, retrench.

“Significant deal flow is likely to be generated by companies with healthy US-dollar balance sheets because of the dollar’s strength against other major currencies”, said BRG Managing Director Andrew Webb. “Those companies will be looking to acquire assets and technology on an opportunistic basis, taking advantage of faltering profitability and/or distressed share prices”.

However, evaluating distressed assets or companies brings its own risks, Webb cautioned, noting that disputes frequently arise from worse-than-expected liabilities or operability. And in many sectors exposed to consumers, he added, cost pressures and sales and pricing volatility are likely to cause financial distress to businesses—even if they’re several stages up the value chain, such as suppliers of raw materials.

“We are seeing an increase in private capital activity for investors willing to take a minority position or subordinating credit; or equity incentives such as recapitalisation or refinance transactions in the next year”.

– DAN GALANTE, Managing Director, BRG

In this volatile environment, the dealmakers, lawyers and PE executives BRG surveyed expect the pace of disputes to ramp up. “The cumulative impact of the war in Ukraine, sanctions and COVID may amount to a perfect storm, generating additional disputes and at the same time harsher economic conditions that make parties less willing to leave money on the table”, said Amy Kläsener, an international arbitration partner at Jones Day in Frankfurt. “We generally see a time lag of 12 to 18 months, but I do think we’ll see a lot of disputes activity in the coming year as a result of these cumulative impacts”.



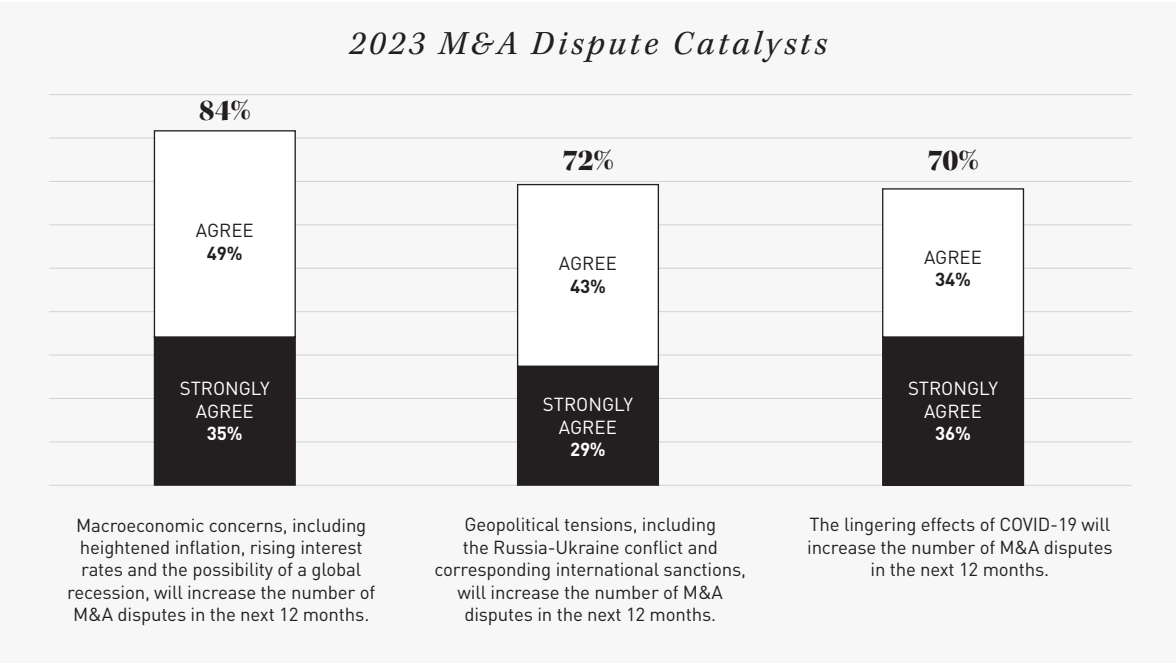


Macroeconomic Impact on Deals and Disputes

Macroeconomic Concerns are Driving Disputes in Churning Fiscal Waters

Upheaval across financial and energy markets is reshaping the landscape for both deals and disputes in 2022, as urgent concerns about macroeconomic issues such as inflation and rising interest rates assume greater importance than pandemic-driven uncertainty.

Such pressures are likely to increase in the coming year. More than four-fifths (84%) of survey respondents expected macroeconomic concerns to increase the number of M&A disputes. Respondents also selected geopolitical strife (72%) and COVID-19's lingering effects (70%).





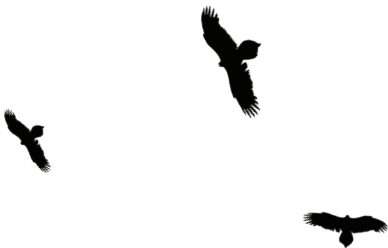
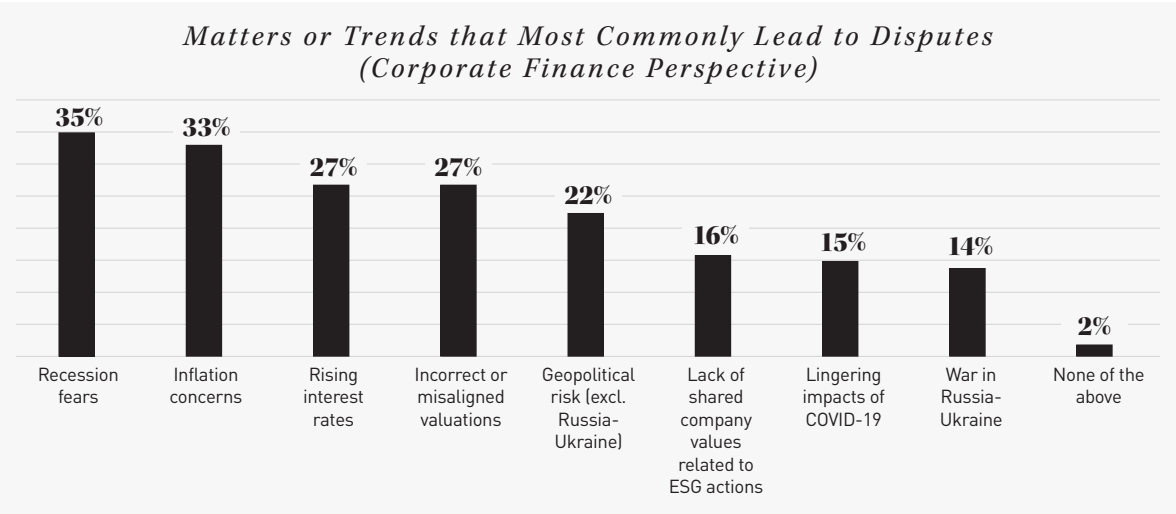
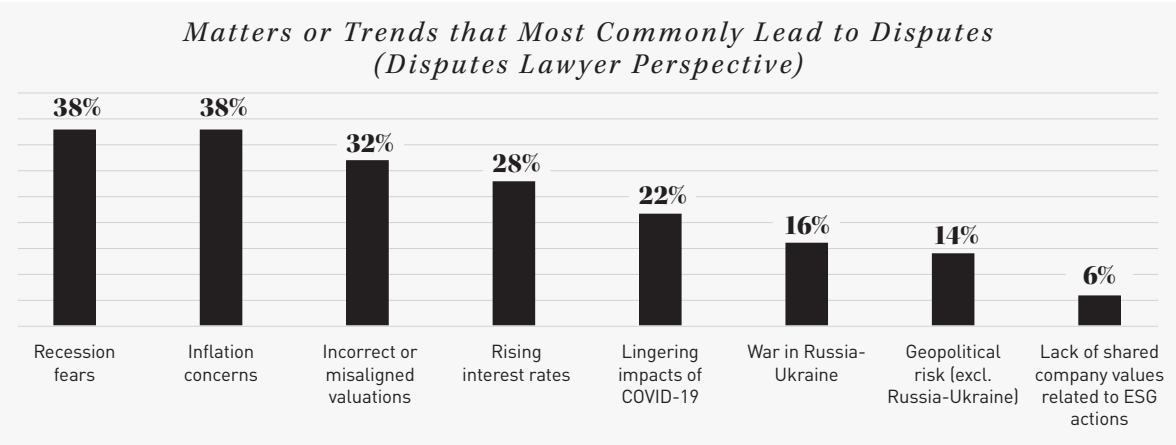
Volatility Weighs on Deals

“The increase in disputes is likely because prices are more volatile”, Weiniger said. “So when you sign the deal today to close in three months’ time, there’s a greater chance that your economic assumptions will be completely wrong at closing”.

The geopolitical situation in Europe is also creating turbulence across global energy markets, with significant regional price differentials in liquefied natural gas (LNG), for example, creating incentives for disputes in energy supply contracts, said BRG Director Crosby MacDonald. “Companies that have control over LNG cargoes will seek to send them to the highest-priced markets to take

advantage of the arbitrage opportunities enabled by price differentials”, he said. “I expect to see further LNG contractual disputes regarding issues such as volumes, flexibility and force majeure, as well as prices”.

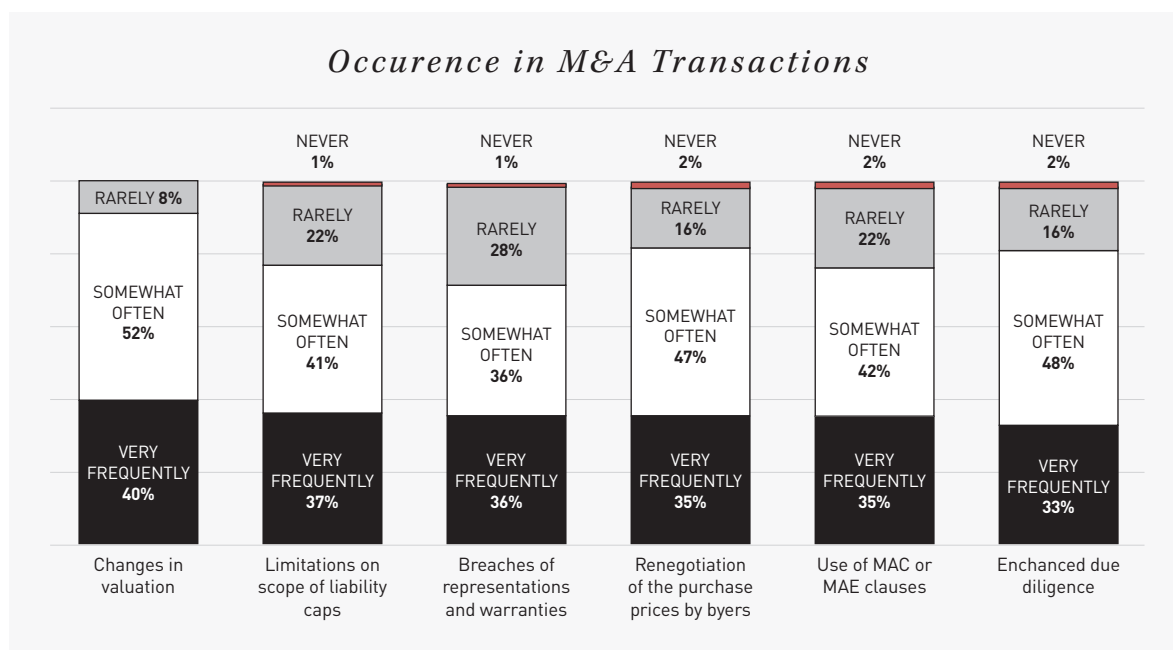
Disputes lawyers and corporate finance lawyers and advisors agree that recession fears and inflation concerns were the two main drivers of M&A disputes over the past year. Those factors are reflected in the frequency of M&A deal events like changes in valuation, which respondents said were occurring somewhat often (52%) or very frequently (40%).





“One of the debates is whether to run a valuation before or after a deal closes”, said Nicholas Lingard, a partner at Freshfields Bruckhaus Deringer in Singapore and head of the firm’s international arbitration practice in Asia. “As market conditions become more challenging, that question will become very acute. The valuation differentials could be really stark between a year ago and now”.

Buyers are also renegotiating purchase prices, with 82% of respondents seeing this happen somewhat often or very frequently. While some deals incorporate provisions aimed at ensuring the final price reflects the agreed-upon value of the acquired business on the closing date, those terms can also lead to disagreements. “Parties are now building in price-adjustment mechanisms more than before to deal with potential volatility, and there will always be disputes based on the accounting metrics you’ve used”, said Andrew Short, a commercial litigation partner at Mishcon de Reya in London.



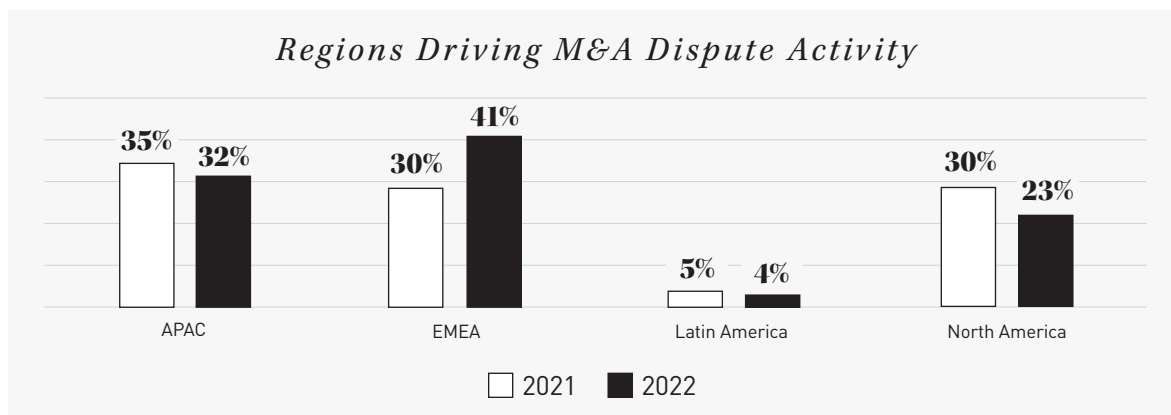
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– **NICHOLAS LINGARD**, Partner at Freshfields Bruckhaus Deringer

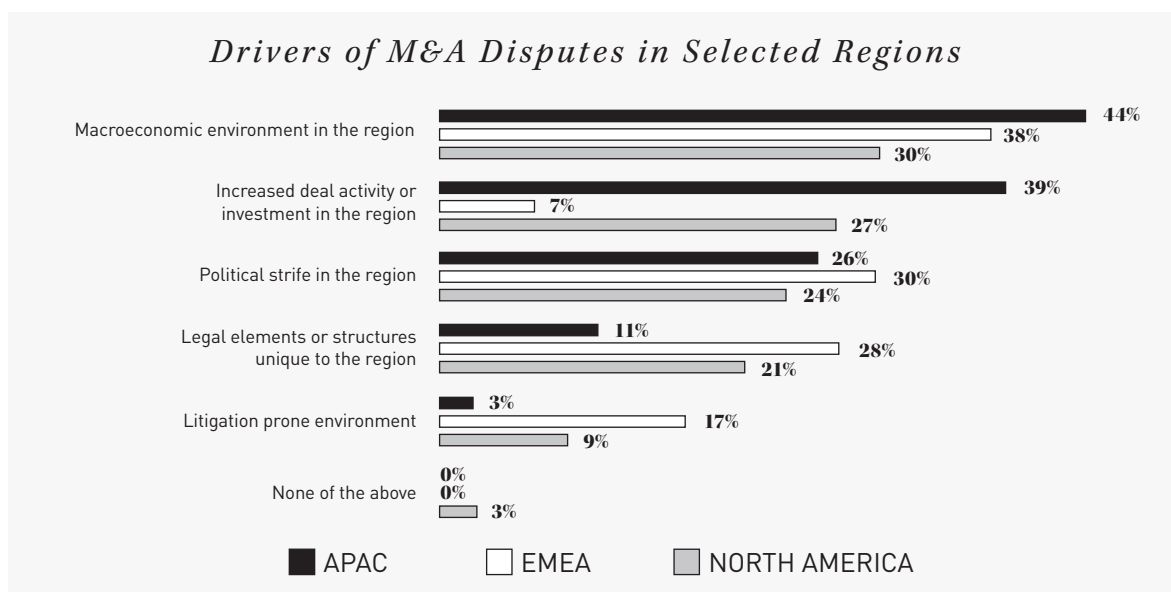
Regional Outlook

EMEA Is the Focus of Future Disputes as Macroeconomic Concerns Deepen

It's not surprising that EMEA passed APAC as the region to watch for M&A disputes in 2023, as Russia's war in Ukraine, related sanctions and energy market turmoil significantly disrupted the region's economic activity. When asked which region they expected to most drive increases in M&A dispute volume and value, 41% of respondents selected EMEA, up from 30% in 2021.



Macroeconomic concerns were expected to be the most significant driver of 2023 disputes across EMEA, APAC and North America. EMEA also had the highest expectations for political strife in the region to drive disputes, with 30% of respondents there citing it as a factor, compared to 26% in APAC and 24% in North America.



“The reality is it’s often quite hard to pinpoint one factor, because so many are bubbling in the background”, said Julianne Hughes-Jennett, a disputes partner at Quinn Emanuel Urquhart & Sullivan in London. “We are in a very unusual period of history in that sense. Not only are we dealing with a land war in Europe, but also inflation and coming out of a pandemic”.



Active APAC Deal Market and Political Upheaval in Latin America May Fuel 2023 Disputes

In APAC, respondents selected deal activity/increased investment in the region as the leading factor in disputes for the coming year. “I’d expect to see more from India. They are very active in post-M&A disputes, and I believe those will increase”, said Lingard. “We’re seeing bigger deals, control deals from financial sponsors and private equity clients in India. So, I’d expect the value of these disputes could become even larger too”. This appears to be part of a broader trend involving increased overseas investment and deal flow into South and Southeast Asia, in line with geopolitical developments.

Macroeconomic concerns were slightly ahead of increased deal activity as a predicted dispute factor for the coming year in North America, where the recent M&A boom has been shadowed by surging inflation.

Some respondents also anticipate increased activity in the Americas beyond the US, due to political upheaval in key Latin American economies such as Chile, Colombia, Peru and Mexico. “There have been several recent elections in the region electing left-leaning governments”, said Thomas Walsh, an international arbitration partner at Freshfields in New York. “The uncertainty, and the risks posed by leftist governments, will likely lead to more disputes coming out of these countries”.

“The uncertainty, and the risks posed by leftist governments, will likely lead to more disputes coming out of these [Latin American] countries”.

– THOMAS WALSH, Partner at
Freshfields Bruckhaus Deringer



2022 Dispute Drivers Point to Regional Differences

With respect to 2022, our report found that specific dispute catalysts varied significantly by region, likely due to a combination of macroeconomic influences, region-specific pain points—the Chinese property market meltdown, for example—and differing regulatory approaches.

Respondents in EMEA said the regulatory environment was a prime driver of disputes in the region, where UK and European Union agencies have been enacting stricter rules on issues including antitrust, data privacy and ESG. Nearly one-third (31%) selected the regulatory environment as a top dispute factor, compared to 21% in North America and 14% in APAC.

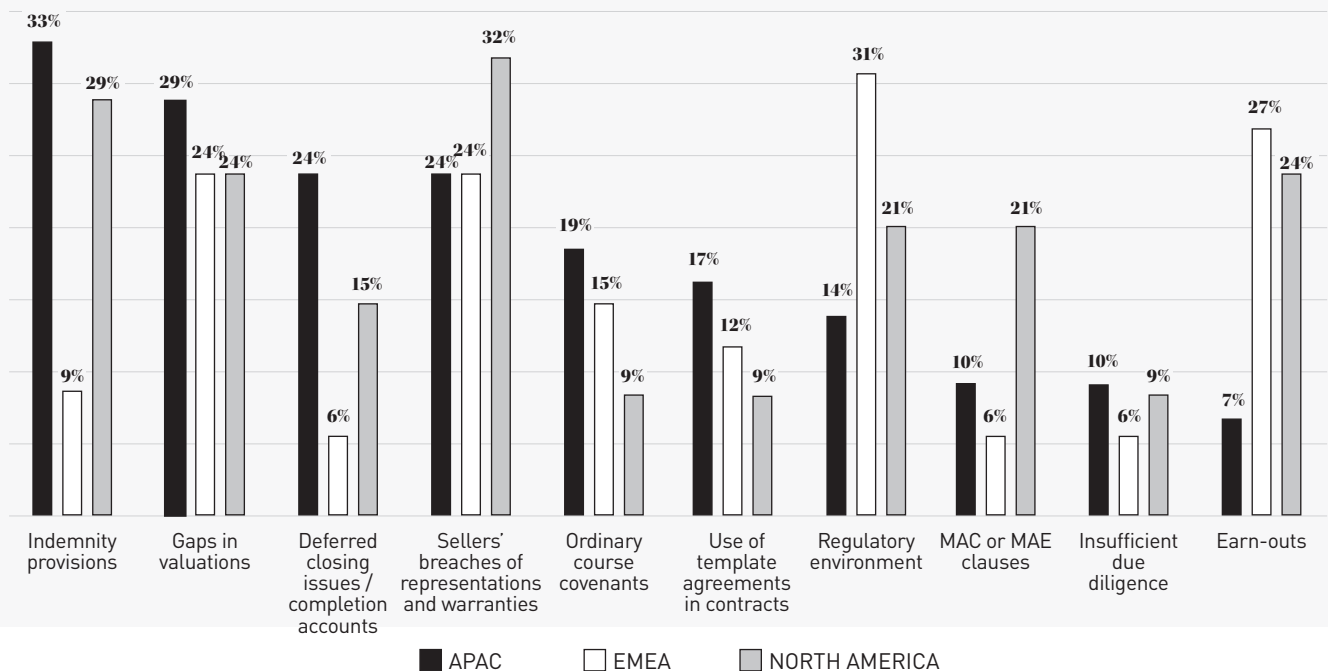
Jurisdictions vary in their use of legislation and the role of litigation as tools of public policy, and those divergent approaches can drive significant differences in M&A disputes volume, said Daniel Ryan, a BRG managing director and head of the firm's London office. "Currently, the regulatory focus in EMEA on competition and on data and privacy issues is leading to significant levels of dispute activity—much more so than elsewhere".

The second-ranked dispute driver in EMEA was earn-outs, which can lead to disagreements over restrictions on steps buyers may take during a certain period after a transaction closes. This is unsurprising given the drastic shift in the macroeconomic environment over the past year and earn-out disputes arising from deals done during last year's boom could continue to increase in the year ahead.

In APAC, indemnity provisions transferring risk from one party to another led the way (33%), followed by gaps in valuations (29%). Meanwhile, in North America, respondents cited sellers' breaches of representations and warranties (R&W) as the top factor (32%), trailed closely by indemnity provisions (29%).

"The reps and warranties and indemnity cases that I have dealt with run the gamut from healthcare to sales of assets. Some involved service businesses that didn't live up to expectations during the pandemic—buyers were given projections, and the projections didn't hold up", said Travis Hunter, a trial lawyer and director at Richards, Layton & Finger in Delaware. Similar issues may arise in the current macroeconomic slowdown.

Most Prevalent Factors in Disputes



Sector Overview

FinTech and Energy & Climate Sectors

Generate Biggest Increases in Dispute Activity

This year we introduced FinTech as a separate sector in our survey, and respondents reacted in force—FinTech was the top-ranked sector for dispute activity growth in 2022, as cryptocurrency’s implosion, regulatory challenges and a slowdown in available capital drove setbacks in the industry. Energy & Climate was the second-most active area for M&A disputes, followed by Traditional Financial Services. Those results mark a shift from 2021, when Hospitality & Leisure and Life Sciences held the top spots.

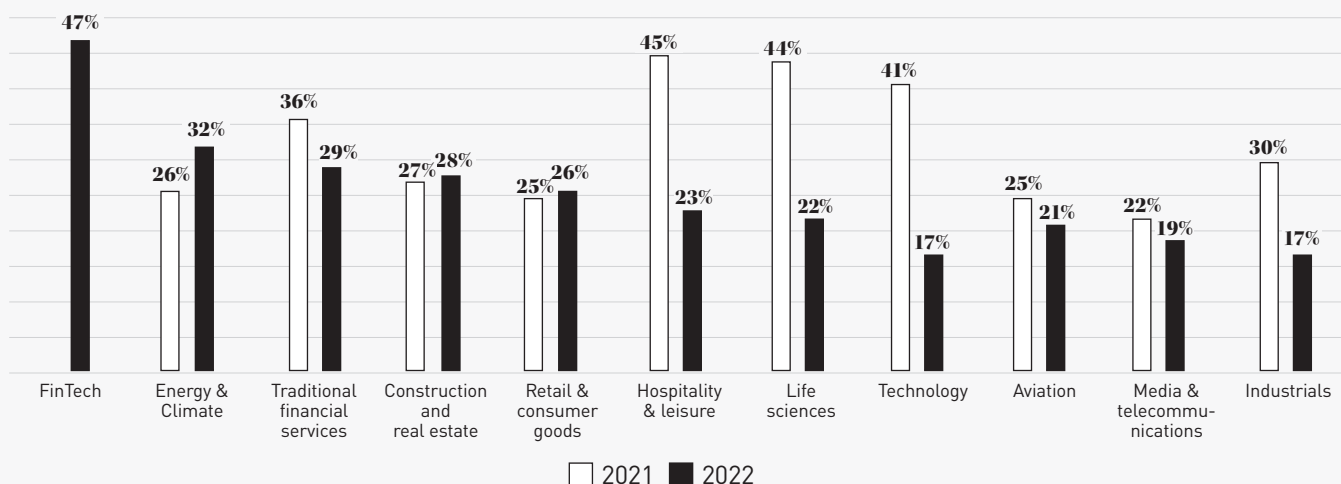
“The sudden huge jumps—and of course, sudden falls—in the value of crypto assets have generated disputes”, said Jern-Fei Ng KC, a barrister and arbitrator.

Crypto and digital assets are subject to the same macroeconomic pressures as equities, bonds and other risk-on assets, but they add “a unique flavor of disorder stemming from failed experimentation around algorithmic stablecoins, and the resulting contagion to large, centralised exchanges”, said Kevin Hamilton, a BRG managing director and leader of the firm’s Global Applied Technology practice. Hamilton said the current “crypto winter”—i.e. an extended period of depressed cryptocurrency asset prices—could last well into next year, “with increased disputes from failed projects and companies attempting to hang on until the next bull cycle”.

Matthew Townsend, an international arbitration partner at Reed Smith in London, said he is seeing increasing numbers of disputes involving a crypto element. This includes claims arising from investments in crypto projects and platforms. It also includes disputes between centralised exchanges and third-parties such as liquidity providers, or oracle services delivering real world data to smart contracts. He is also seeing a wave of claims by users of decentralised finance (DeFi) against project founders or other participants.

The energy sector has likewise been in turmoil this year, including the unprecedented clampdown on European natural-gas supplies tied to the Russia–Ukraine dispute. Disputes lawyers noted that boom times for energy companies can foster disputes, and that increased activity around renewable energy investing could also portend future disagreements arising out of M&A-based growth.

Industries Experiencing Uptick in Disputes Over Past Year





Sector Expectations for 2023

Looking ahead, respondents expected Construction & Real Estate to garner the most disputes in the coming year. That likely reflects upheaval in in the Chinese property market and pressures on the US housing and construction sectors amid rising inflation and ongoing hikes in the cost of supplies and labour.

However, BRG Managing Director Anamaria Popescu, who specialises in commercial construction claims, expects disputes in the sector to stay at current levels for the moment. “Owners and contractors are very risk averse now and need to save every penny they have”, she said. “So they will not be spending money in 2023 on lawyers and consultants for litigation or arbitration and will be trying to resolve disputes internally”.

That said, in the US, a wave of new infrastructure and energy projects tied to the 2021 Infrastructure Investment and Jobs Act and this year’s Inflation Reduction Act could generate additional disputes in the coming years, Popescu said. “Large infrastructure projects take several years to design and build, so claims and disputes will lag behind them. Maybe in 2024 we will start to see an increase in infrastructure disputes”.

Industries Likely to See an Increase in Dispute Activity



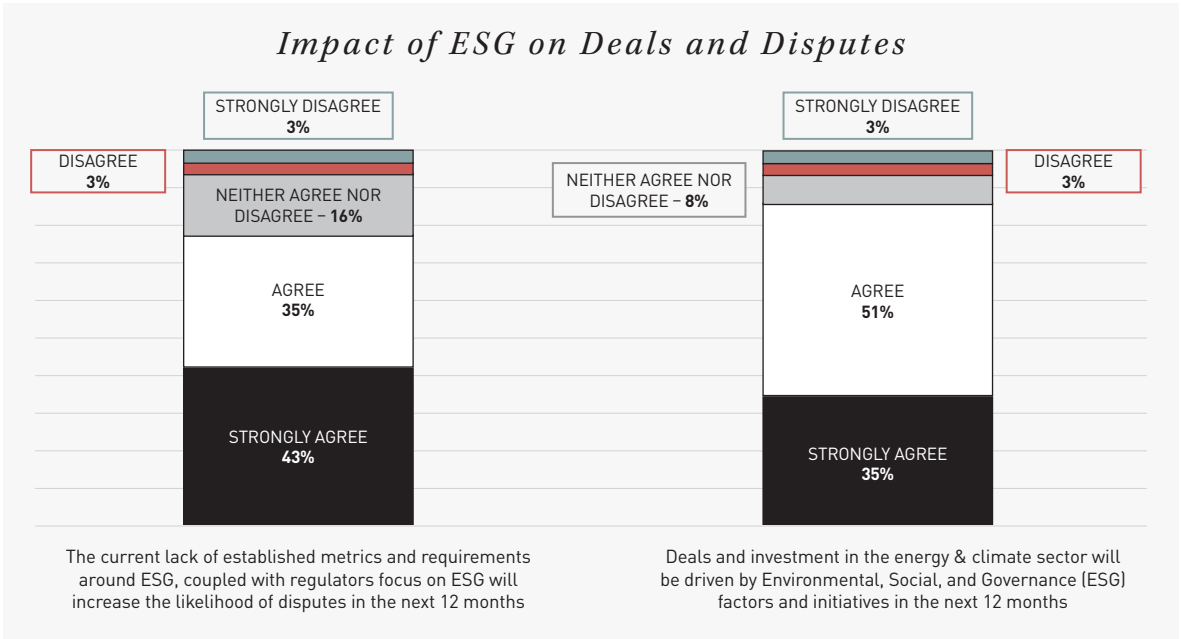


ESG Pressures Expected to Drive Energy-Sector Disputes

Energy & Climate and FinTech were tied for second place for industries expected to see a bump in disputes in the coming year, followed by Traditional Financial Services. “Regulatory and market-based activities are leading to increased ESG disclosures, with disputes simultaneously emerging as ESG performance and outcomes fail to match up with projects”, said BRG Managing Director Neal Brody.

Moving forward, experts expect ESG could factor strongly into disputes on the energy front as regulations take shape and businesses strive to meet evolving investor expectations. Respondents agreed that deal activity in the sector will be driven by ESG factors (86%) and that a lack of firm metrics will lead to disputes (78%). “The legislative landscape is hardening around disclosures and targets. As a consequence, I think you will see more clauses in contracts to deal with this”, said Quinn Emanuel’s Hughes-Jennett. “Inevitably, you will then see a rise in ESG disputes”.

ESG decarbonisation targets could also give rise to energy-sector disputes over the financial burden of stranded assets such as coal-fired power plants, as well as government-related disputes triggered by ESG issues that involve sagging commodity prices, BRG’s Webb said. Short-term uncertainty and increased political risk are also expected to fuel disputes in the mining and extractive industries. “While materials such as lithium, cobalt and copper are still benefiting from strong demand tied to electric vehicle production and the clean-energy transition, softening demand from China, the US and Europe for other mined commodities is leading to cutbacks in production of steel, pigments and other products”, Webb said. “That will have a knock-on effect on commodity supply”, potentially leading to disputes over pricing and supply contracts.



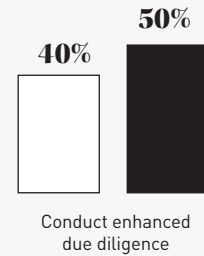


Critical Steps to Mitigating M&A Disputes

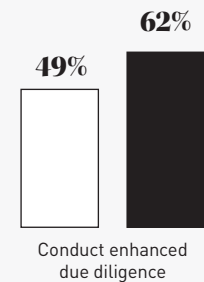
Last year, our research identified key steps that dealmakers could take to mitigate the risk of a dispute—like conducting enhanced due diligence, undergoing pre-litigation counselling and investing in litigation preparedness tools (e.g. establishing a document-retention policy). In 2022, even more lawyers are counselling their clients to take such preventive actions. This year, for instance, half of attorneys representing buyers and 62% of lawyers representing sellers advised their clients to conduct enhanced due diligence, up from 40% and 49%, respectively, in 2021.

In this turbulent environment, “We are seeing a clear payoff for market participants that have taken a more tailored approach to their M&A processes and agreements—for instance, by incorporating deal-specific provisions while adhering to often tight transaction timelines”, said BRG Managing Director Vincent Biemans. “Although that does not necessarily eliminate disputes, we are seeing an important benefit materialise that counts in today’s environment: narrower and more defined disputes, despite the real issues faced by the target businesses”.

*Counsel to **Buyers** as Means of Bracing for Disputes*



*Counsel to **Sellers** as Means of Bracing for Disputes*



□ 2021 ■ 2022





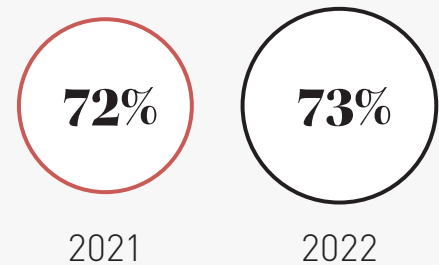
Marina Boterashvili, an international litigation and arbitration senior associate at Quinn Emanuel in London, said that a few of her recent cases have stemmed from M&A deals “which were done on a very fast timetable and with the mentality of ‘sign now, fix later’ due to the perception of a hot market and high levels of competition for investment opportunities”.

As the economic slowdown heightens pressure on dealmakers, counsel to buyers are advising actions ranging from retaining rights to information, to undergoing pre-litigation counselling and maintaining flexibility in clauses. “We’ve seen disputes arising from significant mismatches in management styles, investors’ outlooks for the business, their exit strategy and so on”, Boterashvili said. “It really brings to light the importance of proper due diligence, in terms of both the business you are investing in and whom you are doing it with”.

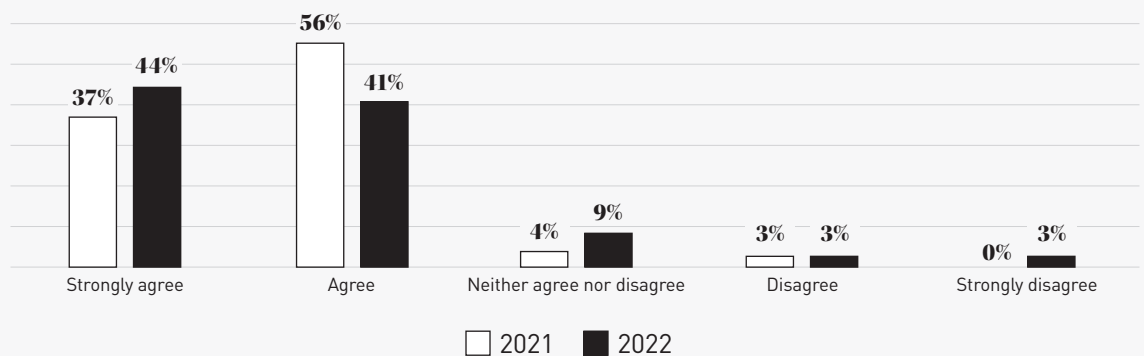
Private-equity involvement in M&A deals can also increase the likelihood of post-closing disputes, corporate finance attorneys and advisors said. That could be a function of a higher tolerance for risk compared to corporate dealmakers. While some private equity professionals we surveyed said their firms typically engage in multiple actions aimed at avoiding post-closing legal disputes—including due diligence and legal policy review—others said they are doing “nothing”.

However, even as M&A disputes increased in 2022, most are still settled before trial. Ng said that for those parties that opt to keep fighting, the choice may be driven more by changing economic circumstances than by genuine disagreement between two sides of a transaction. “One party could suddenly find themselves saddled with a contract whose terms they don’t much like”, he said. “There are a number of bet-the-company cases, where the macroeconomic circumstances have changed so fundamentally that some parties simply cannot afford to lose—so they fight the cases to the bitter end”.

Proportion of Disputes that Settled Prior to Trial



Private equity involvement in M&A transactions increases the likelihood of post-closing disputes



M E T H O D O L O G Y



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Methodology

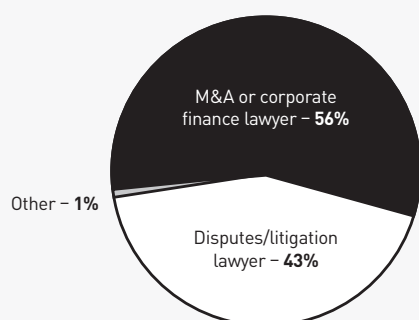
BRG's 2022 M&A Disputes research initiative was conducted in two major phases: in-depth qualitative interviews and a quantitative online survey. The interviews took place from 25 July through 5 August and resulted in strong verbatim input from 12 interviewees across the globe. The survey was distributed in August and open for responses from 29 August until 9 September.

A total of 181 respondents completed the survey, which included 75 lawyers (private practice or in-house), 58 private equity professionals and 48 corporate finance advisors. The panel was split mostly evenly in terms of geographic representation, with 63 respondents based in APAC, 61 in EMEA and 57 in North America. Full demographic breakdowns are included below.

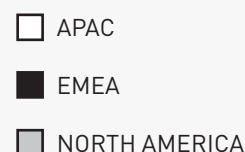
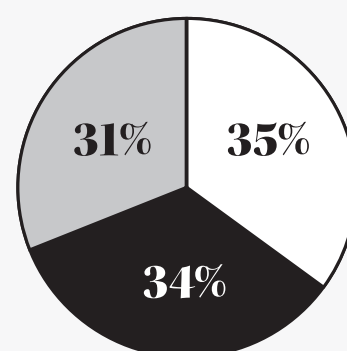
Respondent Role



Lawyer Respondents By Type



Respondent Location by Region



REGIONS	NUMBER
APAC	63
EMEA	61
North America	57
Total	181



ABOUT BRG

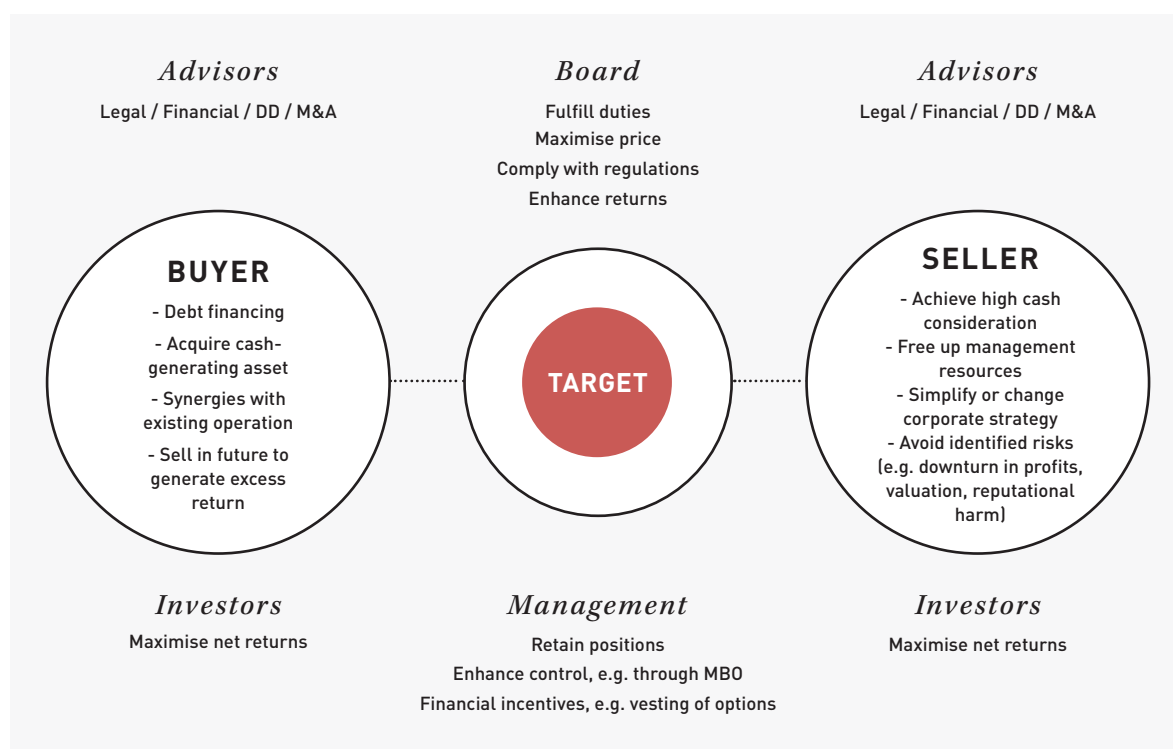
Berkeley Research Group advises clients on high-stakes disputes and investigations as part of our firm's closely integrated global network.

Harnessing expertise in finance, accounting, analytics and technology, and drawing on a depth of industry experience, our teams provide economic consulting services, financial analysis, expert reports and testimony, transaction-related diligence and disputes services, and strategic guidance to businesses, investors and law firms. Our teams are made up of the most highly qualified professionals and senior industry executives who have built, managed and restructured major businesses. Our industry experts have acted as principals and advisors in tens of billions of dollars' worth of M&A transactions, financed mega-infrastructure projects, worked on private equity-backed leveraged buyouts (LBOs) and managed complex structured finance vehicles. We combine analytical thinking and structured presentation with decades of commercial knowledge and experience.

OUR EXPERTISE – M&A DISPUTES

The complex nature of M&A disputes makes them uniquely fertile ground for our approach. In addition to the traditional accounting expert role, we bring a commercial understanding of the transaction and an appreciation of the perspectives of all parties involved. We unpick the commercial drivers and the behaviours of the parties in order to navigate the dispute and decipher the relationship between the complaint and underlying issues. Our industry practitioners bring an intuitive view which is combined with our team's analytical rigour and understanding of the dispute resolution process.

M&A: KEY PLAYERS AND THEIR INTERESTS





Contributor Biographies

Contributors

MARINA BOTERASHVILI

Senior Associate, Quinn Emanuel Urquhart & Sullivan, London

Marina Boterashvili specialises in complex international litigation and arbitration with an emphasis on civil fraud, asset tracing, and joint venture and shareholder disputes. She also advises on cross-border proceedings, often with an offshore element, and her experience includes advising on jurisdiction issues, anti-suit injunctions, and obtaining and resisting pre- and post-judgement asset freezing relief in the English, Cyprus and British Virgin Island courts. Boterashvili has represented multinational clients, high-net-worth individuals and sovereign governments in cases arising across a range of sectors, including telecommunications, energy and natural resources, pharmaceuticals and financial services.

JULIANNE HUGHES-JENNETT

Partner, Quinn Emanuel Urquhart & Sullivan, London

Julianne Hughes-Jennett is a versatile disputes lawyer with extensive experience in complex, high-value commercial disputes. She advises clients from a range of sectors, including financial services, natural resources, life sciences, and technology and telecommunications. Her experience includes ad hoc arbitrations as well as arbitrations under the rules of the International Criminal Court (ICC), London Court of International Arbitration (LCIA), United Nations Commission on International Trade Law (UNCITRAL) and International Centre for Settlement of Investment Disputes (ICSID). Hughes-Jennett's practice also straddles ESG litigation and white-collar crime and investigations. She is a solicitor advocate with full rights of audience for civil matters at all levels of the English Courts.

TRAVIS HUNTER

Director, Richards, Layton & Finger, Delaware

Travis Hunter is an accomplished trial attorney who has successfully handled significant cases in all of Delaware's state and federal courts. He has particular expertise in handling large commercial disputes in the Delaware Superior Court's Complex Commercial Litigation Division, serving as trial counsel in some of the largest cases ever filed in that division. He routinely litigates complex disputes involving intellectual property and trade secrets, cryptocurrency (both Bitcoin and Ethereum), business contracts, M&A, insurance coverage and products liability. Additionally, he has acted as trial counsel in large arbitrations filed with the American Arbitration Association.

AMY KLÄSENER

Partner, Jones Day, Frankfurt

Amy Kläsener is a seasoned international arbitration partner with deep experience in M&A disputes. She also advises frequently in software development, engineering and construction disputes in the nuclear, energy, chemical and manufacturing sectors. As a US lawyer based in Europe for over 15 years, she has developed a deep understanding of multiple legal cultures. Kläsener advised on one of the first M&A arbitrations involving warranty and indemnity insurance, as well as one of the first and largest arbitrations involving the construction of a nuclear power plant. German clients seek her counsel regarding international disputes, as do U.S. clients navigating complex German and European legal issues.

NICHOLAS LINGARD

Partner, Freshfields Bruckhaus Deringer, Singapore

Nicholas Lingard is the head of Freshfields' international arbitration practice in Asia. An experienced international arbitration counsel and advocate, Lingard represents clients in commercial and construction disputes across a variety of industries, under all the major arbitral rules and under all major systems of law, with particular experience advising clients on disputes arising from M&A transactions and joint ventures. He also leads one of the most active treaty arbitration practices in Asia, representing both investors and states in high-profile, politically complex cases around Asia and the world. He provides public international law advice to sovereign and private clients, and accepts occasional appointments as arbitrator.



JERN-FEI NG KC

Barrister & Arbitrator

Jern-Fei Ng KC is a highly recognised counsellor specialising in commercial litigation and arbitration, with extensive experience appearing before courts and tribunals and sitting as arbitrator in a number of jurisdictions, including England, Hong Kong, Singapore, Malaysia, the British Virgin Islands, Cayman Islands and Luxembourg. He has acted as counsel in some 350 cases and as arbitrator in some 30 cases (as presiding, sole and co-arbitrator) pursuant to, amongst others, ICC, Hong Kong International Arbitration Centre (HKIAC), LCIA, London Maritime Arbitrators Association (LMAA), Singapore International Arbitration Centre (SIAC), Permanent Court of Arbitration (PCA) and UNCITRAL Rules. Ng was one of the youngest Queen's Counsel to be appointed in 2018.

BYRON PHILLIPS

Partner, Hogan Lovells, Hong Kong

Byron Phillips is a disputes lawyer and problem solver with over a decade of experience solving crises for clients. He is experienced in handling complex cross-border arbitration, litigation and investigations, including technology-related disputes, M&A, shareholder, partnership and joint venture disputes, white collar crime and fraud, insolvency disputes, sports-business related disputes and professional liability disputes for clients in the public and private sectors.

RICHARD ROLLO

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Richard Rollo is a recognised litigator with extensive experience navigating business law issues, with a particular focus on Delaware. He represents both defendants and plaintiffs in complex corporate and commercial disputes involving Delaware corporations and alternative entities, such as limited liability companies and partnerships. His litigates corporate control, governance, M&A, fiduciary, contractual, statutory and other dispute matters in the Delaware Court of Chancery, Delaware Supreme Court and Delaware Superior Court's Complex Commercial Litigation Division.

ANDREW SHORT

Partner, Mishcon de Reya, London

Andrew Short is a partner with Mishcon de Reya's commercial litigation team. He is a pragmatic lawyer with strong judgement who remains calm under pressure to provide clients with the most practical, commercially focused advice. Short is an experienced litigator, having advised clients in a number of high profile and complex matters. He advises clients across a number of sectors, such as financial services, healthcare, construction, technology and insurance. He also has experience acting for governments and state organisations. He has a particular focus on English court proceedings, but also has significant experience of public inquiries, investigations, mediations and crisis management.

MATTHEW TOWNSEND

Partner, Reed Smith, London

Matthew Townsend is an international arbitration lawyer. He has experience under the rules of all major arbitration rules and has represented many parties to M&A disputes. This includes a number of "industry first" matters, including acting in the first emergency arbitration under the HKIAC arbitration rules, and representing some of the earliest applicants for relief in Mainland China under its 2019 reciprocal interim relief arrangement with Hong Kong. Matthew conducts his own oral advocacy. He is a regular writer and speaker on arbitration matters and is described as "a rising star in international arbitration" by Who's Who Legal Arbitration, 2020.

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Thomas Walsh is a partner in Freshfields' top-ranked international arbitration practice. Recognised for his work in international and domestic commercial arbitrations, Walsh has served as counsel in numerous arbitrations under most of the major arbitration rules. He has particular experience with post-M&A, joint venture, collaboration and licensing disputes, primarily for clients in the life sciences, technology, private equity and industrial sectors. A Spanish speaker, Walsh is active in Freshfields' Latin America arbitration practice, where he is counsel to foreign investors in investment treaty and commercial arbitrations involving business in the region.



MATTHEW WEINIGER KC

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Matthew Weiniger KC is Linklaters' global co-head of international arbitration, specialising in international arbitrations, public international law, and trade law. He also advises on non-contentious matters involving the protection of investments under public international law, with particular expertise in investment treaty arbitrations. Weiniger regularly represents parties in proceedings before the English Commercial Court, whereby arbitral awards are challenged under the applicable provisions of the English Arbitration Act 1996. He has conducted numerous international arbitrations, both ad hoc and institutional (including under ICSID, ICC, LCIA, HKIAC and SIAC rules), in cases arising from all major industry sectors, in particular energy and financial services. Much of his experience has been gained in emerging markets. He co-heads the Linklaters team writing Arbitration Links, the firm's arbitration blog with insights, updates and news from the Linklaters arbitration experts.

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Mustafa Hadi leads BRG's Asia-Pacific region and is co-leader of the firm's Global Economics practice. With his practice a market leader in addressing the most complex issues in the M&A and PE disputes fields, he founded BRG's annual publication in this space in 2020.

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Kevin Hagon is a former investment banker experienced in investment analysis, principal finance and credit risk management. At BRG, he utilises his extensive transaction advisory expertise in a disputes context.

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Vincent Biemans advises clients on economic damages, accounting, and valuation and other financial issues such as solvency. He also has experience with post-closing M&A disputes as both an advisor and a neutral accountant.

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Neal Brody has extensive experience encompassing a broad spectrum of environmental, health and safety issues, including their application in contracts, M&A and real estate transactions, as well as administrative enforcement, litigation and alternative dispute resolution.

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Daniel Galante has more than 25 years of experience providing transaction-related diligence for buy- and sell-side transactions, including commercial, financial, operational and tax services to enable day-one readiness, 100-day planning and post-acquisition value creation.

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Kevin Hamilton leads BRG's Global Applied Technology practice and has more than 20 years of experience leveraging technology and data analytics to drive enhanced operational and financial performance for clients. He specialises in advanced technologies, including blockchain and cryptocurrency, artificial intelligence and machine learning.



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A former energy and investment banking executive, Aaron Howell leverages his unique combination of industry and transactional experience to provide energy industry, valuation, damages and dispute advisory services to law firms and their clients.

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Crosby MacDonald specialises in providing expert evidence on valuation, economic and regulatory issues in international commercial disputes. He also has experience assessing damages and preparing expert reports on economic issues, particularly in the energy and resources sector.

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Tri MacDonald is principal executive officer and president of BRG, a senior member of the BRG Health Analytics practice and a leader in the firm's Healthcare practice. He has extensive experience providing accounting, financial, statistical, analytical and operational consulting services to clients across multiple industries.

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Dr Anamaria Popescu is a managing director in BRG's Global Construction practice, a construction arbitrator and a licensed Professional Engineer with over 25 years of experience in project management, construction claims, schedule delay analysis, project controls and contract management.

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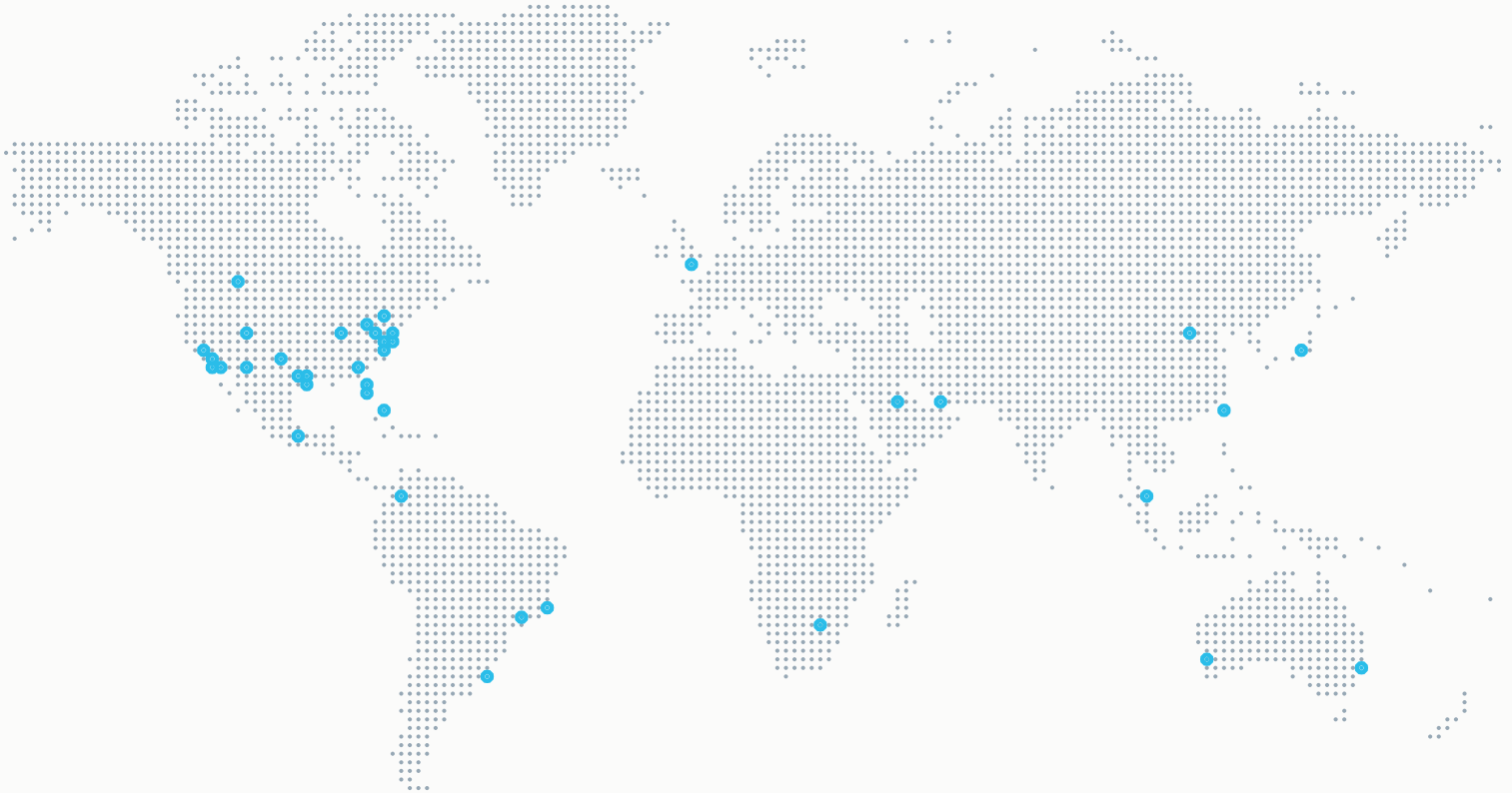
A quantum expert with particular expertise in M&A disputes, banking, capital markets and shareholder disputes, class actions and IP litigation, Daniel Ryan has led BRG's London office since joining the firm in 2013.

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Andrew Webb is a former Rothschild investment banker with over 25 years of experience in advising governments, private companies and joint ventures on strategy, fundraisings, debt financings, mergers, acquisitions, disposals and restructurings with a combined deal value in excess of \$25 billion.

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Berkeley Research Group, LLC (BRG) is a global consulting firm that helps leading organisations advance in three key areas: disputes and investigations, corporate finance, and performance improvement and advisory. Headquartered in California with offices around the world, we are an integrated group of experts, industry leaders, academics, data scientists and professionals working across borders and disciplines. We harness our collective expertise to deliver the inspired insights and practical strategies our clients need to stay ahead of what's next.

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