

Supplement



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M&A DISPUTES LOOK SET TO RISE AMID CONTINUING ECONOMIC HEADWINDS



Authored by: Daniel Ryan, Managing Director - BRG

In the future, the buoyant M&A market of 2021, which saw the number of announced deals exceed 62,000 globally, with an unprecedented 24% increase from 2020, may be seen as a golden time for the sector.

This year, macroeconomic and geopolitical upheavals, including inflation, soaring energy prices, and rising interest rates have cast a

cloud over M&A activity, which has declined steadily throughout 2022.

These uncertainties have fuelled a rise in M&A disputes, which rose year on year in 2022, a trend that is expected to increase into 2023, according to new research from the Berkeley Research Group (BRG), M&A Disputes Report 2022. Few industry sectors are safe from disputes, with fintech, energy and climate, and financial services looking most vulnerable.

The report found that recession fears and inflation concerns were the top two dispute catalysts this year, according to disputes lawyers, corporate finance attorneys and advisors. Along with economic chaos, stricter merger controls in Europe are adding to pressures in the M&A market. 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 Environmental, Social and Governance (ESG) requirements.



Disputes rising worldwide

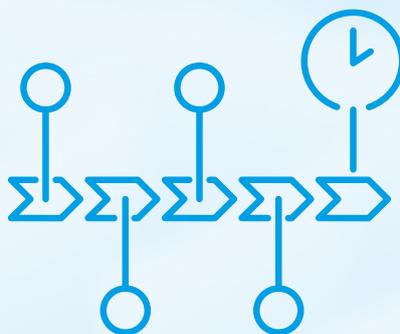
While disputes have been rising across the EMEA region—in Germany, for example, currently, around ten per cent of M&A deals have led to disputes, with the expectation that there will soon be a wave of insolvencies and distressed assets sales—the number of disputes is also growing in APAC. In Asia, the collapse of China's real estate market, which prompted the World Bank to revise down its outlook for China's gross domestic product, has created "buyer's remorse" on a number of deals. Meanwhile in Hong Kong, disputes have arisen due to Russian companies—shut out of western markets due to sanctions—exploring Hong Kong as an attractive destination. This is an issue not just in Hong Kong but across Asia.

The second-ranked dispute driver in EMEA was earn-outs. This is unsurprising given the drastic shift in the macroeconomic environment over the past year—and earnout disputes arising from deals done during last year's boom could continue to increase in the year ahead.

In addition to economic concerns, we are also seeing ESG concerns featuring more prominently in M&A deals and experts expect ESG is likely to factor strongly into disputes on the energy front as regulations take shape and businesses strive to meet evolving investor expectations.

A large majority of 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%).

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.



Disputes occurring at different stages of a deal

Disputes are occurring both in the pre- and post-closing of deals, with a growing number of exit disputes, and threats of injunctive relief becoming more commonplace.

One of the most contentious issues around M&A deals is pricing.

Buyers are renegotiating purchase prices, with 82% of respondents seeing this happen somewhat often or very frequently.

Post-acquisition, many buyers will be disappointed as actual results will fall significantly below expectations, spurring buyers to look at reps and warranties. Statistically, most post-deal disputes relate to breaches of reps and warranties. The most common is a breach of financial statement warranties.

Looking ahead, respondents expect construction and Real Estate to generate the most disputes in the coming year. That likely reflects the upheaval 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. 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 result in additional disputes in the coming years.



Minimising the risks of disputes

Robust due diligence—looking at all aspects around the deal—is essential for minimising the risk of disputes. All parties must have realistic expectations on valuations in order for the deal to be completed successfully.

It's also important to recognise that different legal frameworks may exist depending on which countries are involved in the deal, so parties must have a thorough understanding of all legal requirements.

Finally, deals need to be a good cultural as well as a financial fit. There is often not enough consideration given to cultural nuances. Even in today's environment of cross-border deals, it's surprising how often cultural factors are not considered, which can lead to misunderstandings across parties.





INTELLIGENCE THAT WORKS

M&A AND PRIVATE EQUITY DISPUTES

BRG's diverse group of experts can address every aspect of M&A and private equity disputes. Beyond the traditional economics, accounting and valuation expert roles, we bring a commercial understanding of the transaction via our dedicated sector experts and an appreciation of the perspectives of all parties involved. This enables us to decipher the relationship between the claim and underlying issues and navigate the dispute effectively.

Thought leaders in this field, BRG launched its [2021 report](#) on the sector at the [TL4 Shareholder Disputes and Class Actions Conference](#) last November. We look forward to sharing our 2022 report with the community later this year.

For more information, please contact [Dan Tilbury](#).

Disputes
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M&A DISPUTES PART 2

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JONES DAY

BYRON PHILLIPS
HOGAN LOVELLS

MATTHEW TOWNSEND
REED SMITH

VIRTUAL EVENT

7TH NOVEMBER 2022
11:00AM - 12:00PM UK TIME

SPEAKERS

Speakers:

Mustafa Hadi, Managing Director, **BRG**, moderator

David Rogers, Director, **BRG**

Byron Phillips, Partner, **Hogan Lovells**

Amy Kläsener, Partner, **Jones Day**

Matthew Townsend, Partner, **Reed Smith**

Factors giving rise to M&A disputes

- Geopolitical uncertainties, soaring energy prices, currency fluctuations and rising interest rates have cast a cloud over M&A activity, which has declined steadily throughout 2022 following an extremely buoyant 2021.
- These uncertainties have fueled a rise in M&A disputes, led by EMEA – currently, around ten per cent of M&A deals in Germany are being disputed, with the expectation that there will soon be a wave of insolvencies and distressed assets sales. Fintech, life sciences and financial services are all seeing an increase in disputes
- The number of disputes is also growing in AIPAC. In Asia, the collapse of China's real estate market has created "buyer's remorse" on a number of deals. And, with Hong Kong being an attractive destination for Russian corporates, disputes have arisen over Russian-owned entities in the wake of global sanctions. This is an issue not just in Hong Kong but across Asia.

- Disputes are occurring both in the pre- and post-closing of deals, with a growing number of exit disputes, and threats of injunctive relief becoming more commonplace.
- With market volatility worldwide, one of the most contentious issues around M&A deals is pricing. Post-acquisition, many buyers will be disappointed as actual results will fall significantly below expectations. Then buyers start looking at reps and warranties; going through financial statements line by line; and looking at supplier and customer contracts. Statistically, most post-deal disputes relate to breaches of reps and warranties. The most common is breach of financial statement warranties.

Minimising the risks of disputes

Panellists also examined what steps can be taken to reduce the risk of disputes:

- Robust due diligence – looking at all aspects around the deal – is essential. All parties must have realistic expectations on valuations. Insurers and consultants can also play an

important role in the early stages of a deal to ensure that key points are covered.

- It's important to recognise that different legal frameworks may exist depending on which countries are involved in the deal, so parties must have a thorough understanding of all legal requirements.
- Deals need to be a good cultural as well as a financial fit. There is not enough consideration given to cultural nuances. Failure to consider these can lead to misunderstandings across the parties involved.



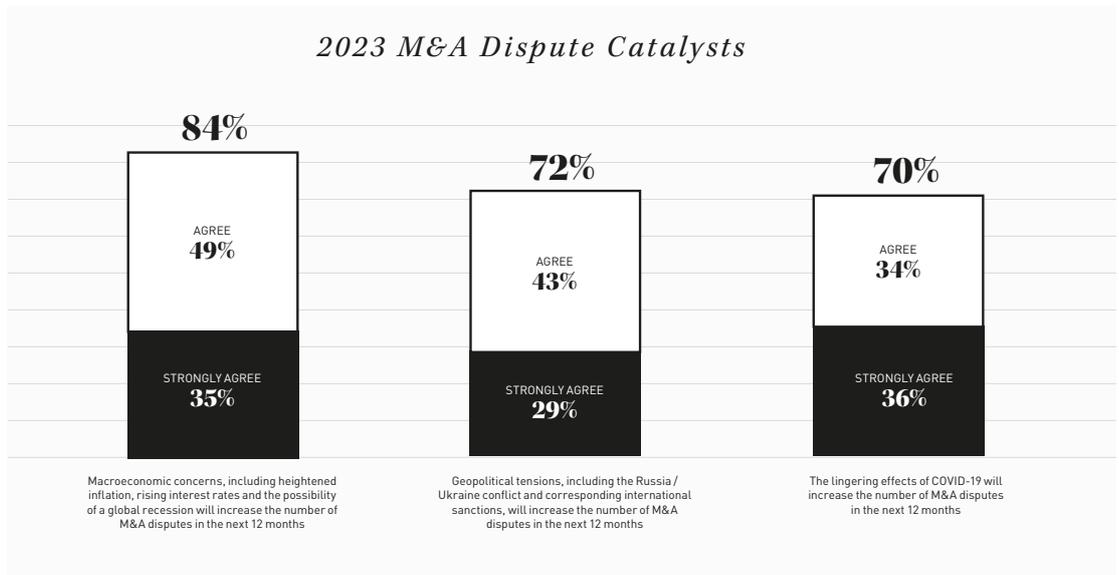


Economic Uncertainty Fuels Rise in Disputes

Last year, Berkeley Research Group (BRG) professionals predicted an escalation in M&A disputes as global dealmaking volumes reached a record high. That frenzied M&A activity hit a speed bump in 2022, as liquidity dried up and the economic outlook darkened. Yet these headwinds are fueling new post-transaction disputes—and changing their characteristics in important ways.

That’s according to BRG’s third-annual M&A Disputes Report, which will launch in mid-November. The report finds that the volume of disputes has risen even further in the last year, with respondents expecting increased activity over the next 12 months. Our latest survey also shows that macroeconomic concerns are surpassing COVID-19 disruptions as the primary dispute catalyst.

2023 M&A Dispute Catalysts



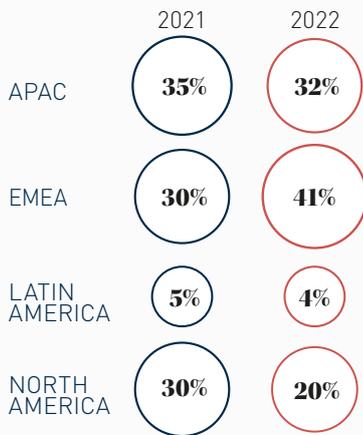
The new report examines M&A dispute activity and insights from Europe, the Middle East and Africa (EMEA), North America and the Asia-Pacific (APAC) regions. The research again brings together the perspectives of some of the world’s top deal lawyers, disputes lawyers and private equity professionals, along with leading BRG experts.

Additional Takeaways >

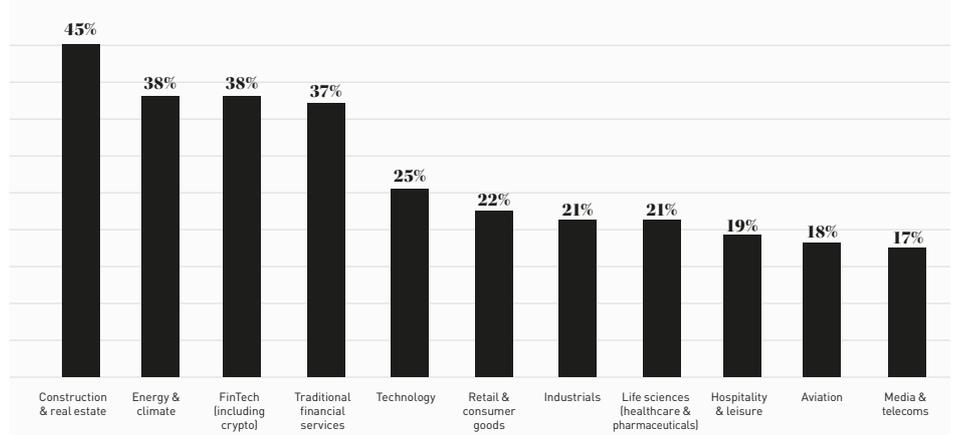
Additional Takeaways

- Disputes increased the most in the FinTech industry (including Crypto) in 2022, with Energy and Traditional Finance rounding out the top three. Respondents expect the Construction & Real Estate sector to see the biggest increase in disputes in 2023.
- Environmental, Social and Governance (ESG) disputes are brewing as regulations take shape and businesses strive to meet evolving ESG criteria.
- EMEA is the region expected to drive the most dispute activity in the coming year, with strict regulatory regimes and political strife seen as significant factors.
- Enhanced due diligence is recommended as a critical dispute-mitigation measure for both buyers and sellers.

Regions Driving M&A Dispute Activity



Industries Likely to See an Increase in Dispute Activity in 2023



Our research suggests that in a volatile economy, dealmakers may deepen their focus on opportunistic transactions, potentially increasing the likelihood of disputes. Private equity involvement further complicates the picture, as such firms—whose tolerance for risk in a downturn may be higher than that of corporate dealmakers—remain flush with dry powder and continue to raise funds and hunt for bargains in a distressed environment.

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.

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THE FULL REPORT WILL LAUNCH IN MID-NOVEMBER, ACCESSIBLE VIA THE QR CODE PRINTED LEFT

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