Lovells

The Shrinking World

Research report: how European in-house counsel are managing multinational disputes

Spring 2008

Lovells LLP and its affiliated businesses have offices in:
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"The biggest challenge is the lack of knowledge of international law."

In-house Counsel

"There are many lawyers that have no knowledge of multinational disputes."

In-house Counsel

Overview

Key findings

- More companies have seen an increase in disputes than a decrease over the past three years. Around a third (38%) of respondents say the number of disputes has increased compared with less than a sixth (14%) who say that the number of disputes has decreased in the same period
- Although the number of regulatory or compliance type disputes is small (only 3% over the past three years), they are viewed as the second highest area of risk, with 45% of respondents rating them as medium to high risk
- Just under a quarter (22%) of respondents have either been threatened with or on the receiving end of a class action
- Nearly a third of respondents (31%) feel there has been a trend towards more multinational disputes in the past three years
- Lack of experience (32%) and lack of information regarding the relevant law and procedures (26%) are the two most significant factors cited by in-house lawyers when it comes to the challenges of managing multinational disputes
- The US (29%), China (16%) and Russia (16%) are the top three countries in-house lawyers are the most concerned about when it comes to managing a multinational dispute
- The top considerations when deciding whether to contest or settle a dispute are, in order: impact on reputation; financial cost of losing; and impact on relationships/customers.

Commentary

The upward trend in disputes seen by European companies is taking place notwithstanding a generally strong economy and transactions market over the last three years. This seems to be driven by two forces, the first economic and the second regulatory.

Past experience of economic downturns shows that litigation generally increases when the economy turns sour and there is evidence to show a recent increase in the number of financial class actions in the United States. On the regulatory side, the European Commission and national regulators have prioritised increasing consumers' awareness of their rights and have introduced procedures to support them. The development of a series of measures around antitrust enforcement actions and class actions by European member states clearly reflects this.

Companies experience the majority of their disputes with customers, suppliers and employees. However, they tend not to be the disputes that keep them awake at night. It is disputes with regulators that stand out as an emerging area of concern. Disputes with regulators tend to be infrequent in nature but create potentially catastrophic results for the entire company. The damage that can accrue can result in significant damage to reputation, share price and ability to trade, as well as significant civil and criminal penalties for the company and directors alike.

In-house lawyers generally feel ill-prepared to handle the difficulties that multinational disputes create, citing as their major concerns a lack of experience and of information regarding the law and procedures involved. Particular types of disputes lend themselves more readily to multinational conflict and they tend to be the ones most likely to attract significant publicity; for example: product recalls, disputes with regulators, class actions, patent and other intellectual property disputes. Whether the company is a claimant or defendant it needs to be in a position to manage the strategic as well as tactical aspects

of a dispute. Understanding the best jurisdiction in which to resolve a dispute, as well as knowledge of the detail of the procedures involved, are of extreme importance. Finding external counsel who have that experience and capability is often a challenge.

Not all jurisdictions are viewed equally. Among European in-house counsel our research highlights significant concerns regarding disputes in the US, China and Russia. In the case of the US, experience shows that the complex relationship between state and federal courts, legal costs, the time involved, the extreme and demanding discovery process, the inability to recover costs even if one is successful and the potential for punitive damages awards creates concerns over the way in which a dispute will proceed. In China and Russia, issues regarding the processes involved and their lack of predictability are areas of significant concern. Barely one in five of research respondents with operations in China was confident they could manage a major dispute in that country.

It is against this background that there is a noticeable increase in the use of alternatives to litigation such as arbitration and mediation. The success of mechanisms that help keep disputes out of the courts from the very beginning is a lesson from the construction and projects industries that others may be keen to learn.

In conclusion, the range and risk of multinational disputes for European companies seems set to rise. The stakes involved in terms of reputation and cost also appear to be increasing and in-house lawyers face a number of serious challenges in managing complex, multinational disputes in a rapidly shrinking world.

> “Communication with foreign legal practitioners is always a challenge.”
>
> In-house Counsel

Contents

Throughout this report are selected quotes from in-house lawyers who took part in our five country survey. Their words illustrate the issues faced in managing the complexities of international disputes and how they view their role.

Survey findings

Background

The Lovells 2007/8 survey of in-house lawyers is an independent survey conducted among 180 lawyers in France, Germany, Italy, the Netherlands and the United Kingdom.

The survey provides objective insight into some of the trends emerging around the management and conduct of multinational disputes; the types of disputes companies have to manage and some of the factors to be taken into account when conducting and managing a dispute.

All of the participants are employed by some of Europe's largest multinational companies. They are heavily involved in the management of disputes.

The rising risks facing business

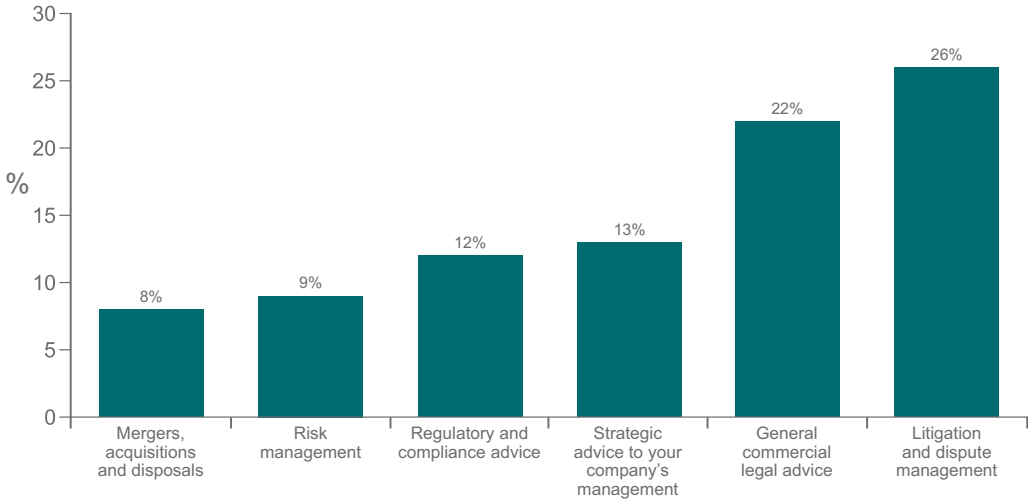
The survey findings show

- More companies have seen an increase in disputes than a decrease over the past three years. More than a third (38%) of respondents say that the number of disputes has increased compared with fewer than a sixth (14%) saying that the number of disputes has decreased in the same period
- In the UK and Italy, half or more of the respondents feel that the number of disputes in which their company has been involved has increased
- In the banking, insurance and reinsurance industries, more than 45% of respondents say that the number of disputes in which their company has been involved has increased

More companies have seen an increase in disputes than a decrease over the past three years.

- Litigation and dispute management accounts for a significant proportion of in-house lawyers' time (26%) compared with general commercial advice (22%) and strategic advice to the company's management (13%) (Figure 1)

Figure 1: Litigation and dispute management take a significant proportion of time

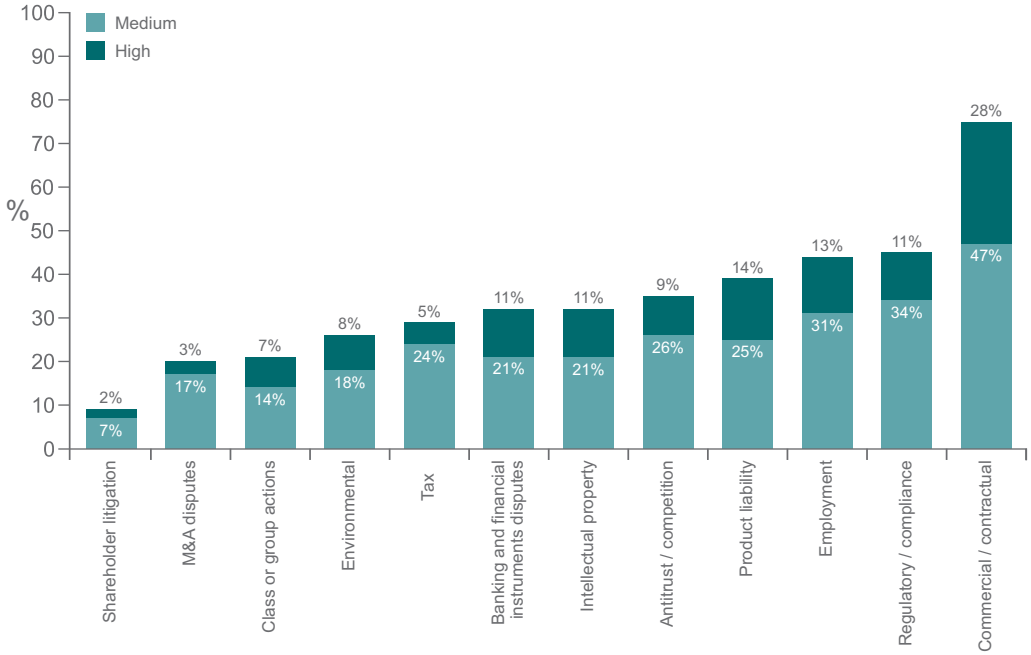


As a percentage, how much of the legal function's time is spent on advice in the following areas?
Base: All respondents (180).

- The amount of time spent managing litigation and disputes is highest in Italy (46%) and lowest in Germany (18%) and the Netherlands (13%)
- Across the different industry sectors surveyed, banking and insurance and reinsurance tend to spend the greatest amount of time on managing disputes at 33% and 30% respectively
- Customers are the main source of disputes for companies, representing 45% of disputes over the past three years, followed by employees (14%) and suppliers (9%)

- Commercial/contractual disputes are seen as creating the most difficulty with three quarters of in-house lawyers (75%) assigning them as medium to high risk
- Regulatory or compliance type disputes are viewed as the second highest area of risk with 45% of respondents rating them as medium to high risk. Employment (44%) and product liability (39%) are also rated highly as perceived areas of risk (Figure 2)

Figure 2: Regulatory or compliance disputes carry significant risk compared to their frequency



Please rate the risk posed to your company by the following types of disputes over the next three years.
Base: All respondents (180).

"The challenge is to have a management strategy to avoid disputes."

In-house Counsel

- While commercial/contractual disputes are universally recognised as the area of greatest overall risk, there is significant geographic variation. For example, in France, the other top two areas of perceived risk are regulatory and antitrust disputes, while in Germany, banking, financial instruments and employment are identified as key risk areas.

Commentary

Across Europe, the finding that a third of companies have seen an increase in litigation over a period when the financial markets have been very strong may surprise many. However, we have seen that litigation can often now be viewed as a potential asset to be exploited and so is not as counter-cyclical as was once the case.

High-profile litigation requires the in-house lawyer continually to exercise his or her judgement, balancing legal, reputation and commercial issues involved in ways that are different from when the business is handling a transaction such as an acquisition. A high profile dispute is time-consuming and requires regular consultation across the business. Coupled with this, a major dispute can take a lot longer to run its course than a typical transaction and so is more likely to be a semi-permanent fixture in the in-house lawyer's diary.

Although there has been a significant increase in the number of disputes being experienced by Europe's largest companies over the past three years, the pattern does not reflect a market that is undergoing a significant wave of litigation. Instead, disputes in the larger European economies need to be looked at in relation to their own particular characteristics and in relation to the economic and social factors that impact more on some industries and markets than others. For example, looking at the Italian market, experience tends to show that, as the economy deteriorates, the amount of litigation increases and, for the past three years, GDP growth in Italy has been relatively low. This justification can be contrasted with the Netherlands where litigation is viewed as a means of dispute resolution of last resort.

The finding that companies experience the greatest volume of their disputes with their customers, suppliers and employees is probably a reflection of the sheer number of different interactions that a business has with these groups on a day-to-day basis. What is more relevant is to examine how in-house lawyers perceive the relative risk of the disputes that they are handling. Commercial disputes are always going to be difficult to manage because of the dangers they pose to the company's overall supply chain and ability to trade. However, risks associated with regulatory- or compliance-style disputes require businesses to be much more sensitive as to how they operate. Regulatory disputes raise real concerns for respondents, despite the fact that few have experienced them. This lack of familiarity is potentially as threatening as the penalties for getting it wrong. The prominence of regulatory-driven disputes, for example, with a financial or environmental regulator, and the subsequent impact on the business at the highest levels cause real concerns.

Within the European Union, the European Commission has been increasingly focused on consumer rights. This may account for growing concerns around regulatory disputes.

The financial reporting failures of the early 2000s and now fallout from the credit crunch, often combined with white-collar crime, and subsequent increased emphasis on corporate transparency and accountability, continue to raise concerns. Disputes like these tend to occupy a significant amount of senior management time and create headlines which can distract from the overall running of the business. The sanctions available to regulators can also concentrate the mind in ways that a straightforward commercial dispute between companies in Europe may not. These regulatory sanctions can range from mild rebukes and public censure through to massive fines and potential criminal prosecution and imprisonment for company directors.

Despite accounting for only three per cent of disputes, regulatory or compliance disputes are seen as the second highest in terms of risk.

Companies recognise their compliance requirements and are willing to consult with external advisers to mitigate those risks. However, it needs to be recognised that in certain markets perceived differences exist between: those regulations which are essentially management focused, such as data protection, privacy, environmental, and financial regulations; and trading regulations, which have a direct impact on the ability of the company to produce and sell goods or services. There is better compliance with the latter than the former, as they directly impact upon the ability of the company to trade on an ongoing basis.

Regulatory disputes can have a 'chilling' cross-border effect on a company's ability to operate in other territories as regulators in one country see what is happening in another and launch their own investigations as appropriate. In addition, regulatory disputes can also open the door to secondary litigation. For example, an adverse antitrust ruling from a national competition authority can open the door to follow-up private enforcement actions from both individual claimants and classes who have suffered financial or market loss as a result of price fixing or abuse of a dominant position.

A class of their own

The survey findings show

- Just under a quarter (22%) of respondents have been either threatened with or on the receiving end of a class action
- Across the markets surveyed, in-house lawyers in France have been most exposed to class actions (33%), while in Italy barely one in 16 (6%) have seen them
- Slightly fewer than a third (30%) of insurance and reinsurance in-house lawyers have experienced the threat or reality of class actions, while in the energy sector the proportion drops significantly to around one in 12 (8%).

Commentary

A number of the respondents to our survey have US operations, or are listed in the US, and so the fact that around a quarter have been exposed to the threat or reality of class actions is not particularly surprising. US class actions have been declining over the past three years, partly as a result of changes to the way in which class actions are handled by the US courts but also because of the general strength of the market economy, which has brought about a reduction in securities litigation. However, that downward trend is threatened by the credit crunch, with securities class-action filings increasing to 166 in 2007 from 116 in 2006 (The Stanford Law School Securities Class Action Clearinghouse and Cornerstone Research). Of the 100 filings made in the second half of 2007, nearly a quarter were associated with subprime issues, demonstrating the tangible risks now emerging for companies who have been involved, at whatever level, in this part of the financial market.

Just under a quarter of respondents have experience of class actions.

Although in its relative infancy compared with the US, the market for European class actions is starting to grow and evolve. Those developments reflect the focus of the European Commission on providing consumers with adequate means of redress. The development of means of collective action in some countries, such as Germany, Italy and the United Kingdom, is designed to create mechanisms intended to reduce the need to rely on the US system. For example, the Netherlands has legislation that permits collective settlement, and this was the approach used by the oil company Shell in managing some of the disputes which it faced following the over-stating and subsequent correction of its oil reserves. The approach had the effect of reducing the overall number of claimants, especially those outside the US, which, in turn, reduced the attractiveness of the dispute to class-action claimant law firms.

Funding for class actions remains a difficulty for claimants in a number of jurisdictions where either contingency fee arrangements are not permitted or where it is not possible directly to obtain third party funding to pursue a claim on behalf of a class. In the UK, contingency fee arrangements (in other words, where the lawyers take a percentage of the damages award if their client wins) are not permitted, although other forms of funding arrangement, for example, conditional fee agreements, are allowed under certain circumstances. Elsewhere in Europe the position has been more restrictive, although this is starting to change.

These differences in funding rules across Europe result in claimants finding innovative ways of pursuing a claim, for example, the creation of a Dutch special purpose vehicle (SPV) to pursue a claim against a German company through the German courts and thus circumvent German restrictions on class action funding. Although only tested in relation to the German courts, the use of a SPV might well appear elsewhere as a tactical device. In Italy, claimants' lawyers until recently could not combine claims and so filed hundreds if not thousands of virtually identical claims, overwhelming an unprepared defendant. There are now new Italian rules in this area, increasing nervousness among companies as a result.

Faced with this changing environment in the European market, companies are having to adopt two particular strategies when it comes to managing class actions. The first is to use methods such as voluntary settlement schemes either to segment or reduce the size of the overall pool of potential claimants. This has the effect of reducing the appetite of class action lawyers who see a consequent reduction in potential fee income as a result. It also deters more speculative or questionable claims, while still recognising the need to ensure that appropriate redress or compensation is available to those with legitimate grievances. The second strategy is to identify one or more jurisdictions where it may be advantageous for a case to be heard ahead of similar claims in other countries. This provides defendants with a clearer picture of what they are likely to be facing in other markets and enables them to act accordingly.

Nearly a third of respondents feel that there has been a trend towards more multinational disputes in the past three years.

The trends and pressures facing companies in international disputes

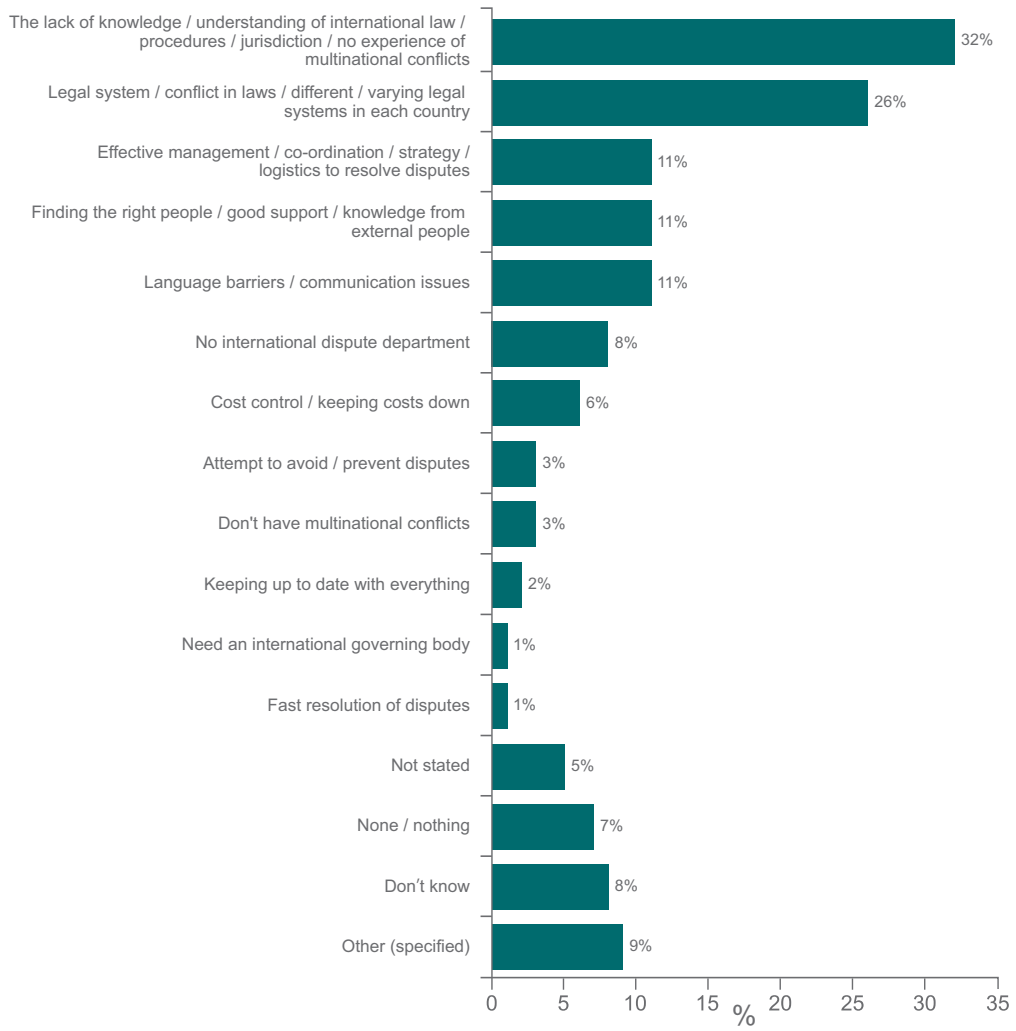
The survey findings show

- Nearly a third of respondents (31%) feel that there has been a trend towards more multinational disputes in the past three years. German participants felt the trend the most (39%) with respondents in France, Italy and the UK feeling it the least (28%). The manufacturing and insurance and reinsurance sectors both equally felt the trend the highest (43%) with the TMT sector feeling it the least (9%)
- While the home country of the company surveyed is the location of the overwhelming majority of disputes (78%), other EU member states and the US also make a showing (7% and 3% respectively)
- Lack of experience (32%) and a lack of information regarding the relevant laws and procedures (26%) were cited as the two most significant challenges involved in managing multinational disputes (Figure 3)
- The US (29%), China (16%) and Russia (16%) are the most concerning markets for in-house lawyers when it comes to managing a multinational dispute (Figure 4)
- Of the 60 respondents with operations in China, a third (34%) were not confident they would be able to manage a Chinese dispute, while only one in five (21%) were confident that they could.

Commentary

Managing a complex multinational dispute can be heavily demanding on the general counsel and the in-house team. This is especially true if the nature and structure of the business itself is very national in nature, with business units pursuing market strategies on a reasonably independent basis.

Figure 3: Lack of knowledge creates challenges for in-house lawyers



What do you think are the challenges for in-house lawyers trying to manage multinational disputes?
Base: All respondents (180).

"It is a challenge to take into account the different legal systems – the challenge is to know them in both a theoretical and pragmatic way."

In-house Counsel

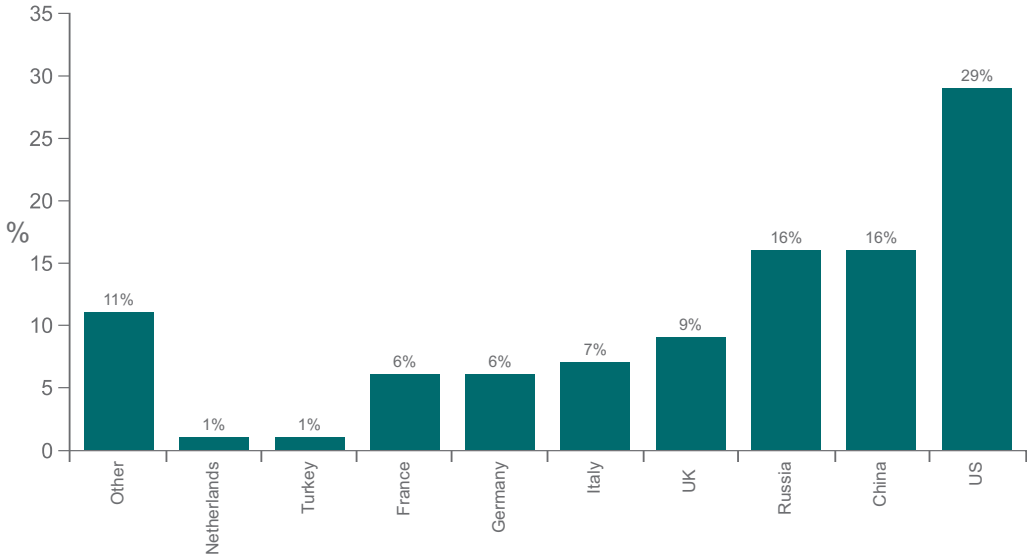
While in-house lawyers are relatively comfortable with managing disputes in their own countries, there is great concern regarding the unknowns that they may encounter when faced with disputes in different markets, especially where the legal system is radically different from that of the home country. These differences most often appear when lawyers from civil code countries, which make up the overwhelming majority of European jurisdictions (and all of continental Europe), find themselves embroiled in disputes in common law countries and vice versa. For example, the radical differences between privilege and document disclosure requirements that exist can hit a company hard, leading to disclosures in a common law country that are simply unimaginable in a civil law country.

Companies need to be smart about how they manage the multinational nature of the dispute. Experience shows that they manage them in very different ways, some outsourcing the management of the dispute to a single law firm, others managing most of it in-house and relying on counsel for specialist advice. Familiarity with the legal system is also an important factor, but other considerations such as translation costs, external lawyers' fees, travel and senior management time commitments need to be taken into account.

In terms of tactics, forum-shopping by both claimants and defendants is relatively common as both sides seek to identify jurisdictions where they are either able to fast track or delay certain aspects of the dispute to their respective advantage. In some cases there are clear benefits in being able to progress a case quickly in a particular country in order to obtain early sight of the opponent's position. The Netherlands, for example, permits pre-action interrogation of third parties, which can be very helpful in this regard.

The internet makes the market for multinational litigation much more transparent, and the sharing of information and tactics from one jurisdiction to another, along with associated publicity, forces companies to take a more holistic view of the management of their disputes. What might have been treated as a 'little local difficulty' could now trigger a genuinely global problem and require a multinational response.

Figure 4: US, China and Russia create serious concerns



In which of the following countries are you most concerned about a major dispute taking place?
Base: All respondents (180).

Companies have the greatest concerns surrounding disputes in the US, China and Russia. With regard to the US, the amount of time it can take to bring a case to trial, the exhaustive discovery process, the inability to recover costs and the potential for a jury to award punitive damages creates an environment where companies are worried about how a dispute will proceed.

The section opposite (The US question) looks in more detail at some of the issues European companies have to deal with when handling disputes in the US.

"It is hard to find legal practitioners with good knowledge and the right experience."

In-house Counsel

The US question

The US legal environment is correctly seen as a difficult one for European companies. Although far more transparent and free of corruption than most, the US legal system is filled with traps in which the inexperienced or uninformed may easily become caught.

There are many aspects of the US litigation engine which make this so. Among the best known are the existence of contingency fees; the "American rule" on costs (in which each party bears its own costs, win or lose); the cost and length of time involved in the discovery process; the uncertainty of jury trials; and the associated risk that punitive damages may be awarded by juries not subject to effective judicial supervision.

However, beyond these relatively obvious factors there are a host of others that can make the management of US litigation particularly difficult for those outside the US:

- the complexity of the US federal system with its multiplicity of courts, prosecutors and regulators at state and federal levels
- the American tradition of targeting corporations as well as individuals in criminal cases – effectively using criminal investigation and prosecution as a form of regulation
- the aggressiveness of US prosecutors and regulators, and the political nature of some of them, especially at state levels
- the extraterritorial application of many US laws (and even international law as in, for example, cases involving the Alien Tort Statute)
- the existence of well-funded and politically connected claimants' lawyers.

There are a number of ways in which companies can minimise their exposure to litigation in the US. In addition to comprehensive compliance programmes and well planned corporate organisational structures, companies can establish strong internal control procedures and effective document management and retention procedures, and manage their activities to avoid the jurisdiction of the US courts. Even if subject to jurisdiction, non-US companies may obtain an early dismissal on grounds of forum non conveniens, international comity or because the case raises political questions.

Generally, it is very difficult for a plaintiff to obtain punitive damages in a commercial case between two sophisticated corporate parties. Whether it is more difficult for a non-US corporation to obtain punitive damages against a US corporation is difficult to say and the answer to that question may depend upon the state and jurisdiction. In January 2008, Lovells obtained a jury award of punitive damages in federal court for AXA against AIG, illustrating that it is not impossible in New York.

When it comes to Russia and China the reverse is more likely to be the case, with concerns resting on uncertainty over who to turn to for good quality objective advice, a fear of the unknown and the unpredictable nature of a dispute, both in terms of process and outcome. Certainly in the Russian and Chinese markets there are concerns centred on how a dispute will be practically managed through the courts; the potential for corruption; and the degree to which political interference will influence any outcome.

These concerns can result in companies preferring to use arbitration or mediation to manage disputes in such jurisdictions.

The top consideration when deciding whether to contest or settle a dispute is its impact on the company's reputation.

Taking steps to manage and settle disputes

The survey findings show

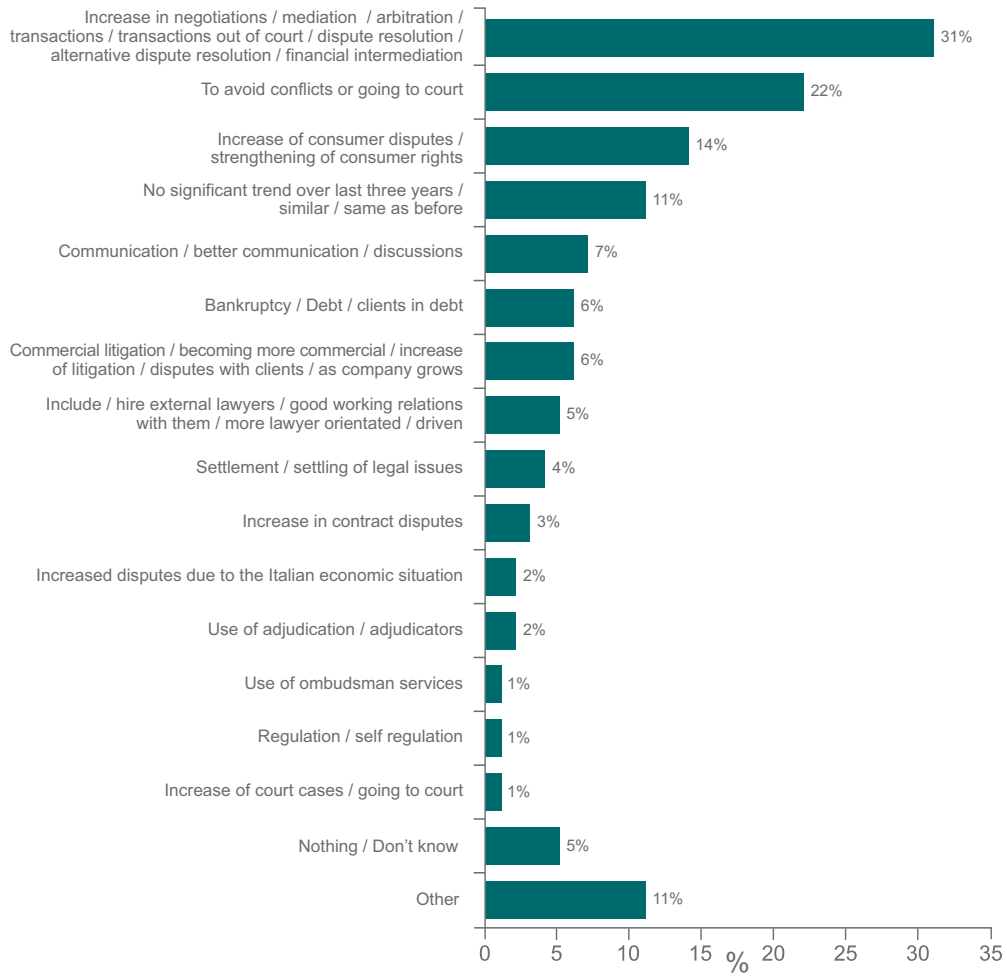
- The top trend in dispute resolution over the past three years (Figure 5) is the increased use of alternatives to litigation such as arbitration and mediation (31%). Taking steps to avoid conflicts (22%) and the impact of increased consumer rights and related disputes (14%) are the highest trends
- The top consideration when deciding whether to contest or settle a dispute is its impact on the company's reputation. This is followed by the financial cost of losing and the impact on relationships/customers. The areas of least concern are potential disclosure of the dispute in the company's financial statements or having to justify losing to shareholders (Figure 6).

Commentary

Alternative dispute resolution can often be seen as a way of avoiding the costs, time pressures and risk to reputation that can be associated with a major dispute. However, in those European countries where the courts are generally perceived as fast-acting and cost-effective, the appetite for alternative dispute resolution is less marked.

The desirability of using mediation can also vary from country to country. In some markets the appointment of a mediator to settle a dispute with a large number of claimants may well be perceived as the most practical and pragmatic way of solving the problem. On the other hand, such an approach might be viewed as opening the floodgates to a wave of other claims, because of the perceived willingness of the defendant to settle claims.

Figure 5: Top trends in dispute resolution

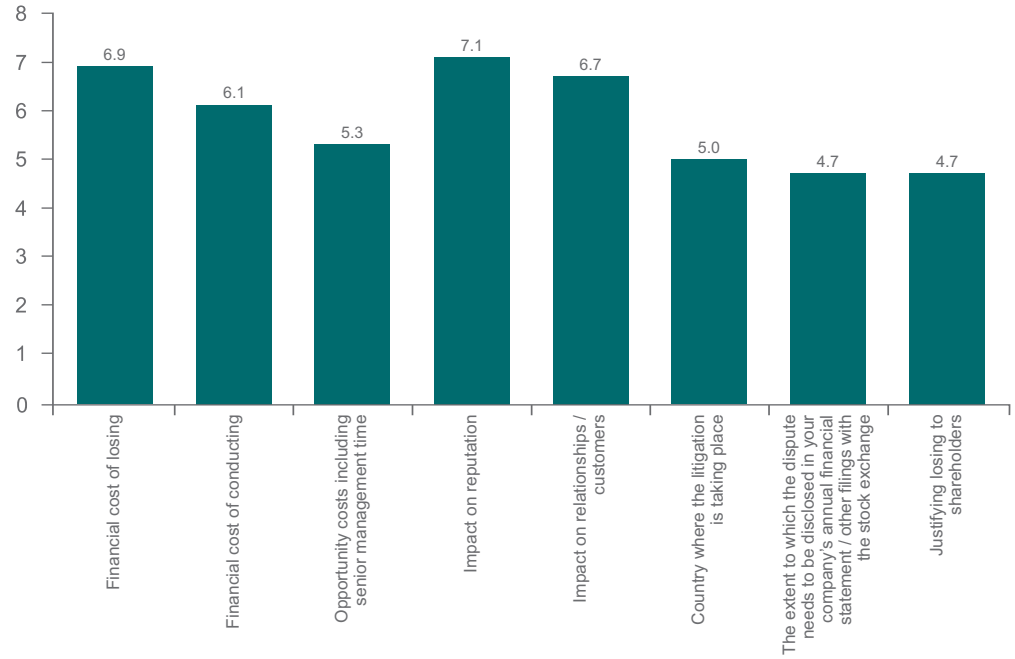


Please describe what you see as the major trends in dispute resolution over the last three years.
Base: All respondents (180).

There are lessons that can be learned from the construction and other capital-intensive industries when it comes to mitigating or managing disputes. They have developed clear protocols for dispute management across the lifespan of a particular project. This is based on the recognition that, at some point in the course of the project, a dispute is going to arise between the various parties and that, for the project to succeed, it is important to ensure that the dispute does not stop work continuing or unduly delay the delivery of the project. Disputes can be taken to independent arbitration or mediation without having to resort to the courts every time a dispute arises.

The dangers that a dispute can pose to a company's reputation, especially if it leads to regulatory exposure, feature highly in the research findings. Businesses which have built their reputation on particular characteristics such as high quality, value for money, consumer fairness, trust and environmental responsibility are acutely aware of the damage that a high profile dispute can have on the company's public perception and brand equity. Assessing the damage, whether through direct impact on short term sales or longer term undermining of the strength of the brand, should be factored into the management of the dispute.

Figure 6: Reputation tops the list of considerations when considering how to handle a major dispute



How influential are the following considerations when deciding whether to contest or settle a major dispute?
Base: All respondents (180).

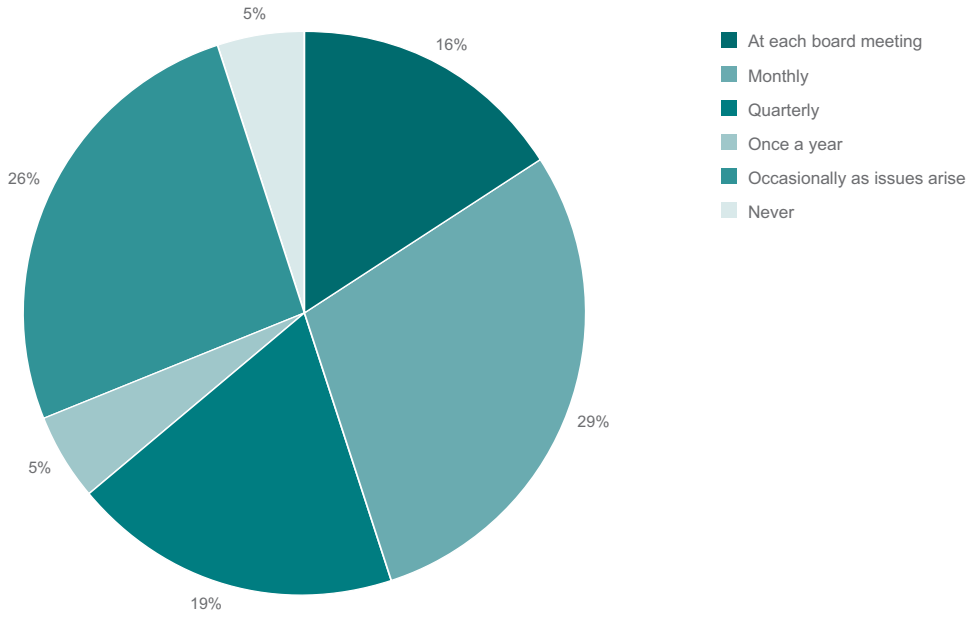
Barely one in six respondents say that they or the general counsel sit on the board.

Reporting disputes to the board

The survey findings show:

- Barely one in six respondents (16%) say they or the general counsel sits on the board. However, nearly half (46%) feel that the general counsel should sit on the board
- Just under half of respondents (45%) say that the general counsel reports either at each board meeting or on a monthly basis on the status of the business' exposure to disputes. One in 20 (5%) never report (Figure 7)

Figure 7: Very variable board reporting across Europe



How frequently do the general counsel / legal function report to the board on the status of the business' exposure to disputes?
Base: All respondents (180).

- The country with the greatest frequency of board reporting is the UK, with more than seven out of 10 (72%) in-house lawyers reporting either at every board meeting or on a monthly basis. Germany has the smallest proportion (30%) of general counsel reporting on this basis
- The manufacturing and TMT sectors have the greatest frequency of board reporting on disputes by the general counsel (51% and 52% respectively).

Commentary

The gap between the reality and the aspirations of general counsel to sit on the board remains significant across Europe. Given the frequent importance of legal issues in corporate decision-making, it seems logical that there should be an effective line of communication with board members. However, across Europe these are significant differences in terms of what makes effective corporate governance and in-house lawyers must, ultimately, be driven by what is appropriate in their market.

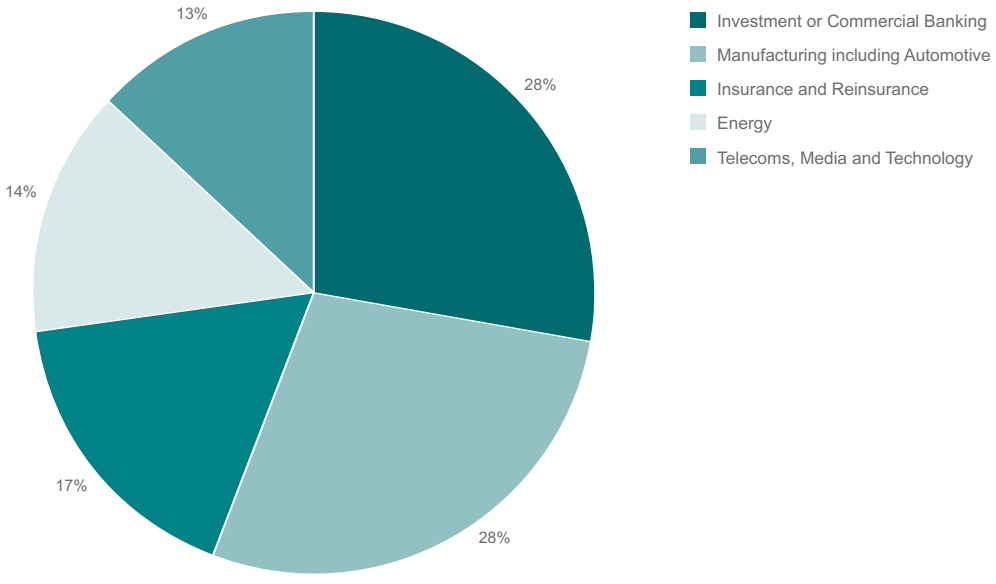
However, when the general counsel has the confidence of the board, they can ensure that the company is better equipped to view legal risks in their commercial context. Being on the board is one way for this to happen; another option is for the general counsel to be present at board meetings whether or not as a board member.

About the survey

In the last quarter of 2007, Lovells commissioned an independent survey of in-house lawyers in five European jurisdictions. The objective was to obtain reliable, research-based market information to help better understand how in-house lawyers viewed the management of multinational disputes and some of the issues with which they have to contend.

Professional independent researchers conducted the interviews by telephone, using a sample made up of the largest companies in each country.

In total the survey comprised 180 respondents, with 36 taking part from each of the following countries: France, Germany, Italy, the Netherlands and the UK. The industry breakdown of respondents is shown below:



Contacts

Amsterdam

Klaas Bisschop
Tel: +31 20 55 33 600
Email: klaas.bisschop@lovells.com

Beijing

Robert Lewis
Tel: +86 10 8518 4000
Email: robert.lewis@lovells.com

Brussels

Christopher Thomas
Tel: +32 2 647 06 60
Email: christopher.thomas@lovells.com

Budapest

Laszlo Partos
Tel: +36 1 505 4480
Email: laszlo.partos@lovells.co.hu

Chicago

Joe McCullough
Tel: +1 312 832 4400
Email: joe.mccullough@lovells.com

Dubai

Shibeer Ahmed
Tel: +971 4 304 5555
Email: shibeer.ahmed@lovells.com

Dusseldorf

Volker Triebel
Tel: +49 211 13 68 0
Email: volker.triebel@lovells.com

Frankfurt

Marc Zimmerling
Tel: +49 69 962 36 0
Email: marc.zimmerling@lovells.com

Hamburg

Volker Meinberg
Tel: +49 40 419 93 0
Email: volker.meinberg@lovells.com

Ho Chi Minh City

James Harris
Tel: +84 8 829 5100
Email: james.harris@lovells.com

Hong Kong

Allan Leung
Te: +852 2219 0888
Email: allan.leung@lovells.com

London

Patrick Sherrington
Tel: +44 20 7296 2000
Email: patrick.sherrington@lovells.com

Lawson Caisley
Tel: +44 20 7296 2000
Email: lawson.caisley@lovells.com

Neil Mirchandani
Tel: +44 20 7296 2000
Email: neil.mirchandani@lovells.com

Madrid

Jose Luis Huerta
Tel: +34 91 349 82 00
Email: joseluis.huerta@lovells.com

Milan

Francesca Rolla
Tel: +39 02 7202521
Email: francesca.rolla@lovells.com

Moscow

Dominic Pellew
Tel: +7 495 933 3000
Email: dominic.pellew@lovells.com

Munich

Detlef Hass
Tel: +49 89 290 12 0
Email: detlef.hass@lovells.com

New York

Marc Gottridge
Tel: +1 212 909 0600
Email: marc.gottridge@lovells.com

Paris

Thomas Rouhette
Tel: +33 1 53 67 47 47
Email: thomas.rouhette@lovells.com

Prague

Miroslav Dubovsky
Tel: +420 221 411 700
Email: miroslav.dubovsky@lovells.com

Rome

Gian Paolo Zanchini
Tel: +39 06 6758231
Email: gianpaolo.zanchini@lovells.com

Shanghai

Douglas Clark
Tel: +86 21 6138 1688
Email: douglas.clark@lovells.com

Singapore

James Harris
Tel: +65 6538 0900
Email: james.harris@lovells.com

Tokyo

Lloyd Parker
Tel: +81 3 5157 8200
Email: lloyd.parker@lovells.com

Warsaw

Marek Wroniak
Tel: +48 22 529 29 00
Email: marek.wroniak@lovells.com

Zagreb

Tin Dolicki
Tel: +385 1 600 56 56
Email: tin.dolicki@odbd.hr

Notes

Our offices worldwide

Asia

Beijing
Lovells
Tel: +86 10 8518 4000
Fax: +86 10 8518 1656

Ho Chi Minh City
Lovells LLP
Tel: +84 8 829 5100
Fax: +84 8 829 5101

Hong Kong
Lovells
Tel: +852 2219 0888
Fax: +852 2219 0222

Shanghai
Lovells
Tel: +86 21 6138 1688
Fax: +86 21 6279 2695

Singapore
Lovells Lee & Lee
Tel: +65 6538 0900
Fax: +65 6538 7077

Tokyo
Lovells Horitsu Jimusho Gaikokuho Kyodo Jigyo
Tel: +81 3 5157 8200
Fax: +81 3 5157 8210

Europe

Alicante
Lovells (Alicante) Limited & Cia.
Tel: +34 96 513 83 00
Fax: +34 96 513 83 03

Amsterdam
Lovells LLP
Tel: +31 20 55 33 600
Fax: +31 20 55 33 777

Brussels
Lovells LLP
Tel: +32 2 647 06 60
Fax: +32 2 647 11 24

Budapest*
Partos & Noblet
Tel: +36 1 505 4480
Fax: +36 1 505 4485

Dusseldorf
Lovells LLP
Tel: +49 211 13 68 0
Fax: +49 211 13 68 100

Frankfurt
Lovells LLP
Tel: +49 69 962 36 0
Fax: +49 69 962 36 100

Hamburg
Lovells LLP
Tel: +49 40 419 93 0
Fax: +49 40 419 93 200

London
Lovells LLP
Tel: +44 20 7296 2000
Fax: +44 20 7296 2001

Madrid
Lovells LLP
Tel: +34 91 349 82 00
Fax: +34 91 349 82 01

Milan
Lovells Studio Legale
Tel: +39 02 7202521
Fax: +39 02 72025252

Moscow
Lovells CIS
Tel: +7 495 933 3000
Fax: +7 495 933 3001

Munich
Lovells LLP
Tel: +49 89 290 12 0
Fax: +49 89 290 12 222

Paris
Lovells LLP
Tel: +33 1 53 67 47 47
Fax: +33 1 53 67 47 48

Prague
Lovells (Prague) LLP
Tel: +420 221 411 700
Fax: +420 224 210 004

Rome
Lovells Studio Legale
Tel: +39 06 6758231
Fax: +39 06 67582323

Warsaw
Lovells H Seisler sp.k.
Tel: +48 22 529 29 00
Fax: +48 22 529 29 01

Zagreb*
Bogdanovic, Dolicki & Partners
Tel: +385 1 600 56 56
Fax: +385 1 600 56 57

Middle East

Dubai
Lovells (Middle East) LLP
Tel: +971 4 304 5555
Fax: +971 4 304 5550

United States

Chicago
Lovells LLP
Tel: +1 312 832 4400
Fax: +1 312 832 4444

New York
Lovells LLP
Tel: +1 212 909 0600
Fax: +1 212 909 0660

* Associated offices
01/03/08

www.lovells.com